

# Annual Report



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OFFICE OF OPEN RECORDS

2012



## A message from Executive Director Terry Mutchler



Since our doors opened four years ago, the workload of the Office of Open Records jumped **89 percent**. The Right-to-Know Law continues to force accountability at every level of government and citizens continue to be the primary user of this sunshine law.

This annual message to the Governor, the General Assembly and the public is difficult because – despite the paramount success of this law and this office - transparency in the Commonwealth faces hurdles that jeopardize our success. Frankly, the future of true transparency and providing public records to Pennsylvanians is shrouded in uncertainty.

On the plus side, the success stories continue to roll in as you will see in the pages of this report. National organizations continue to elevate Pennsylvania's ranking among pro-open government states. However, given the surge in work, our office is straining to accomplish our mission.



## A message from Executive Director Terry Mutchler, cont.

The Office of Open Records is a quasi-judicial, independent agency. We decide whether a record is a public record. We received a record –high, 2,188 appeals in 2012. With seven lawyers, we decided most of those cases in 20 business days as provided by law. (Many states take months and years to decide open-records disputes). Also, we litigate more than 170 court cases, respond to thousands of inquiries, file enforcement actions, conduct mediations, hearings and trainings. The OOR also responded to 785 requests for our records under this law.

The down side is that, plainly, the OOR doesn't have the staff or money to keep pace with the workload that continues to break records every month.

The General Assembly designed the OOR as an adjudicator. Contrary to public assertions by government officials at the highest level, the OOR is not an advocate for requesters or agencies; nor are we activists for the unfettered release of records. As I said on Day One of my appointment, it does not matter who asks for the records or who holds the records; the OOR will, and does, apply the law fairly and evenly in determining what records are public.



## A message from Executive Director Terry Mutchler, cont.

If we don't have the money or staff to do the job, citizens will be forced to reach into their own pockets and go to court when an agency denies a public record, instead of having an initial review from the independent OOR. The courts, of course, continue to play a fundamental role in determining the procedural and substantive legal issues. The OOR's binding authority, neutrality and independence has been consistently challenged – and consistently upheld.

There is no question that the law penned by Senate Majority Leader Dominic Pileggi works, and hundreds of thousands of public records have become available. The RTKL's influence is evident in Gov. Corbett's development of PennWATCH, and the increased access of public records online. But this gained ground may soon be lost.

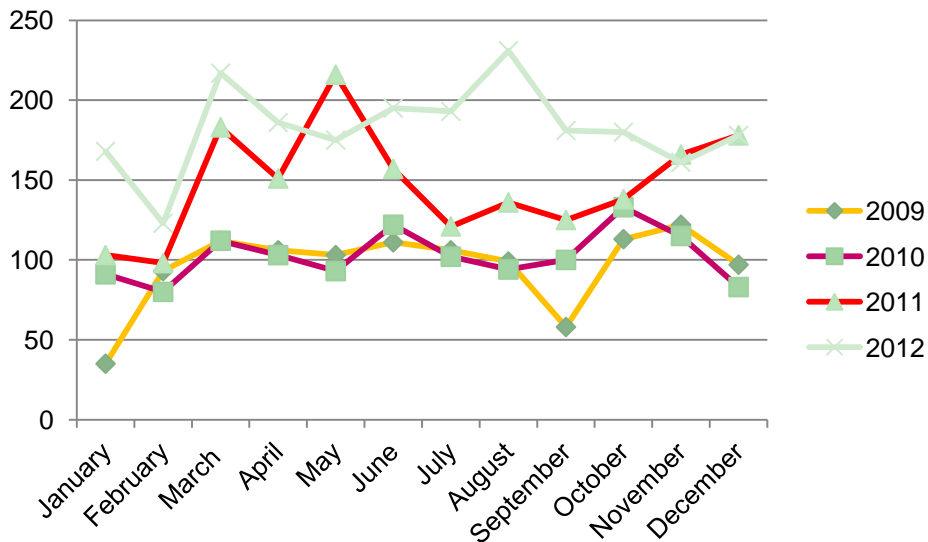
My mission and duty to the citizens of Pennsylvania remains the same: to ensure that this law is applied fairly and evenly and that Pennsylvania excels as a national benchmark of transparency. Pennsylvania's government belongs to its citizens. We should properly fund the independent agency that ensures that public records remain public.

