

# Annual Report



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OFFICE OF OPEN RECORDS

2013



## A message from Executive Director Terry Mutchler



At the end of a six year appointment, I would be remiss if I did not say what a great honor it has been to serve the citizens of Pennsylvania as Executive Director of the Office of Open Records. When the Legislature started this open government experiment in 2008, many

questioned the potential and doubted the impact the Law would have. Lawmakers led by Senate Majority Leader Dominic Pileggi not only crafted a new and effective process granting unprecedented access, but also empowered a new agency to oversee that process. The courts have consistently supported this visionary shift toward openness by upholding and even expanding OOR's binding authority and independence. Pennsylvania's OOR and the RTKL process have piqued the interest of governments and government officials across the country and around the world.

Even after five years, interest in this law and its process has not peaked. Every year the annual number of appeals has increased. Since 2009 the number of annual appeals has more than doubled reaching a staggering high of 2,487 in 2013. Additionally, the OOR continues to litigate or monitor over 250 court cases, respond to thousands of citizen and agency inquiries, file enforcement actions, conduct mediations, hearings, and trainings across the state and meet the statutory deadline of issuing a Final Determination within 20 business days. The OOR has seven appeals officers to carry out this overwhelming task.



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In addition to the appeals, requesters filed a record 778 Right to Know requests in 2013 seeking records from the OOR. Like every year before, the OOR is again facing the likelihood that without additional funding, it will be unable to meet its statutory responsibilities.

While Pennsylvania's long road to transparency continues to be littered with barriers and hurdles, I can say without reservation that the Right to Know Law has been a huge triumph for transparency. Thanks must be given to Governor Corbett for opening the lines of communication. The law works; it has improved and continues to improve our government. Citizens have far greater access to records today than they did prior to 2008. Whether studies regarding the safety of our children or a review of e-mails showing how our money is spent, the RTKL has unlocked the doors giving citizens new tools to monitor and change their government.

Critics and naysayers are quick to overemphasize the shortcomings of the law and bypass its achievements. Can the law be stronger? Yes. An honest reading of the Law shows that certain things need to be fixed. However, we cannot ignore how far we have come even when recognizing how far we have to go. Underestimating the positive impact of the RTKL threatens the progress we have made. Even the harshest critic must concede that Pennsylvania government openness is better under this law.



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That said, the journey has only begun; there is still much work to do. Any form of government fails without transparency and any government that limits openness limits its own success. A strong RTKL and well-equipped OOR working together with an effective Sunshine Law keeps government officials accountable. Such a paradigm deters waste and corruption while at the same time fostering efficiency.

As we look to the future, we must keep moving forward by strengthening the laws that promote transparency and properly equipping the OOR. Requesters should not be denied access to their records based on semantics or legalese. Likewise, agencies should not bear the burden of collecting and providing address lists or data for commercial or political use nor should they be burdened with requests that are used for the sole purpose of harassment. Now is not the time to pause in our pursuit of transparency.

As the Legislature prepares to amend the RTKL, citizens have a unique opportunity to provide input and help shape a law that affects every aspect of their day to day lives. The key to continued success is identifying the problems and changing. Government serves its people best when open and transparent, but it will only allow as much access as the people require.



