

# 2021 Annual Training



**pennsylvania**

OFFICE OF OPEN RECORDS

Liz Wagenseller, Executive Director

## **Pennsylvania's Right-to-Know Law and Sunshine Act Training**

*November 18, 2021*

<https://openrecords.pa.gov>

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# Right-to-Know Law Basics

## The very basics of the Right-to-Know Law

- RTKL allows people to **request state & local gov't records**
- Agencies must respond within **5 business days**
  - Can sometimes extend deadline by 30 calendar days
  - Requester can grant additional time – must be in writing
- Can grant or deny request, or a combination of both
- If any part denied, requester can appeal (**<2.5% of cases**)
- OOR decides cases in 30 days (requester can grant more time)
- Either side can appeal OOR decision to court (**<10% of cases**)

# Office of Open Records

## Created by RTKL: Independent & quasi-judicial

- Decide appeals filed by people denied access to records
- Provide RTKL & Sunshine Act training
- 2020 = 2764 Appeals Reviewed
- 22 total staff
  - Executive Director & Deputy Director
  - 14 Attorneys
  - Chief of Training & Outreach
  - 5 Administrative

# OOR Mediation Program

**RTKL authorizes OOR to establish informal mediation program**

- Goal: Mutually agreeable settlement
- Voluntary & confidential
- Either side can end mediation at any time
  - If mediation ends, case moves to normal appeal process (new AO)
- OOR has trained mediators
- Can save time & expense

