



pennsylvania
OFFICE OF OPEN RECORDS

The 2022 Annual Training will begin soon

- We are recording today's training and it will be posted on our website
- Use Team's "Chat" box to submit questions
- Please keep your questions short and direct
- The panelists will answer questions following their presentation
- Submitted questions are records under the RTKL
- Unfortunately, CLEs are not available this year

2022 Annual Training



pennsylvania

OFFICE OF OPEN RECORDS

Liz Wagenseller, Executive Director

Pennsylvania's Right-to-Know Law

November 15, 2022

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OOR Annual Training Topics

- Basics of the Right-to-Know Law
 - Deputy Director Nathan Byerly
- Tips and Best Practices for Agencies
 - Chief Counsel Kyle Applegate
- Tips and Best Practices for Requesters
 - Executive Director Liz Wagenseller



Basics of the Right-to-Know Law

Alphabet Soup

- OOR = Office of Open Records
- FD = Final Determination
- AORO = Agency Open Records Officer, also includes Open Records Officer, Right-to-Know Officer
- RTKL = Right-to-Know Law
- AO = Appeals Officer

Access, Accountability, Good Government

- The purpose of Pennsylvania's Right-to-Know Law is:
 - *to promote access to government information in order to prohibit secrets, scrutinizes actions of local officials and make public officials accountable for their actions*
- Every record of an Agency is *presumed to be public*. Agencies *bear the burden* of proving that a record is not public.
- An agency can withhold records; it is **not** required to do so under the RTKL.

Is It a Record?

- “Any information **regardless of its physical form or character** that *documents a transaction or activity of an agency* **AND** is created, received, or retained pursuant to law **OR** in connection with a transaction, business or activity of an agency.”

Is It a Public Record?

- RTKL-Section 708(b): Do any exemptions apply, and if so, are we going to invoke them?
- Are there any federal or state statutes, or a judge's order, that make these records "non-public"? (Section 306)
- Is the record protected by privilege? (Section 305)

The RTKL Process: The Request

- Request made to Agency Open Records Officer
- Agency has 5 business days to respond + give reasons for withholding information
 - Grant
 - Deny – 30 RTKL exemptions, court order, other laws
 - Partially Grant/Deny
 - Good faith 30-day extension

The RTKL Process: The Request

- If no response within 5 business days
 - Automatically denied (deemed denied)
 - Cannot be changed –
 - An agency's late response does **not** reset the clock
- At the end of a 30-day extension, agency must grant or deny

The RTKL Process: Appeal

- Appeal for local and Commonwealth agencies made to OOR
- Appeal for criminal investigative records in possession of local law enforcement agencies then appeal to that county District Attorney's AO
- Legislature, Judiciary, Office of Attorney General and several other offices have an AO within their agencies

The RTKL Process: Mediation

- Either party may [request mediation](#) as an alternative to the traditional “adversarial” appeals process.
- Particularly effective where the Request is broad or covers a large number of records that are responsive to the Request, but which the Requester may not have intended to seek.
- If mediation is unsuccessful, the appeal is transferred to a different appeals officer and goes through the OOR appeal process.

The RTKL Process: Appeal

- Requester has 15 OOR business days to appeal – calculated from the mailing date of the Agency’s response or date of the deemed denial (whichever was first).
- OOR will:
 - Assign an Appeals Officer
 - Send appeal packet that notifies parties of submission deadlines
 - Review any legal arguments + evidence submitted
 - Issue FD within 30 calendar days unless extended by Requester

Final Determinations

- Are legally binding final orders.
- Available for review on OOR website, Lexis-Nexis, and Westlaw.

The RTKL Process: Court Appeal

- If Parties disagree with FD, they have 30 calendar days to appeal to relevant court
 - Local agency appeals are to be filed with Court of Common Pleas in the agency's county.
 - Commonwealth agency appeals are to be filed with the Commonwealth Court.
- The OOR must be served notice of the appeal, but the OOR is not a party and should not be named in the caption.

Payment Issues

- Agency is only required to provide the record in the current medium (Section 701)
- Agency cannot charge for electronic records.
- Inspection: Mutually convenient times. Must allow Requester to use their own equipment to make copies.
- Agency cannot charge for labor/redaction/legal review.
- Agency can only charge the actual cost/pass-through costs.

