

PENNSYLVANIA RIGHT-TO-KNOW LAW
Act 3 of 2008 (SB 1, PN 1763, signed February 14, 2008)

NOTE: This should not be considered legal opinion, and some matters of interpretation may be modified by action of the Open Records Office.

HIGHLIGHTS

- All records presumed open unless closed by this or other statute or judicial interpretation.
- 30 specific exceptions delineated.
- On denial, burden of proof is on agency to show that the record was properly denied, although under prior law agencies were required to provide statutory basis for denial.
- New independent Office of Open Records created.
- Definition of record expanded, although in practice for local agencies the types and classes of records are consistent with common practice and case law under the prior act.
- No change in email access; as in prior law the definition of record applies regardless of form.
- Initial request timelines and processes remain relatively the same for local agencies, 5 business days.
- Expanded role for agency open-records officer.
- Redaction rules remain the same.
- Hold-harmless on retention schedules remains the same.
- New appeals process.
- Fee structure similar to current law, although some set by Office of Open Records and large dataset fees explicitly permissible.
- Any statute in conflict supersedes this statute.
- New sections applicable to state-related institutions, general assembly, and state contracts.
- Generally effective for records requests after December 31, 2008. Definitions are effective immediately; but the impact is uncertain given the interaction of definitions within the statute. Indications are the intent is to give Office of Open Records clear basis for development of guidelines.

POINTS FOR AGENCY CONSIDERATION

While an overall understanding of the changes brought by the law is important, there is also some preparation necessary for implementation of the act, and each agency will have a number of issues to consider. Following is an outline of issues; the specific sections in the Chapter and Section Review contain more detail on the considerations the agency should undertake.

- Section 102. Definitions / Record -- Determination of records, and inventory of classes of records, under the agency jurisdiction that meet the new definition.
- Section 502. Open Records Officer – Decisions on who to appoint, including whether to appoint a single open-records officer or subsidiary officers, based on usual flow of requests.
- Section 503. Appeals Officer – Not all appeals relating to the agency records will be handled by the agency, and the appeals process needs to take into account final responsibility for records decisions.
- Section 505. Uniform Form – Determination of how request intake will be handled, including direct-access, verbal, written, and electronic.

- Section 506. Requests / Disruptive requests -- Staff training on reasonable standards, and to focus on the record request and not the requester.
- Section 506. Requests / Disaster or potential damage – Designation of who makes the disaster determination and, for historical documents, whether any documents duly fall within this category.
- Section 506. Requests / Agency discretion -- Establish who makes the determination to release otherwise closed records, and in what circumstances.
- Section 506. Requests / Agency possession – Determine what records are held by outside contractors, and develop procedures concurrently with those contractors on how records requests are to be handled.
- Section 507. Retention of records -- Review Historical and Museum Commission policies on records retention schedules, noting that those schedules are media-neutral but instead focus on the content of the record.
- Section 701. Access -- Review the definition of “record” and “public record” and be clear with responding staff on which are to be accessible.
- Section 703. Written requests -- Develop a mechanism to meet at least nominally the open-records officer notification requirement, and determine the extent and nature of electronic access.
- Section 705. Creation of record -- The agency is permitted to do custom reports and compilations, but should determine whether and in what circumstances the agency will chose to do so.
- Section 706. Redaction – While the law does not require proactive redaction, agencies should focus redaction efforts and considerations on broadly-available electronic records.
- Section 707. Production of certain records – Understand the new third-party notification requirements, and develop consistent policy on transcript release requirements.
- Section 708(a). Burden of proof – Understand the impact of the reversal of the burden of proof for denying access.
- Section 708(b)(6). Exceptions / Personal information – Seek the solicitor’s determination whether the language means the information is a public record and must be released or, since the section is intended to act as a shield on personal information, whether the paragraph simply permits its release.
- Section 708(b)(10). Exceptions / Predecisional records – Understand the impact of the requirement to make available certain predecisional records, compare to current agency practices and paper flow and the parallel to the Open Meetings “deliberations” standard, and determine whether an agenda packet meets this qualification and hence should be made available to the public at the same time as made available to the governing body of the agency.
- Section 708(b)(18) 911 records – Determine whether any agency records meet the imputed intent of “911 response logs.”
- Section 708(c). Exceptions / Financial information – There is more clarity in financial information that must be made accessible, but agency determination is needed on redaction policy.
- Section 708(e). Exceptions / Construction – An agency must consider each exception on its own merits, so cannot have a blanket policy in the nature of “all 911 tapes will be open”; however it should develop a generalized policy of how exceptions applying to the agency will be handled.
- Section 905. Agency Response / Record discard – The agency must develop a methodology to meet the requirement to keep records compiled and copied in response to a request on hand for the requester for 60 days.

