

Annual Report



pennsylvania
OFFICE OF OPEN RECORDS

2010



A message from Executive Director Terry Mutchler



The Right-to-Know Law (RTKL) has made great inroads in opening Pennsylvania government, but the Commonwealth is at a crucial crossroads in its continued quest for records transparency.

In this Second Annual Report, I provide a statistical snapshot of the work, highlight litigation issues that have taken center stage, and underscore enforcement issues that the Legislature must address if citizens are to have meaningful access

to government records. As Executive Director, my primary mission continues to be implementing this law. Transparent government is vital; the free flow of information between government and citizen preserves democracy by preventing the abuse of power of a secretive government.

Undeniably, the Legislature created a strong law and provided meaningful access to thousands records previously off limits. By creating an Office of Open Records (OOR) with binding authority, the General Assembly gave citizens and agencies an independent quasi-judicial Office to oversee and interpret the Law. Across the nation, states like Washington, Iowa, Maryland, Illinois and Tennessee are looking to what they call the “Pennsylvania Model” to create similar independent offices.

As I crisscross the Commonwealth meeting with citizens, officials and the media, two questions are posed: has this law worked and can it be improved? The answer to both is a resounding yes. The RTKL has successfully created access to records either previously unavailable or difficult to obtain.



A message from the Executive Director, cont.

Generally, government officials have been compliant with the Law working with citizens in an effort to comply. Where disputes have emerged, the OOR has assisted both citizens and agencies in directing release of thousands of records while also protecting records properly withheld from release. Groundbreaking court decisions have expanded open government, providing access to government contracts unparalleled anywhere in the country. Much of this annual report is devoted to highlighting decisions of the Commonwealth Court.

The growing success of the RTKL combined with the public's increased understanding of the Law has come at the price of an ever increasing workload. Already understaffed, the OOR saw a staggering workload increase: we handled over 1,700 appeals, over 10,000 inquiries and conducted scores of trainings. The appellate workload topped 130 cases at all levels of the judiciary. This pace cannot be sustained without additional staff and funding.

Thus, we stand at a crossroads. The RTKL is expected to be amended in 2011. In addition to staffing, one of the key aspects that must be addressed is enforcement. If an agency denies records, and the OOR orders release, some agencies simply refuse to obey the Order. This leaves citizens in a pre-2009 conundrum: go to court or forget the request. This issue must be resolved or the RTKL process risks becoming a meaningless exercise.

As we look ahead to 2011, I renew my pledge to apply this law fairly and evenly to both citizen and agency. As always, I welcome your comments and suggestions to improve access to government because I will always believe this government does not belong to me, or any other public official. Pennsylvania's government belongs to its citizens.



RTKL Appeals

Consistent with the first year of this law, appeal statics demonstrate that citizens are by far the No. 1 user of the Right-to-Know Law--and they even picked up the pace of exercising their right to access the public records of their government.

The OOR received 1,727 appeals in 2010 and issued 1,227 Final Determinations compared with issuing 1,159 Final Determinations in 2009. In 2010, of the 1,227 appeals resulting in a final determination 1,105 were filed by citizens. The media was a distant-second in filing appeals with this Office.

With the increased workload, the Office of Open Records continued to examine and refine procedures for processing appeals efficiently. The OOR also continued to adopt new policies based on the welcomed direction from the Commonwealth Court in interpreting this important law.

Similar to the debut year of the law, people wanted to know how their government was spending tax money and thus, sought financial records; they wanted to know the reasons employees were fired and sought dismissal letters and continued to question the cost of obtaining copies of records. The statistics also reflect that some agencies continue to ignore RTKL requests, leading to a citizen appealing what is called a “deemed denial” where the citizen appeals to the OOR because the Agency did not respond to the request.

Of the 1,727 filings with the Office, more than 500 attempts to appeal were returned because due to insufficient filing, timeliness issues (whether premature or late), and lack of OOR jurisdiction.



RTKL Appeals, cont.

What Records Did People Want to See?

