

OOOR Draft Regulations – Stakeholders & Commenters

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April 7, 2017

VIA E-MAIL (RegulationsOOR@pa.gov)

Mr. Erik Arneson
Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120

Re: Draft Regulations of the Office of Open Record

Dear Mr. Arneson:

Thank you for inviting us to participate in the Office of Open Records' regulatory process and to comment on the OOR's draft regulations. We greatly appreciate the time and effort that the OOR took in drafting the regulations and are grateful that the OOR has sought input from various stakeholders prior to formally proposing the regulations.

We write as attorneys who represent journalists who seek access to government records in connection with their reporting on government affairs and other matters of public concern. Although we represent many media clients, we offer comments on the draft regulations solely on our own behalf, as lawyers experienced in advising and representing members of the press and public who request government records.

We understand that the Pennsylvania NewsMedia Association (PNA) is submitting comments on the draft regulations. We have reviewed those comments and agree with PNA's concerns and suggestions. We will not endeavor to repeat each of those concerns and suggestions in this letter, but instead simply state that we wholeheartedly agree with them.

In addition to echoing the concerns articulated by PNA, we offer the following input about the draft regulations:

Erik Arneson
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1. Many of the draft regulations appear to be outside the regulatory authority granted to the OOR under the Right to Know Law (RTKL). That authority is limited to “promulgat[ing] regulations relating to appeals involving a Commonwealth agency or local agency.” 65 P.S. § 67.504(a). For example, all of the provisions in Section B dealing with filing and responding to RTKL requests fall outside of the regulatory authority granted to the OOR under the RTKL. Likewise, the OOR has no authority to regulate agencies’ policies with respect to third-party notice or how agencies respond to requests for information pertaining to third parties.

2. Several of the draft regulations would make substantive changes that are not contemplated by or are contrary to the RTKL itself. For example, the RTKL contains no provision addressing “commercial purpose.” The General Assembly has considered, but not enacted, legislation adding a “commercial purpose” provision to the statute. Nevertheless, the draft regulations define “commercial purpose” and include a provision about requests with a “commercial purpose.” See Draft Regs. §§ 77.5(a), 77.7. Another example: The draft regulations would give OOR appeals officers the authority to increase the time for a final determination. See, e.g., Draft Regs. §§ 77.74, 77.76. But, the RTKL provides that only the requester has that authority. See 65 P.S. § 67.1101(b)(1).

The draft regulations should fall clearly within the OOR’s regulatory authority, as set forth in the RTKL, and those regulations should be consistent with the procedural and substantive provisions of the RTKL. In reviewing and revising the draft regulations, we respectfully request that the OOR carefully evaluate whether each regulation is consistent with the text of the RTKL and in accordance with the authority granted to the OOR by the RTKL.

3. The definition of “personal information” in Section 77.5 on page 3 of the draft regulations reflects a material, substantive change in the law. For example, the RTKL does not include an exemption for “[i]nformation that affects the legal or safety interest of an individual.” This vague phrase and other components of the “personal information” definition appear nowhere in the RTKL and should not be included in the OOR’s regulations, as they are beyond what the Law exempts. Indeed, this definition would have the effect of rendering exempt from disclosure certain information that, by law, must be disclosed under *all* circumstances, such as voter registration records and property tax records. If the OOR believes that it is necessary to use the term “personal information” in its regulations and to define that term, the term should be defined solely by citing to the RTKL’s exemptions that address an individual’s personal information, such as 65 P.S. § 67.708(b)(1)(ii), (6)(i), (7), (12), (14), and (15)(i).

4. Similarly, the regulations should not include any definition of “reasonable expectation of privacy,” if that term is even needed in the regulations, which we do not believe is the case. The concept of a “reasonable expectation of privacy” is well defined by case law. More importantly, in the context of information and records held by the government, the reasonableness of any expectation of privacy is controlled by the RTKL and cases interpreting it, which provide explicitly what kinds of information and records people can reasonably expect to

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be withheld from the public (including information and records shielded by other statutes). Any expectation of privacy beyond what is exempt under the RTKL is *per se* unreasonable.

5. Although we do not believe that the OOR has the regulatory authority to mandate what steps agencies take, or how they respond, after receiving an RTKL request, *see supra* No. 1 (discussing Section B of draft regulations), if the OOR had that authority, the proposed regulations relating to the handling of third-party “personal information” are flawed. Under Sections 77.24 and 77.25, agencies would be required to defer to a third party’s opinion about whether that person’s “personal information” should be kept from the public. The RTKL provides that the public should have access to all government records, subject to specific, limited exemptions. The Law sets forth what information and records are exempt from disclosure. Third parties should not be permitted to override the Law, and agencies should not defer to the preferences of third parties. By requiring the agency to withhold records after receiving a third-party objection, the regulations undercut the Law’s presumption that government records are open to the public, and undermines its requirement that the agency bears the burden of showing that a record is exempt from disclosure. A better use of the notice procedure (assuming the OOR has authority to institute one) would be to use it to solicit information from third parties about whether there are special reasons unique to them and not known by the agency why their information should not be subject to access. That is relevant to the legal question of whether disclosure is required, whereas third parties’ preferences about disclosing particular records are not relevant.

6. In the regulations addressing the procedure for OOR appeals, provision should be made for a time for the requester to file a reply to an agency’s response to the appeal. Under current practice and the draft regulations, a requester’s appeal must address “any grounds stated by the agency for denying the request.” Draft Regs. § 77.45(a)(4). The agency then can respond to the requester’s grounds for “believ[ing] the requested record to be public” and not exempt. *Id.* §§ 77.45(a)(3), 77.46(b). The requester, however, has no meaningful opportunity to reply to the agency’s response. In practice, agencies often provide very little explanation for denying requests, simply citing exemptions with no analysis. And, in the case of deemed denials, the requester is given no explanation for why records are being withheld. Thus, in most cases, the agency’s response to the appeal is the first time that a requester is offered a meaningful explanation for the denial. Yet, the requester has no opportunity to reply to that explanation unless the time for rendering a final determination is extended. The regulations should address this situation by providing a set time for the agency to respond to the appeal, and a subsequent period in which the requester can file a reply. This practice is common in court proceedings and particularly necessary in these circumstances, where the agency likely has offered no detailed basis for the denial pre-appeal, but carries the burden of establishing that the requested record is

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exempt. Requesters should be given a real chance to argue why the agency has not met that burden.¹

Thank you again for the opportunity to review and comment on the OOR's draft regulations. If you have any questions or would like to discuss our comments, please give us a call. We would be happy to work with the OOR to address these concerns and the concerns raised by the PNA.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: 
Michael Berry
Paul J. Safier

¹ We recognize that the draft regulations allow requesters to submit "additional information," Draft Regs. § 77.46(b), but the time for doing so is the same as for the agency to file its response to the appeal. In practice, agencies often wait to file a response until the deadline. In these situations, the requester's right to file "additional information" is a hollow one, for, as a practical matter, he/she is unable to file any "additional information" to reply to the agency's response.

Simon Campbell

Lorah, Benjamin

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Friday, March 24, 2017 11:51 PM
To: Arneson, Erik; Lantz-Johnson, Delene; Byerly, Nathanael; Brown, Charles (OOR)
Subject: Fwd: Bills please
Attachments: AOPC Request.pdf

Faith contacted me today to remind me to get my feedback in writing by the end of March on the regs. I've already given it on video form and I see no need to help you put me as a tick in the box. It's actually appalling what you've done with the draft regs. Total legislative re-write by un-elected unaccountable people.