- Section 1306. Immunity – While civil immunity is retained, there is no longer immunity from “criminal damages and penalties.” Also understand that the immunity section does not relieve liability that may accrue under other statutes, such as HIPAA or the public welfare code.
- Section 1307(b). Fee limitations / Duplication – The agency should review its duplication fee structure, noting that the new state Open Records Office will be making final determinations on local fees. Review as well the new language on datasets, intended primarily to ratify fee structures currently in place, rather than to promote establishment of new fees, for comprehensive datasets such as GIS databases.
- Section 1307(e). Fee limitations / Enhanced electronic access -- The agency should proactively request approval from the Office of Open Records for these types of fees.
- Section 1308. Prohibition / Reasons for request – Train staff on differentiating between asking the purpose of the request (prohibited) and asking the requester questions to narrow or better define the request.
- Section 1310(a). Office of Open Records – Agencies should consider the options to seek advisory opinions of the Office and use the mediation process, and develop a requirement for the agency open records officer to regularly monitor information posted to the web site and concurrent updates of local policies to maintain conformity. The listing of agency open records officers requires local monitoring, and will require a determination of who in the agency is required to be listed, particularly if the agency sets up a structure of subsidiary officers and differing points of access.
- Section 3104. Effective Date -- The old statute is not repealed until January 1, 2009, so that is when the new appeals process comes into effect, but staff training on its provisions should begin immediately.

CHAPTER AND SECTION REVIEW

Chapter 1. Preliminary Provisions

Section 101. Short Title

Right-to-Know Law

Section 102. Definitions

- Agency includes Commonwealth agency, local agency, judicial agency, or legislative agency.
- Financial record includes account, voucher, or contract dealing with receipt or disbursement of funds or acquisition, use or disposal of services, supplies, equipment or property, and includes the salary and expenses paid to an officer or employee of an agency.
- Record is any information regardless of form, documenting a transaction or activity of an agency, is created, received, or retained pursuant to law or in connection with a transaction, business or activity of the agency. It includes documents, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document. *Points for agency consideration include determination and inventory of alternate media, including databases and email which (like prior law) are open based on content and not on form. It also includes recognition that not every document in the custody of the agency is a record; some may not meet this definition.*
- Requester is a legal resident of the United States (prior law definition was limited to Pennsylvania residents).

- Public record is a record not exempt under this law, exempt from disclosure by another law or regulation or judicial order or decree, or protected by a privilege.
- New definitions for aggregated data, appeals officer, confidential proprietary information, financial record, homeland security, privilege, terrorist act, trade secret, legislative and judicial agencies, legislative and judicial records.

Chapter 3. Requirements and Prohibitions

Sections 301 through 304.

General requirement for commonwealth agencies, local agencies, legislative agencies, and judicial agencies to provide relevant records in accordance with the act, and prohibits denial of access due to the intended use of the record.

Section 305. Presumption

Sets the general rule that a record is presumed a public record, unless it is exempt under this law, is protected by a privilege, or is exempt from disclosure under federal or state law or regulation or judicial order or decree. The presumption is keyed to the definition of “record”; note that not every document or file in the agency’s possession is a record.

Section 306. Nature of document

This law specifically does not supersede or modify the public or nonpublic nature of a record or document as established by federal or state law, regulation, or judicial order or decree.

Chapter 5. Access

Section 502. Open-records officer

Each agency is to designate an official or employee to act as its open-records officer, who will receive requests, direct them as appropriate within the agency, track the progress in responding, and issue interim and final responses to requesters. Upon receiving the request, the officer is to note the date of receipt on a written request, compute the five day period for required response and note it on the request, maintain an electronic or paper copy of the request until it has been fulfilled or until a final determination is issued on denial. *Points for agency consideration include whether to appoint a single open-records officer or subsidiary officers, flow of requests, coordination of policies and appeals. It should recognize, dependent on agency structure, multiple intake points (potentially differentiating among direct-access, verbal, and written requests), and multiple individuals charged with initial determination. The intent is not that every request literally flow through the open records officer – for example, existing counter-clerk or direct-access formats may be acceptable – but that the open records office is both the first point of access for those not knowing where to go in the agency for access, and is the individual ultimately responsible for subsidiary offices complying with access requirements. The designation of an individual with final determination responsibility should key on what level of the agency would be the one likely to take an appeal to the Open Records Office or the court. When making the designation, note the interaction with the written request routing issues noted under section 703.*

Section 503. Appeals officer

- The Office of Open Records appoints an appeals officer for commonwealth and local agencies.
- If local agency law enforcement records are involved, the district attorney designates an appeals officer relating to access to criminal investigative records in possession of a local agency of that county. *Points for agency consideration include meeting with the DA and political subdivisions to determine how these appeals will flow, when and how determinations are made that the*

request is for a record falling under this provision, and who handles follow-up including requester notification and appeals management.