Requesters want to see a myriad of government records and their requests often mirror national issues and concerns. The economy and financial stresses seem to be on everyone's mind. As families sit at the kitchen table to better track their spending, they want to know if their government leaders are doing the same. To find out, they file Right-to-Know request to track their tax dollars. These requests seek, among other records, invoices, audits, bid proposals, and contracts.

In 2010, citizens also sought:

- government officials' e-mails
- meeting minutes
- policies and manuals
- government and consultant reports
- videos
- recordings
- property records



Appeals, cont.

Status of appeals as of 12/31/2010

1227 Appeals Docketed

362 Granted or partially granted

172 Dismissed

204 Withdrawn

74 Pending

15 Consolidated

400 Denied

Breakdown of the appeals filed against Commonwealth and Local Agencies

309 against State Agencies:

49 Granted or partially granted

35 Withdrawn

44 Dismissed

160 Denied

4 Consolidated

17 Pending

918 against Local Agencies:

313 Granted or partially granted

169 Withdrawn

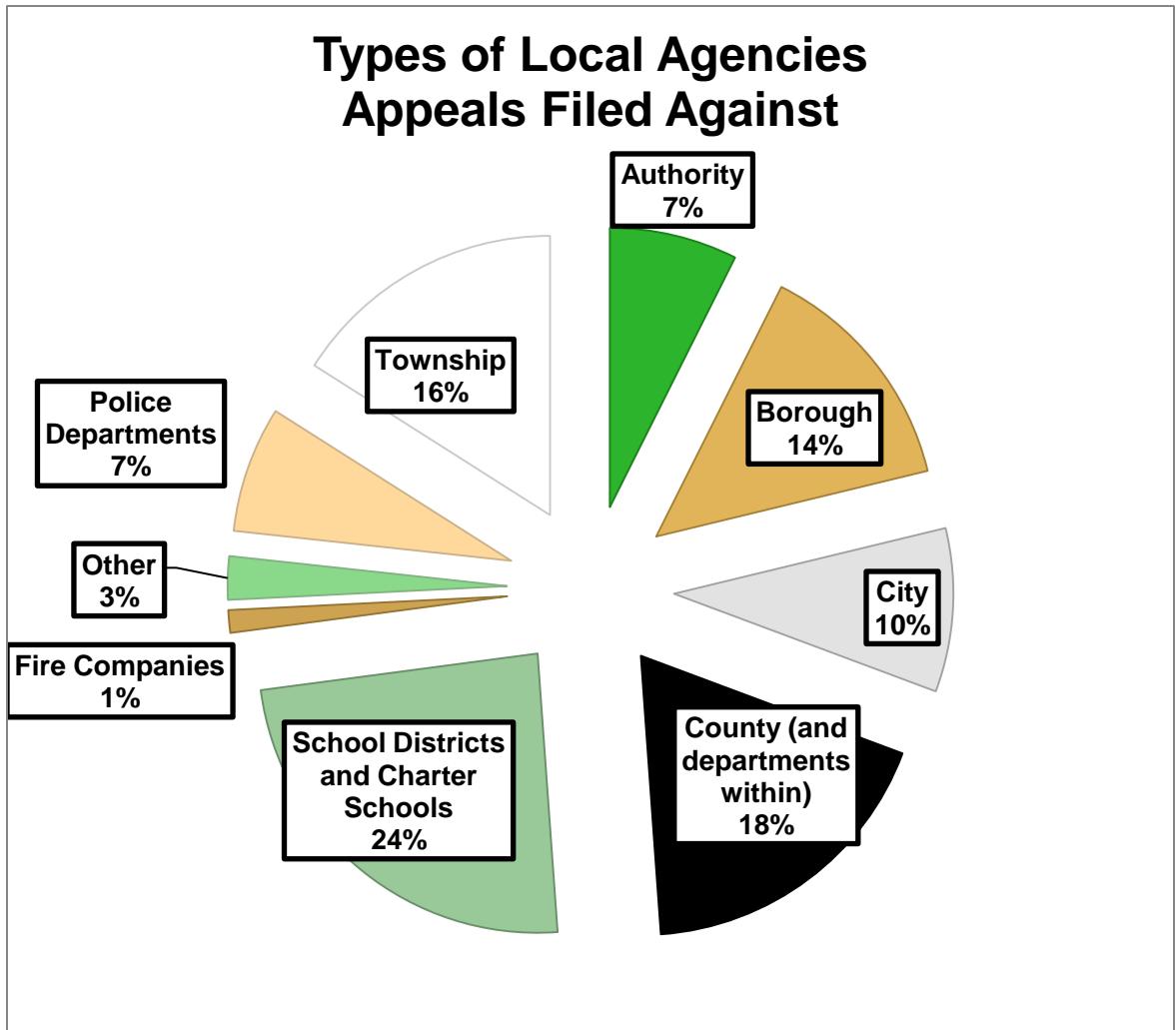
128 Dismissed

240 Denied

11 Consolidated

57 Pending

Appeals, cont.





Appeals, cont.

Most appeals filed to the OOR:

Alfonso Rizzuto (DOC Inmate)	35
Simon Campbell (Stop Teachers Strikes)	27
Marissa Bluestine (PA Innocence Project)	32
Solena Laigle (ACLU)	17

Appeals Filed Against Commonwealth Agencies

Corrections	109
State Police	30
Transportation	17
Board of Probation & Parole	11
Environmental Protection	11
State	11
Public Welfare	11

All other Commonwealth agencies: less than 10 appeals each filed against them

Most Appeals Filed Against Local Agencies

*City of Philadelphia	46
*Allegheny County	17

* And all departments and agencies within



Right-to-Know Requests

Many people don't realize that the Office of Open Records is also subject to the Right-to-Know Law. We must comply with requests in the same fashion that we require other Commonwealth and local agencies to comply.

In 2010, the Office of Open Records received over 200 Right-to-Know requests for records of our Office. While all but 24 were misdirected requests, the major areas of interest in records the OOR maintains continues to revolve around three areas: employee information, appeal documents and OOR court matters.