Despite my cynicism at all things government I actually thought OOR might be on the up and up. I guess not. Legal decisions by the OOR of late have become a joke. I go to Chad Schnee these days to get property records ruled public. He always was a decent appeals officer. Not because I thought I could "win". Rather, because I knew he wouldn't mess me around on the law. By contrast, OOR? Today, whether or not state lawmakers have public or private home addresses depends upon which piece of paper the address is on. I showed Russ Diamond 2016-1838 and 2017-0338. I don't think, Erik, you realize that it's OOR's integrity that takes a hit with that sort of thing.

As you see from below/attached, I'm gearing up to take on the judicial branch so they can tell me I don't have to follow the law. You remember, Jared, Delene. He was a silent government lawyer the day I met Schultz in his grandiose office. Now I have to pay him to be a hack for the judicial branch not the executive branch.

Regardless, I'm supposed to lobby OOR before March 31st? Thanks but no thanks. I think I'd rather see what legislative re-write gets sent to IRC and then see what legal action and/or statutory amendment can be considered. I'll talk to the Chairman of the State Govt. Committee before I'll talk to OOR about amending the law. Maybe we need a whole new paradigm. Like taking some budget dollars out of OOR and putting them into newly created OAG enforcement officers. Various ideas are in my head.

As for rallying the legislature around statutory amendment ideas; that's easy. I'll just write to them all at home, cite their privacy in 2016-1838, and tell them that all the addresses are going on the internet unless they get a court order to stop me. That'd be guaranteed to get 253 views on a lobbying video.

I actually thought you wanted my input as a Requester of records. I thought you wanted to talk about streamlining appeals and how to make the process smoother. I thought we were going to talk about e-technology. google drive, one drive, and all the other tools we should all be using to save money and eliminate paperwork. Instead, what do I see? A legislative re-write to further "protect" the poor government employee. Yes, that poor soul who does such good work everyday and has his personal information ruthlessly released to the public to meanies who use the law in ways that the government doesn't like.

I hope you get the commercial intent done. Not because I have any. Rather, it'll be fun setting up RequestsBySimon in which I insist the person who comes to me does not tell me why they want the records. Just so we can have appeals in which I say "Hey government, I dunno why the guy wants stuff. I never asked him. But here's your affidavit saying that I don't have any commercial interest." That way, Delene, you can write a reg that requires me to inquire as to the nature of the associations I am keeping while I try not to laugh.

You want polite written feedback? Ask PNA. I don't insult OOR's intelligence and I ask only for the same in return. I don't think it's too much to ask. I have 800 requests hitting the streets on Monday. You know what I'm

spending my time doing? Learning about things called gmail email merge. It's new to me but it looks like I can set things up to pump out scores of appeals to OOR using e-technology.

Will I feel sorry for OOR? Not a chance. OOR made a decision to re-write the law instead of talking to me.

SC.

----- Forwarded message -----

The most bizarre thing, that never ceases to me, amaze is when public servants catch an attitude with the public. I'm pretty sure it's supposed to be the other way around.

I met Jared years ago when he was #2 inside the Office of General Counsel under Jim Schultz in the Corbett administration. They were giving me the runaround on RTKL requests I was making of the administration. A mutual acquaintance arranged for a meeting to see if we could all work it out as Republicans together because I kept beating them at OOR, and they kept going to court. I was nice in that meeting even though they looked at me like I was poop to be scraped off their very impressive shoes. Mind you, they didn't change their ways so instead of getting mad at them I figured I'd get their client mad at them, by dropping him into some fun headlines. http://www.pennlive.com/midstate/index.ssf/2012/09/records_denial_called_public_a.html.

----- Forwarded message -----

From: **Simon Campbell** <parighttoknow@gmail.com>

Date: Fri, Mar 24, 2017 at 4:40 PM

Subject: Bills please

To: jwh@elliottgreenleaf.com

Cc: paruest@centrecountypa.gov

Jared, fyi attached.

The System Boys over at the AOPC Government Club who give my money to you, don't like me too much. Primarily because I expect them to follow the law and serve me. They tell me all branches of government are equal but one is a bit more equal than the others. Hence their belief that I have to follow their Rule instead of them following my law. Still, we'll all have a jolly good time figuring it out.

Your briefs make me smile almost as much as New York Times v. Sullivan makes me smile. That precedent requires an opposing party to prove I don't believe what I believe. Such burden would require opposing counsel to get inside my head and understand it. Heck, my own lawyers can't figure that out let alone opposing ones.

If I was Michelle Shutt's husband I might have a problem with your client's memory loss and your briefs. So much so that I'd be tempted to blast out campaign flyers all over town declaring her to be a criminal for aiding and abetting criminal activity by signing and supplying a fake document to a Prothonotary in order to deceive the public. "Pam Ruest is a criminal" that sort of thing.

Just think, if Pam didn't like it, she could file a defamation suit and argue that she might have done what she's accused of, but can't remember. Meanwhile I could argue that the basis for my reasoned belief that Judge Ruest is a criminal accomplice of SPM is Handelman Brief 1, Handelman Brief 2.

See, your legal argument is a winner in a court of law and a disaster in the court of public opinion for anyone who wanted to pick a political fight with a Judge with that kind of memory loss.

Bottom line? The public needs to see exactly what perks of the job are assigned to the privileged class known as a black-robed public servants. Freebie lawyers is surely a nice perk.

I need to see how much I am forced to pay you to serve Pam, not me. Only because many people believe it'd be far greater public service to see our tax dollars spent on Kathleen Yurchak than you.

Just sayin' ...

SC

If an agency refuses to follow the internet posting requirements of Section 504(b)(1) and 504(b)(2)

...then the agency is breaking the law. The words "shall be posted" constitute a statutory mandate, not an item for discretion. Whenever a government agency refuses to fulfill a mandatory duty of law, an action in mandamus can be brought against that agency in Court.

Scores of government agencies are in violation of law re: Section 504(b).

A knock-on effect of agencies ignoring the law is the OOR also ends up breaking the law. Section 1310(a)(7) to be precise. Once again the words "shall do" are seen in Section 1310(a). It is a statutory **mandate** on OOR to "post the name and address of all open records officers in this Commonwealth".

That is not happening despite the law *requiring* it to happen. OOR's list of ORO's is like looking at Swiss cheese. Lost of holes in it. Agencies break the law and then OOR breaks the law. OOR has been in existence for 8 years and still the citizens of this Commonwealth cannot get to OOR's website to get a list of the contact details of all OROs.

Why not? It's because OOR has taken a sloppy attitude about its own obligations by quietly ignoring agencies' obligations.

I come back to the word mandamus. Such action typically vests standing in the DA or AG but there is a category of standing for another party to bring a mandamus action if that party has an interest that is distinct from the public at large. Section 1310(a)(7) gives OOR an interest that is different from the public at large. You have a statutory mandate to fill that I do not have.

Here's what OOR should do, and what it should have done years ago:

File a RTKL request of all agencies around PA for the contact details of their ORO and Appeals Officer an inside that request, remind them all about Section 504. Give them a link to a form to fill in. Maybe a video training. And inside that same request, tell them all that any agency that doesn't comply with posting the info. online and sending the information to OOR will be taken to Court by OOR in an Act of Mandamus. Do it just once, with one agency, and word would spread fast.