Section 504. Regulations and policies.

- As under prior law, an agency may promulgate regulations necessary to implement the act.
- Rules must be posted within the agency and, if the agency maintains a web site, on that web site.
- Rules postings must also include contact information for the open-records officer, contact information for the Office of Open Records or other appeals process, and a form which may be used to file a request.
- The Office of Open Records may promulgate regulations but only for appeals.

Section 505. Uniform form.

The Office of Open Records will develop a uniform form that must be accepted by Commonwealth and local agencies. Agencies do not have to adopt this as their official form, but must accept it if a request is submitted on it. *Points for agency consideration include determining what information is not contained on that form that the agency will have to ask the requester to add in order to fulfill the request. Agency form differentiations should be based on a good faith effort to expedite the request and improve the accuracy of the response.*

Section 506. Requests.

(a) Disruptive requests – The agency can deny access if the requester has made repeated requests for the same record and those requests have placed an unreasonable burden on the agency. This does not permit the agency to deny a request for a different record. *Points for agency consideration include training staff to focus on the record request and not the requester. This clause should be used in good faith and not become an excuse not to answer requests falling outside the parameters of the section.*

(b) Disaster or potential damage – An agency may deny a request when timely access is not possible due to disaster, or in the case of historical or rare documents when access could cause physical damage or irreparable harm, but the agency must still make a reasonable effort to make the contents of the record accessible. *Points for agency consideration include who makes the disaster determination and, for historical documents, whether any documents duly fall within this category.*

(c) Agency discretion – An agency may make any otherwise exempt record accessible if disclosure is not statutorily or judicially prohibited, it is not protected by a privilege, and if the agency head determines that public interest favoring access outweighs individual, agency, or public interest favoring restriction. *Points for agency consideration include establishing who makes the determination under this policy and in what circumstances. The determination is left to the undefined “agency head” which might be intended to mean the open records officer, but could instead mean the chief elected or appointed official or the governing body. If the agency determines that the decision is left to the open records officer, it should still discuss and determine the general parameters the open records officer is to apply on the agency’s behalf. Note the interaction with and effect of the parallel third party notice requirements of section 707.*

(d) Agency possession – An agency record held by a contractor performing a governmental function on the agency’s behalf is considered a public record of that agency, and the contractor is required to make the record open. Other records of the contractor not related to the agency contract are not open. The agency retains discretion to receive the request and to make a determination on access. If the contractor duplicates the record they are entitled to the duplication fee. *Points for agency consideration:*

- *This section is intended to apply to contractors performing an actual service, such as human services providers.*
- *It may apply to contractors such as construction contractors, but limited to the information relating to the agency contract.*
- *It is not intended to apply to incidental custodians of records such as payroll services or archival storage services, although it is not clear from the statute and subject to future interpretation by the Office of Open Records.*
- *Subpart (3) requires the “request for a public record in the possession of a party other than the agency” to “be submitted to the open records officer of the agency” for determination of access. It is not clear whether this means the requester must submit it directly to the open records officer, or the requester can make the request of the custodian who in turn submits it to the open records officer. The agency should make a determination on how this is to be interpreted and on that basis how requests are to be routed to ensure compliance with timelines.*

Section 507. Retention of records.

This restates prior law specifically stating that nothing in the act is intended to modify, rescind, or supersede any record retention policy. *Points for agency consideration include review of Historical and Museum Commission policies on records retention schedules, noting that those schedules are media-neutral but instead focus on the content of the record. For example, the content of an email is determinative on whether it is retained.*

Chapter 7. Procedure

Section 701. Access.

- *This sets the presumption that access is to be given to any public record unless otherwise provided by law. Points for agency consideration include review the definition of “record” and “public record”; not every document in the agency’s possession qualifies as a record, and not every record qualifies as a public record. Examples falling outside are documents that are not part of the agency’s business, including (generally) subscriptions, or personal items of officials and employees not related to the agency or agency business.*
- *It is to be provided in the medium being requested if it exists in that medium, otherwise in the medium in which it exists, comparable to prior law.*
- *Records are to be accessible during regular business hours.*
- *The act does not require granting access to an agency or agency employee’s computer (note permissive access is included in section 703).*

Section 702. Requests.

This restates prior law allowing the agency to fulfill verbal, written or anonymous verbal or written requests, but relief can be sought only if the request is filed in writing.

Section 703. Written requests.

