

Act 77 of 2020: Guidelines Published by the Office of Open Records

The Coronavirus (COVID-19) pandemic has challenged public agencies across Pennsylvania to find a way to continue providing access to public records and public meetings during a time when many offices were physically closed and social distancing requirements prevented large gatherings.

Among the many lessons learned are that good communication, always essential in the Right-to-Know Law (“RTKL”) process, is even more necessary during a disaster declaration. Agencies should remember that transparency builds trust, especially in times of crisis. Likewise, requesters should consider whether a records request can wait and be made after the disaster declaration has ended. When a request is made, requesters should consider the circumstances and extend common courtesy and patience to the responding agency. Reasonableness is key. The RTKL works best as a collaborative effort rather than an adversarial process.

It is also useful to remember that the formal RTKL process is not required to request or provide access to records. Informal requests and responses can be more efficient because they come with fewer administrative requirements.

Act 77 of 2020 requires the Office of Open Records (“OOR”) to “publish guidelines for a Commonwealth agency specifying how the Commonwealth agency is required to respond to a request for records made during a disaster declaration when the Governor has ordered the Commonwealth agency to close the Commonwealth agency’s physical location.”

Those guidelines must be published “[n]o later than five days after the effective date of this section.” Accordingly, the following guidelines are hereby published by the OOR.

As a preliminary matter, the OOR notes that the definition of “Commonwealth agency” in Act 77 is narrower than the definition of “Commonwealth agency” in the RTKL. These guidelines apply only to any agency included in the definition of “Commonwealth agency” under Act 77 (“Any agency or commission of the executive branch under the policy, direction or supervision of the Governor.”) The OOR further notes that other agencies may benefit from reviewing these guidelines and applying them, to the greatest extent possible, in similar situations.

In Pennsylvania, gubernatorial disaster declarations are governed by Chapter 73 of Title 35:

A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat

of a disaster is imminent. The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. (§ 7301(c))

When a disaster declaration is issued by the Governor, and the Governor has ordered a Commonwealth agency to close its physical location, the following shall apply:

1. **Public notification.**--The agency shall, as promptly as reasonably possible, but not later than three business days following the closure, update the section of its website required by Section 504(b) of the RTKL to notify the public that the agency's physical location is closed and to provide information regarding any necessary changes in the agency's RTKL process, including any limitations on receiving RTKL requests in person, via postal mail, via facsimile, or other method. The agency shall also use its social media accounts to notify the public of any such changes and limitations and shall notify the OOR of any such changes and limitations. (The OOR notes that having an online request form and proactively posting commonly requested records online can save agencies time and effort.)
2. **Remote responses.**--The agency shall ensure that its Agency Open Records Officer ("AORO") is able to receive and respond to RTKL requests remotely. If this is not possible, the agency shall, as promptly as reasonably possible, but not later than three business days following the closure, appoint an alternate or temporary AORO who is able to receive and respond to RTKL requests remotely. The contact information for the alternate or temporary AORO shall be posted on the section of the agency's website required by Section 504(b) of the RTKL and shall be provided to the OOR.
3. **Response time.**--The agency shall respond to a RTKL request within five business days of the AORO receiving the request. The response shall comply with Section 901 of the RTKL. In its response, the agency may, as appropriate, invoke an extension of time of up to 30 calendar days pursuant to Section 902 of the RTKL.
4. **Entering a closed physical location.**--No agency employee shall be required to enter a physical location which has been closed pursuant to a gubernatorial disaster declaration. If gathering records responsive to a RTKL request requires any agency employee to enter such a physical location, the agency shall provide the requester with an estimate of the time it will take to access the records. To the extent possible, the contents of a record shall be made accessible to a requester even when the record is physically unavailable.

Nothing shall prevent a requester from requesting the same records after the closure ends. If the closure ends while the request or a related appeal remains pending, the agency shall notify the requester and proceed to review the responsive records under Section 901 of the RTKL.

5. **Inspection of records.**--If a requester seeks to inspect records while the agency's physical location is closed pursuant to a gubernatorial disaster declaration, the agency shall make a reasonable attempt to accommodate inspection. If it is not possible to do so, the agency shall provide electronic copies of the requested records, if possible, and shall provide the requester with an estimate of the time it will take to schedule inspection for any records that cannot be provided electronically.
6. **Appeal process.**--After receiving any appeal involving an agency which has been ordered to close its physical location following a gubernatorial disaster declaration, the OOR may invoke reasonable extensions to ensure due process and to provide all parties with a full and fair opportunity to meaningfully participate in the appeal. The OOR shall take into consideration all evidence and/or argument provided by the agency regarding any limitations on its ability to access requested records or otherwise process the RTKL request underlying the appeal.
7. **Additional policies and procedures.**--Agencies should review any existing Continuity of Operations Plans (COOPs) and revise them, if necessary, to reflect the requirements of Act 77 and these guidelines. Agencies may also develop additional policies and procedures intended to help them comply with the RTKL, Act 77 of 2020, and these guidelines. Such policies and procedures may not contradict the RTKL, Act 77 of 2020, or these guidelines. Such policies and procedures shall be posted on the section of the agency's website required by Section 504(b) of the RTKL and shall be provided to the OOR.

The OOR notes that Act 77 of 2020 does not preclude an agency from invoking, as appropriate, the existing exemptions in Section 708 of the RTKL, or any other law or regulation which may govern access to records.

These guidelines may be updated. Before any update, the OOR shall provide, to the extent reasonably possible, advance notice of at least seven days to allow for public comment.

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