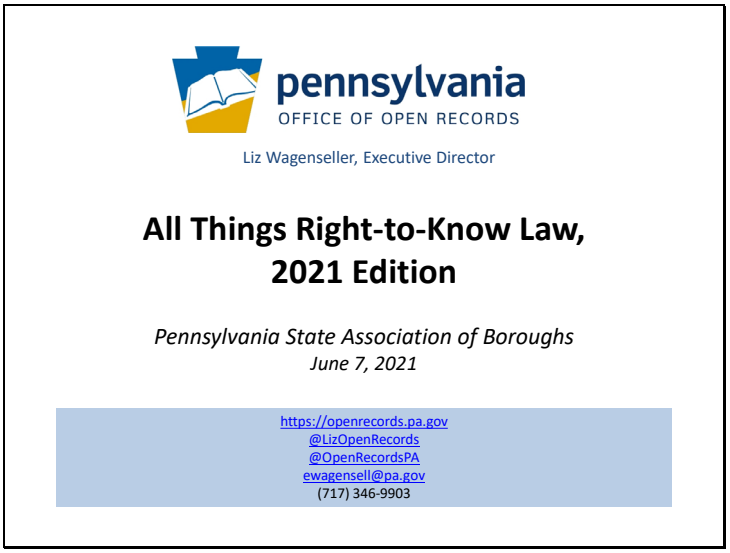
Slide 1


pennsylvania
OFFICE OF OPEN RECORDS
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All Things Right-to-Know Law, 2021 Edition
Pennsylvania State Association of Boroughs
June 7, 2021
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Slide 2

Presentation Overview

1. Right-to-Know Law Requests
2. The OOR and the Appeals Process
3. Tips and Best Practices
4. Recent Developments
5. Questions?

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Slide 3

Right-to-Know Law Requests

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Slide 4

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**)

Slide 5

Receiving RTKL Requests

Not everything has to be a formal RTKL request

- **Use common sense**
- What will be most efficient? What will take the least time?
- Post commonly requested records on website
- Little (or no) reason to require RTKL request for simple records

Slide 6

Receiving RTKL Requests

The Agency Open Records Officer (AORO) is VITAL

- Borough appoints AORO
- AORO receives all requests
- AORO serves as main 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
- AORO, *when necessary*, consults with agency solicitor

Slide 7

What are Records?
Any information, regardless of its physical form.

- Paper
- Emails
- Phone records
- Text messages
- Blueprints
- Audio recordings
- Security camera footage
- Social Media

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Slide 8

Possession of a Record

- You cannot use personal devices and accounts to hide the public's business
- Third Party (Contractor) Records
- Copyrighted Records
- Tax Collector Records v. Agency Reports
- RTKL does not address records retention, although you should have a retention schedule

Slide 9

Responding to RTKL Requests

What agencies must do (part 1)

- Conduct a **good faith search** for records
  - Advise all custodians of potentially responsive records about the request – employees & contractors
  - Obtain all potentially responsive records from those in possession
  - Review responsive records & assess their public nature
  - Search must be reasonably calculated to find all responsive records

Slide 10

Responding to RTKL Requests

What agencies must do (part 2)

- Maintain all responsive records through all appeals
  - RTKL authorizes courts to sanction for bad faith
- Consider the constitutional right to privacy

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Slide 11

Responding to RTKL Requests

What agencies are not required to do

- Do not have to create a record that doesn't exist
- Do not have to conduct legal research
  - "What law gives you the authority to do this thing I don't like?"
- Do not have to create electronic copies if only hard copies exist
- But… it might make sense to do any or all of these
  - Again: **What is most efficient?**

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Slide 12

Requesting Information In Databases

Information in databases subject to presumption of openness

- Commonwealth Court has ruled, repeatedly, that agencies must provide non-exempt data from databases

Slide 13

Payment Issues

- Agency is only required to provide the record in the current medium
- Cannot charge for electronic records
- **Must** allow Requester to use their own equipment to make copies
- Cannot charge for labor/redaction/legal review
- Can only charge the actual cost/pass-through costs