This is initially a restatement of prior law providing that the request can be submitted in person, by mail, email, or facsimile, but with more clarity on ability to submit by electronic means if permitted by the agency. It also retains language that the requester should identify or describe the records in sufficient detail to enable agency retrieval. New language requires written requests to be addressed to the open-records officer, and employees are to forward requests to the officer. *Points for agency consideration include development of a mechanism to meet at least nominally the open-records officer notification requirement, which may include subordinate officer designation to accommodate agency office structure, concurrent with the appointment process under section 502. Consideration should also*

include the extent and nature of electronic access, and particularly how email requests – which likely count as written requests -- will be logged, including the timeline for response to email received during non-business hours. There should be special consideration by agencies that use “slip requests”, e.g. having requesters write citations on scrap paper to hand to a counter clerk for retrieval, on how these procedures comport with the law.

Section 704. Electronic access.

This is generally a restatement of prior law allowing the agency to make its records available electronically but requiring the agency to convert to paper if the requester is unable or unwilling to use electronic access.

Section 705. Creation of record.

This is generally a restatement of prior law providing that an agency is not required to create a record that does not exist, or to compile, maintain, format or organize a record in a manner in which the agency does not do currently. *Points for agency consideration include recognition that the agency is permitted to do custom reports and compilations, but should determine whether and in what circumstances the agency will chose to do so. This section also should be brought into consideration as a part of the decision-making process on determinations of access and as part of the elements of burden of proof when a denial is issued.*

Section 706. Redaction.

This is generally a restatement of prior law on redaction. If an otherwise accessible public record contains confidential information then the document is to be made available by redaction if redaction is possible. Redacted information is deemed a denial pursuant to Chapter 9 and is subject to appeal. *Points for agency consideration – while the new act does not generally cordon off new subjects of confidentiality, agencies are often confronted with how to handle easily accessible information (e.g. court records, marriage records) that contains personal information that may by law be withheld. Absent any other law requiring redaction, the agency should consider the actual potential for improper use of information when making determinations on pro-active redaction. Records management professionals do not consider directly accessible paper based personal information to require proactive redaction because the access is limited, in-person, and time-consuming (termed “practical obscurity”), which makes it unattractive to malicious users. Instead they suggest attention and resources be focused on electronically-accessible records, which can be more easily “mined” and can be accessed in relative obscurity.*

Section 707. Production of certain records.

This new language requires the agency to notify any third party that is the subject of a record or the provider of the record if the agency gives access to any record that is not a public record. If the record was submitted accompanied by a notice of trade secret or proprietary information, the agency notice must be given within five days and the third party has five days to comment on the release. Agency denial may be given based on trade secret or proprietary information and although not clearly stated seems to indicate that the agency must deny release if the third party requests it to do so. Transcripts of administrative proceedings may be released prior to final adjudication if provided by agency procedure or contract, and must be provided following final adjudication. *Points for agency consideration include the interaction of this notification requirement with the permission granted under section 506(c) to release otherwise non-public information, and development of clear policies on pre-final adjudication transcripts. Note that some transcripts may be exempt from disclosure under other sections or statutes, or may be subject to redaction.*

Section 708. Exceptions for public records.

(a) Burden of proof – The agency may deny access only by showing by a “preponderance of evidence” that a record is exempt. *Points for agency consideration include review of prior case law, some of which may either apply or be instructive in making determinations of applicability of exceptions. Note that the section refers to “record” rather than “public record”, so the initial determination is whether it is a public record, and if so then whether any other exception applies.*

(b) Exceptions – The subsection is the general delineation of exceptions, and includes:

Loss of state or federal funds -- (1) Comparable to current law, a record the disclosure of which would result in the loss of federal or state funds or is reasonably likely to result in physical harm to or the personal security of an individual.

Homeland security -- (2) Public safety, military, and homeland security records that are reasonably likely to jeopardize or threaten public safety, or records designated classified by a federal or state military authority.

Infrastructure security -- (3) Records reasonably likely to endanger safety or security of a building, public utility, infrastructure, or information storage system, including computer hardware and software, National Infrastructure Protections and similar threat assessments, counterterrorism information, and building infrastructure records.

Computer security -- (4) Records that could jeopardize computer hardware or software or network security.

Medical information -- (5) HIPAA-type records, unemployment compensation records, and workers compensation records concerning individual medical, psychological, psychiatric, or disability information.