A handwritten signature in black ink that reads "Terry Mutchler". The signature is written in a cursive style with a large, looped "T" and "M".



## Record Workload

In 4 years, our workload has jumped 89 percent. In 2012, Requesters filed 2,188 appeals with the OOR, compared with 1,772 appeals in 2011, 1,228 appeals in 2010, and 1,159 appeals in 2009, its first year.





### The Impact of the RTKL and the OOR

Citizens obtained critical information about their government by using the Right-to-Know Law. Many of these records were ordered to be released by the OOR:

- Inspection reports of school cafeterias. The ability to obtain these records keeps parents informed as to the safe food handling practices in the schools their children attend.
- The cost of agency investigations and lawsuits including those involving allegations of sexual harassment, misappropriation of funds and discrimination.
- Records demonstrating how property tax assessments are determined.
- Government e-mails to determine how, why and when money is spent and to ensure agencies are run in an efficient and cost effective manner. One request revealed disparaging remarks about citizens.



## RTK Request Impact

- RTKL requests have revealed pay disparities among agency employees and the impact that has had on hiring, promotion, and quality of management. Pay disparity led employees to decline promotions while others sought demotions to receive higher salaries.
- Requesters continually track and monitor government spending by obtaining legal invoices. In some cases, legal bills exceeded \$50,000 with a limited and vague explanation. Another revealed that a lawsuit had cost local taxpayers over \$250,000 in legal fees.
- A RTKL request showed that city officials spent tens of thousands of dollars on seminars and conferences in San Antonio, New Orleans, Indianapolis and Orlando.
- Public records revealed that an agency had received an anonymous one million dollar donation; over three quarters of it was used to purchase emergency vehicles.
- Records detailing proposed early retirement incentives for employees. A board had approved the proposal without explanation at a meeting.



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## Function of the OOR

Many still misunderstand the role and function of the OOR in obtaining records.

A requester may submit a written request to an agency seeking records. An agency has five business days to respond to that request. If an agency denies the request or fails to respond within five business days, the requester can appeal to the OOR.

After assigning an appeals officer, the OOR permits both the requester and agency to submit arguments in support of their positions. After carefully weighing the evidence and legal arguments presented, the OOR issues a binding Final Determination within thirty calendar days.

In addition to handling over 6,000 appeals, the OOR also:

- Trains local and state officials in the law
- Conducts hearings
- Conduct mediations
- Reviews fees charged by Agencies
- Fields questions
- Maintains a website
- Answers questions about the law

The OOR has produced Citizen and Agency Guides that provide a detailed explanation of the Process. They are available on the OOR webpage <https://openrecords.state.pa.us>.