You can download a list of all education agencies from PDE's site:
<http://www.edna.ed.state.pa.us/Screens/Extracts/wfExtracts.aspx>

I contend OOR should be proactively doing this once a year to make sure Section 1310(a)(7) stays fresh.

If you don't do it, then don't blame me when OOR has to crank out the postal mail in appeals to send copy to agencies. I'd rather deal with only e-mail too; but with so many deadbeat charter schools and others getting away with breaking the law, I have no idea what their e-mail address

is. We should all strive to operate in a paperless world but OOR needs to get serious about Sections 504 and 1310(a)(7).

OOR should be looking at ways to store case records in the cloud too. Appeals submissions come in, they get posted to the cloud instantly by the Appeals Officer under a folder with the docket name. That way, you don't have to write regs to deal with me personally.

There are other things OOR could be doing. Every year I get involved in a PSEA 'fair share arbitration' via Rule 7 of that attached. The Union has the burden of proof. The dispute goes before the American Arbitration Association who appoints a neutral arbitrator.

You might want to look at the AAA model (www.adr.org). The two parties (PSEA and the challengers who are represented by me) get given their instructions and all filings made by both side are uploaded by the parties into the AAA's "WebFile" access system. It's a bit like PACfile in our courts.

Unfortunately, it seems that instead of wanting to get into the streamlining business OOR chose to get into the "we're government and must protect our own" mentality when developing regs. And that's not going to fly.

As I requester I don't want to have to think about document delivery in an appeal. Just give me a link to a place to upload my submission and where I can conveniently look at the other sides submissions and interim rulings.

OOR was in the 20's with Terry and technology. It's in the 50's with Erik. Your starting point is a Section 1310(a)(7) spreadsheet of your own. Complete with email addresses. Not just for appeals purposes. You should be e-notifying agencies of things like training videos too.

If OOR end up doing paper copies in appeals in response to gmail merge form me, you'll only have yourselves to blame for entirely the wrong focus in regs development. There's no reason you can't be cloud based such that the appeals officer and the admin behind what you do, is in the 21st century. Then the only thing you'd ever need do with your own records is point to Section 704.

SC

Lorah, Benjamin

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Thursday, March 02, 2017 1:33 PM
To: Lantz-Johnson, Delene
Cc: Arneson, Erik; Byerly, Nathanael; Brown, Charles (OOR)
Subject: Re: FW: Glad to participate in the draft regs

Delene, I posted my comments and suggestions online:

http://www.parighttoknow.com/OOR_Draft_Regs.php

One of the things I try not to do is insult people's intelligence even when disagreeing with them. I only ask for the same courtesy in return. I don't believe that anyone at OOR 'inadvertently' got involved in legislation by regulation. You took language that was in SB 411 and copied it word for word.

Simon.

On Thu, Mar 2, 2017 at 10:25 AM, Lantz-Johnson, Delene <dlantz-joh@pa.gov> wrote:

Simon, thank you for the quick response and as I previously provided I am available to discuss any comments or suggestions you have to regarding the regulations. Thank you, Delene.



Delene Lantz

General Counsel
Office of Open Records
[\(717\) 346-9903](tel:7173469903)
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
<http://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

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From: Simon Campbell [mailto:parighttoknow@gmail.com]
Sent: Thursday, March 02, 2017 10:13 AM
To: Lantz-Johnson, Delene
Cc: Arneson, Erik; Byerly, Nathanael; Brown, Charles (OOR)
Subject: Re: FW: Glad to participate in the draft regs

Delene, please call me Simon. I left my voicemail before actually looking at the attachments. I'm not that big on formalities. Then I read the draft regs last night. Oh my lord. I had naively assumed that perhaps, just maybe, it might be the case that OOR wanted to actually consider the view of the people for whom the law was written (which, by the way, isn't Government or third parties).

I thought you guys wanted real input like the need to say agencies go first on the appeal submission, requesters go second, close the record by a certain date. That sort of thing. When I realize I am just a proverbial 'tick in the box' and that OOR thinks it can become the Pennsylvania General Assembly, then sure I'll give my feedback. OOR can watch it the same as anyone else can.

Comments? Suggestions? I dunno. Maybe a refund of my taxes on the salaries of un-elected public servants spent thinking they were the Pennsylvania General Assembly in Subchapters A thru C?

See, I have a mental starting point that all agencies that process requests are sods. I'm happy to be surprised to be made wrong about that, whenever it happens, but that's my starting point. So it's kind of funny witnessing OOR don the royal robe and tell them all what to do. It might create a situation where me and the sods have something in common.

As for the commercial stuff ...I can't wait for that legislation by regulation. I'll have to set up RequestsBySimon.com with an online form for fellow Americans to describe all the records they want and give me an e-mail address for where to send it after I get it. If I get questioned by the government to why I want the records I want, I can honestly say "gee, government, I've got no idea. I never asked the guy."

That way OOR can use its new subpoena power to demand to know if I might be associating with someone other than Dan Mohn; and further demand that I find out what this other person wants the stuff for. That way OOR can regulate my life the same way it wants to regulate agency life.

I have no idea how Pluto talks to Saturn, Delene. You're all Government. I simply don't think the way you do. It's not a world I understand.

On Thu, Mar 2, 2017 at 9:39 AM, DC, OORFile <RA-OORFile@pa.gov> wrote:

Good Morning Mr. Campbell, Erik received your voicemail regarding the due dates for the draft regulations and asked me to reach out to you in response. We are requesting any comments or suggestions regarding the draft regulations be submitted to the office by March 31st. Please see attached stakeholder review letter for some additional suggestions on submitting comments to the office. In addition, I am available to answer any questions you may have in the interim. Thank you, Delene.



Delene Lantz

General Counsel
Office of Open Records
(717) 346-9903

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Harrisburg, PA 17120-0225

<http://openrecords.pa.gov> | [@OpenRecordsPA](#)

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From: DC, OORFile
Sent: Wednesday, March 01, 2017 1:37 PM
To: Simon Campbell
Subject: RE: Glad to participate in the draft regs

Mr. Campbell,

Attached please find correspondence from Erik Arneson regarding the OOR draft regulations.

Sincerely,

Faith

From: Simon Campbell [<mailto:parighttoknow@gmail.com>]
Sent: Monday, September 26, 2016 9:26 PM
To: DC, OORFile
Subject: Glad to participate in the draft regs

Thanks for the opportunity! Contact details are (updated):

Simon Campbell

668 Stony Hill #298

Yardley, PA 19067

Tel: [267-229-3165](tel:267-229-3165)

parighttoknow@gmail.com

Rosemary Chiavetta



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

March 31, 2017

Erik Arneson
Executive Director
Office of Open Records
Cmwlth Keystone Bldg.
400 North St, 4th Fl.
Harrisburg PA 17120-0225



By First Class Mail and Email (RegulationsOOR@pa.gov)

Re: Pennsylvania Public Utility Commission Comments to the Office of Open Records Draft Regulations Version March 1, 2017.

Dear Mr. Arneson:

The Pennsylvania Public Utility Commission's (PUC) Comments to the Office of Open Records (OOR) Draft Regulations (Version March 1, 2017) are as follows:

§ 77.5 Definitions.

