

ISSUE BRIEF

SENATE POLICY DEVELOPMENT AND RESEARCH OFFICE

PREPARED IN CONJUNCTION WITH THE SENATE REPUBLICAN POLICY COMMITTEE

The Right to Know Law

Introduction

- On February 14, 2008, the Governor signed Senate Bill 1 (Pileggi) into law as [Act 3 of 2008](#), the Right-to-Know Law. Unless otherwise noted, the law will take effect on January 1, 2009.
- Under the new law, a record in the possession of a Commonwealth agency or local agency is presumed to be a public record unless the record is exempt under Section 708 of the Act, it is protected by a privilege, or it is exempt from disclosure under any other federal or state law or regulation, or judicial order or decree. The same presumption applies to legislative records and judicial financial records. Nothing in the Act is intended to supersede or modify the public or confidential nature of a record or document established in federal or state law, regulation, or judicial order or decree.
- The bill specifically requires a Commonwealth agency, a local agency and a legislative agency to provide public records or legislative records in accordance with the Act. The agencies are prohibited from denying a requester access to a public record or legislative record due to the intended use of the record by the requester. A judicial agency is required to provide financial records in accordance with the Act or any rule or order of court providing equal or greater access to the records. Similarly, a judicial agency cannot deny a requester access to a financial record due to the intended use of the record by the requester.

Office of Open Records (The Office of Open Records provisions became effective immediately.)

- Act 3 of 2008 established the Office of Open Records in the Department of Community and Economic Development to provide information relating to implementation and enforcement of the Act, to provide training courses, to establish an internet website with information relating to the Act, to conduct a biannual review of the fees charged under the Act, and to review appeals of decisions by Commonwealth agencies.
- The Office is required to employ or contract with attorneys to serve as appeals officers. Each appeals officer must complete a training course.
- The Office of Open Records will develop a uniform form which must be accepted by all Commonwealth and local agencies, in addition to any form used by the agency to file a request under the Act. The uniform form will be published in the *Pennsylvania Bulletin* and on the office's public website. Judicial agencies and legislative agencies are permitted to develop their own forms or use the one developed by the Office of Open Records.
- The Governor appoints the executive director of the Office who serves for a term of six years. The executive director cannot serve more than two terms or seek election or accept appointment to any political office during his or her tenure and for one year thereafter.
- On April 24, 2008, Governor Rendell announced the appointment of Terry Mutchler, an attorney and former Capitol newsroom correspondent, as Executive Director of the Office of Open Records. At the time of her appointment, Ms. Mutchler was serving as public access counselor and senior policy advisor to Illinois Attorney General Lisa Madigan.

- The appropriation for the Office will be a separate line item and will be under the jurisdiction of the executive director. The Office must report annually to the Governor and the General Assembly on its activities.

Agency Requirements

- All agencies covered by the Act must designate an open-records officer who will receive requests for records, direct requests to the appropriate person, track the agency's response to the requests and maintain the required records.
- The Office of Open Records must designate an appeals officer for all Commonwealth and local agencies. The other agencies and offices covered by the Act must also designate an appeals officer. An agency can promulgate regulations, rules or policies necessary to implement the Act. However, a policy, rule or regulation adopted under the Act cannot limit the number of records which may be requested or require the disclosure of the purpose or motive for the request for access to records.
- The following information must be posted at each agency and, on the agency's public website, if it maintains one: contact information for the open records officer, contact information for the applicable appeals officer, a form which can be used to file a request, and the regulations and policies of the agency relating to the Act.
- Public records, legislative records or financial records will be available for access during regular business hours of an agency. An agency can also make its records available through any publicly accessible electronic means. If a requester is unwilling or unable to use the electronic access, the requester can submit a written request to have the record converted to paper. The agency would be required to provide the paper version of the record within five days of the receipt of the request. Nothing in the Act could be construed to require access to the computer of an agency or individual employee of an agency.
- An agency can deny a requester access to a record if the requester has made repeated requests for that same record, which have placed an undue burden on the agency. Such a denial would not restrict the ability to request a different record.
- A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function, and which is directly related to the governmental function and not otherwise exempt, would be considered a public record.
- If information which is not subject to access is an integral part of a public record, legislative record, or financial record, the agency will be required to redact the information which is not subject to access and grant access to the other information. Information that an agency redacts would be considered a denial.
- If, in response to a request, an agency produces a record that is not a public record, legislative record or financial record, the agency would be required to notify any third party that provided the record to the agency, the person that is the subject of the record and the requester.
- An agency would also be required to notify, within five business days, a third party of a request if the third party provided the record and included a written statement that the record contains a trade secret or confidential proprietary information. The third party would have five business days from receipt of the notification to provide input on the release of the record. The agency would be required to deny the request or release the information within ten business days of the provision of notice to the third party and notify the third party of the decision.
- Nothing in the Act could be construed to modify, rescind, or supersede any record retention disposition schedule of an agency established pursuant to law, regulation, policy or other directive.