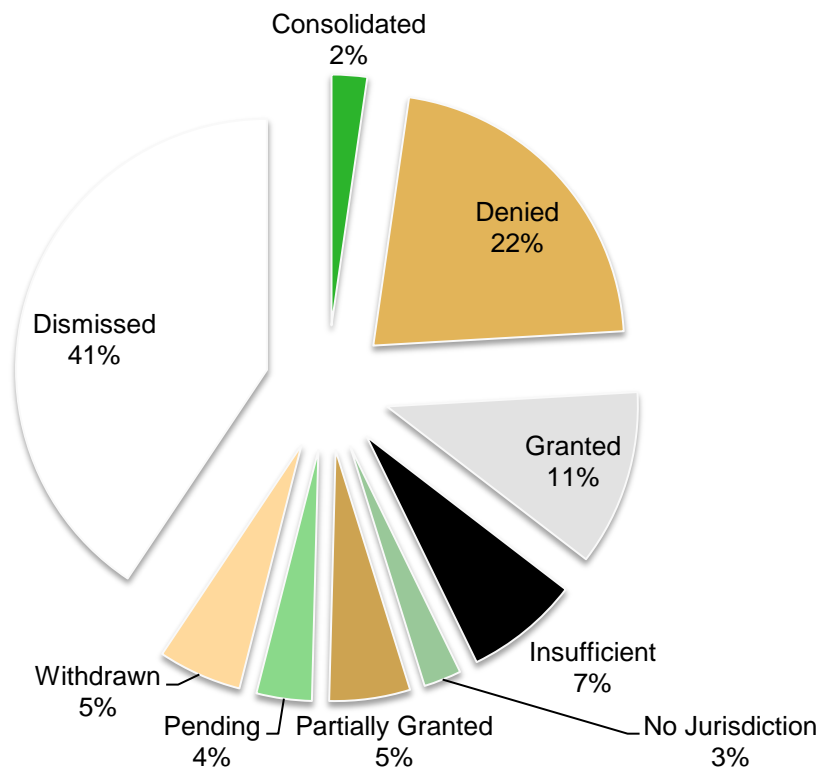




## Status of appeals as of 12/31/2012

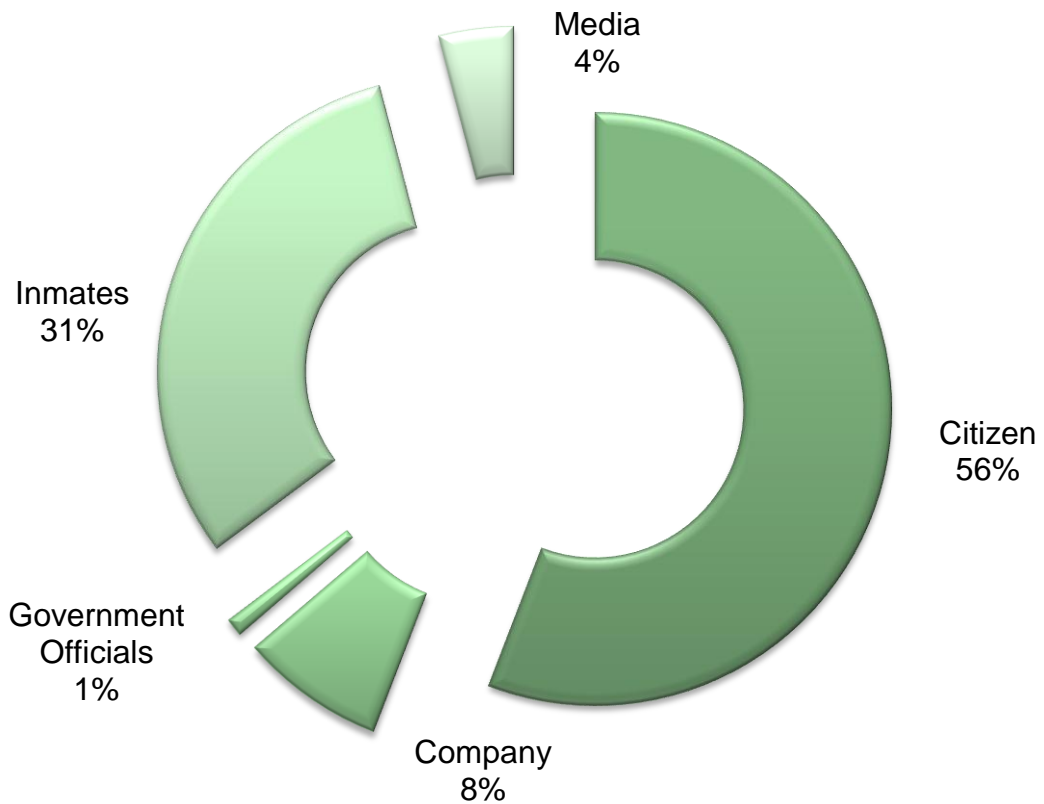
2188 Appeals Filed

248	Granted	118	Withdrawn
114	Partially granted	78	Pending
889	Dismissed	161	Insufficient
477	Denied	50	Consolidated
53	No Jurisdiction		