Personal identifiers -- (6)(i) Personal identification, including

- Social security number
- Driver’s license number
- Personal financial information
- Home, cellular or personal telephone numbers
- Personal email addresses
- Employee number
- Other confidential personal identification number
- Spouse’s name, marital status, beneficiary or dependent information
- Home address of a law enforcement officer or judge

(ii) Reverse exception - the paragraph does not preclude release of the name, position, salary, actual compensation or other payments or expenses, employment contract, or length of service of a public official or agency employee. *Points for agency consideration include a solicitor’s determination whether the language means the information is a public record and must be released or, since the section is intended to act as a shield on personal information, whether the paragraph’s “nothing . . . shall preclude” simply permits its release; given the reference to most of this information in the definition of “financial record,” inclusion of a reverse exception with redaction in section 708(c), and the common understanding of public access under current case law, the former is likely the correct interpretation.*

(iii) Qualification – like (ii) but generally applicable, an agency “may” redact name and other identifying information relating to undercover law enforcement.

Employee records -- (7)(i) Employee records including letters of reference unless relating to vacancy appointment to elected office or to Senate confirmation

(ii) Performance ratings or reviews.

(iii) Civil service test results generally for the Commonwealth, legislative, or judicial agencies, or for local agencies only when release restricted by collective bargaining but if not restricted only test scores of passing individuals.

(iv) Employment applications of unsuccessful applicants.

(v) Workplace support services program information.

(vi) Written criticisms.

(vii) Grievance material including discrimination or sexual harassment.

(viii) Discipline, demotion or discharge information in a personnel file, but a reverse exception for “final action of an agency that results in demotion or discharge.”

(ix) Academic transcripts.

Labor relations -- (8)(i) Strategy or negotiations for labor relations, collective bargaining, or arbitration proceedings. Final or executed contract or agreement is open.

(ii) Arbitration exhibits and transcripts. Final award or order in a grievance procedure is open.

Legislative drafts -- (9) Draft bill, resolution, regulation, statement of policy, management directive, ordinance, or amendment.

Predecisional records -- (10)(i) Records reflecting internal predecisional deliberations whether internal or between agencies, whether officials or employees, including contemplated course of action, research, and memos. Includes strategy to achieve adoption of a budget, legislative proposal, or regulation.

(ii) Reverse exception – a predecisional record presented to a quorum for deliberation as that is defined in the open meetings law is open at the time of presentment. *Points for agency consideration include an understanding that the statute creates a continuum comparable to the “deliberation” threshold in the open meetings law, in that there is a point at which drafts and alternative proposals cross from a developmental phase to a deliberative phase. It also includes determining whether an agenda packet meets this qualification and hence should be made available to the public at the same time as made available to the governing body of the agency.*

(iii) Reverse exception – written or internet application or request for Commonwealth funds.

(iv) Reverse exception – results of public opinion polls, focus groups, marketing research.

Trade secrets -- (11) Trade secrets or confidential proprietary information (see Definitions, section 102).

Aids to memory -- (12) Personal-use notes and working papers that have no official purpose.

Donor identity -- (13) Records disclosing donors to an agency or potential donors or donor profiles. Reverse exception – if the donation is intended for personal benefit to a named official or employee of the agency.

Scholarly information -- (14) Unpublished lecture notes, research material, and other scholarly correspondence.

Academic information -- (15)(i) Academic transcripts.
(ii) Exams, exam questions, answer keys.

Criminal investigative records -- (16) Detailed list of criminal investigation records. Reverse exception – police blotters except certain traffic reports.

Non-criminal investigative records -- (17) Non-criminal investigative records including:

- (i) Complaints
- (ii) Investigative materials
- (iii) Identity of confidential sources, including whistleblowers.
- (iv) Information made confidential by law.
- (v) Work papers underlying an audit.
- (vi) Records revealing institution, progress or result of an agency investigation or that would result in hindrance of the agency.

911 records -- (18) 911 recordings and records. Reverse exception – “time response logs” (undefined) or tapes or transcripts where the agency or a court determines that public interest outweighs disclosure over nondisclosure. *Points for agency consideration include a good-faith determination, within the context of the statute and the exception, whether any existing or regularly-produced agency documents constitute time response logs, bearing in mind that section 705 contains language exempting the agency from compiling any report that does not currently exist.*

DNA records -- (19) DNA and RNA records.

Autopsy records -- (20) Autopsy records except reporting the name of the deceased and the cause and manner of death.

Minutes -- (21)(i) Draft minutes “until the next regularly scheduled meeting.”
(ii) Minutes of executive sessions.

Real estate transactions -- (22)(i) Real estate appraisals, engineering or feasibility estimates, environmental reviews, relating to lease, acquisition, or disposal of real property, equipment connected with a real estate transaction, and construction projects.
(ii) Reverse exception – information becomes public once a “decision is made to proceed” with the acquisition, disposal, or construction.

Library records -- (23) Library and circulation records of an identifiable individual or group.

Library materials -- (24) Library and museum materials for which an access restriction has been placed by a donor.

Archaeological and species sites -- (25) Identification of archaeological or endangered or threatened species sites if not publically known.