Personal Information – should add “non-business social media information” and “usernames, passwords, and PINS” and “utility customer account information”

Comment:

“Non-business social media information” is information about a person’s non-business online activities on Instagram, Facebook, twitter, snapchat and other social media outlets. Such information is not government work related, and represents an intrusion into a person’s personal life that is not more substantial than the public’s need to know such non-business information.

“Usernames, passwords, and PINS” is information about a person’s activities with online entities. Usernames allows requestors to know the aliases utilized when interacting with online entities and represents an intrusion into a person’s personal life that is not more substantial than the public’s need to know such information. For example, Usernames could provide evidence of personal activities and purchases. Passwords and PINS would be information that is used to log into online or financial networks with a username. Release of these passwords and PINS would allow a requestor to access these accounts with other entities. This could lead to extensive violations of a person’s non-business related life and actions. For example, access to a Hotmail or google email account. *See Pa. State Educ. Assn. v. Office of Open Records*, 148 A.3d 142 (Pa. 2016).

“Utility customer account information” is information about a customer’s utility account, such as the account number itself, their utility usage, payment history, dispute history, and the like. The Commission has considered this information to be confidential, and public utilities have maintained this information as confidential. The Commission sometimes has such customer utility account information as part of informal complaints, surveys, and as part of investigations. The Commission believes it is in the public interest for customer utility account information to be considered personal information that a customer would not like others to have access to, and is information of a confidential nature between the utility customer and the utility.

§ 77.6 Computation of time.

(providing in pertinent part) *...(a)(2) ...the calculation of the extended deadline will start the first calendar day after the 5 business day response period... even if the extension is invoked prior to the 5th business day.*

Comment:

The PUC strongly agrees with the proposal for computation of time of the extended deadline to commence after the 5 business day response period. This rule, as drafted, not only codifies uniformity in the calculation of the agency’s final response due date, but also serves to maximize the agency’s time period to compile and prepare a response in a manner which is permissible under the statute.

§ 77.7 Request made for commercial purposes

Comment:

The PUC agrees it is advisable, as a matter of policy, to require requestors to identify whether the information is sought for commercial purposes. The burden upon state agencies to provide records is intended to provide transparency of agency actions for the benefit of the Commonwealth and its citizens, not to inure to the benefit of private for-profit actors. Tax dollars devoted to agency operations required by compliance with the RTKL are not recouped by the copying fees, which cover only the superficial costs involved with searching for compiling and providing adequate public access to records. Therefore, commercial enterprises should be required to adequately compensate taxpayers for the use of agency resources for commercial purposes. Requiring requestors to self-identify if their use is commercial will enable the commercial fee to be applied, without requiring specific statement as to the requestor’s use of the information.

§ 77.71 Submission of filings after the docketing of an appeal.

Should add – (4) Agencies will have ten business days to file a response to an appeal.

Comment:

Presently the OOR gives seven days for an Agency to respond to an Appeal. Seven days is a very short turnaround time to provide a privilege log and supporting affidavit, as well as legal argument why the listed documents fit within an exception or legal privilege. Providing a privilege log requires substantial effort to simply sort through and prepare the list of documents with the required information. The supporting affidavit must be prepared by an attorney, with consideration for providing evidence to support the legal arguments against disclosure. Preparing the legal argument takes substantial time for agency legal staff. In addition, all of these steps require collaboration with numerous agency staff, as well as the supervisory staff, in multiple areas of an agency. For example, the legal department is heavily involved, as is the Right-to-Know Officer and their staff, and the general agency staff (and their supervisors) relating to the topic that has been requested. To prepare all these materials in time for review, legal counseling, and approval by multiple staff, their supervisors, and legal supervision is not easily done in seven days.

Since the OOR must render a decision in 30 days, the Commission is sensitive of the need for OOR hearing officers to have sufficient time to prepare their determination. Therefore the Commission respectfully requests that the usual seven days for a response be changed to ten business days. This will provide the Commission with nearly 50% more time to prepare its response, and is a much more reasonable burden on Commission staff.

Sincerely,



Rosemary Chiavetta, Secretary
Right to Know Officer
Pa Public Utility Commission

Tony Crisci

On Mar 31, 2017, at 1:46 PM, Tony Crisci <tonycrisci@crisciassociates.com> wrote:

Delene,

Please accept these comments from CSPRA as my comments on the proposed OOR regulations. I believe that you will receive a similar submission from Richard Varn, the Executive Director of CSPRA. Thank you.

<CSPRA Comments on Proposed Rules March 2017 Final.docx>

<Excessive Records Requests 2017 V-7 .docx>

<Benefits of Commercial and Personal Use of Public Records 2016.docx>



COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

March 31, 2017

To: Pennsylvania Office of Open Records (OOR)

Re: **Proposed Rules**

Who We Are

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public record access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, governmental, commercial, and societal benefit. Members of CSPRA are just a few of the many entities that comprise a vital link in the flow of information for these purposes and provide services that are widely used by constituents in your state. Collectively, CSPRA members alone employ over 40,000 persons across the U.S. The economic and societal activity that relies on entities such as CSPRA members is valued in the trillions of dollars. Our economy and society depend on value-added information and services that includes public record data for so many important aspects of our daily lives and work.

Concerns and Comments Regarding the Proposed Rules

Statutory Authority

There have been various unsuccessful attempts over the last few years to amend Pennsylvania law in nearly the exact manner as is proposed in the draft rules. This causes us to wonder: Upon what statutory authority is the OOR relying to promulgate these rules? We would request that the specific statutory authority be identified for each new substantive provision of the rules. Without proper statutory grounding and guidance, the rules would be subject to legal challenge. If there is not explicit statutory authorization, the proposed rules could appear to be a method of bypassing the legislative process.

Commercial Record Requests

It is often said that we live in an information economy. The natural resource on which that economy depends is information and public records and commercial users of those records are a critical source. Public and private data is used in combination to equalize access to

business opportunities, provide convenient and personalized customer service, protect consumers, increase markets and market efficiency, manage and reduce risk, support many public services such as law enforcement, and contribute substantially to economic growth. It is so ubiquitous, it is easy to forget that good information leads to the decisions, marketing, and communications that help businesses get started or grow and to help for government to efficiently serve its people. We have achieved a degree of democratization of opportunity through equal and reasonably priced access to public information that strengthens the vitality of our entrepreneurial and small business sectors. Public policy regarding commercial use of public records should not imperil the free flow of information that is a major job creation engine for our economy.

We have attached a white paper highlighting the value of the use of public records for personal and commercial uses. We hope you also find this helpful. We would also note that scholarly research also makes extensive use of commercial resources drawn from public records in many fields such as criminal and civil justice, housing, public expenditures, public health, and economic forecasting.

We have historically opposed public records laws and rules that have the potential for differential treatment, more limited access, or greater charges for certain “commercial” uses and users of public records. Pennsylvania is now considering all three. We understand that one of the motivating factors is the issue of dealing with records requests that are burdensome and considered excessive. If this is a consideration, we suggest instead a direct approach to that problem. To assist in your deliberations, we have attached a second white paper that lays out an approach and framework for addressing burdensome or excessive records requests while preserving the principles and benefits of public access. The paper urges you to look for the root causes of the problems you are experiencing and adopt a balanced solution to those problems. We also suggest you look at pending legislation in Washington state (HB 1595, and in particular sections 2 and 3) that is the result of a very inclusive interim process that brought stakeholders together to address this problem.