## Appeal Percentage by Requestor Type





**Breakdown of the appeals filed involving  
Commonwealth and Local Agencies**

752 involving State Agencies:

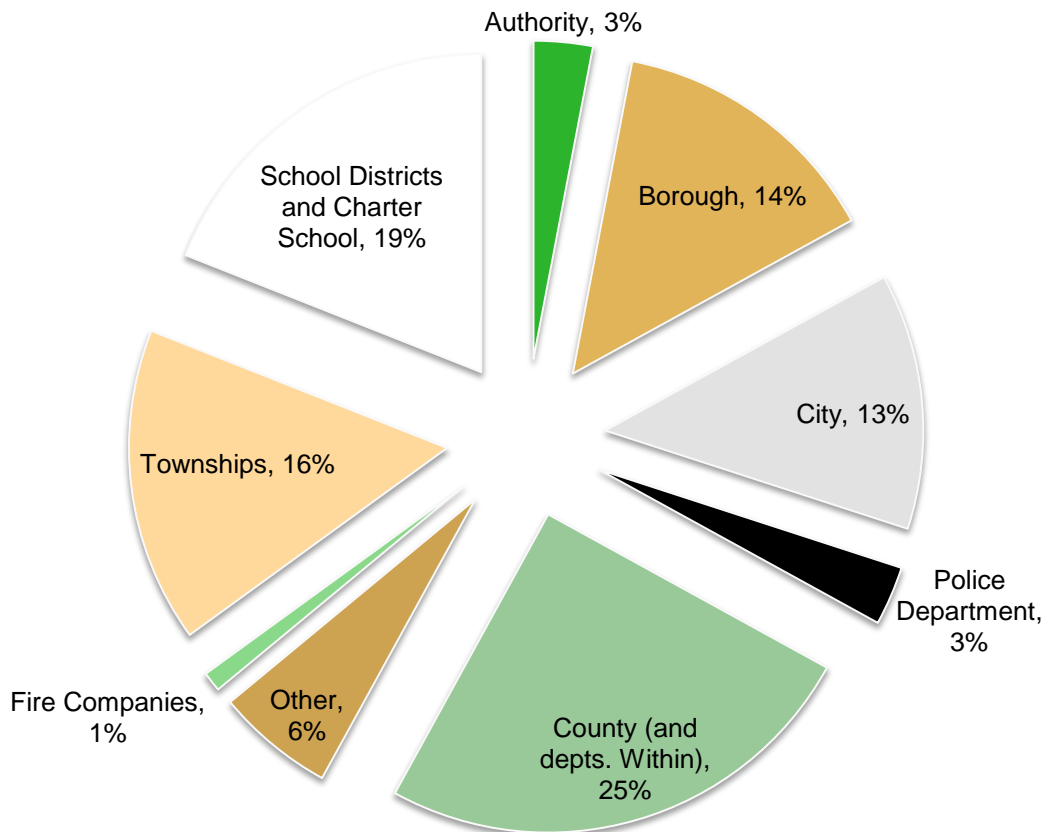
- 34 Granted or partially granted
- 35 Withdrawn
- 293 Dismissed
- 62 Insufficient
- 4 No Jurisdiction
- 283 Denied
- 13 Consolidated
- 28 Pending

1436 involving Local Agencies:

- 328 Granted or partially granted
- 83 Withdrawn
- 596 Dismissed
- 99 Insufficient
- 49 No Jurisdiction
- 194 Denied
- 37 Consolidated
- 50 Pending



