



pennsylvania

OFFICE OF OPEN RECORDS

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Right-to-Know Law Basics

The very basics of the Right-to-Know Law

- RTKL allows people to **request state & local gov't records**
- Agencies must respond within **5 business days**
 - Can sometimes extend deadline by 30 calendar days
 - Requester can grant additional time – must be in writing
- Can grant or deny request, or a combination of both
- If any part denied, requester can appeal (**<2.5% of cases**)
- OOR decides cases in 30 days (requester can grant more time)
- Either side can appeal OOR decision to court (**<10% of cases**)

Right-to-Know Law Basics

All state & local government records **presumed** to be public

- 30 exceptions in the RTKL
 - Fewer apply to financial records & aggregated data
- Exceptions in other laws & regulations
- State constitution's right to privacy
- Attorney-client privilege & other privileges
 - Only if recognized by PA courts; not "self-critical evaluation"
- Records can be made non-public by court order

What is a Record?

A record is...

- “information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency”
- *PA Office of Attorney General v. Philadelphia Inquirer* (No. 2096 C.D. 2014, decided Nov. 19, 2015)

Office of Open Records

Created by RTKL: Independent & quasi-judicial

- Decide appeals filed by people denied access to records
- **Provide RTKL & Sunshine Act training**
- In 2018, OOR received **2,229 appeals**
 - That's total appeals, not total requests
 - No central database of # of requests (~6,000 agencies)
 - Estimated 109,000 requests received in 2016
 - Anecdotal evidence suggest that has remained fairly steady

Appealing a RTKL Denial

If any part of a request is denied, requester can appeal

- If request is denied, appeal can be filed within 15 business days
- Most appeals filed with the OOR
 - Not Attorney General, Auditor General, Treasurer, General Assembly
 - Not Courts (requests & appeals governed by Rule 509)
 - Denials from **local** agencies based on **criminal investigatory records** appealed to county DA (but PSP denials appealed to OOR)
- Requesters can appeal redactions (which are denials) & fees

RTKL Appeal Process

OOR appeal process designed to be simple

- Requester can file appeals w/ online form at OOR website
 - About 10 to 15 minutes to fill out
- No lawyer necessary
- OOR assigns Appeals Officer to oversee case
- Both sides can present evidence & argument
 - Burden of proof is on the agency seeking to deny access
- OOR has **30 days** to issue Final Determination

OOR Mediation Program

RTKL authorizes OOR to establish **informal mediation program**

- Goal: Mutually agreeable settlement
- Voluntary & confidential
- Either side can end mediation at any time
 - If mediation ends, case moves to normal appeal process (new AO)
- OOR has trained mediators
- Can save time & expense

RTKL Appeal Process Beyond the OOR

All OOR decisions can be appealed to court

- Local agency appeals go to Court of Common Pleas
- State agency appeals go to Commonwealth Court
- OOR is not a party to appeals
 - *Agency v. Requester* or *Requester v. Agency*

RTKL Appeal Process Beyond the OOR

Courts can and often do:

- Ask OOR to provide the certified record
 - OOR tries to do this automatically; not always notified of appeals
- Ask OOR to have a representative attend a hearing
 - Again, OOR not a party to appeals
 - OOR can answer procedural questions, offer procedural suggestions
- Remand cases to the OOR
 - Could also order parties to participate in OOR mediation

Discovery-Related RTKL Requests

Discovery orders can be written to prohibit RTKL requests

- Ordinarily, discovery orders **do not prohibit use of RTKL**
- RTKL is to be construed without regard to requester's identity
- However, **presumption of openness does not apply if:**
 - The record is exempt from disclosure under a judicial order
 - Section 305(a)(3) of RTKL
- Such orders should be tailored as narrowly as possible
 - Other parties, unconnected to litigation, should not be penalized

Discovery-Related RTKL Requests

Legislature is considering language to address situation

- SB 783 of 2019-20 session
- Proposal: An agency may deny a request to a party to litigation when the request:
 - is material to a pending civil action or proceeding to which the agency is a party and the Pennsylvania Rules of Civil Procedure or the Federal Rules of Civil Procedure apply; or
 - was previously made in litigation discovery

Discovery-Related RTKL Requests

Chester Community Charter School v. Hardy (2012)

- Commonwealth Court: “It may be that the Requester is using the Right-to-Know Law to conduct discovery ... This result may seem unfair ... Unfortunately for Charter School, it matters not. **A requester’s motive under the [RTKL] has been made irrelevant by the legislature.**”
- 38 A.3d 1079, 1089 (Pa. Commw. Ct. 2012)
- See also *City of Allentown v. Brennan* 52 A.3d 451 (Pa Commw. Ct. 2012)

Discovery-Related RTKL Requests

Office of the District Attorney of Phila. v. Bagwell (2017)

- Commonwealth Court: “Discovery conducted in a court of law and a request made under the RTKL are wholly separate processes and **it is only in rare circumstances, such as the issuance of a protective order**, that a judicial order or decree governing discovery in litigation will act to prevent disclosure of public information responsive to a RTKL request.”
- 155 A.3d 1119, 1139 (Pa. Commw. Ct. 2017)

Discovery-Related RTKL Requests

Petersen v. Stroudsburg Area School District (OOR 2019-0557)

- Request: documents pertaining to SASD's terms of engagement w/ specific law firm, initiation of relationship between SASD & law firm, any communications prior to engagement
- Agency denied request
- On appeal agency said: Insufficiently specific, attorney-client privilege & **records subject to protective order**
 - SASD said Requester's employer recently scheduled depositions of 2 SASD board members "in order to obtain the same records"

Discovery-Related RTKL Requests

Petersen v. Stroudsburg Area School District (OOR 2019-0557)

- OOR found: “The [protective] Order does not bar disclosure of the responsive records under the RTKL. ... As **the Order does not expressly preclude release of the records under the RTKL**, the District has failed to prove that the responsive records are barred from disclosure thereunder.”

OOOR Resources

Website, Twitter, Email Lists & More

- Web: <https://openrecords.pa.gov/>
- Blog: <https://openrecordspennsylvania.com/>
- Email lists: Daily Digest of FDs & General Updates
 - <https://www.openrecords.pa.gov/EmailSubscriptions.cfm>
- Twitter: [@OpenRecordsPA](#)
 - Executive Director: [@ErikOpenRecords](#)
- [YouTube Channel](#)
- Open Records in PA Podcast: [Apple Podcasts](#), [Stitcher](#), etc.