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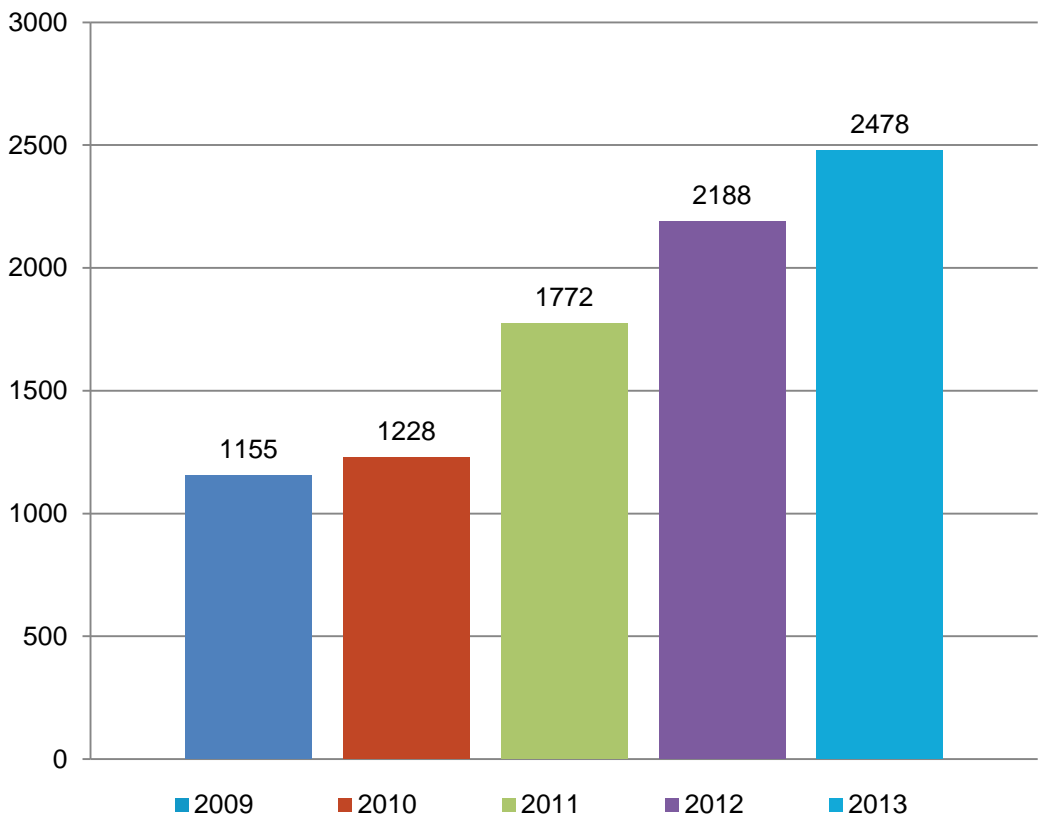
## A message from Executive Director Terry Mutchler

Finally, I would like to thank Governor Corbett for permitting me to serve the citizens of the Commonwealth these past six years. The future effectiveness and continued success of the OOR will rise or fall on the leadership and funding of the OOR. The mission must remain the same: to ensure that this law is applied fairly and evenly and that Pennsylvania continues to excel as a national benchmark of transparency. Such an objective reiterates what I have said since Day One that Pennsylvania's government belongs to its citizens.



## Record Caseload

In five years, our caseload has jumped **113 percent**. In 2013, Requesters filed **2,478 appeals** with the OOR, compared with 2,188 appeals in 2012, 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

Using the RTKL, citizens are empowered by the ability to obtain critical information about their government. As a quasi-judicial agency, the OOR oversees and enforces the RTKL. Transparency is best demonstrated by easy access. In a fast-paced, hi-tech world, perhaps the greatest demonstration of easy access is the availability of public records on a public webpage. The OOR consistently encourages agencies to make as many records available online as possible such as financial reports, budgets, contracts, grants, salaries, and similar records. Such access allows citizens not only to assess the efficiency and effectiveness of government, but to also demand and implement change where change is needed.

Below is a brief synopsis of just a few situations where records have been released:

- Records relating to a consulting agreement which allowed citizens to determine whether the agency was conducting government business in an ethical manner.
- Records relating to a water quality issue. The issue was subsequently resolved.
- Records relating to the spending of millions of dollars by township officials. The requests resulted in many of the township's financial records, budgets, and meetings being made public online.



## RTK Request Impact

- Records obtained through the RTKL revealed that a county would pay corrections officers half a million dollars in overtime.
- Records revealed that a school district conducted vague bookkeeping which resulted in unmonitored lines of credit for local stores and upscale restaurants.
- Records revealed the names of school district employees who failed to pay required tuition for their children.
- Records revealed that a borough manager was paid \$12,360 as part of a separation agreement. Such information allows citizens to analyze whether these types of agreements are appropriate and whether changes to future agreements need to be made.
- Records related to over \$70,000 in questionable charges resulted in criminal charges being brought against a public employee for theft.
- Records revealed how much agencies are spending in legal fees for representing and defending public officials and employees.
- Government official's e-mails, texts and correspondence showing how, why and when money is spent and to ensure agencies are conducting business in an efficient and cost effective manner.