# Appeals Involving Local Agencies





## Most Appeals Filed with the OOR:

Sean Donahue (inmate)	77
Jack Williams (City Councilman)	48
Shawn Makanvand (citizen)	40
Charles Hoyer (inmate)	34

## Most Appeals Filed Involving Commonwealth Agencies

Dept. of Corrections	419
State Police	43
Dept. of Public Welfare	36
Dept. of State	33
Dept. of Labor & Industry	30

## Most Appeals Filed Involving Local Agencies

*City of Philadelphia	59
*City of Johnstown	41
Loganville Borough	37
*Allegheny County	21

\* And all departments and agencies within



The OOR's court docket is surging. Our legal department handled 2,188 Final Determinations, 785 requests for records of OOR; mediations, hearings and inquiries, in addition to the court docket. The Office litigates or monitors about 170 cases a year in the state courts.

On average, each attorney Appeals Officer handles 393 appeals/cases a year – a heavier caseload than many Assistant District Attorneys. Many of these cases require extensive legal briefing and oral argument.

Much of the state's Right-to-Know Law continues to be shaped by the judiciary. The OOR estimates that it will take another five years before a full body of case law exists on the Right-to-Know Law. In 2012, the Supreme Court and Commonwealth Court considered numerous issues of first impression and issued rulings covering a wide range of significant open records issues.<sup>1</sup> Following is an overview of the most significant cases:

<sup>1</sup> These numbers are based on appeals where the OOR was given notice. While the RTKL requires the OOR to be noticed on any appeal of its Final Determinations, the OOR does not always receive the required notice.



### **Third Party Contracts - 65 P.S. § 67.506(d)**

In one of the most pro-open government rulings in the United States, the Pennsylvania Supreme Court in *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012) determined that records held by a government contractor are public if the contractor is performing a governmental function and the records are directly related to that function. The underlying facts involved a local stadium authority that contracted out the operation of its stadium to a private company, which held records associated with the award of concessions.

### **What is a Right-to-Know Request?**

A seminal case in which the Pennsylvania Gaming Control Board did not respond to a citizen's written request for records because the Requester did not cite the RTKL or use a form. The OOR determined that it was a valid request. The Commonwealth Court agreed holding that written requests for records made to governmental agencies are presumptively right-to-know requests. The Right-to-Know Law does not require that a written request cite the Right-to-Know Law for the request to be processed by the agency. The OOR argued this case twice; once before a panel of three and then before the Court *en banc* before its decision was upheld. The case was remanded to the Gaming Control Board, and is now on appeal to the Supreme Court. *Commonwealth v. Office of Open Records*, 48 A.3d 503 (Pa. Commw. Ct. 2012).



### **Predecisional deliberations and *In Camera* Review**

The Commonwealth Court is currently reviewing whether the OOR has authority to privately review an agency's requested records (*in camera* review) prior to making a final determination. The issue arose following a request for the Governor's calendar. The Commonwealth Court initially remanded the case to the OOR for *in camera* review. After the Governor's Office requested reconsideration, the Commonwealth Court vacated its decision and scheduled an oral argument before the Court, sitting en banc on February 13, 2013. *Office of the Governor v. Scolforo*, No. 739 C.D. 2011 (Pa. Commw. Ct. June 7, 2012) (decision vacated).

### **Waiver of Defenses**

The Commonwealth Court was asked to revisit its decision in *Signature Info. Solutions, LLC v. Aston Twp.*, 995 A.2d 510 (Pa. Commw. Ct. 2010). In *Signature*, the Court held that an agency waived any legal arguments or defense it did not raise in its response to a Right-to-Know request. The Court found that *Signature* precludes an agency from recasting the issues on appeal from those presented to and considered by the OOR. However, a caveat was carved out in the Court's analysis - an agency cannot waive an individual's privacy rights. Here, DEP provided notice that information would be public and the OOR was affirmed. The OOR filed an amicus brief to contest reconsideration of the landmark decision in *Signature*. *Commonwealth v. Cole*, 52 A.3d 541 (Pa. Commw. Ct. 2012).