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Slide 14

The OOR and Appeals Process

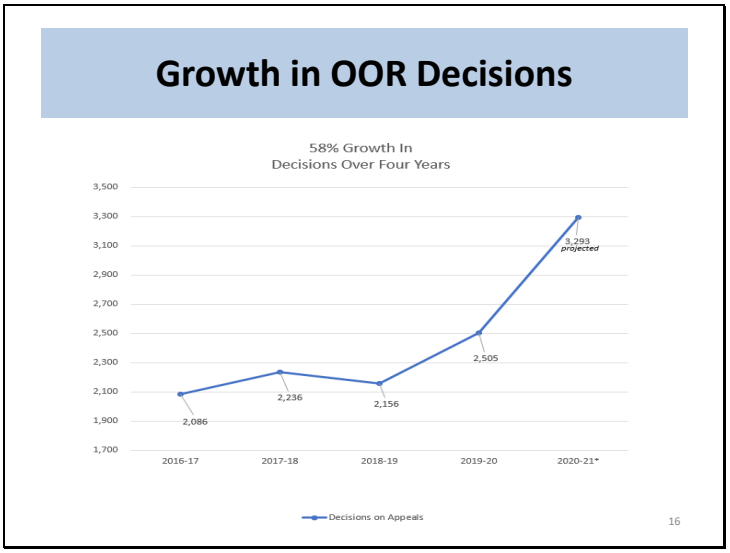
Slide 15

Office of Open Records

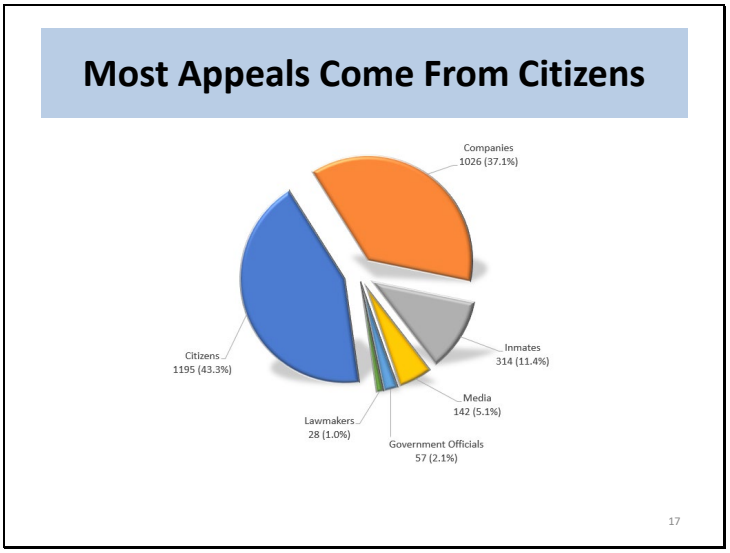
Created by RTKL: Independent & quasi-judicial

- Decide appeals filed by people denied access to records
- Provide RTKL & Sunshine Act training
- 2020 = 2764 Appeals Reviewed
  - (372 involved boroughs)
- 20 total staff
  - Executive Director & Deputy Director
  - 13 Attorneys (incl. 11 Appeals Officers)
  - Chief of Training & Outreach
  - 4 Administrative

Slide 16


Growth in OOR Decisions
58% Growth In
Decisions Over Four Years
3,500
3,300
3,100
2,900
2,700
2,500
2,300
2,100
1,900
1,700
2,086
2,236
2,156
2,505
3,293
projected
2016-17
2017-18
2018-19
2019-20
2020-21*
Decisions on Appeals
16

Slide 17


Most Appeals Come From Citizens
Companies
1026 (37.1%)
Inmates
314 (11.4%)
Media
142 (5.1%)
Government Officials
57 (2.1%)
Lawmakers
28 (1.0%)
Citizens
1195 (43.3%)
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Appealing a RTKL Denial

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

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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

Slide 20

Training from the OOR

Training on the RTKL & Sunshine Act

- OOR website filled with information
  - https://www.openrecords.pa.gov
- Weekly virtual trainings: basics, recent cases & more
  - Details on OOR website
  - May also request a custom virtual training

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Tip: 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

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Best Practices

Experience shows agencies handle RTKL requests best when:

- AORO receives RTKL training
  - Other staff may also benefit from training
- Alternate AORO is available when AORO is out of office
- AORO uses resource email account rather than personal email account
- Update OOR when AORO changes to another individual
- Agency work is done on agency devices & email accounts
- A good record retention policy is in place … and followed.