We note that the proposed rule already has exceptions for some commercial entities that are classified as press or media entities as well scholarly research. Others may be proposed as the rule progresses. That policy makers often choose to propose such exceptions in this type of rule or law is a red flag that drawing such a line can be difficult and those on the exceptions list

may be there from lobbying or perceived political clout rather than any defensible and sustainable legal framework. Commercial entities in the information business are increasingly difficult to distinguish by such categorizations, and it is unfair to treat lawful commercial entities dealing with the same raw material differently because of the way they choose to add value and sell their products and services.

We also urge you to approve a policy that maintains the tradition of obtaining public records for any purpose at a price that is as close to the marginal cost of reproduction as possible. This is the “gold standard” for public records and has been a critical part of our democracy and economy for many decades. Straying from marginal cost undermines public access and doing so only for certain commercial users amounts to an information tax by another name.

The Home Address Exemption

We are concerned about removing home address from the public record. We support withholding public address only in limited classes of exceptions and on a case-by-case basis where the life and safety of a person is at stake and withholding their address would be an effective means of protecting them. Where we live is neither secret nor a defensible secret. We are part of a community. We must be publicly known to own property for our property ownership system to work.

Our addresses are used for countless services, billing processes, and transactions across many public and private entities. Address information can also provide a way of distinguishing between two people with the same or similar names. Addresses in public records are also used in consumer and identity theft protection alerting services (such as Life Lock and credit monitoring services) to make people aware of how their name and address, if different from their own true history, has appeared in the public record. This alerts them to the possibility that someone is using their name and impersonating them. Addresses are also used in academic and accountability studies and news stories to relate where people live to relevant public policy facts. Restrictions on home addresses in the public record must be narrowly tailored to achieve and specific and important public purpose. More general restrictions do more harm than good, give a false sense of security, and may actually hurt those it is intended to help. If the restriction under consideration in the proposed rule would apply to only public employees, it could potentially remove the home addresses of over 10% of the Pennsylvania population from all public records. If it is applied to all citizens it would have proportionately larger negative repercussions. The

property ownership and lending issues alone raised by this are staggering. How will systems that depend on a reliable association between name and address in accurately applying the facts of public record work without this data? The short answer is they will not and the effects on individuals and the state's economy will be substantial.

A New Broad and Subjective Right of Privacy in Public Information

The rule proposes a new right of privacy based on a person's "reasonable expectations of privacy" regarding information that with few exceptions, is public by its nature and by necessity. This subjective standard will have to be expensively defined in numerous legal forums with uncertain results and no clearly defined benefits from its adjudication, and will also be initially decided by each agency resulting in a patchwork of policies on the same or similar information. Further, the notice and objection provisions will impose a massive and costly burden on government, delaying many routine releases of public information.

We have found that the best public policy begins with a presumption of openness in government records with narrowly defined exceptions where the benefits and costs are carefully weighed and known in advance. Creating such an expansive right by administrative rule is not likely to yield public benefits without substantial legal and practical challenges. . Please instead consider specific exemptions where new developments have created a serious problem that can only be ameliorated by a targeted, sensible, and well-defined solution or exemptions. Please also consider proposing and pursuing these changes in legislation rather than rule where a more full debate and public participation in the process can be achieved.

Conclusion

Public records are for all to use as they see fit under the law and need to be available to all without unduly burdensome fees or categorical limitations. The effect of any new fees or access limits needs to be understood and carefully considered to ensure this critical resource continues to flow and support our civic and economic needs.

Please remain vigilant in protecting open and reasonably priced public access to public records. Thank you for your consideration of our input.

Regards,

Richard J. Varn

Executive Director

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COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

Managing Excessive Requests While Preserving Public Records Access

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public records access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, commercial, and societal benefit. It is CSPRA's belief that the records of how our society governs itself at all levels and manner of government ought to be open and accessible to all.

Policymakers and records managers in all levels and branches of government endeavor to fulfill public records requests with fidelity to the purpose and requirements of the law. Occasionally, some of these requests are seen as excessive and a solution is sought for dealing with such requests. CSPRA has developed the principles and framework below to assist those developing solutions to this problem.

Always a Need for Balance

- Maintaining and defending an open and accessible government is not easy and not without challenges
- Addressing the need to be fair and open in our records and government should be not presumed to be a lesser value than other governmental services
- The best approach is to be fair, open, and low cost—and technology and shared services often make that possible
- The weight and value placed on fairness and openness should be measured in both its great value to a free and open society and the economic benefits of open public records access
- When the values at stake and the effects of decisions are properly weighted, a proper balance can be struck

What to Avoid

- Do not judge records requestors by who they are or where they are from rather than by the nature or effect of their request
- Do not use the “excessive” label as a pretext or excuse to:
 - Avoid maintaining a modern records system
 - Hide records and thereby avoid responsibility for government misdeeds or mismanagement
 - Deny requests for trivial or personal reasons
 - Collect more taxes and fees from users or categories of users
 - Cut the budgets for records management

How to Judge a Request to Be “Excessive”

- A request may be considered excessive if it:
 - Is not foreseeable and therefore beyond record managers’ ability to plan ahead to meet such requests in a routine manual or automated manner
 - Is done in a manner that is harassing, is repetitive, or is voluminous beyond reason when compared to comparable requests from other similar requestors of this type of record
 - Requires substantial manual processing because the technology to automate responding to this type of request does not exist or is not cost effective
 - Is done in such a manner that it approximates the effect of a denial of service attack by overburdening the system of record so that it cannot function and there is no reasonable and cost-effective way to anticipate and scale up the system to address such requests
 - Requires interpretation of the data and judgment as to its meaning

Framework for Solutions

- Determine what requests are actually causing a problem beyond the records system’s operational parameters and inventory the systems and tools available to records custodians for records management and access
 - This can be accomplished through a survey mechanism or annual reporting process

- Determine the key factors causing the requests to be problematic and a possible response to that factor or issue. For example:
 - Is it that the requests are not clear or overly broad and difficult to interpret and fulfill?
 - If so, consider using smart forms or a record request portal that helps requesters formulate an understandable and reasonable request
 - Are the requests asking for a response that will require substantial manual processing?
 - Identify and implement technology and software that will reduce the manual processing
 - Are the requests asking for records that could be digitized and made more easily available but still remain in paper form?
 - Consider programs to conduct bulk digitization of records
 - Do the requested records require substantial redaction to remove non-public information before release?
 - Use tools that automate this process such as digital loss prevention tools and intelligent search with automated masking technology for specific non-public information
 - Is there a shortage of staff to process and fulfill the request even when the requests are reasonable and not excessive?
 - Consider new sources of help such as using work-study students and interns from educational institutions or on loan from private industry as a public service to help modernize the system and implement new technology and solutions
 - Some jurisdictions have used the prison industry system to digitize non-sensitive records and provide job and life skills to those in the correctional system
- To the extent possible, work collectively improve the records system to accommodate such requests
 - Identify a funding source for grants or revolving loans that can be used to modernize records systems and implement new technologies that address the most

costly records issues and assist those jurisdictions too small to address the problem by themselves

- Facilitate the formation of shared services between units of government for records management and public access that help jurisdictions leverage economies of scale
 - These can be accomplished by shared use of state government technology infrastructure, by intergovernmental agreement, or by services offered by the associations representing the offices and jurisdictions of local government
- For those remaining, narrowly tailor an exception
- Use quantitative analysis of fulfilling the request, not qualitative analysis of the requestor and their motives in crafting the exception
 - Example: Texas Sec. 552.232. Allows a governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges to avoid providing the copies again with certain exceptions
 - Example: Illinois 5 ILCS 140/3.2 allows a records custodian define a person who asks repeatedly for numerous and various records as a “recurrent requestor” and require them to pay up front for records or tell them their requests are burdensome and ask them to reduce their requests to manageable proportions
- Use a multi-factor formula with allowance for a judgment in favor of granting the request, a chance to reframe the request so it can be granted, and a chance for appeal if denied
- Non-judicial appeal of findings of excessiveness should be to a disinterested third party
- The same entity for appeals should be available for advisory opinions to help guide records managers’ decisions

For additional information, questions, or assistance in adopting and implementing the ideas presented in this document or in addressing any public records issues, please contact us or visit our web site as <http://www.cspra.org>.