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## Litigation, cont.

### **May an Agency Ignore a RTKL Request?**

The Commonwealth Court considered whether an agency may ignore a request if the requester owes fees for prior requests. It held that an agency may not refuse to respond to a RTK request based on past-due fees. *DOT v. Drack*, 42 A.3d 355 (Pa. Commw. Ct. 2012). In the opinion, the Court confirmed the OOR's authority to permit parties to file petitions and ask the OOR to reconsider its final determinations.

### **E-mails on Personal Computers of Government Officials**

The Commonwealth Court, again agreeing with the OOR, found that work e-mails of public officials on personal computers can be subject to disclosure when agency business is deliberated. A requester sought e-mails between Borough Council members concerning the Borough's consideration of a land development plan. Because they were exchanged by a quorum of supervisors, it constituted a transaction of agency business. The Court stated that the agency Open Records Officer had a duty to inquire of supervisors as to whether they were in possession, custody or control of the requested emails and, if so, whether or not they were public and the OOR should have directed the ORO to do so rather than concluding that the records are public and ordering disclosure (resulting in a remand to the trial court and the OOR). *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Commw. Ct. 2012).



### **Coroner Records**

In granting greater access, the Supreme Court reversed the Commonwealth Court (and OOR) finding that the RTKL and Section 1236.1(c) of the Coroner's Act each provide immediate access to cause and manner of death records. *Hearst TV Inc. v. Norris*, 54 A.3d 23 (Pa. 2012)

### **Declaratory Relief against the OOR**

The Pennsylvania State Educational Association sued the OOR in Commonwealth Court asking for a declaration that public school employees' home addresses are protected by the Pennsylvania Constitution or uniformly exempt under the RTKL. The Commonwealth Court dismissed the case on jurisdictional grounds and the Supreme Court reversed concluding that the RTKL does not provide public school employees with a reliable administrative or judicial method to seek redress for a decision by their employer to release information they believe to be protected. The Court found it just and proper for the OOR "to be hauled into court to address core and colorable issues connected with such treatment at the behest of affected persons and their associations." The Court stated that there could be no justice absent the OOR's presence. The OOR briefed and argued this case before the Supreme Court. *Pa. State Educ. Ass'n ex rel. Wilson v. Pa. Office of Open Records*, 50 A.3d 1263 (Pa. 2012).



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## Litigation, cont.

### **What is an Agency?**

The Commonwealth Court considered whether or not the Delaware Valley Regional Planning Commission is an independent agency subject to the RTKL, as the OOR found. The Court reversed the OOR, holding that in order to be considered a Commonwealth agency, an essential governmental function must be performed. *Scott v. Del. Valley Reg'l Planning Comm'n*, 56 A.3d 40 (Pa. Commw. Ct. 2012).



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## Right-to-Know Requests

Like all Commonwealth agencies, the OOR is subject to the RTKL. In 2012, the OOR received 785 requests for records of our agency:

- 678 *requests were misdirected requests*
- 98 *requests were granted or partially granted*
- 8 *requests were denied for no responsive records existing*
- 1 *request was withdrawn*

The OOR has granted access to the following records:

- E-mails*
- Names and titles of OOR staff*
- OOR staff salaries*
- OOR Interim Guidelines*
- OOR Citizens' Guide*
- Home address of the Executive Director*
- Copies of the Pennsylvania Constitution and the Right-to-Know Law*
- Appeal information contained in certain docketed appeals*
- Names of requesters filing most appeals with the OOR*
- OOR request and appeal forms*
- Open Records Officers of agencies*



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## Training

In addition to answering telephone and e-mail inquiries, the OOR continues to provide statutorily-mandated regional trainings across the state to local municipalities, citizens, public employees, solicitors and organizations.