Procurement -- (26) Information gathered prior to a bid being awarded.

Insurance – (27) Communications with insurers, carriers, administrators, or risk management office. Reverse exception – insurance contracts and financial records relating to provision of insurance.

Social services – (28) Records of individuals relating to application for and provision of delineated social services.

Legislative constituent correspondence – (29) Normal constituent correspondence, except correspondence from registered lobbyists.

Minor child – (30) records identifying the name, home address or date of birth of a child 17 or under. Points for agency consideration include awareness of redaction needs where this information appears incidentally; in most circumstances records of minors are governed by other statutes.

(c) Financial records – None of the exceptions apply to financial records, including redacted release of financial records containing information protected under loss of state or federal funds, homeland security, infrastructure security, computer security, medical identifiers, personal identifiers, and criminal and noncriminal investigative records. *Points for agency consideration – while the language indicates that an agency “may redact” protected information, the probable interpretation is that access to the information is not simply made permissible, but must be furnished if the protected information can be redacted.*

(d) Aggregated data – None of the exceptions apply to aggregated data (see definition, section 102), except for data protected under loss of state or federal funds, homeland security, infrastructure security, computer security, and medical identifiers.

(e) Construction – An agency must consider each exemption separately, presumptively on its own merits. *Points for agency consideration – while the agency cannot have a blanket policy in the nature of “all 911 tapes will be open”, it can have a generalized policy of how exceptions applying to the agency will be handled including the criteria the agency will use, so long as the policy is not prejudicial.*

Chapter 9. Agency Response

Section 901. General rule.

- Similar to prior law the agency is to make a good faith effort to determine if a requested record is a public record, whether it has custody, and to respond as promptly as possible.
- Records can be held until applicable fees are paid.
- Response must be given within five business days for written requests, and if the time is not met the request is deemed denied.

Points for agency consideration – if a denial is a “deemed” denial, for example under one of the time-lines, the burden of proof still falls on the agency to prove the record is not subject to access. In the alternative the agency can provide remedy by release of the record.

Section 902. Extension of time.

(a) Determination -- The section lists allowable reasons for the agency open-records officer to unilaterally exceed the 5-day requirement for written requests without it being considered a deemed denial. The reasons parallel the prior law, and include

- Redaction is required
- Records are stored in a remote location
- Bona fide and specified staffing limitations
- Legal review is necessary to determine whether the record is accessible
- Requester has not complied with agency policies
- Requester refuses to pay applicable fees

- The extent or nature of the request precludes a response within the specified time period.

(b) Notice – Comparable to prior law, if any of the determinations applies, the open-records officer must send written notice within five business days noting that the request is delayed, the reasons for delay, reasonable date on which a response can be expected, and an estimate of fees. A response anticipated longer than 30 days is deemed denied unless the requester agrees to the longer delay. If that extended date is not met the response is deemed denied.

Section 903. Denial

This is comparable to prior law but has different effect given the reversal of burden of proof. Denial must be accompanied by a description of the record, the legal authority supporting the denial, the contact information of the open-records officer, date of response, and the appeal procedure.

Section 904. Certified copies.

As under prior law, a requester can request that copies be certified.

Section 905. Record discard.

Records compiled on behalf of a requester can be discarded if not picked up by the requester within 60 days of agency response. *Points for agency consideration -- this means the records compilation needs to be kept for 60 days.*

Chapter 11. Appeal of Agency Determination

Section 1101. Filing of appeal

(a) Authorization – Upon denial of a written request the requester may file an appeal with the Office of Open Records, or judicial, legislative or other appeals officer – attorney general or district attorney in the case of certain criminal investigative records – within 15 business days of the mailing date of the agency response or deemed denial. The appeal states the grounds for asserting openness and addresses the grounds of agency denial. The Office of Open Records assigns an appeals officer.

(b) Determination – The appeals officer must make a final written determination, with explanation, within 30 days. Failure to meet that date is a deemed denial. The appeals officer may conduct a hearing on the matter. The determination is a final order, and is sent to both requester and agency.

(c) Direct interest – A third party with an interest in the record on appeal may join the appeal within 15 days of receiving “actual knowledge” of the appeal but no later than the date the appeals officer issues an order. Participation is by written request to provide information or to appear before the appeals officer, on behalf of either the requester’s or the agency’s position. The appeals officer can decide whether to accept the information, based on timing and whether the information is probative, and if accepted the officer must notify both agency and requester.

Section 1102. Appeals officers.

(a) Duties – The section sets out due process notifications for requester and agency when a matter is on appeal. Both parties may submit additional documents in support of their positions, which the officer is required to review. The appeals officer may hold a hearing and admit evidence, and must issue a final determination on behalf of the Office of Open Records.