# Training from the OOR

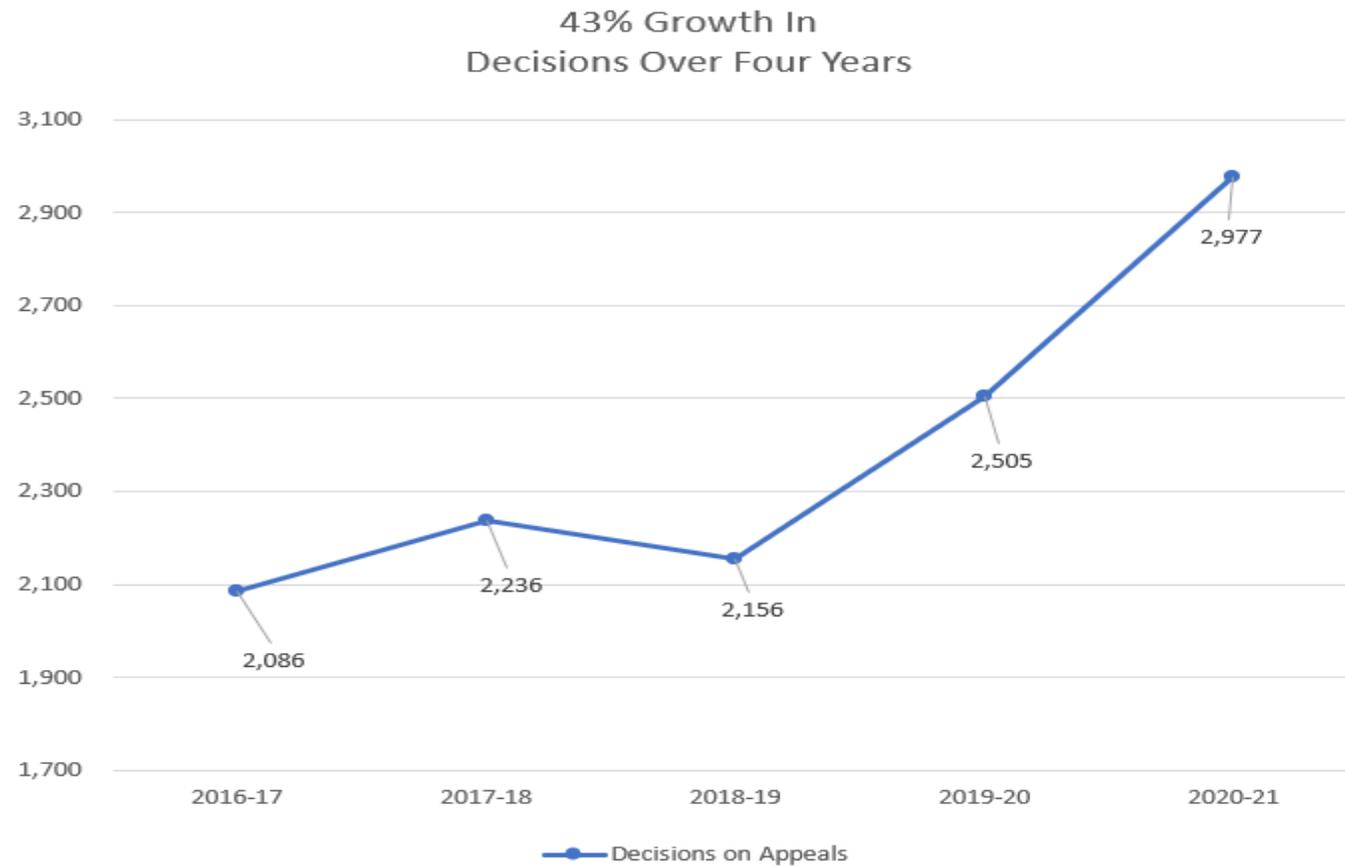
## Training on the RTKL & Sunshine Act

- OOR website filled with information
  - <https://www.openrecords.pa.gov>
- Weekly virtual trainings: basics, recent cases & more
  - Details on OOR website
  - May also request a custom virtual training