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COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

June 21, 2016

To: Senate Judiciary Committee

Re: **Oppose AB 2880**

Who We Are

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public record access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, governmental, commercial, and societal benefit. Members of CSPRA are just a few of the many entities that comprise a vital link in the flow of information for these purposes and provide services that are widely used by constituents in your state. Collectively, CSPRA members alone employ over 40,000 persons across the U.S. The economic and societal activity that relies on entities such as CSPRA members is valued in the trillions of dollars. Our economy and society depend on value-added information and services that includes public record data for so many important aspects of our daily lives and work.

We are writing to express our concerns about AB 2880 and join with several other organizations that have pointed out the impact of this legislation on citizen speech, open government, and access to public records. Specifically we join in the critique provided in a June 6th letter signed by the Electronic Frontier Foundation and 22 other groups concerned about the bill. We do not see any need for this broad new statutory copyright regime for public records and find it antithetical to suggest that public records need to be protected from the public. We favor targeted to solutions to problems and intelligently enhancing access rather than sweeping legal changes that will undoubtedly have negative unintended consequences for public records access and open government.

Public records are for all to use as they see fit under the law and need to be available to all without unduly burdensome categorical or legal limitations. The effect on public access of

any new limitations needs to be understood and carefully considered to make sure the critical resource of public records continues to flow and support our civic and economic needs. Please remain vigilant in protecting open public access to public records. Thank you for your consideration of our input.

Regards,

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Elam Herr

**Comments on the Office of Open Records draft regulations on the Right-to-Know Law,
Title 51, Pa Code, Chapter 77, Appeals Process.**

Page 3, Section 77.5 (*definitions*): The subcategories under “personal information” should be revised so that they are grammatically consistent. Would also question why: “(ii) individual’s financial institution account information,” “(v) individual employee contributions to retirement plans and investment options,” “(vi) individual employee contributions to health care benefits and other benefits,” and “(vii) Individual employee contributions to charitable organizations” are part of one’s personal information that may be released under the RTKL? It would seem that “(i) individual information enumerated in the RTKL” would be sufficient to cover those areas to be released.

Page 4, Section 77.5 (*definitions*): Would suggest the following as an alternative to the existing wording, “An agency or entity alleged to be subject to the RTKL that received a request for records and is the subject of an appeal filed by a requester.”

Page 4, Section 77.6 (*computation of time*): There are several instances in this section where consistent terminology should be used, i.e. “time will start,” “deadline will start,” “time will accrue,” and “time begins.”

Page 4, Section 77.6 (a) (2) (*computation of time*): Should the sentence read “... notice under 901 and 902 of the RTKL, ...”

Page 6, Section 77.21 (*registration of open-records officers*): Should this include an alternative ORO if one has been appointed?

Page 6, Section 77.22 (b) (*general notice*): Isn’t this requirement excessive? How many times does an agency have to provide this notice, and in how many of the listed methods does it have to be listed in order to guarantee that an agency has provided adequate notice? Also, since the agency has to provide notice under Section 77.25, is this requirement necessary?

Page 7, Section 77.23 (1) (*third party interest policy*): Typo error at end of parenthetical phrase.

Page 7, Section 77.23 (2) (*third party interest policy*): Does this subsection require the agency to redact the personal information if the third party request that it be redacted under Section 77.25? If yes, then we would suggest the section read: “the agency shall redact the personal ...”

Page 7, Section 77.24 (*request for records containing the personal information of third parties*): This section seems wordy and could be rewritten. As written I am not sure who’s “reasonable

belief” it refers to, the individual whose personal information is involved or is it the personal belief of the ORO?

Page 7, Section 77.25 (a) (*notice to third parties of the release of their personal information in which there is a reasonable expectation of privacy*): How is the written notice to be provided? How does the agency know when the “5 business day clock” is to begin? Subsection (a) (1) seems to contradict subsection (a) in that (a) (1) states that the notice will be released on a certain date, and (a) states that the agency will grant access to the records “5 business days after receipt.”

Page 9, Section 77.42 (e) (*timely filing of appeal required*): If it is the failure of the OOR to receive an appeal due to the OOR’s administrative breakdown, why should the OOR have the benefit to “choose” whether to accept the appeal?

Page 11, Section 77.47 (c) (*deficient appeal*): Why does a “deficient appeal” toll the appeal period? If someone does not get everything in, why should they get the benefit from tolling the deadline?

Page 13, Section 77.73 (a) (*additional information*): Not sure this reads right. Should one be admitting into “evidence” into evidence? Seems to be redundant.

Page 13, Section 77.73 (b) (*additional information*): The word “contain” should be “containing.”

Page 13, Section 77.74 (e) (*agency notice of appeal to third parties and agency contractors or vendors*): This section seems to contradict Section 77.23 (2). Section 77.23 (2) reads that the agency shall redact the personal information if the third party objects to the releasing of the information, while this section state that the ORR may release it if they so desire.

Page 14, Section 77.75 (a) (*request for direct interest participant status*): The “comma” should be deleted.

Page 17, Section 77.103 (b) (*receiving records submitted for in camera inspection*): This section stipulates that even if the submission is not complete or in compliance the appeal officer may continue with an in camera inspection. What is the basis for this action? What or who determines that the inspection is to proceed, and what are the criteria that will determine the “basis of justice, fairness and the expeditious resolution of the appeal.”

Page 17, Section 77.103 (c) (*receiving records submitted for in camera inspection*): It is redundant to require the appeals officer to provide a copy of the in camera inspection index since the submitting party already has to provide it.

Page 17, Section 77.103 (c) (3) (*receiving records submitted for in camera inspection*): Who is an “unauthorized person” or better yet who is an “authorized person?”

Page 18, Section 77.104 (d) (*maintaining the confidentiality of records submitted for in camera inspection*): Is a “person authorized” to review the records the same as the “appeals officer?” If not, who is a “person authorized” to review the records?

Page 19, Section 77.106 (b) (*returning records submitted for in camera inspection*): Should the envelope also be “sealed” along with being marked confidential?

Page 19, Section 122 (a) (*procedure for scheduling a hearing*): In what circumstances will hearings not be open to the public? Who makes that decision? Is there any criteria that determines that decision?

Page 22, Section 129 (a) (*recording of hearings*): Who makes the determination that the hearing officer will not omit anything from the record?