(b) Procedures – The Office of Open Records or other office authorized to take appeals can adopt procedures relating to those appeals, with deference to general rules of administrative practice and

procedure under the Pennsylvania Code. If no rules exist, procedural matters are decided on “the basis of justice, fairness and the expeditious resolution of the dispute.”

Chapter 13. Judicial Review

Section 1301. Commonwealth agencies, legislative agencies and judicial agencies.

Appeals from appeals officer determinations for these agencies are taken to Commonwealth Court, and must be filed within 30 days of the mailing date of the decision.

Section 1302. Local agencies.

Appeals from determinations of the appeals officer (typically Office of Open Records but potentially district attorney) relating to local agencies, or a deemed denial by an appeals officer, are filed with the court of common pleas, within 30 days of the mailing date of the decision. The petition for review constitutes a stay on the release of the documents until a decision is rendered by the court.

Section 1303. Notice and records.

(a) **Notice** – Parties to the appeal must be served notice under applicable court rules.

(b) **Record on appeal** – The record before the court includes the request, agency response, appeal filed by the requester, transcript if any, and final written determination of the appeals officer.

Section 1304. Court costs and attorney fees.

(a) **Reversal of agency determination** – As under prior law, on reversal of agency determination the court may award all or part of reasonable attorney fees and litigation costs if the court finds the agency acted willfully or with wanton disregard, or if the agency action was not based on a reasonable interpretation of law.

(b) **Sanctions for frivolous requests or appeals** – As under prior law, the court can award all or part of reasonable attorney fees and litigation costs if the court finds the challenge was frivolous.

(c) **Other sanctions** – The court can impose other penalties and costs consistent with rules of court.

Section 1305. Civil penalty.

(a) **Denial of access** – Comparable to prior law, civil penalty of up to \$1,500 (increased from \$500 in prior law) can be imposed against the agency if access was denied in bad faith.

(b) **Failure to comply with court order** – Comparable to prior law, an agency or official who fails to promptly comply with a court order under the act can be assessed a civil penalty of up to \$500 per day.

Section 1306. Immunity.

(a) **General rule** – Comparable to prior law, except as provided in the penalty section or other law, the agency and its officials and employees are held harmless from civil penalties for compliance or non-compliance with the act. Prior law also extended this immunity to “criminal damages or penalties.” *Points for agency consideration – this does not relieve civil or criminal liability that may accrue under other statutes, such as HIPAA or the public welfare code.*

(b) **Schedules** – Comparable to prior law, no agency, official or employee is liable for civil or criminal damages for compliance with a records retention and disposition schedule.

Section 1307. Fee limitations.

(a) Postage – As in prior law, postage fees cannot exceed actual cost of mailing.

(b) Duplication – The standard for duplication fees based on comparable services in the community remains, but with two important distinctions. First, the fee schedule is to be set for the Commonwealth and local agencies by the Office of Open Records, and second, the agency may establish separate fee schedules for “complex and extensive data sets.” The Office of Open Records may take into account regional price differences, and it is anticipated that local agencies will suggest that the Office set “up to” fee schedules to take into account the varying, but accepted, range of basic copying costs at the local level. The “data sets” language is intended to allow agencies to set market-based fees for comprehensive data sets such as geographic information systems, property assessment lists, voter registration lists, and the like, which has been relatively common practice under prior law and is based on the notion that it would be a disservice to taxpayers to allow private enterprises, which typically pay higher fees for development or acquisition of these datasets in the marketplace, be able to acquire them at nominal cost from a governmental entity. There is an exception to these higher fees for requests from media or from nonprofit organizations conducting educational research, although these requests are still subject to the normal duplication fees. *Points for agency consideration – the intent of the dataset language is to cover complete datasets as suggested in the examples, as contrasted to requests for multiple records from a dataset. It is also intended primarily to ratify fee structures currently in place, rather than to promote establishment of new fees. Note that there is a presumption that these datasets are being used for commercial purposes so unless otherwise restricted by law (e.g., restrictions on resale of voter records in the Election Code) an agency charging a dataset fee should not impose restrictions on resale or commercial use.*

(c) Certification – As under prior law, an agency can impose certification costs.

(d) Conversion to paper – Comparable to prior law, if a record is not available on paper the agency is limited to the lesser of electronic duplication or what the equivalent duplication fee would have been had the record been on paper.

(e) Enhanced electronic access – As under prior law the agency can assess a flat rate, subscription fee, transaction fee, or similar fee for enhanced electronic access to records, with the added provision that the fee must be approved by the Office of Open Records. *Points for agency consideration – when establishing a fee structure generally, the agency should proactively request approval from the Office of Open Records for these types of fees.*

(f) Waiver of fees – As under prior law an agency may waive fees for cause.