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## Function of the OOR

Many still misunderstand the role and function of the OOR in obtaining records. Here is how it works.

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 within fifteen business days.

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 twenty business days.

In addition to handling over 9,000 appeals, the OOR also:

- Trains citizens as well as local and state officials in the law
- Conducts hearings, mediations, and *in camera* review (the OOR reviews the actual records requested and determines whether they are public)
- Reviews fees charged by Agencies
- Maintains a website
- Answers questions about the law via phone or e-mail

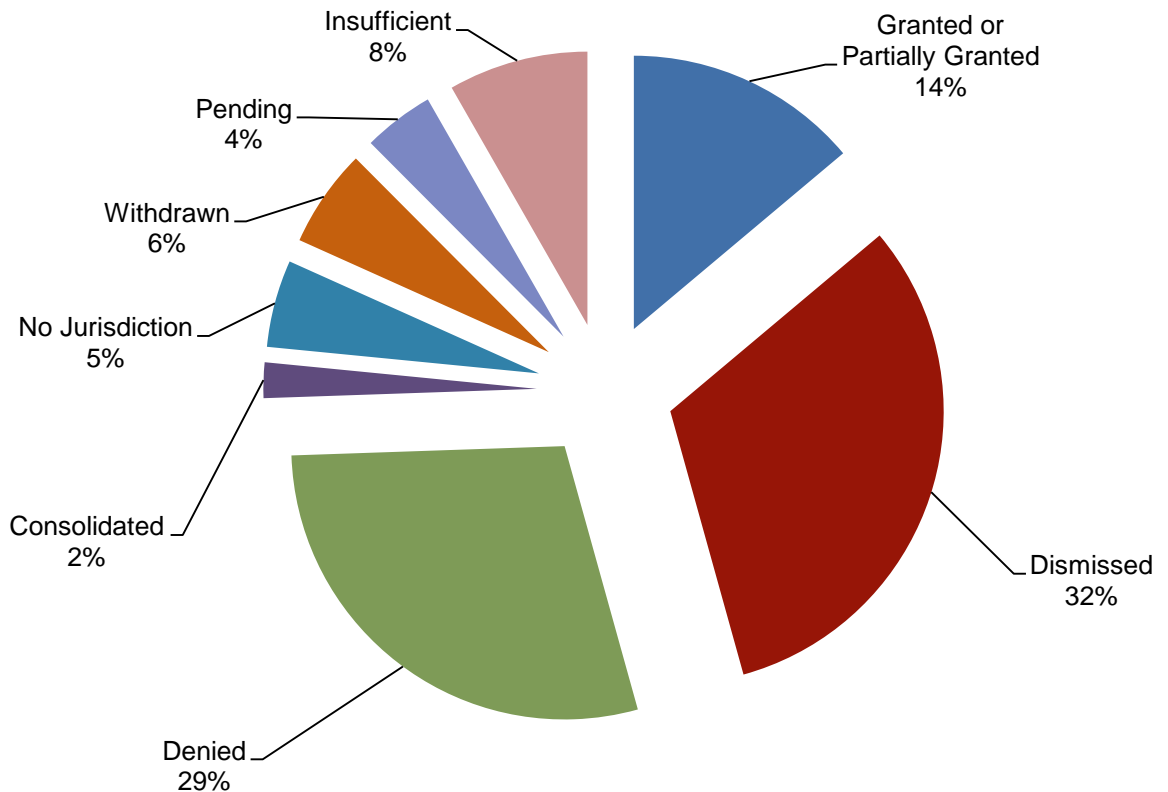
The OOR has produced Citizen and Agency Guides that provide a detailed explanation of the Process. They are available on the OOR webpage <https://openrecords.state.pa.us>.