Doug Hill



COMMENTARY ON PROPOSED OFFICE OF OPEN RECORDS REGULATIONS

Title 51 Pa. Code
Part IV. Office of Open Records
March 31, 2017

77.1. Purpose.

No comments

77.2. Scope of part.

No comments

77.3. Liberal construction.

No comments

77.4. Forms.

Does this give the OOR capability to pass judgment on forms used by agencies anywhere in their RTKL administrative process, including electronic forms, particularly where the regulation requires the agency to develop a policy or notice relative to the filing or appeal process?

77.5. Definitions.

Electronic transmission

While it may not be needed in the regulation there should be an understanding that technology limitations, including transmission capacity and security protocols, may limit the ability to transmit data and records electronically in every circumstance.

Personal information, Reasonable expectation of privacy

The establishment of a "reasonable expectation" seems to be an appropriate standard. There are records, such as recorded mortgages, where financial institution information (subpart ii) is the point of the public filing. To confirm, does the "reasonable belief" afford a protection that removes these types of records from the third party notice and redaction requirements found elsewhere in the regulation, given that the third party should understand the nature of the record? Should that point be made more clearly in (i) under *Reasonable expectation*, and should (ii) be expanded to include this concept?

Requests

The requirement of (ii) for any and every agency employee to be knowledgeable and responsive may be overly broad, particularly since it need not be a citation but simply a "reference;" for example, if the requester asks as obliquely using "RTK" or its federal sibling "FOIA" abbreviations?

77.6. Computation of time.

(a)(3)(i) Allowance of 3 mailing days. The experience of counties, affirmed by the USPS, is that the shift to more regionalized sorting centers now creates an expectation of up to four days for in-state mail.

77.7. Requests made for a commercial purpose.

(b) Fee schedule for commercial purpose. The RTKL gives specific capability to the local agencies to develop fee schedules relating to market value of records sought for commercial purpose, tied to both local economies and the unique nature of those records. We would like a better understanding of the basis on which the OOR would make the determinations on commercial-use fee schedules.

77.21. Registration of open-records officers.

No comments

77.22. General notice.

(a) Public notice of personal information. Please cite the statutory basis for this notice. Can the statement be on the same posting as that for process and fees? Is the notice to contain the nature of personal information the records contain or is it simply, as it appears, a generic "may contain personal information"? Can it include a statement of records containing personal information are subject to disclosure (are not protected) based on the nature of the record (e.g. recorded mortgages), based on the record, by being governed by another statute, falling outside the protections of the RTKL (e.g. election records), or based on the record not being subject to affirmative redaction requirements (e.g. bound record books shelved and available to direct public inspection).

(b) Notice to individuals. As worded, while the intent appears to be a published aggregate notice, the phrase "to provide notice to individuals" will be interpreted by some to mean specific individual notice. As is the case for (a), please cite the statutory basis for this notice. The frequency and durability is missing; is this a once-and-done, or published periodically? If it is a once-and-done, is there an obligation to republish if storage circumstances or media change, or if different classes of records are developed?

77.23. Third party interest policy.

Is the reference to "reasonable expectation of privacy" sufficient for an agency to conclude that the redaction requirement at (2) is applicable if the agency concludes the expectation is not reasonable based on the nature of the record? The point is to assure that the mere third party belief is not sufficient to require redaction upon objection.

77.24. Requests for records containing the personal information of third parties.

(a) Determination of third party personal information. As noted in the definitions at 77.5, the issues of third party notice and standing, as well as redaction, hinge on the capacity for agency determination of "reasonable expectation," and clarity on that point is important.

77.25. Notice to third parties of the release of their personal information in which there is a reasonable expectation of privacy.

(a) Requirement for notice. Elsewhere, electronic notice is permitted. Can this be written to permit electronic notice to qualify as written notice?

(b) Extension requirement. For clarity, the phrase should read “to respond to the request in order to allow third parties ...”; as written, it seems like it is a “request to allow third parties ...”

(c) Redaction. Reference the comments made earlier (e.g. 77.23(2)) on agency determination regarding reasonable expectation.

77.26. Notice to contractors and vendors.

No comments

77.27. Preserving responsive records during the request and administrative appeal process.

No comments

77.41. Communications and filings generally.

No comments

77.42. Timely filing of appeal required.

(c) The presumption is appreciated.

(e) Exceptions on untimely appeals. This is vague, and if it remains should have clarity so as not to affect the balance of rights and duties among parties. What is the nature and durability of the exception? Is it something temporary or incidental, is it an accident, is it something undetected in system design (procedural or technological)? Is an underperforming employee, unscheduled employee leave, or lack of contingency planning an “administrative breakdown?”

77.43. Method of filing an appeal.

(b) Paper requirements. We recommend removing the 8.5 x 14 option; many agencies have abandoned that standard and so receipt of filings from other parties could be at minimum problematic for the agency’s record management purposes.

77.44. Determination of filing date.

No comments

77.45. Form and contents of appeal.

No comments

77.46. Docketing of appeals.

(c) Discharge of duties. Does the final phrase give OOR some extra-statutory basis for denying access to its own records?

77.47. Deficient appeal.

(a) Lack of documents. This is the correct approach and is appreciated.

(b) Order for missing documents. Given that the appeal was voluntarily filed, the OOR should issue an advice, rather than an order.

(b)(2) Refiling. The requirement that all related components and documents be refiled when an appeal is refiled is appropriate, not just for convenience but also to give clarity to which elements continue to apply to the matter on appeal.

77.48. Entry of appearance.

(a) Counsel not required. Does this create any procedural issues, when compared to a party represented by counsel, if a matter is subsequently appealed to the courts, or is the record established at section 1303(b) of the statute sufficient to assure parity?

77.49. Tolling.

The intent and application of this is unclear.

77.50. Public access to OOR appeal files.

(a) Mediation records. The exclusion is appropriate and consistent with other mediation processes.

(c) Bulk distribution. The idea is discernable, even if the term is not defined.

77.71. Submission of filings after the docketing of an appeal.

Supplemental filings. The provision should include a clear standard for deadlines, given the need for review by all parties.

(2) File format. Consideration should be given to the capacity of all parties to access the file formats. Will the OOR maintain utilities for file conversion on behalf of parties who cannot access an OOR-accepted file type?

77.72. Deciding procedural matters.

No comments

77.73. Additional information.

(b) Exemption log. Does the phrase "unless otherwise directed" permit the officer not only to excuse from submittal, but also require additional information? To be clear, the section does not now require agencies to develop and maintain exemption logs as a matter of course?

(b)(1) If it is a class of records the date may not be discernable

(b)(3) "Status" is not clear – does this mean title/office? The requirement to list recipients is likely immaterial, and at some level could be either burdensome or impossible to fulfill based on either volume or anonymous access.

77.74. Agency notice of appeal to third parties and agency contractors or vendors.

(a) Personal notice. The context indicates notice is personal notice, not by publication. Are there circumstances where, recognizing the impracticality of personal notice, notice by publication would be sufficient?

(b) Timing and content of notice. First, it is unclear whether the seven business days means the date of the Notice of Appeal or the date of receipt of the Notice. Second, what is encompassed by "providing the entire contents" – is this a constructive summary of the matter or is it truly the entire contents of the case file? If the former it will require preparation by counsel, but if the latter the cost and assembly time could be prohibitive, particularly if notice is individual. Even a simple one-page notice can be complex and time-consuming if the volume of third parties is sizable.