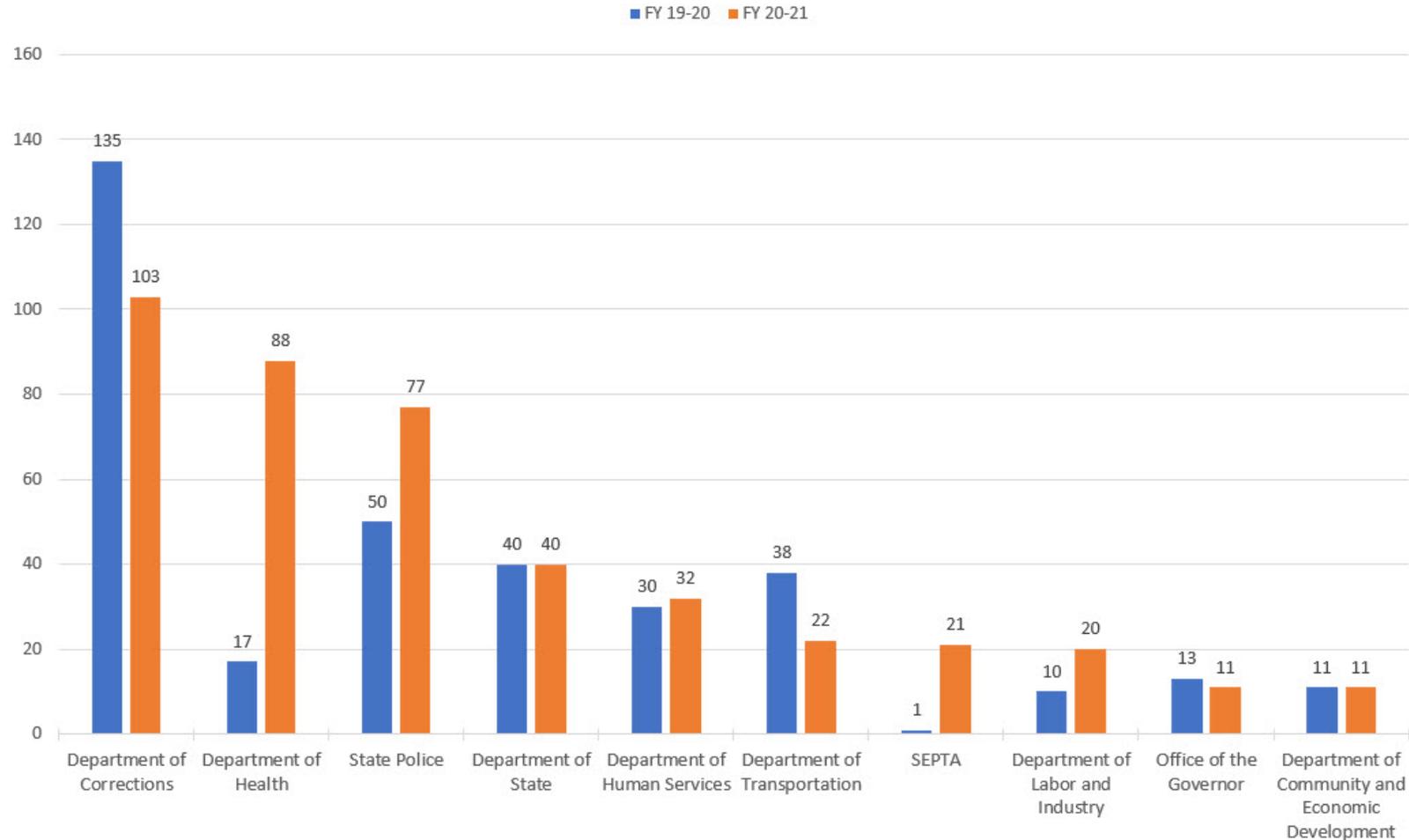
# RTK Requests During the Pandemic

- The OOR remained operational through the pandemic.
- The OOR issued indefinite stays (essentially a pause) for all appeals filed with the OOR from late March to early April of 2020; switched to 30 day stays in April.
- In August of 2020, the OOR began issuing stays for appeals only as needed; otherwise, business as usual, which continues to this day.