## Breakdown of total appeals as of 12/31/2013

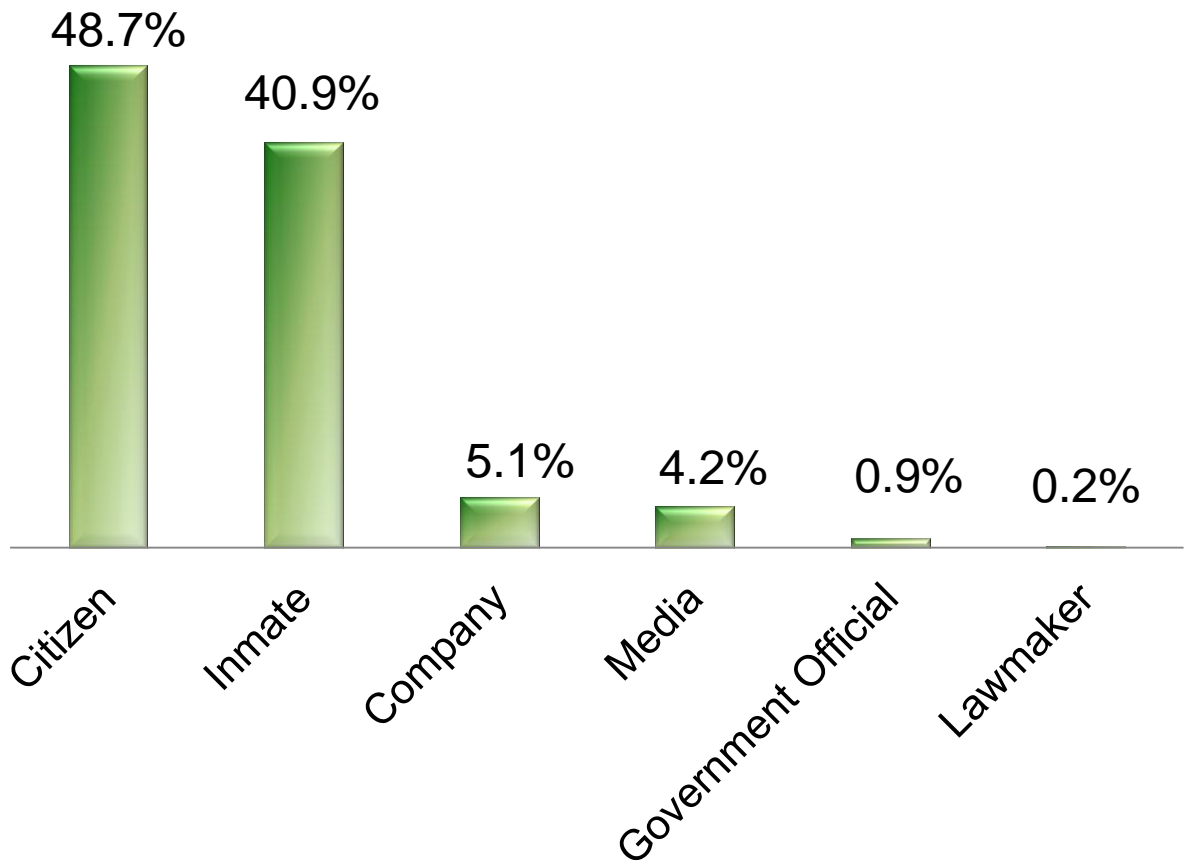
2478 Appeals Filed

344	Granted or Partially Granted	144	Withdrawn
788	Dismissed	104	Pending
713	Denied	205	Insufficient
128	No Jurisdiction	52	Consolidated