In the last four years, the OOR has conducted nearly 800 trainings. These trainings are vital to assisting requesters and especially agencies comply with the law in an efficient and cost-effective manner.

As mandated by Law, the OOR held its Annual Training in October at the State Museum located in Harrisburg. Over 150 people attended including lawmakers, agency representatives, and members of the public. The training focused on the RTKL providing a brief overview of the law, the procedural requirements and impact of the law, hot topic issues, and recent court opinions. The training also included a brief overview of the Sunshine Law.



The OOR maintains and operates an informal mediation program designed to promote access to records outside of formal appeals. The goal of informal mediation is to resolve disputes between an agency and a requester without undergoing a formal hearing process and to avoid litigation once the administrative procedures for appeals by the OOR have been exhausted.

Mediation allows an agency to better understand a request so that a requester can receive the records he or she actually seeks. Mediation reduces the burden of production that a voluminous request places on an agency, as well as reduces potential financial costs to the requester.

In 2012, the OOR conducted three mediations. Of these mediations, one was successful.

- In *Tighe v. Erie County*, OOR Dkt. AP 2012-0942, the request sought records used in tax assessment. The mediation process resulted in the withdrawal of the appeal.
- In *Reigle v. Pennsylvania Department of Transportation*, OOR Dkt. AP 2012-1231, the request sought information regarding hydraulic plate compactors. The appeal is still pending.
- In *Andrews v. Methacton School District*, OOR Dkt. AP 2012-1324, the request sought class sizes of school grades. Mediation was offered but was declined. However, the two parties resolved the matter. The appeal was therefore dismissed as moot because the Requester had received the records.



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## Media

Since its creation, the OOR has received considerable attention as people across the United States track the ongoing advancement of what has been called the “Pennsylvania Model.”

Since the first Final Determination in February 2009, national, state and local news organizations have editorialized and discussed the OOR’s Final Determinations both challenging and praising them. Open government issues, including OOR Final Determinations, have consistently appeared in *The New York Times*, *The Wall Street Journal*, *Philadelphia Inquirer*, *Pittsburgh Post-Gazette*, *Philadelphia Daily News*, *Pittsburgh Tribune-Review*, *The Morning Call*, *The Patriot- News*, *Delaware County Daily Times*, *York Daily Record*, *The Herald*, *The Sentinel*, *Scranton Times*, *Erie Times-News*, *Pocono Record*, *Reading Eagle*, *Intelligencer Journal*, *Beaver County Times*, *The Times Leader*, *Pottsville Republican*, *The Daily News* and *Ellwood City Ledger* and many others.



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## Office of Open Records Staff

### **Terry Mutchler, Executive Director**

Gov. Edward G. Rendell appointed Terry Mutchler, a lawyer and former journalist, to a six-year term in April, 2008.

Prior to accepting this position, Ms. Mutchler served as Illinois' first Public Access Counselor to enforce the state's sunshine laws and also served as a senior advisor and speech writer for the Attorney General.

She previously worked at a national law firm in its media law group and appellate practice group in Chicago. She is a former law clerk for a retired Chief Justice of the Illinois Supreme Court, and also clerked for the Executive Office of the President during the Clinton Administration focusing on privacy issues. Before becoming an attorney, Ms. Mutchler was an investigative journalist for The Associated Press in Pennsylvania, New Jersey, Alaska and Illinois, where she was the first woman appointed as Statehouse Bureau Chief. She later served as a senior advisor and speech writer for the late Illinois Senate Minority Whip, Senator Penny Severns.

Mutchler received her bachelor's degree from the Pennsylvania State University and her *juris doctor* from the John Marshall School of Law in Chicago. She was selected as a Bohnett Fellow at the Kennedy School School of Government, Harvard University.