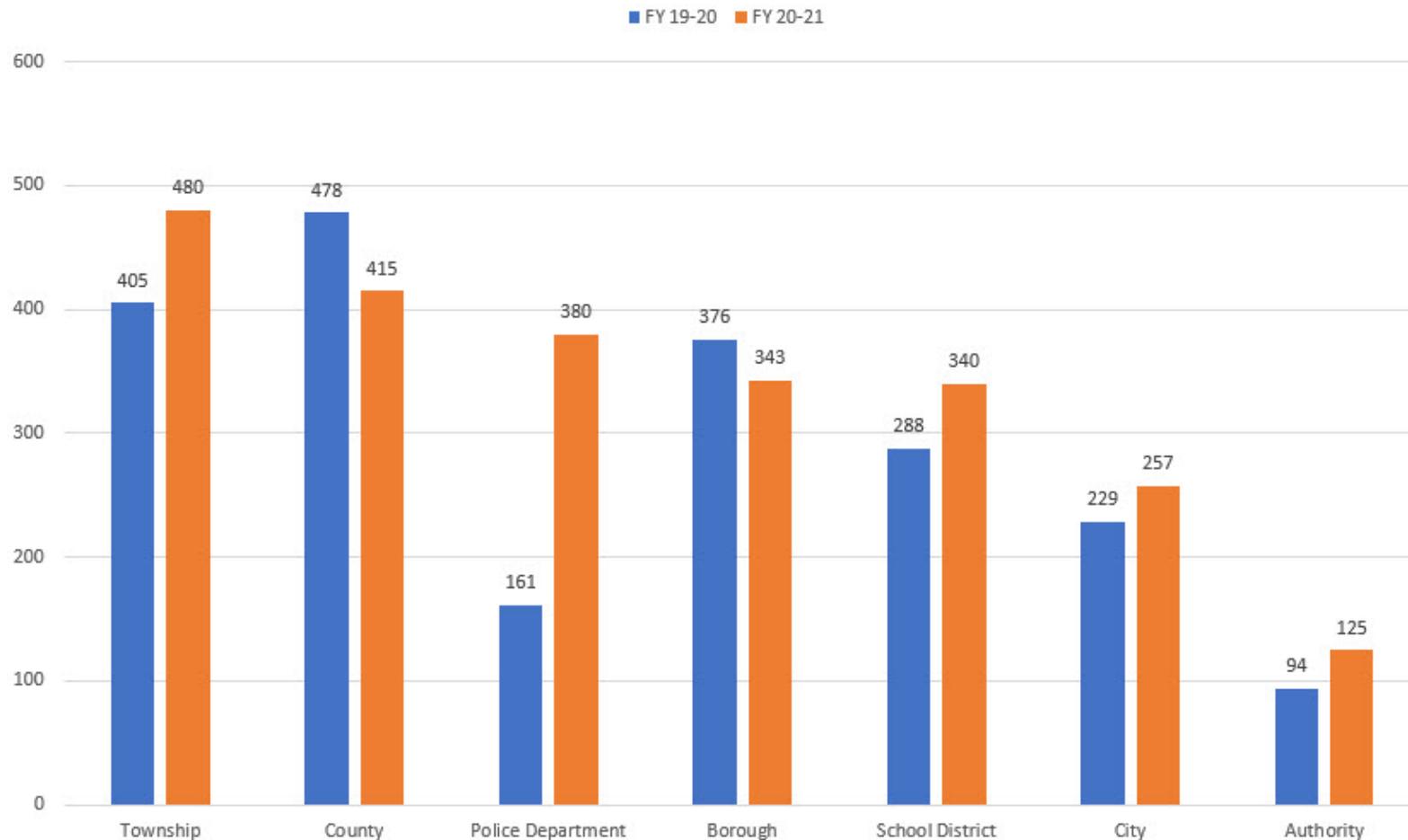
# Growth in OOR Decisions



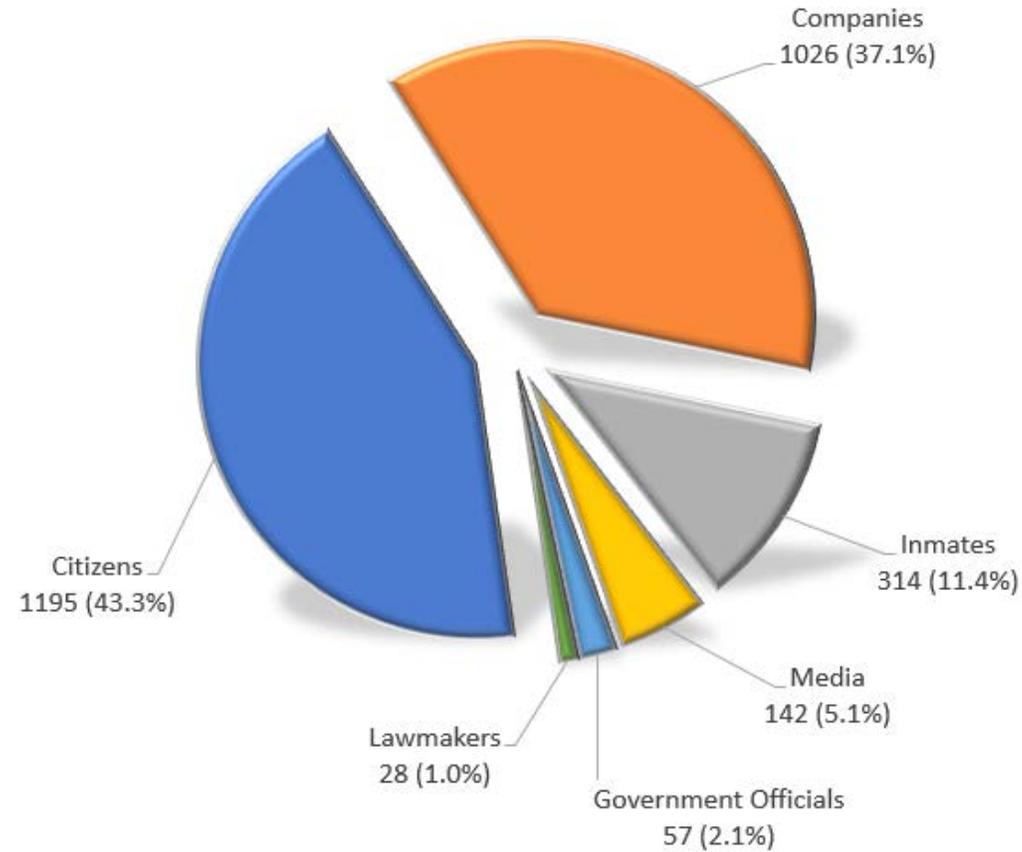
# Since Pandemic Began, Major Increases in Appeals Involving Health, Other Agencies