## Appeal Percentage by Requester Type

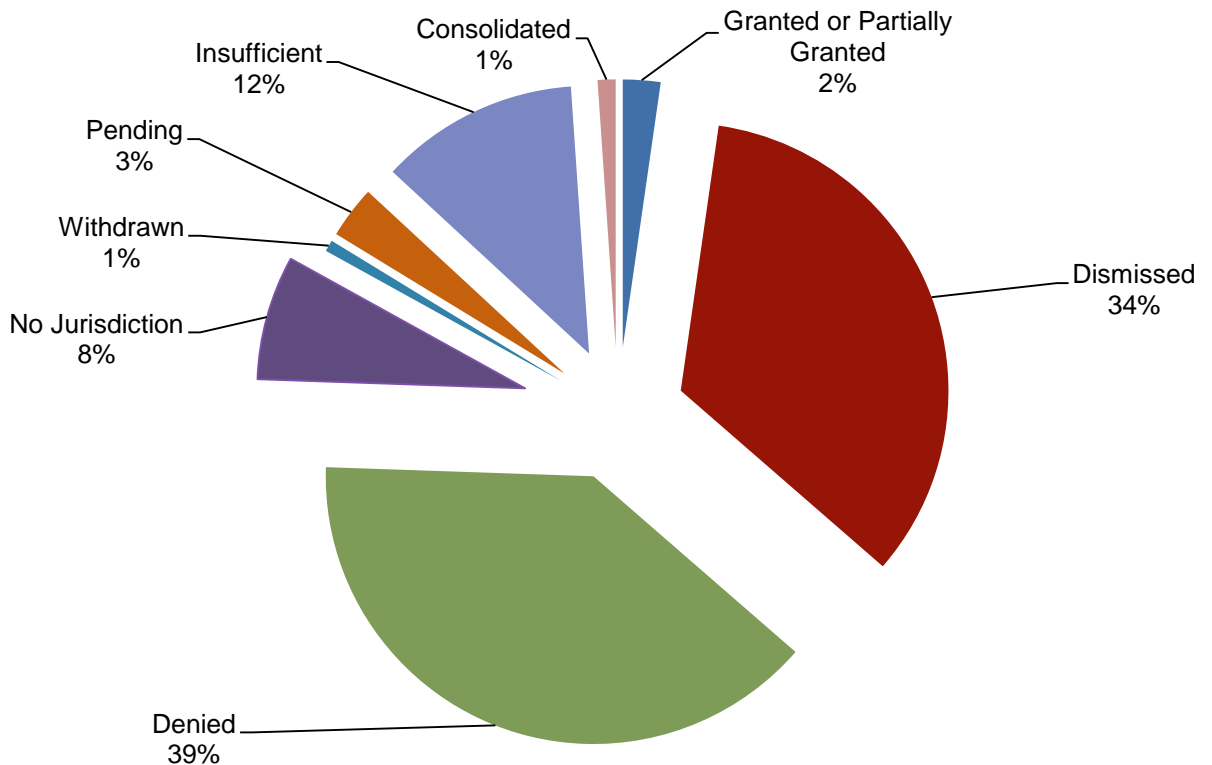




## Breakdown of inmate appeals as of 12/31/2013

1014 Appeals Filed by Inmates

23	Granted or Partially Granted	7	Withdrawn
346	Dismissed	104	Pending
397	Denied	122	Insufficient
76	No Jurisdiction	11	Consolidated