(g) Limitations – As under prior law no other fees may be charged unless permitted by another statute, unless the agency necessarily incurs costs, and any fees must be reasonable. No fee can be imposed for review to determine whether a record is accessible. There is an open question whether prior case law will stand in which the court found the “necessarily incurs costs” language permits the agency to charge reasonable fees for the cost of redaction.

(h) Prepayment – As under prior law an agency may require a requester to prepay fees if the fee estimate for the records access request is over \$100.

Section 1308. Prohibition

As under prior law, policies or regulations may not limit the number of records requested and may not require the requester to disclose the purpose for the request. *Points for agency consideration – separately the act requires the requester to make the request with reasonable specificity, so within limits it may be permissible to ask the requester questions to narrow the request, being sensitive to the “purpose” prohibition.*

Section 1309. Practice and procedure.

Rules of administrative law and procedure do not apply to the act unless adopted by regulation or policy.

Section 1310. Office of Open Records.

(a) Establishment – The independent office is established within the Department of Community and Economic Development. Generally, apart from its role in first-level appeals and in establishment of fees, it is cast as a guidance body. Its specific duties include:

- Provision of information relative to implementation and enforcement of the act.
- Issuance of advisory opinions to agencies and requesters.
- Provision of training courses to agencies, public officials and employees on this and the Open Meetings law.
- Provision of annual regional training courses to local agencies, public officials and public employees.
- Assignment of appeals officers. Note that this subsection requires appeals officers to be attorneys and to complete sanctioned training courses. It also permits hearings to be held on a regional basis.
- Establishment of an informal mediation process.
- Establishment of an internet site with information on fees, advisory opinions, and the name and address of all open records officers.
- Biannual review of fees under the act.
- Annual report on activities and findings to the Governor and General Assembly.

Points for agency consideration include considered usage of the options to seek advisory opinions and use the mediation process, as well as agency open records officer regularly monitoring of information posted to the web site and concurrent updates of local policies to maintain conformity. If a matter is brought on appeal, the regional hearing provision may give the opportunity to request a local venue. The listing of agency open records officers requires local monitoring, and will require a determination of who in the agency is required to be listed, particularly if the agency sets up a structure of subsidiary officers and differing points of access, as will likely be the case in, for example, county row offices.

(b) Executive director – The executive director of the Office is a gubernatorial appointment.

(c) Limitation – The executive director is precluded from political activity during tenure and one year after.

(d) Staffing – The executive director has sole prerogative to appoint staff to the Office, including attorneys who will act as appeals officers.

(e) Duties – The executive director carries out delineated responsibilities of the Office and monitors cases on appeal to the Office.

(f) Appropriation – To maintain independence, the appropriation to the office is in a separate line item from DCED and is under sole jurisdiction of the executive director.

Chapter 15. State-Related Institutions

The chapter adds provisions specific to state-related institutions.

Chapter 17. State Contract Information

The chapter adds provisions specific to Commonwealth contracts and contracting.

Chapter 31. Miscellaneous Provisions

Section 3101. Applicability.

The act applies to “requests . . . made” after December 31, 2008. This is considered to be a retroactivity provision, essentially meaning that the record being requested under the new standard may have been created before the effective date of the law. For local agencies, some records that were not accessible previously may now become accessible after December 31 by change of the definition of “public record”. This has a greater impact on legislative and court records, many of which are being brought under the statute for the first time.

Section 3101.1. Relation to other laws.

Restates language from other sections that provisions of other statutes that conflict with this statute take precedence.

Section 3101.2 Severability.

All provisions of the act are severable.

Section 3102. Repeals.

The prior Right-to-Know Law is repealed in its entirety, along with superseded elements of the Administrative Code.

Section 3103. References.

While the prior Right-to-Know law is repealed, any reference to it in another statute is considered a reference to the new law.

Section 3104. Effective date.

The title, definitions, and creation of the Office of Open Records take effect immediately. Provisions relating to state-related institutions and Commonwealth contracts take effect July 1, 2008. The remainder of the act takes effect January 1, 2009. *Points for agency consideration – The old statute is not repealed until January 1, 2009, so that is when the new appeals process comes into effect. There is some confusion on the impact of the new definitions and the new Office of Open Records taking effect prior to the other provisions of the law. Regarding definitions, it may be impossible to reconcile new definitions with an access and appeals process from the prior law that in context uses the terms differently. There is a suggestion that the intent is to give the new Open Records Office the capacity to begin drawing up guidelines based on these new definitions. Similarly, the provisions relating to the Open Records office will become operational as soon as that office becomes operational – the Governor has 90 days (May 14) to appoint an executive director – but the appeals process does not take effect until January 2009.*