

Pennsylvania Right to Know Law
(Act 3 of 2008, 65 P.S. § 67.101, et seq.)

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On January 1, 2009, the newly enacted Pennsylvania Right to Know Law will take effect (Act 3 of 2008, commonly referred to as The Open Records Law). The new Open Records Law fundamentally alters the previous law by shifting the presumption in favor of transparency. In doing so, the law now presumes that all public records held by state and local agencies are public unless specifically excluded by at least one of 30 enumerated exceptions. School districts and municipalities are considered “local agencies” under the Right to Know Law; thus, this law applies to them.

The new law shifts the burden of proving an exception to the governmental agency claiming the exception. Although many of the disclosure exceptions mirror traditional areas where disclosure was withheld under the prior law, it is impossible to overemphasize the significant policy shift which the new law represents. As a matter of practice, we advise our clients that, at least in the short term, any “close call” is likely to be determined in favor of disclosure.

To enforce the law, the Act has established a substantial and formal structure. Every local agency is obliged to appoint a “Right to Know Officer.” This appointment must be publicized, though it does not need to be done by formal action of the agency’s governing body. For those clients who maintain web sites, the Right to Know Officer must be identified on the web site. All staff should be instructed to forward Right to Know requests to the designated Officer. Because the new law imposes time constraints on the agency’s response time, staff must be instructed that handling a request is a priority and the Right to Know Officer must get the request as quickly as possible. We encourage our clients to develop a “Right to Know Request Form,” which they are entitled to do. In the event any client needs assistance developing such a form, we are available to help. The Right to Know Request Form must also be available on the web site, together with contact information for the Pennsylvania Office of Open Records. The Office of Open Records has developed a standard record request form which must be honored when properly used.

Many of our clients already maintain Open Records Policies and Record Retention Policies. These are not mandated by the law but represent good practice. They should be reviewed to ensure compliance with the new law. They must also be made available on the web site.

In the event a local agency refuses to disclose some or all of the requested documents, the requester has the right to file an appeal to a newly-formed administrative agency called the Office of Open Records. For the first time since the enactment of the original Right to Know Law in 1957, a dispute need not go to court, but rather, to the Office of Open Records. In addition to handling appeals from decisions of local agency Right to Know Officers, the Office of Open Records has been tasked with the authority to establish rules and guidelines. Interim guidelines have recently been posted. The Office of Open Records will go through the formal rule-making procedure early in 2009, providing an opportunity for comments or concerns to be submitted. If any client identifies a concern, we encourage that client to share it with us, as we anticipate that we will submit comments and suggestions during the rule-making process. In the meantime, however, the interim rules and guidelines established by the Office of Open Records should be considered binding.

The interim guidelines produced by the Office of Open Records permit the local agency to charge fees for producing records upon request. Those fees may range from .10¢ to .25¢ per page for records copied; \$1.00 per record to certify the record; actual costs for unusual media (like blueprints or microfiche); actual costs for postage; and, statutory fees for specific records (like police accident reports). Unfortunately, the Office of Open Records does not currently permit any charge for labor involved in redacting records. No other fees are permitted.

When a local agency receives a written request for records, the Right to Know Officer must determine in good faith if the record requested is a public record, legislative record or financial record and whether the agency has custody or control of it. The assumption should be that the record is public, unless it is covered by one of the enumerated exceptions described below. The local agency must also respond as promptly as possible, which means within 5 business days. In situations where 5 business days is not sufficient, the Right to Know Officer should still issue a letter within 5 business days explaining what records are being produced and estimating the time required for their production. In no event should this period exceed thirty days. If no response is issued, the request will be automatically deemed denied, permitting an appeal.