More Payment Issues

- Mutual exchange, **but payment is due first**
- An Agency may require pre-payment if the fees are expected to exceed \$100
- Record Discard: Hold responsive records for 60 days before discard if not picked up. (Section 905)
- Agency can deny for non-payment of previous requests



Agencies & RTKL: Tips and Best Practices

Respond to All Requests

The consequences can be significant

- By not engaging, an agency may lose its right to protest the release of sensitive documents
- A court may issue steep fines for acting in bad faith
- May contribute to a reputation of opaqueness, raise suspicions
- May encourage more RTKL requests to be filed

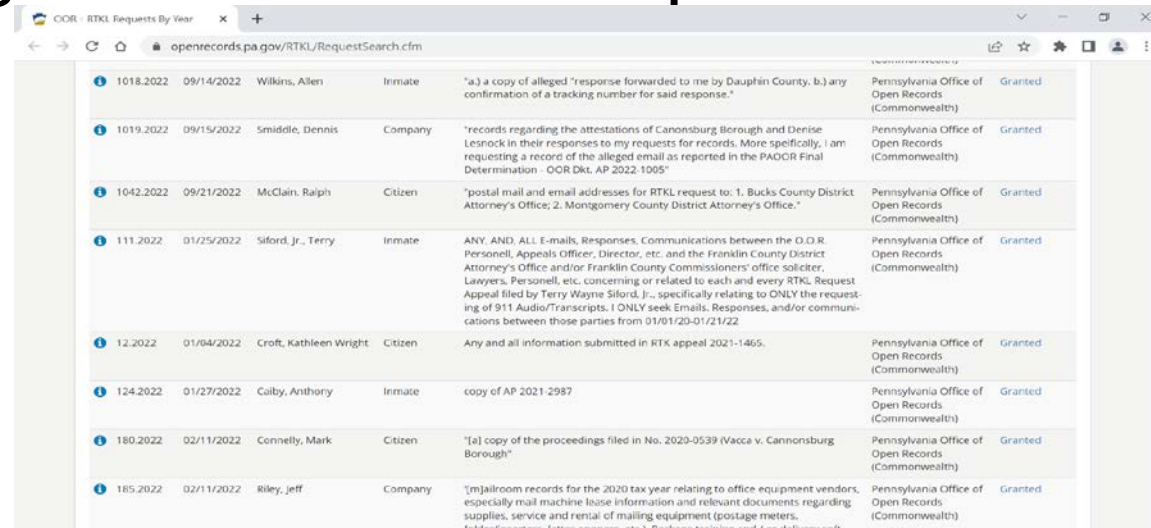
Take Pro-Active Measures to Mitigate Increased Volume of RTKL Requests

- Post commonly-requested records online
- Post RTKL responses & granted records online
- Ensure records are properly retained and accessible
- Consider informal process; little (or no) reason to require RTKL request for simple records
- Communicate with the requester to narrow down what they are seeking
- Consider granting access to some exempted records

Post Records Online

Easy Access to Certain Records Helps Everyone

- Post commonly-requested records online
- Direct website users to appropriate agency for records your agency doesn't possess
- Post records granted via RTKL requests



The screenshot shows a web browser window with the URL openrecords.pa.gov/RTKL/RequestSearch.cfm. The page displays a table of RTKL requests with the following columns: Request ID, Date, Requester Name, Requester Type, Request Description, Agency, and Status. All requests shown have a status of 'Granted'.

Request ID	Date	Requester Name	Requester Type	Request Description	Agency	Status
1018.2022	09/14/2022	Wilkins, Allen	Inmate	"a) a copy of alleged "response forwarded to me by Dauphin County, b.) any confirmation of a tracking number for said response."	Pennsylvania Office of Open Records (Commonwealth)	Granted
1019.2022	09/15/2022	Smiddle, Dennis	Company	"records regarding the attestations of Canonsburg Borough and Denise Lesnock in their responses to my requests for records. More specifically, I am requesting a record of the alleged email as reported in the PAOCR Final Determination - OOR Dkt. AP 2022-1005"	Pennsylvania Office of Open Records (Commonwealth)	Granted
1042.2022	09/21/2022	McClain, Ralph	Citizen	"postal mail and email addresses for RTKL request to: 1. Bucks County District Attorney's Office; 2. Montgomery County District Attorney's Office."	Pennsylvania Office of Open Records (Commonwealth)	Granted
111.2022	01/25/2022	Siford, Jr., Terry	Inmate	ANY AND ALL E-mails, Responses, Communications between the O.D.R. Personell, Appeals Officer, Director, etc. and the Franklin County District Attorney's Office and/or Franklin County Commissioners' office soliciter, Lawyers, Personell, etc. concerning or related to each and every RTKL Request Appeal filed by Terry Wayne Siford, Jr., specifically relating to ONLY the requesting of 911 Audio/Transcripts, I ONLY seek Emails, Responses, and/or communications between those parties from 01/01/20-01/21/22	Pennsylvania Office of Open Records (Commonwealth)	Granted
12.2022	01/04/2022	Croft, Kathleen Wright	Citizen	Any and all information submitted in RTK appeal 2021-1465.	Pennsylvania Office of Open Records (Commonwealth)	Granted
124.2022	01/27/2022	Colby, Anthony	Inmate	copy of AP 2021-2987	Pennsylvania Office of Open Records (Commonwealth)	Granted
180.2022	02/11/2022	Connelly, Mark	Citizen	"[a] copy of the proceedings filed in No. 2020-0539 (Vacca v. Cannonsburg Borough"	Pennsylvania Office of Open Records (Commonwealth)	Granted
185.2022	02/11/2022	Riley, Jeff	Company	"[m]ailroom records for the 2020 tax year relating to office equipment vendors, especially mail machine lease information and relevant documents regarding supplies, service and rental of mailing equipment (postage meters, folder/inserters, letter openers, etc.), Package training and / or delivery soft-	Pennsylvania Office of Open Records (Commonwealth)	Granted