# Most Local Agencies See Spikes In Appeals



# Most Appeals Come From Citizens



# RTKL in 2021

❖ “Department of Labor admits it overcharged unemployed Pennsylvanians millions of dollars”

*Spotlight PA , July 9, 2021*

❖ “IBM paid Pa. \$33M to settle lawsuit over jobless benefits computer project”

*The Patriot-News, September 13, 2021*

❖ “Free rides take \$104M toll on Pennsylvania Turnpike finances”

*Associated Press, September 14, 2021*



- **“Kangaroo’s secret remains safe after Pennsylvania refuses to disclose its location to former Quakertown woman who once owned it”**  
*Morning Call, February 26, 2021*

# Two Agencies Fined for Acting in Bad Faith

- *Uniontown Newspapers vs. Department of Corrections (2020)*
  - Commonwealth Court found that the Department of Corrections “acted in bad faith” in its search for responsive records to a RTKL request and required the Department to pay the newspaper \$118,458 in legal fees
- *California University of PA vs. Bradshaw (2021)*
  - Commonwealth Court ordered California University of Pennsylvania to pay over \$14,000 in legal fees to a newspaper for frivolous conduct and acting in bad faith for how it handled an open records request

# OOOR Study Finds Need for Improvement in Agency RTKL Webpages

- OOOR reviewed RTKL webpages of 135 agencies. Key findings:
  - 91% have RTKL information on their websites as required by law
  - 50% have all three required pieces of information (AORO contact info, OOOR contact info, RTKL request form)
- **Best practices:**
  - Easy to locate
  - Comprehensive information for agency open records officer
  - Resource account for AORO
  - Printable *and* electronic request forms
  - Include links to frequently requested items
  - Police departments should include RTKL request info
  - Everything should be provided on one webpage

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George, Spiess, Chief of Outreach and Training

## **SUNSHINE ACT Agenda Requirements**

*November 18, 2021*

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# Agendas

- All agencies must post an agenda of issues to be deliberated on or planned official action at least 24 hours prior to the public meeting.
- Includes Regular and Special meetings
- Does not include work sessions, conferences, and Executive Sessions
- Websites\*, agency offices, and meeting sites, and available at the meeting itself

\*(including other social media platforms i.e.: Facebook)

# Agendas continued

## Changing the Agenda

### - Before the Meeting:

- “di minimus” with no expenditure of funds or entering into a contract

### - During the Meeting:

- If initiated by the public – can be deferred to a future meeting
- If initiated by the board by majority vote:
  - Reason must be announced prior to official action
  - Amended agenda must be posted within 24 hours
  - Minutes must reflect the change

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Nathan Byerly, Deputy Director

## **CASE LAW UPDATE AND REVIEW**

*November 18, 2021*

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# Section 708(b)(10) – predecisional internal deliberative records

Chester Water Authority v. Pa. Dep't of Cmty. & Econ. Dev.

249 A.3d 1106 (Pa. 2021)

RTKL request: copies of documents reflecting communications among the Department, Econsult, and the Fairmount Capital and McNeese firms (consultants) related to the potential sale of the water authority

DCED denied under Section 708(b)(10):

The *internal*, predecisional deliberations *of an agency, its members, employees or officials* or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency . . . .

# Section 708(b)(10) – predecisional internal deliberative records

- The OOR found that the agency communications with consultants were internal to the agency and thus protected under Section 708(b)(10).
- The Commonwealth Court affirmed stressing the desirability of a frank exchange of ideas and opinions between the agency and its consultants.

# Section 708(b)(10) – predecisional internal deliberative records

- The PA Supreme Court disagreed:
  - Section 708(b)(10) does not on its face apply to communications with outside consultants.
  - The statute requires narrow construction.
  - This solidifies the interpretation that private consultants providing services as independent contractors **do not** qualify as agencies, members, employees, or officials who may engage in protected internal communications.

# Bad Faith

California University of Pennsylvania v. Bradshaw, No. 1491 C.D. 2018  
(October 13, 2021)

RTKL request: all records related to donations from Manheim Corporation to the Foundation for University of California between January 1, 2008, and December 31, 2013, and all records identifying the uses of those funds.

# Bad Faith

University denied the request stating it did not possess donation records of the Foundation and it did not matter who had the records since access to donor records is protected from disclosure under Section 708(b)(13).

The OOR disagreed and granted the appeal.

University appealed to Commonwealth Court.

Commonwealth Court affirmed the OOR. University filed a petition for allowance of appeal with Pa. Supreme Court which was denied.

University contacted Foundation and discovers no such records existed.

# Bad Faith

- In sum, the Court concludes that the University engaged in bad faith and frivolous conduct in denying Respondent's RTKL request. Why?
- It denied the request without first determining whether the Foundation had potentially responsive records in its possession and then subsequently litigated the denial.

# Bad Faith vs. Good Faith Search

Uniontown Newspapers v. DOC, 243 A.3d 19 (Pa. 2020)

- Request for documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette.
- Court held Department of Corrections acted in bad faith at the request stage under the Right to Know Law in significant part because the agency open records officer (AORO) failed to act with diligence in response to appellee's request as required by § 502(b)(1).

# Bad Faith vs. Good Faith Search

Uniontown Newspapers v. DOC, 243 A.3d 19 (Pa. 2020)

- AORO did not:
  - review the request with the Bureau of Health Care Services;
  - question assumptions or the narrow interpretation of the request by the Bureau;
  - did not take any steps to confirm whether the only records that existed other than those generated in the ongoing investigation were medical records.

# Good Faith Search

- Elements of a good faith search:
  - Advise all custodians of **potentially** responsive records about the request
    - Agents within its control, including third party contractors
    - Employees – includes personal devices
  - Obtain all potentially responsive records from those in possession
  - **AORO** has duty to review the records and assess their public nature
    - If unsure that records are responsive, employees should give records to the AORO for assessment
    - Employees and contractors should **not** be independently deciding if the records fall under an exemption – responsive records should go to the AORO for that determination
  - Follow-up on inconsistencies, assumptions and inaccuracies

# Good Faith Search

- Additional notes:

Failure to *search records* in an agency's possession for responsive records during the request stage constitutes bad faith.

An AORO is meeting duty of diligence when "direct[ing] requests to other appropriate persons within the agency."

The AORO does not fulfill his or her obligation simply by relying on the representations of others without inquiring as to what investigation was made and without reviewing the records upon which the individual responding to the request relied.

An agency's failure to locate responsive records *until motivated by litigation* shows bad faith, meriting consideration by a fact-finder.

# Bad Faith

Uniontown Court also held:

- Proof of bad faith does not require establishing fraud or corruption. Rather, an abandonment of mandatory duties by an agency, including performance of a detailed search and review of records to ascertain if the requested material exists, or if any exclusion may apply, **prior to denial of access** will support a finding of bad faith. (citing [\*Chambersburg Area Sch. Dist. v. Dorsey\*, 97 A.3d 1281 \(Pa. Cmwlth. 2014\)](#)).