The Law is still in its infancy and all of us are still learning about the law and awaiting continued direction from the Courts. The learning process is most notably evidenced by the number of misdirected requests received in this Office. The misunderstanding still exists that the Office of Open Records is a repository for all public documents in the Commonwealth. More than 200 formal requests were made to the Office of Open Records that should have been directed to another Commonwealth or local agency.



Litigation

The Courts took center stage in 2010, providing the first judicial interpretations of the state's Right to Know Law. This required the OOR to shift its focus and resources to the voluminous litigation. These numbers are approximations as even though the RTKL requires service on the OOR, the OOR is not always served with notice that a judicial appeal has been filed. Additionally, these numbers do not reflect the number of open appeals filed in 2009 that are still pending.

The 2010 Numbers

- At least 80 appeals filed in Courts of Common Pleas
- At least 66 appeals were filed with the Commonwealth Court either appealing Court of Common Pleas decisions or Final Determinations involving state agencies.
- At least 13 matters have been filed with the Pennsylvania Supreme Court.

The Decisions

The Commonwealth Court issued a number of ground-breaking decisions. They provided guidance on the term "governmental function," the court's standard of review of OOR determinations, and the format and medium records must be provided. They weighed in on the controversial issue of home addresses. All decisions are available on our website at <http://openrecords.state.pa.us>. Following are some highlights:



Litigation, cont.

What is a Governmental Function:

East Stroudsburg University Foundation, et al v. OOR, 995 A.2d 496 (Pa. Commw. 2010).

This seminal case stemmed from a reporter's inquiry into a former University official trading sex for scholarships. The University denied a request for various records asserting that the records were held by the private University Foundation with which the University contracted. The Court held that when an agency contracts with a private entity those contracts are "governmental function." They held that "the language is plain that all contracts that government entities enter into with private contractors necessarily carries out a governmental function – because the government always acts as the government." The Court also stated that the OOR does not have standing to defend its decisions because it is not aggrieved by the release of another agency records.