Communicate with the Requester

Good communication can prevent and solve many issues

- Requesters often submit broad requests to ensure they get all the records they want
 - Understandable, but can be expensive & frustrating
 - Requesters don't want surprise bills
 - Agencies don't want unnecessary work
- Many requesters willing to discuss requests
 - Cannot require requester to provide reason for request
- If agreement reached on revised request, put it in writing

Consider Granting Some Exempt Records

RTKL is not a confidentiality statute

- None of the exemptions **MUST** be claimed
- Again: **Use common sense**
- Records can be released outside of the RTKL
- An agency may exercise its discretion to make any otherwise exempt record accessible if:
 - Disclosure is not prohibited by law or regulation (ex. FERPA); and
 - The record is not protected by privilege; and
 - The agency head determines that public interest favoring access outweighs any interest favoring withholding.

Appoint the Right Employee as AORO

The Agency Open Records Officer (AORO) is **VITAL**

- AORO receives RTKL training
- AORO receives all requests & is point of contact for requesters
- AORO contacts employees & contractors who may have records
- AORO tracks deadlines for responses and appeals
- AORO, *when necessary*, consults with agency head, solicitor
- Alternate AORO is available when AORO is out of office
- A resource account is used for RTKL requests and appeals

Conduct Agency Business on Agency Accounts/Devices

- Records about agency business are subject to the RTKL, regardless of the “ownership” of the medium
- Access to personal emails, personal Facebook messages, personal texts may be subject to RTKL if they discuss agency business.
- Keep things simple by avoiding doing agency business on personal devices and accounts


Consider Mediation

- Either party may [request mediation](#) as an alternative to the traditional “adversarial” appeals process.
- If mediation is unsuccessful, the appeal is transferred to a different appeals officer for issuance of a final determination.
- Particularly effective where the Request is broad or covers a large number of records that are responsive to the Request, but which the Requester may not have intended to seek.

Cite Lack of Specificity With Caution

Basing a Denial on Specificity Alone

- Specificity is a complicated, subjective basis for denial
- The OOR cannot rule on specificity first and then provide an opportunity to raise exemptions. All reasons for denial must be raised at the same time.
- If no other reason for denial is provided by school district and the OOR disagrees with specificity argument, access to records will likely be granted.
- May not be able to introduce new evidence or exemption in court appeal.



Requesting Records: Tips and Best Practices

Submit your RTKL Request to the Correct Agency

- Submit requests to the agency that has the record
 - Rarely the OOR – we receive > 900 misdirected requests every year
- Address requests to Agency Open Records Officer (AORO)
- Commonwealth agencies each have own: DEP, DCNR, DOC, DCED, etc.
- Some agencies have separate AOROs by bureau, dep't, etc.
 - e.g., Philadelphia has approximately 40 AOROs
- Important to send request to the right AORO
 - If not sure, say so: “If this request is misdirected, please let me know so I can withdraw it and direct it to the proper AORO.”