In the event the Right to Know Officer determines that some or all of the requested documents are not public records, that decision must be in writing and must specify the exception that the Officer has determined prohibits disclosure. Thereafter, the requester may appeal that decision to the Office of Open Records within 15 business days of the written notice from the Right to Know Officer. If the local agency does not respond to the request, the appeal period will begin to run thirty days after the request was made. The Appeals Office of the Office of Open Records will make its determination on the appeal within thirty days of receipt of the appeal. A hearing may be conducted, but is not required. If no decision is issued by the Appeals Officer within thirty days, the appeal will be deemed denied. If the appeal is denied, the requester may bring an action in the county court of common pleas. This action must be filed within thirty days of the mailing date of the Appeal Officer's decision. If the court reverses the decision of the Appeals Officer, the court may award reasonable attorney's fees and costs when the court concludes that the denial was unreasonable or where the decision of the Right to Know Officer or Appeals Officer was in willful or wanton disregard of the applicable law. If the court determines that the requester's appeal is frivolous, the court may impose sanctions. Furthermore, the new law permits civil penalties up to \$1,500 if the local agency acted in bad faith and \$500 per day for a local agency's failure to comply with a court order regarding those records.

We strongly advise our clients to take the following steps in light of these changes in the law: promptly identify your Right to Know Officer and have that person trained in the listed exceptions; develop a Right to Know request form; identify and conduct training for all staff who are likely to receive a right to know request; and update your website with the identity of the Right to Know Officer, a copy of the Right to Know Request Form, a copy of the Open Records Policy, if one exists, and a copy of the Records Retention Policy, if one exists.

The following is a descriptive list of the recognized exceptions to disclosure. The list is merely descriptive, and should not be used to determine whether an exception applies in any specific case.

- ✓ Disclosure results in loss of federal or state funds or creates substantial and demonstrable risk of physical harm
- ✓ Disclosure risks national security

- ✓ Disclosure risks physical building, infrastructure and/or computer security
- ✓ Individual's medical history
- ✓ Personal identification information, including social security number, spouse's name, marital status, or beneficiary information
- ✓ Letter of reference or recommendation
- ✓ Performance rating
- ✓ Results of civil service tests
- ✓ Employment applications of those not hired
- ✓ Written criticisms of an employee
- ✓ Grievance material, including documents related to discrimination or sexual harassment
- ✓ Information regarding discipline, demotion or discharge contained in personnel file (does not apply to final action taken)
- ✓ Academic transcript
- ✓ Record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings (does not apply to the final contract or agreement reached)
- ✓ An exhibit entered into at an arbitration proceeding, a transcript of the arbitration or the *opinion* (does not apply to final *award or order* of the arbitrators)
- ✓ Draft of a bill, regulation, management directive, ordinance
- ✓ Records reflecting internal pre-decisional deliberations of an agency
- ✓ Strategy used to develop a budget
- ✓ Trade secrets
- ✓ Notes intended for personal use including message slips
- ✓ Records showing lawful donation to agency (does not apply where donation is for remuneration or personal benefit)
- ✓ Unpublished lecture notes, manuscripts articles or scholarly works
- ✓ Academic transcripts and test records
- ✓ Records relating to or resulting in criminal investigation
- ✓ Certain records relating to noncriminal investigations which are deemed an invasion of privacy
- ✓ Audio recordings of emergency response (does not apply to time logs or cases where public interest demands disclosure)
- ✓ DNA records
- ✓ Autopsy report (does not apply to name and manner of death)
- ✓ Draft minutes
- ✓ Minutes of an executive session or any record of discussions held in executive session
- ✓ Contents of real estate appraisals
- ✓ Library archives of individuals or groups
- ✓ Library, museum materials, or rare book where disclosure violates gift, grant, etc.
- ✓ Location of archeological site (does not apply if site is already known to public)
- ✓ Procurement or disposal contract prior to the award of the contract
- ✓ Communication between agency and insurance carrier
- ✓ Information revealing social services identity
- ✓ Correspondence between constituent and member of General Assembly identifying person requesting services
- ✓ Record identifying information of a minor

Clients who have questions regarding issues discussed in this article, or any education law matter, are encouraged to call us at 215-345-9111 or 570-654-2210.