Only One Bite At the Apple:

Signature Information Solutions, LLC v. Aston Township, 995 A.2d 510 (Pa. Commw. 2010)

This case protects the Right-to-Know law from becoming a "meaningless exercise." The Court held that an agency cannot raise new exceptions for denying access to records during an appeal before the OOR. If the agency failed to raise an exception in its response to the request, it cannot invoke that inception at a later time.



Litigation, cont.

Third-Party Contractors:

SWB Yankees LLC v. Wintermantel, 999 A.2d 672 (Pa. Commw. 2010)

This may be the most sweeping open government decisions of an appellate court in the United States to date reaching the records of otherwise private corporations. The Court held that the fact the Authority (a government agency) contracted out the operation of its baseball and other entertainments to SWB Yankees puts SWB Yankees, even as a third party, in the same position as an agency for purposes of the RTKL. The Court emphasized the fact that the Authority was created for the benefit of the people of the Commonwealth, to increase their commerce and prosperity, and for the improvement of their health and living conditions. The Authority contracted with the SWB Yankees which creates revenue for the Commonwealth and operates a public stadium for the benefit of the Commonwealth. Therefore, the requested bids from concessionaires directly relate to the Authority's governmental function and thus are public records.

Records housed on personal computer of a government official:

In Re Silberstein, 814 C.D. 2010 (1/6/11)

In reversing the OOR, the Court held that documents and electronic communications of an individual public office holder maintained on a personal computer are not records of an agency because a single official is not authorized to act alone. After finding that emails and documents exchanged between board members and citizens on private email accounts are not subject to section 506(d), the Commonwealth Court held the agency does not possess the records and therefore no presumption of public status exists under section 305. The Court further stated in a footnote: "...we do not believe that Section 506(d)(1) could reasonably be construed to mean that the only time that an agency is required to provide a record that is not in its physical possession is when the agency contracts for a governmental function".



Litigation, cont.

Where do you Live?

Most home addresses are available under the state's Right-to-Know law. This is one of the most controversial sections of the law, and being litigated before the Supreme Court. Under the current law, only home addresses of judges, law enforcement officers are minors are protected from release. Addresses in which release would cause a substantial and demonstrable risk to personal security. The Pennsylvania School Education Association, on behalf of teachers, sought an injunction in the Commonwealth Court to bar the OOR from enforcing this provision of the law as written. The Association circumvented the administrative process outlined in the RTKL by not appealing a Final Determination or joining an appeal as an interested party. The Commonwealth Court ultimately ruled that PSEA filed its complaint against the wrong party and should have sought injunctions against school districts not the Office of Open Records.

On November 1, 2010, the Pennsylvania Supreme Court reinstated an injunction temporarily barring the release of home addresses of all public school employees until it reaches a final decision.



Trainings

The Office of Open Records continued to train hundreds of public officials, citizens and members of the media regarding all aspects of this law. The trainings provide a hands-on approach to the law, address chronic issues that agencies encounter, procedural issues, hot topic issues and the emerging trends we see from court opinions.

The OOR conducted its mandated Annual Training in Harrisburg and also traveled to all parts of the state to conduct regional trainings. The OOR had to factor in the increased workload, budget constraints and staffing limitations, and as a result the OOR held fewer trainings in 2010.

- 21-Jan Elected official forum Greensburg
- 1-Mar Richlandtown Borough Richland
- 10-Mar PASBO Annual meeting Hershey
- 10-Mar CLE with Treasury Dept Harrisburg
- 12-Mar Allegheny Bar Assn - Municipal & School Solicitors Pittsburgh
- 12-Mar MCATO Spring Convention East Norriton
- 22-Mar CCAP Spring Conference Harrisburg
- 23-Mar Susquehanna University - Comm seminar Selinsgrove
- 26-Mar PBI Land Use Institute Philadelphia
- 27-Mar PA AP Broadcasters Grantville
- 31-Mar IUP RTKL Symposium Indiana
- 13-Apr Gannon University -- Erie
- 13-Apr Pocono Record & Northampton Comm. College Tannersville
- 17-Apr Better Watchdog Workshop Philadelphia Inquirer -- Philadelphia
- 20-Apr PSATS Conference Hershey
- 5-May CCAP Assessor's Assn of PA Annual Conference Seven Springs
- 6-May Rep Mahoney RTK Forum Uniontown
- 12-May Central Susquehanna IU Lewisburg
- 15-May PA Society of Newspaper Editors Harrisburg



Trainings, Cont.