Be As Specific As Possible In Request

- An agency can deny a request if it is deemed “insufficiently specific”
- Request should attempt to identify a transaction/activity of an agency, and NOT ask for an overly-broad collection of records
 - *“Emails Mary Smith sent about May 17, 2022 city council meeting” vs. “All emails Mary Smith ever sent in the last four years”*
- Attempt to address three areas:
 - **Subject Matter:** Identify ‘transaction or activity’ of the agency (e.g., “July 15 meeting about new park”)
 - **Scope:** Identify discrete group of docs (e.g., type or recipient)
 - **Timeframe:** Identify a finite period of time
 - This is the most fluid factor – failure to identify a finite timeframe will not automatically render a request overbroad & a short timeframe will not make an overbroad request specific
 - Timeframe can be implied (e.g., “the ongoing Pine Street repaving”)

Track and Dates & Deadlines In Case You Need to Appeal

- Must state & local agency must respond in writing **within 5 (agency) business days**
 - If no response received, request is deemed denied
 - If an agency doesn't respond at all within five days, onus is on requester to know to appeal within 15 business days; no remedy if you fail to do so.
- Agency can extend timeline by 30 calendar days
 - Must be done in writing within the initial 5 business days
 - Any other extension must be agreed to by requester & in writing
- **Missing a deadline can curtail all of your efforts; no remedy if appeal is untimely.**

Consider Engaging & Negotiating with Agency


- May be willing to work with you on deadlines, better understand your request and thus reduce timeline and copying costs
- Agencies cannot require you to disclose your motive in making the request, but they can ask questions in order to understand the specific records you are seeking

RTKL Does Not Apply to Police Recordings

- Act 22 of 2017 covers **police video & audio recordings**
- Must request recording within 60 days of its creation
- Agency has 30 days to respond, may deny for various reasons
- Denials may be appealed within 30 days to court; \$125 fee
- Law enforcement agencies & DAs have fairly broad discretion to release a recording (with or without a written request).
- More [info on OOR website](#)

Other Request Tips

- Anticipate exemptions; avoid walking into one by carefully crafting request so that it is not dismissed with obvious exemption
- Seek records—don't ask questions
- Be cautious in asking for lists
 - Agency not required to create a list that doesn't exist (unless a database pull)
 - Instead, ask for all responsive records will produce list that you are seeking
- Consider submitting multiple requests at once
 - Might avoid getting all requests bogged down by one or two controversial ones
 - Also helpful if request is time sensitive
- Learn about the database software used by the agency
 - If possible, learn capabilities of program/database – ask if unsure
 - Terminology can be important – use agency jargon if possible
 - Create, export, compile, format, CSV, TXT, comma-delimited...



Appealing a RTKL Denial: Tips and Best Practices

Multiple Reasons to Consider Appealing a RTKL Response

- If agency denies access to some or all records requested
- If agency redacts portions of granted records
- If agency fails to respond to RTKL response by statutory deadline
- Ask agency to redact nonpublic portions of record rather than deny access to entire record
- If production of granted records is delayed by agency
- Fee issues

Grant OOR Extensions Whenever Possible

- Some appeals are complicated and require more extensive research; 30 days may not be sufficient
- Heavy workload
- This may allow the establishment of a briefing schedule, allowing agency to respond to requester's arguments. A briefing schedule may also permit the requester to respond to the agency's arguments.

Filing an Appeal is Simple and Free

- Requester only required to submit basic info, but may choose to provide brief with legal arguments and point to specific evidence
 - Thousands of appeals are successfully appealed every year without the requester utilizing an attorney
 - An organized requester who keeps careful track of all dates and deadlines is all that is needed
 - If you have access to an attorney, can be helpful in more complicated situations or to reduce work for requester
- Three simple requirements to appeal
 - Submit all required documents within 15 **business** days of agency denial/deemed denial
 - Fill out one-page appeals form; not required to provide legal basis for appeal
 - Provide all required documentation (listed on appeals form)

If you want to become involved in appeal...

Try to consider what would help the appeals officer

- Refute each exemption raised by agency, ideally with specific court cases or previous OOR final determinations
- Point to specific evidence to demonstrate an agency's factual assertions may be incorrect
- Submit an affidavit if trying to utilize factual information to demonstrate an agency may be wrong
- If agency cites new or additional reasons for denial, ask for an opportunity to respond

Three Options After the OOR's Final Determination

- If you believe the OOR made an error, can request Petition for Reconsideration within 15 days of FD mailing
 - Cannot submit new evidence
 - OOR responds within 30 days
- Agency or requester may appeal FD to court within 30 days of FD mailing; stays record request
 - Local agency → Court of Common Pleas
 - State agency → Commonwealth Court
- Submit a new RTKL request that is modified based on why first attempt was denied
 - Different format, agency, or individuals named
 - More specific

Additional Questions?

Today's training has been recorded and will be posted to our website.

If we did not answer your questions today or you have more questions, contact us:

- Via website form: <https://www.openrecords.pa.gov/ContactOOR.cfm>,
 - Via email: openrecords@pa.gov, or
 - Via phone: 717-346-9903.
- Submitted questions are records under the RTKL.
 - OOR website has resources for agencies & requesters
 - <https://www.openrecords.pa.gov/>