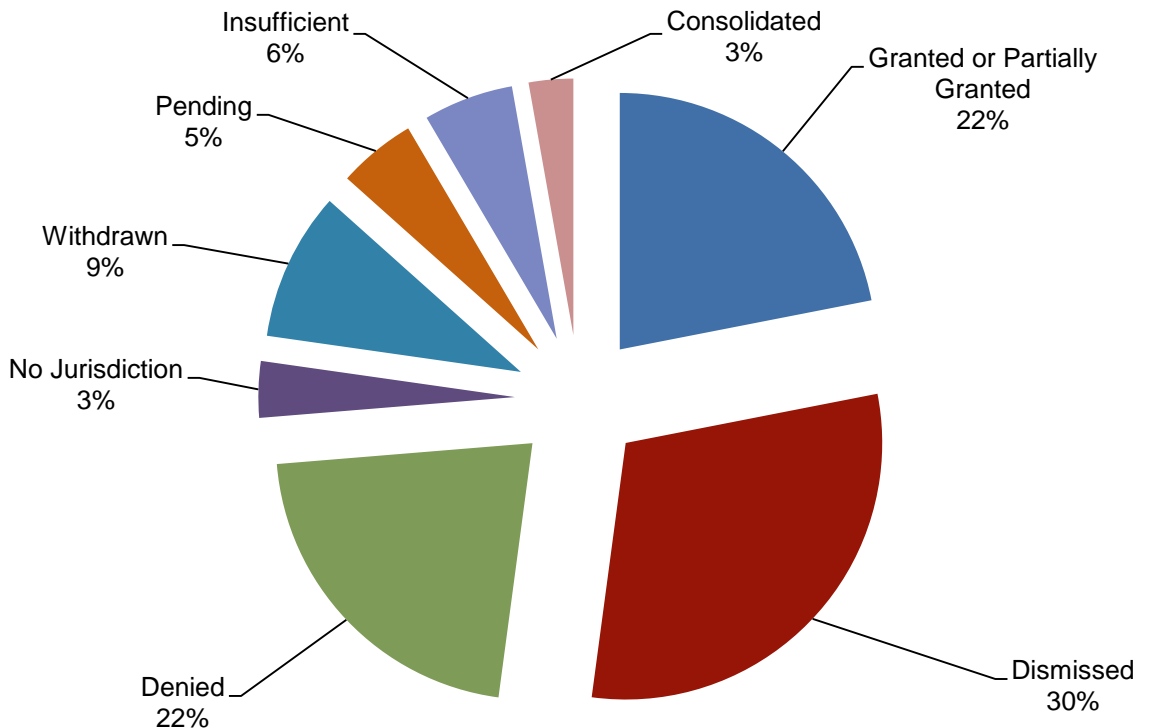




## Breakdown of remaining appeals as of 12/31/2013

1464 Appeals Filed by  
Citizens, Companies, Government Officials, Lawmakers, and Media

321	Granted or Partially Granted	137	Withdrawn
442	Dismissed	72	Pending
316	Denied	83	Insufficient
52	No Jurisdiction	41	Consolidated





### Breakdown of the inmate appeals filed involving Commonwealth and Local Agencies

773 involving State Agencies:

- 8 Granted or partially granted
- 3 Withdrawn
- 247 Dismissed
- 102 Insufficient
- 11 No Jurisdiction
- 363 Denied
- 11 Consolidated
- 28 Pending

241 involving Local Agencies:

- 15 Granted or partially granted
- 4 Withdrawn
- 99 Dismissed
- 20 Insufficient
- 65 No Jurisdiction
- 34 Denied
- 4 Pending



## Breakdown of the remaining appeals filed involving Commonwealth and Local Agencies

311 involving State Agencies:

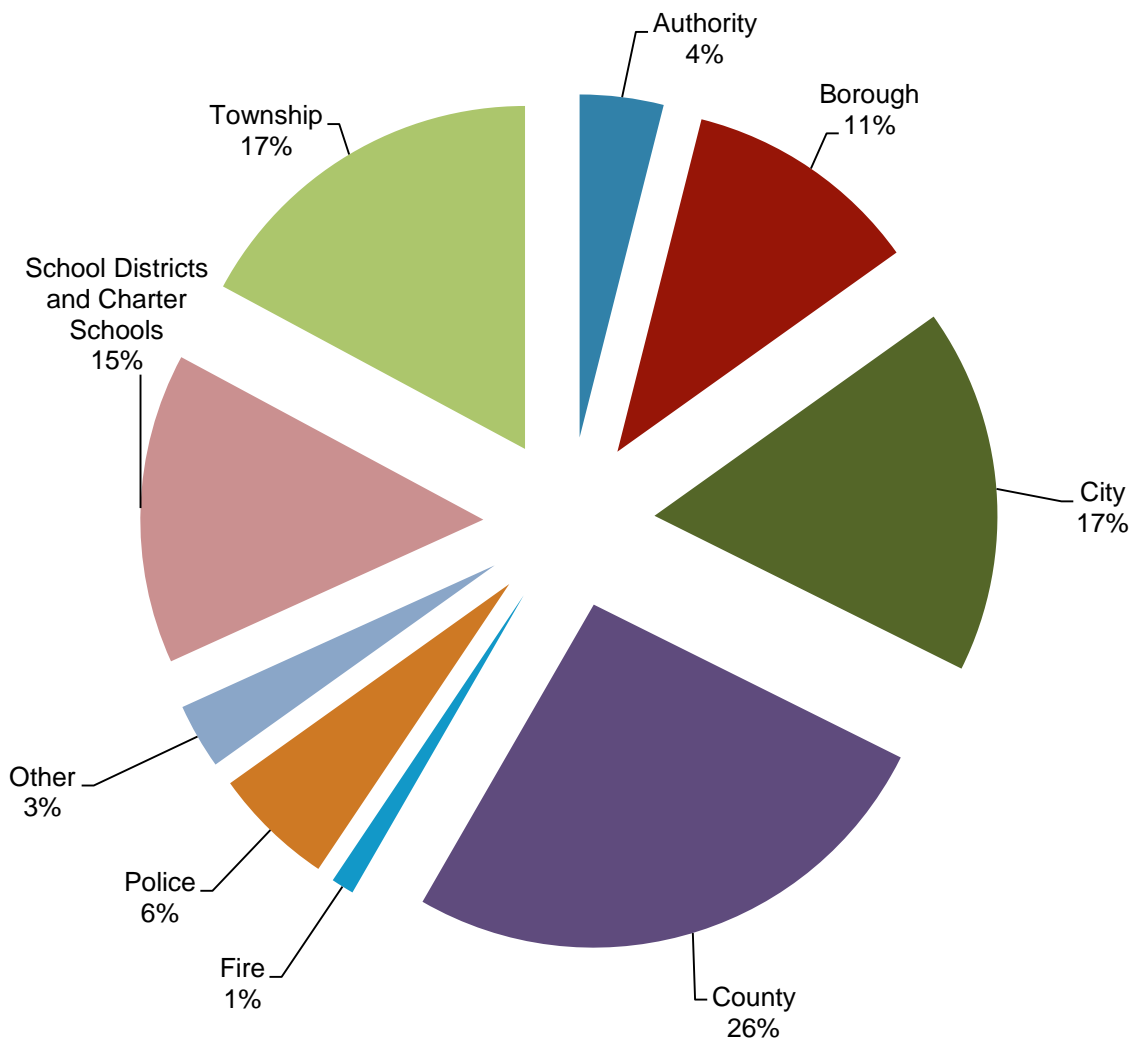
- 37 Granted or partially granted
- 33 Withdrawn
- 88 Dismissed
- 20 Insufficient
- 5 No Jurisdiction
- 95 Denied
- 18 Consolidated
- 15 Pending

1153 involving Local Agencies:

- 284 Granted or partially granted
- 104 Withdrawn
- 354 Dismissed
- 63 Insufficient
- 47 No Jurisdiction
- 221 Denied
- 23 Consolidated
- 57 Pending



## Appeals Involving Local Agencies







## **Most Appeals Filed with the OOR:**

Sean Donahue (Citizen)	115
Jack Williams (City Councilman)	31
Michael Smith (Citizen)	27
Charles Hoyer (Inmate)	25

## **Most Appeals Filed Involving Commonwealth Agencies**

Dept. of Corrections	684
Board of Probation and Parole	56
State Police	40
Dept. of State	41
Dept. of Labor & Industry	32

## **Most Appeals Filed Involving Local Agencies**

*City of Philadelphia	82
*Luzerne County	74
*City of Hazleton	41
*Philadelphia County	38

\* And all departments and agencies within



In addition to over 9,000 appeals, the OOR is actively involved in appellate litigation surrounding the RTKL. The General Assembly granted the OOR the unique right to respond to a court appeal of any of its Final Determinations. As a result, the OOR regularly litigates in the courts protecting the intent and purpose of the law by involvement in cases surrounding the process, procedure, and authority of the RTKL and OOR.

The OOR has monitored or been involved in over 500 court appeals and has argued a case in the Pennsylvania Supreme Court every year since 2011; and expects to do so again this year. OOR attorneys regularly appear before the Commonwealth Court filing briefs, conducting oral arguments and attending hearings. Because of this, OOR Appeals Officers carry a caseload that exceeds that of an average Assistant District Attorney.

While the courts have held that the OOR is not a party in RTKL court appeals, the OOR was required to defend itself as a named party in 29 court appeals in 2013. This typically occurred in the County Courts of Common Pleas. At a minimum, these cases required a filing with the court asking that the matter be dismissed and at a maximum required attendance at a hearing.