- 18-May PA APCO Annual Spring Conference Lancaster
- 20-May Mercer County Tax Collectors
- 29-May Wilkes University Newspaper Club Wilkes-Barre
- 9-Jun Delaware County Bar Assn Bench Bar Conference Poconos
- 18-Jun CCAP Solicitor's Conference Harrisburg
- 22-Jun PNA Media Lawyer's Luncheon Hershey
- 27-Jul PA-NJ Assn of Libraries Philadelphia
- 11-Aug WFMZ-TV Allentown
- 11-Sep PA COG State College
- 23-Sep Shickshinny Shickshinny
- 28-Sep Township Assn, GIS
- 29-Sep Moore Twp Police Dept Bath
- 14-Oct PSBA School Board Secretaries Conference Hershey
- 20-Oct Lycoming/Sullivan Borough's Assn Duboistown
- 24-Oct ACLU RTK Forum Lancaster
- 4-Nov PAIU HR Group State College
- 7-Nov Boroughs Assn meeting Williamsport
- 9-Nov OOR Annual Training Harrisburg
- 15-Nov OOR Annual Training Harrisburg
- 15-Nov PBI Event Camp Hill
- 18-Nov C.O.P.S Conyngham Borough
- 9-Dec Webinar for PA State Assn of Boroughs Harrisburg



Mediation

The Office of Open Records created an informal mediation program designed to promote access to records outside the formal appeals procedures. Many agencies and requesters do this own their own, and are encouraged to take this approach. But where assistance is needed, we provide it.

The OOR's informal mediation program is particularly useful when the issue in the appeal regards the specificity of the request or where a large volume of records is sought. This is especially true when the parties are acrimonious or distrustful of each other. Mediation facilitates open discussion often leading to an amicable resolution particularly where a requester is not certain which records or types of records contain the information sought. Mediation allows an agency to better understand the request enabling it to suggest the type of records that would be responsive. The requester then receives the precise information rather than scores of tangentially responsive, but not necessarily desired, records. Mediation reduces the burden of production that a voluminous nonspecific request places on the agency as well as reduces the financial cost to the Requester.

In *Boice v. Jenkins Township*, OOR Dkt. AP 2010-0657 the Requester sought Notice to Abate Nuisance letters and the disposition of those letters for a one year period. The agency denied the Request as insufficiently specific. The OOR suggested its informal mediation program and both parties agreed to participate. During the initial mediation session after exploring each party's position and facilitating open discussion, an amicable resolution was reached. Upon receipt of all responsive records, the Requester withdrew her appeal. She commented "mediation can work well when all parties agree to negotiate in good faith."



Mediation , Cont.

HOW MEDIATION WORKS:

- Both parties must agree to mediation. All discussion, negotiations and material reviewed during mediation, which are not part of the record submitted on appeal, are confidential. However, the ultimate resolution of the dispute is a public record. If mediation does not resolve the matter, the appeal is transferred to a new appeals officer for final determination based upon the public submission from each party. The new appeals officer does not review any of the material submitted as part of the mediation.



Staff Bios

2010 brought significant changes to the staff of the Office of Open Records.

Our previous Chief Counsel, **Corinna Wilson**, took on the Herculean work of organizing our Litigation Department and did an unmatched job of navigating the uncharted waters of the Right-to-Know Law in the Commonwealth Court. In mid-2010, she accepted a senior policy position with Treasurer Rob McCord, leaving a critical spot in our office vacant.