Exemptions

- The burden of proving that a record, legislative record, or financial record is exempt from public access would be on the agency receiving the request by a preponderance of the evidence.
- Section 708 of the Act lists the records that are exempted from access by a requester. In determining whether a record is exempt from access, an agency would be required to consider and apply each exemption separately.
- An agency would not be required to create a record which does not exist or to compile a record in a manner in which the agency does not currently compile, maintain or organize the record.
- An agency could exercise discretion to make an otherwise exempt record accessible for inspection or copying if the conditions outlined in the Act are met.

Response Times

- The time to respond to a request cannot exceed five business days from the date a written request is received by an open records officer. If the agency fails to send the response within the five business days, the written request for access would be deemed denied.
- The Act provides for an extension of the response time if certain circumstances, such as the need for redaction or legal review, apply. In these instances, the open records officer would send a written notice within the five business days notifying the requester that the request for access is being reviewed, the reason for the review, and a reasonable date that a response is expected to be provided.
- If an agency's response is a denial of a written request, a written response would have to be issued detailing, among other information, the specific reasons for denial, including a citation of supporting legal authority.

Appeals

- A requester can file an appeal with the Office of Open Records or other appropriate appeals officer within 15 business days of the mailing date of an agency's response or within 15 business days of a denial.
- The appeal must state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and address any grounds stated by the agency for delaying or denying the request. A person other than the agency or requester with a direct interest in the record could file a written request to provide information.
- Prior to issuing a final determination, the appeals officer could hold a hearing. A decision to hold or not hold a hearing would not be appealable.
- The appeals officer is required to make a final decision within 30 days of the receipt of the appeal. The Act provides for judicial review of the decision.

Penalties

- A court can award reasonable attorney fees and costs if it finds that an agency willfully or with wanton disregard deprived the requester of access to a public record or otherwise acted in bad faith; or, the exemptions, exclusions, or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of the law. The court can also award reasonable attorney fees and costs to the requester or agency if it finds the legal challenge was frivolous.

- A court can impose a civil penalty of not more than \$1,500, if an agency denied access to a public record in bad faith.
- An agency or public official who does not comply with a court order under the Act would be subject to a civil penalty of not more than \$500 per day until the public record is provided.

Fees

- Fees for duplication will be established by the Office of Open Records for Commonwealth and local agencies and by each judicial and legislative agency. The fees must be reasonable and based on prevailing fees for comparable duplication services provided by local business entities.
- Fees for copying complex and extensive data sets of geographic information systems or integrated property assessment lists can be based on consideration of reasonable market value of the same or closely related data sets unless the information is being provided to the media for publication or broadcast or to a non-profit organization.
- An agency can establish user fees specifically for the provision of enhanced electronic access, but only to the extent that the enhanced electronic access is in addition to making records accessible for inspection and duplication as required by the Act.
- Except as otherwise provided by statute, no other fees could be imposed unless the agency incurs costs for complying with the request. No fees could be imposed for an agency's review of a record to determine if the record is a public, legislative or financial record.
- On November 24, 2008, Terry Mutchler, Executive Director of the Office of Open Records, announced the fee schedule for state and local agencies under the act. Costs will be limited to between 10 cents and 25 cents per page for copies of requested documents. Agencies will only be permitted to charge the actual costs for reproduction of blue-prints, color copies, odd-sized materials and downloading records to computerized discs. No fees will be permissible for staff time or salary for complying with a request or for redacting information that is exempt under the law. Originally, Governor Rendell issued a Management Directive allowing state agencies to charge a fee for redacting exempt information but the fees have since been suspended in response to negative feedback about them.

State-Related Institution Salaries *(The effective date of these provisions was July 1, 2008.)*

- Act 3 also requires that no later than May 30 of each year, a state-related university (Temple, Pitt, Penn State and Lincoln) must file a report with the Governor's Office, the General Assembly, the Auditor General, and the State Library containing the following:
 - all information required by Form 990 (Return of Organization Exempt from Income Tax);
 - the salaries of all officers and directors of the state-related institution; and
 - the highest 25 salaries paid to employees.
- The report will not include information relating to individual donors.

Contracts e-Library *(The effective date of these provisions was July 1, 2008.)*

- The measure also requires Commonwealth agencies, legislative agencies and judicial agencies to provide copies of certain contracts in excess of \$5,000 to the Treasury Department no later than 10 days after the contract is fully executed. These contracts include those involving any property, real, personal or mixed of any description, or any contract for personal services. The requirement does not apply to a contract protected by a privilege.

- The Treasury Department is required to make the contracts available for public inspection either by posting a copy of the contract or a contract summary on its public website. The Treasury Department must post the information in a way that allows the public to search the contracts or the summaries and to maintain a page with instructions on how to review a contract on the website.
- On June 23, 2008, the Pennsylvania Supreme Court amended Pennsylvania Rule of Judicial Administration No. 509 to provide, among other things, that the Administrative Office of Pennsylvania Courts will make contract information “available on the website of the Unified Judicial System.” The Court acted in reliance upon its authority under the Pennsylvania Constitution and Section 304 of the Right-to-Know Law. Accordingly, contracts entered into by judicial agencies will not be available from the Contracts e-Library.
- On July 22, 2008, Pennsylvania Treasurer Robin Wiessmann unveiled the [searchable database](#) of state contracts.

Repeals

- Act 3 repealed the existing Right-to-Know Law (Act 212 of 1957).