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## Office of Open Records Staff

**Nathanael Byerly**, Deputy Director of the Office of Open Records. Prior to serving as Deputy, he was OOR Chief Counsel and the Open Records Officer. He has also been an Appeals Officer and issued hundreds of Final Determinations.

As senior advisor to the Executive Director, he is actively involved in speech writing, testifying before the Legislature, and managing the administration and budget of the OOR. Mr. Byerly has conducted dozens of trainings and presentations on the Right-to-Know Law across the Commonwealth including to the Pennsylvania Conference of State Trial Judges, the Pennsylvania Bar Institute, and members of the Pennsylvania School Boards Association.

Prior to joining the OOR, he was a Special Assistant United States Attorney in the Harrisburg Branch of the U.S. Attorney's Office for the Middle District of Pennsylvania. Mr. Byerly has also worked in private practice for the Law Offices of Craig A. Diehl and Knauer & Associates, LLC. He is a graduate of the University of Dayton School of Law.



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**Dena Lefkowitz**, Chief Counsel, joined the OOR in 2008. She crafted the procedural rules governing appeals to the OOR, the first Final Determination issued by the OOR and was integral to the formation of the office. She oversees the legal affairs of the OOR, provides counsel to the Executive Director, argued before the Supreme Court of Pennsylvania and regularly appears before the Commonwealth Court. Ms. Lefkowitz also trains government officials and lawyers in continuing legal education courses on the requirements of the RTKL.

Prior to joining the OOR, Ms. Lefkowitz was General Counsel to the Chester Upland School District and Assistant General Counsel to the School District of Philadelphia and has also been a civil litigator for firms in Media, Bala Cynwyd, Norristown and Philadelphia. She is a graduate of Temple University School of Law.

**J. Chadwick Schnee**, Assistant Chief Counsel, joined the OOR in 2010 as an Appeals Officer and became Assistant Chief Counsel in 2011. He has argued numerous Right-to-Know Law matters in courts of common pleas, the Commonwealth Court and the Supreme Court and is responsible for tracking and making recommendations on pending legislation impacting the RTKL. Mr. Schnee is a former associate with the Pittsburgh-based Campbell, Durrant, Beatty, Palombo & Miller, P.C. and previously interned for the Hon. Chief Judge Donetta Ambrose of the U.S. District Court for the Western District of Pennsylvania. He graduated from the University of Pittsburgh School of Law.



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**Charles Rees Brown**, Senior Attorney, joined the OOR in May, 2011. Mr. Brown is a graduate of Penn State University and Widener University School of Law. Prior to joining the OOR, he served in the Governor's Office of General Counsel representing the Department of Community and Economic Development.

**Audrey Buglione**, Staff Attorney, joined the OOR in 2009 as an Appeals Officer. Prior to joining the OOR, Ms. Buglione was an associate with McNeese, Wallace & Nurick, in Harrisburg. Ms. Buglione is a *magna cum laude* graduate of the Widener University School of Law.

**Kyle Applegate**, Staff Attorney, joined the OOR in the Spring of 2011 as an Appeals Officer. Before joining the OOR, Mr. Applegate was a law clerk for the Franklin County Court of Common Pleas. Mr. Applegate is a *magna cum laude* graduate of Widener University School of Law.

**Benjamin Lorah**, Staff Attorney, joined the OOR as an Appeals Officer in November of 2011. Prior to joining the OOR in 2011, Mr. Lorah served as an attorney for the Pennsylvania Board of Finance and Revenue for nearly 5 years. Mr. Lorah is a graduate of The Pennsylvania State University Dickinson School of Law.



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**Angela Eveler**, joined the OOR as an Appeals Officer in October, 2012. Prior to joining the OOR, Ms. Eveler served as the Executive Director of the Pennsylvania Immigration Resource Center, a non-profit legal services organization. Ms. Eveler previously served as an Assistant Public Defender in the York County Public Defender's Office and as a judicial law clerk in the York County Court of Common Pleas. Ms. Eveler is a graduate of Widener University School of Law.