# Corporate Donor Names are Public

California University of Pa. v. Bradshaw, 210 A.3d 1134 (Pa.Cmwlth 2019)

- **Request:** Records related to donations between Manheim Corporation and a university fund.
- **Holding:** Section 708(b)(13) of the RTKL uses the term “individual” (as do other exemptions) rather than “person” to refer to exempt donor identities, and therefore the exemption applies only to the identities of natural persons, not corporate entities.

# Case Law Update

Easton Area Sch. Dist. v. Miller, 232 A.3d 716 (Pa. 2020)

School bus video did not constitute an education record under the Family Educational Rights and Privacy Act, 20 U.S.C.S. § 1232g, because the school district failed to show that it was exempt from disclosure under 65 Pa. Stat. Ann. § 67.708(b)(1)(i), as the school district did not demonstrate it would lose federal funding as a result of disclosure.

The order included instructions to the school district to redact students' images from the video prior to disclosure.

# Case Law Update

Payne v. Dept. of Health, 2020 Pa. Commw. LEXIS 700 (Pa. 2020)

- Scores alone do not demonstrate any deliberation among the agency's employees. Where an agency regularly releases a type of information, it cannot claim that information is internal and confidential in other situations.

Darlington v. Dept. Of Labor & Industry, 2020 Pa. Commw. LEXIS 451 (Pa. Commw. Ct. 2020)

- Routine boiler inspections are not exempt under Section 708(b)(17) because the language of the statute differentiates between inspections and investigations, the statute permits inspection by certified third parties rather than agents of the Department of Labor & Industry, the agency did not show that the routine inspections involved the kind of comprehensive inspections which occurred in prior cases, and because there was no apparent public policy which justifies withholding the documents

# Case Law Update

McKelvey v. Pa. Department of Health, 255 A.3d 385 (Pa. 2021)

- Request for all of the medical marijuana business permit applications pursuant to the RTKL
- DOH allowed applicants to redact information the third parties believed should be redacted. DOH did not independently review the applications or redactions.
- Because the Right-to-Know Law (RTKL) did not allow an agency to delegate its disclosure duties or defer to the redactions of third parties, the Department of Health's failure to independently review the redactions by applicants seeking permits to grow, process or dispense medical marijuana was not in accord with the RTKL.

# Arguments & Evidence Not Submitted to OOR Might be Waived

Mission Pa., LLC v. McKelvey, 2019 Pa. Commw. LEXIS 528

- **Request:** Applications for grower/processor and dispensary permits for medical marijuana.
- **Holding:** Third parties which have a full opportunity to submit this information to the OOR and fail to do so do may not have a right to submit that information on appeal to the court.

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## LOOKING AHEAD TO 2022

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# Pending Legislation of Note

- Vexatious requestors (HB1457/SB552)
- Commercial requestors (SB312)
- Agency use of “trade secret” exemption (HB 296)
- Amend Disease Prevention and Control Law (HB1893)

# In Development at OOR

- Electronic docketing system
  - All steps of appeal process conducted on portal accessed via OOR website
- Promulgation of regulations of appeals process
- Rework of website

# Agency Responses: Areas for Improvement

- **Submitting conclusory affidavits**, in which an agency provides a legal argument or conclusion instead of facts. Example, “These records are not subject to the RTKL” is conclusory; the agency must explain factually *why* the records are not subject
- **Insufficient searches for records**, when an agency does not prove that they did a thorough search for potentially responsive records. For example, affirming that a third-party contractor searched their records
- **Declining to reach out to a requester to narrow down a request.** The RTKL does not prevent an agency from calling a requester in an attempt to better ascertain the records they seek. A brief conversation can often save the agency hours of time and even prevent an appeal.

# Additional Questions?

Today's training has been recorded and will be posted to our website.

If we did not answer your questions today or you have more questions, contact us:

- Via website form: <https://www.openrecords.pa.gov/ContactOOR.cfm>,
  - Via email: [openrecords@pa.gov](mailto:openrecords@pa.gov), or
  - Via phone: 717-346-9903.
- 
- Submitted questions are records under the RTKL.
  - OOR website has resources for agencies & requesters
    - <https://www.openrecords.pa.gov/>