Slide 24

Affidavits

- Insufficient to say: The agency looked. They do not have any records.
- Level of detail critical to meeting burden
- Establish a nexus between the exemption and any redactions
  - Who
  - What
  - Where
  - When
  - How
  - Why

Slide 25

Affidavits

- Who looked for records
- Who did they talk to as part of search for records – custodian, officials, contractors, person with knowledge, etc.
- Where did they look
- When did they search
- Why did they look there
- What did they find or not find – mention retention policy
- Where else could the records be - private devices
- Why does the agency not have them if it should
- What keywords were used as part of the search

Slide 26

Gregg Twp. v. Grove, 2018 Pa.Commw.Unpub. LEXIS 343; 2018 WL 3097074

- Request was for footage from security cameras in building used for municipal offices
  - Agency denied claiming release would threaten public safety and endanger safety of the building (b)(2) and (3)
- Court held agency did not meet burden and video was public
  - Why?
    - Affidavit was silent as to what was depicted in video
    - Affidavit referred generally to all the cameras but failed to explain why footage from one camera will jeopardize safety
    - Affidavit did not explain how the cameras are used to enhance public safety – monitored some contemporaneously
    - Affidavit did not address whether info could be redacted
    - Affidavit had conclusory statements without explaining details about how security will be jeopardized

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Recent Developments

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RTK Requests During the Pandemic

- The OOR remained operational through the pandemic.
- The OOR issued indefinite stays (essentially a pause) for all appeals filed with the OOR from late March to early April of 2020; switched to 30 day stays in April.
- In August of 2020, the OOR began issuing stays for appeals only as needed; otherwise, business as usual, which continues to this day.

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Sunshine Law During the Pandemic

- Act 15 of 2020 went into effect on April 20 and applies as long as an emergency declaration is in effect.
  - Remote meetings are allowed; quorum may be fulfilled with remote participants.
  - "To the extent practicable" local government agencies must provide advance notice of all remote meetings including date, time, technology, and how the public can participate.
  - "To the extent practicable," local government agencies must provide for public participation directly through the teleconferencing or videoconferencing system used to hold the meeting, via email and/or via postal mail.
  - If an emergency meeting (i.e., a meeting called without public notice) related to COVID-19 takes places, the minutes of that emergency meeting must be made available within 20 days.
- Even when in-person meetings resume, the virtual option of participating and viewing an agency meeting may continue.

Slide 30

Recent Court Cases of Interest

- *Finnerty vs. Department of Community and Economic Development (2021)*
  - Documents exchanged with an outside consultant are not exempted as "internal deliberations"
- *Uniontown Newspapers vs. Department of Corrections (2020)*
  - The DOC failed to disseminate documents that the OOR ordered be released; Commonwealth Court found that the DOC "acted in bad faith" and required the DOC to pay the newspaper $118,458 in legal fees

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Pending Legislation of Note

- SB 522 (Dush): Vexatious requestors
- SB 312 (Brooks): Commercial requestors
- SB 492 (Mastriano): commercial requesters, inmates, personal fin. Info. and PIAA
- SB 554 (Stefano): Requires that agencies make their meeting agendas available to public at least 24 hours before meeting; once agenda finalized, may not take any official action on any item that is not listed on the notice, except in emergency situations or to consider matters that are de minimis in nature.

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In Development at OOR

- **Electronic docketing system**
  - All steps of appeal process conducted on portal accessed via OOR website
- **Promulgation of regulations of appeals process**
- **Review of agencies' RTKL webpages**
  - Will publish report with best practices

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OOR 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: @LizOpenRecords
- Phone: (717) 346-9903
- Email: openrecords@pa.gov