After an extensive search, **staff attorney Nathanael Byerly** was named Chief Counsel. Filling his staff attorney position, the Office of Open Records hired **J. Chadwick Schnee**, a lawyer from private practice in Pittsburgh. Mr. Schnee, was a former associate with the Pittsburgh-based Campbell, Durrant, Beatty, Palombo & Miller, P.C. He graduated from the University of Pittsburgh School of Law and has had work published in numerous journals, newsletters and other publications.

In August 2010, the Office of Open Records lost a friend and colleague with the unexpected death of Deputy Director Barry Fox. Candidates from across the state were interviewed. Nathanael Byerly, OOR Chief Counsel, was tapped for the post.

In conjunction with this promotion, **Senior Attorney Dena Lefkowitz**, who joined the Office in 2008, was named Chief Counsel. The one-time General Counsel to the Chester Upland School District and Assistant General Counsel to the School District of Philadelphia. Ms. Lefkowitz has also been a civil litigator for law firms in Media, Bala Cynwyd, Norristown and Philadelphia. She is a graduate of Temple School of Law.



Staff Bios, cont.

Lucinda Glinn, Staff Attorney, who joined the OOR in 2008, was named a senior attorney for research and training. A litigation attorney and appellate advocate with Harrisburg's Nauman Smith Shissler & Hall LLP before joining the OOR staff, Ms. Glinn has also been an associate at K&L Gates. She is a graduate of the Georgetown University Law Center and Lafayette College.

Audrey Buglione, Staff Attorney: Prior to joining the Office of Open Records, Ms. Buglione had her own law firm. She has also been an associate at McNees, Wallace & Nurick, in Harrisburg. Ms. Buglione is a *magna cum laude* graduate of the Widener University School of Law, Harrisburg Campus.

Maryanne Brawley, Executive Assistant:

Ms. Brawley came to the Office of Open Records from Bravo Group, a Harrisburg public advocacy firm. She has served the OOR as the Assistant Open Records Officer and IT Coordinator. She is a graduate of University of Maryland with degrees in Accounting and English.

Cindy Watson, Administrative Officer:

A former Communications Specialist with Coventry Health Care, Ms. Watson has also been a Paralegal Supervisor and Administrative Officer with the Pennsylvania Department of Corrections as well as an Administrative Officer for the Supreme Court of Pennsylvania. She is a graduate of Harrisburg Area Community College with a liberal Arts degree and a Paralegal Certificate.



In Memoriam



On August 29, 2010, our Deputy Director, Barry Fox, was enjoying a summer bike ride while vacationing when he unexpectedly died. He was only 47. Our primary focus rests with his wife, Jeanette, and their two young daughters. But, the citizens of this Commonwealth also experienced a great loss because Barry was the true measure of a public servant.

Two questions guided the Barry in his work: is what we are saying true and how will it affect citizens? Barry's professional compass was set to justice, honor and fairness. He had a knack of balancing meaningful access to records with the reality of the heavy workload agencies face. He understood that this law requires government transparency but also places a responsibility on citizens: to file requests accurately, specifically and timely.

Since my appointment, people ask "What's the single biggest challenge?" In the past, the answer was the ever-changing challenges: establishing a state office from the ground up and the difficulty of the workload: eight people handling 3,000 appeals, hundreds of court cases, tens of thousands of inquiries, and nearly 500 trainings. Now, the answer has changed. The single biggest challenge we faced as a staff was Barry's death. The treasure of Barry's presence was, not only his fine mind and love of this work, but quite simply he made this job fun. His compassion and unmatchable humor made this a great place to work. As our Chief Counsel poetically captured Barry: "He was the soul of the office."

The greatest professional tribute I can pay to Barry Fox is to ensure that the Office of Open Records fulfills its mission so that in years to come, when the staff nameplates change and new executive directors sit at this desk, the independent spirit of this Office, created by Barry and me, endures. Citizens and agencies alike must know they can rely on the well-reasoned, fair, and most important, independent, decisions of this office.