The OOR obtained and reviewed the records of agencies (*in camera* review) in 43 different cases. The office filed four enforcement actions when agencies refused to turn over records so that the OOR could



determine if the records were public. The Commonwealth Court has reiterated in numerous cases the OOR's authority to conduct such a review.

The appellate courts issued many ground breaking decisions in 2013. Below is a synopsis of some of those decisions. Copies of the decisions are available on the OOR's webpage.

### **Supreme Court**

**Bowling v. Office of Open Records**: The Supreme Court affirmed the Commonwealth Court and held that the standard of review for "Chapter 13 courts" (the Commonwealth Court and Common Pleas Courts hearing appeals from the OOR or other appeals officers under the RTKL) is *de novo*. The scope of review is "broad or plenary." While the Court held that Chapter 13 courts may substitute their own findings of fact and conclusions of law for those of the OOR, the appellate courts and OOR have already been operating under this paradigm for several years.

**Levy v. Senate of Pennsylvania**: Under a Commonwealth Court decision in 2010, when an agency denied access to records it could not raise new reasons for that denial if the requester appealed to the OOR. The Supreme Court reversed that case and held that agencies may offer new arguments about why a record is not public even if they did not raise those arguments to the requester at the request stage.



## Commonwealth Court

**McClintock v. Coatesville Area Sch. District:** The Commonwealth Court relied on **Levy** when it held that an agency can raise reasons for denying access to records even when it failed to respond to the request and the request was deemed denied. No waiver occurs when an agency does not respond to a Right-to-Know request (a deemed denial).

**Office of Governor v. Raffle, and Office of Lieutenant Governor v. Mohn:** In these cases, the Commonwealth Court reviewed requests for the names, addresses, e-mail addresses, and/or telephone numbers of the Governor, Lieutenant Governor, and employees of their offices. The Commonwealth Court held there is no Constitutional right of privacy in a public employee's home address and the personal security exemption of the RTKL does not prohibit release of the government employees' home addresses where only conclusory affidavits are offered. The Court held that government issued e-mail addresses, cellular and personal direct dial office telephone numbers of Office of the Governor employees are personal information and are not required to be released under the personal identification exemption of Section 708(b)(6) of the RTKL. The Court also held that middle names are public.



**Office of Governor v. OOR:** The Commonwealth Court held that the five-day response in Section 901 does not start until the request is actually received by the agency's designated Open Records Officer. The court rejected the OOR's position that the time period under Section 901 starts when any agency employee receives the request. The OOR argued the case before the Supreme Court and a decision is pending.

**Citizen's Voice v. City of Wilkes Barre and LAG Towing:** The Commonwealth Court imposed litigation costs against an agency when it failed to comply with the RTKL.

**Borough of West Easton v. Mezzacappa:** The Commonwealth Court held that a second request for the same records is not disruptive. The court rejected the agency's argument that the request was "unreasonably" burdensome because it has only a small part-time staff and the responsive records numbered 50 pages.

**Bagwell v. PDE:** The Commonwealth Court held that records received by a public official who services as an ex officio Board member qualifies as information "received" by an agency. In this case, the Secretary of Education received information from Penn State University where he served as an ex officio Board member. In considering those records received by the Department of Education, the court decided that records "of" an agency need not originate with or be created by that agency to fall under the RTKL. The case is currently on remand in the OOR to determine whether the requested records are subject to certain exemptions from public disclosure.



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## Right-to-Know Requests

Like all Commonwealth agencies, the OOR is subject to the RTKL. In 2013, the OOR received 717 requests for records of our agency:

- 610 *requests were misdirected requests*
- 99 *requests were granted or partially granted*
- 3 *requests were denied for no responsive records existing*
- 1 *request was denied*
- 2 *requests were withdrawn*
- 2 *requests are pending*

The OOR has granted access to the following records:

- *Names and titles of OOR staff*
- *OOR staff salaries*
- *OOR Interim Guidelines*
- *OOR Citizens' Guide*
- *E-mails*
- *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 five years, the OOR has conducted over 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 125 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.



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## Mediation

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 2013, the OOR conducted four mediations.