(c) Proof of notice. The "proof of notice" is not defined. We would oppose proof of receipt for individual notice, but even proof of sending is not defined. A good faith standard should be included in any case; some records may have no contact information regarding the subjects and even where there is, as records age the veracity of contact information in the record diminishes. The agency should not be liable either for a fatal procedural flaw in meeting this obligation or for the potential release of protected information regarding individuals who did not receive the notice. While the latter is partially addressed in (e), where the number of third parties is large the likelihood is that the OOR will apply some sufficiency standard even in the face of probability that not all third parties were notified, resulting in potential liability to the agency for the release. Similarly, the agency should not be required to search for individuals for whom it does not have contact information or for whom contact information is no longer current (even if notified of failed delivery). And, as in (b), the question of date of notice versus receipt of notice should be clarified.

(e) Withholding release of third-party records. See the notes in (c). An additional comment relates to larger or older record sets where there are likely third parties that did not receive notice. We recommend all be withheld or, in the alternative, there be some relief for liability for release of records for third parties without contact information. Given the complexity of these record sets there may be no practical means to identify which fall into that category and, even where this is possible, the time and effort could be prohibitive.

77.75. Request for direct interest participant status.

(b) Timing. The extended exception should be deleted in its entirety. It renders the stated deadline meaningless, and gives the agency and appellant no opportunity to examine or respond.

(e) Action on a written request. The purpose is not clear; is it a written request from the agency and appellant and if so why must they formally make the request rather than simply receive it by right. How does this compare to (g)?

(f) Grant of status. The parties to the appeal should be afforded the opportunity to present objections to the grant of interest participant status.

77.76. Appeals officers extending the final order deadline.

(b) Stay of final order. While implicit, this does not actually indicate the officer can or should modify the decision based on the ruling of the court. At the same time, a ruling by a common pleas court may not have an effect for agencies in other districts, and so the appeals officer should have some reasonable discretion to still make a ruling within his/her view of the facts and law.

(c) Extension for submittal. The extension should also be permissible for probable delays other than review, including for example acquisition or compilation.

77.91. Participating in the mediation process.

No comments

77.92. Facilitating the mediation process.

No comments

77.93. Concluding the mediation process.

(b)(2) Appeal transfer. Taken with 77.94(a) is it correct that the appeal before the appeals officer is on a de novo basis, or are just mediator records excluded?

77.94. Records of the mediation process.

(a) Mediation records. See 77.93(b)(2), above.

77.101. Ordering the in camera inspection of records.

No comments

77.102. Submitting records to the OOR for in camera inspection.

(b)(4) Author and recipient. See commentary on 77.73(b)(3), above.

77.103. Receiving records submitted for in camera inspection.

No comments

77.104. Maintaining the confidentiality of records submitted for in camera inspection.

No comments

77.105. Submitting records submitted for in camera inspection as part of the certified record for appellate review.

No comments

77.106. Returning records submitted for in camera inspection.

No comments

77.107. Disposing of abandoned in camera records.

Disposal on abandonment. While there is no objection to the provision, we are curious for examples on how this could happen with agency records.

77.121. Decision to hold a hearing.

No comments

77.122. Procedure for scheduling a hearing.

Editorial: ... the following procedures are to be followed:

77.123. Hearing calendar.

No comments

77.124. Prehearing conference.

No comments

77.125. Issuance of subpoenas.

No comments

77.126. Depositions.

No comments

77.127. Purpose of hearing.

No comments

77.128. Authority delegated to appeals officers.

No comments

77.129. Recording of hearings.

No comments

77.130. Order of presentation.

(c), (d) and (e) Status of direct interest participant. The direct interest participant should not be permitted to cross examine, or to make a closing argument.

77.131. Limiting the number of witnesses.

No comments

77.133. Stipulations.

No comments

77.134. Evidence.

No comments

77.135. Procedure following hearing.

No comments

77.151. Petitions for reconsideration.

No comments

77.161. Final orders.

No comments

77.162. Effect of final orders if no appeal is filed.

No comments

77.163. Judicial review of the final order.

No comments

77.164. Record on appeal.

No comments

Tom Howell

Title 51 Pa. Code

Part IV. OFFICE OF OPEN RECORDS

CHAPTER 77. APPEALS PROCESS

Subchapter A. GENERAL PROVISIONS

§ 77.1. Purpose.

The purpose of this part is to promote the orderly and expeditious determination of appeals of decisions of Commonwealth and local agencies under the RTKL.

§ 77.2. Scope of part.

(a) This part governs practice and procedure before the OOR.

(b) Except when inconsistent with this part and as provided in paragraph (c), 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) is applicable to practice and procedure before the OOR.

(c) Sections 31.2, 31.13, 31.25, 33.1—33.4, 33.11, 33.15, 35.21—35.23, 33.31, 33.32, 33.34—33.37, 33.42, 33.51, 33.61, 35.1, 35.2, 35.5—35.7, 35.9—35.11, 35.14, 35.19, 35.20, 35.23, 35.24, 35.35—35.41, 35.45, 35.48, 35.51, 35.54, 35.55, 35.101, 35.103, 35.127, 35.201—35.207, 35.211—35.214, 35.221, 35.225, 35.226, and 35.231—35.233 of 1 Pa. Code do not apply to practice and procedure before the OOR.

§ 77.3. Liberal construction.

(a) This part will be liberally construed to secure the just, speedy and inexpensive adjudication of every applicable appeal. The OOR or appeals officer at any stage of an action or proceeding may disregard an error or defect of procedure that does not affect the substantive rights of any party or may waive a requirement of this part when necessary or appropriate if the waiver does not adversely affect a substantive right of a party.

(b) This section applies in proceedings involving  se litigants.

(c) This section supersedes 1 Pa. Code § 31.2 (relating to liberal construction).

§ 77.4. Forms.

The OOR may publish and distribute forms required to implement this subchapter.

§ 77.5. Definitions.

(a) The following words and terms, when used in this part, have the following meanings:

Address—For the purposes of section 703 of the RTKL (65 P.S. § 67.703) only, the e-mail or postal location listed by a requester to which  agency will direct its response.

Agency—A Commonwealth or local Agency as defined in section 102 of the RTKL (65 P.S. § 67.102).

Agency employee—An individual employed by an agency.

Appeals officer—An attorney licensed in this Commonwealth designated by the Executive Director



Commercial purpose—

(i) The use of a record for any of the following:

- (A) For the purpose of selling or reselling any portion of the record.
- (B) To obtain names and addresses from the record for the purpose of commercial solicitation.
- (C) In a manner through which the requester can reasonably expect to make a profit.

(ii) The term does not include the use of a public record by an educational or noncommercial scientific institution for scholarly or scientific research, or the use of a public record by the news media, a journalist or an author for news gathering or dissemination in a newspaper, periodical, book, digital publication, or radio or television news broadcast.

Deemed denial—The failure of an agency to issue a timely response to a request under section 901 or 902(b) of the RTKL (65 P.S. §§ 67.901 and 67.902(b)).

Deficient appeal—An appeal received by the OOR that does not include information or documents, or both, required under the RTKL or § 77.46 (relating to docketing of appeals), or both.

Direct interest participant—A person or entity, other than the requester or agency, who has been granted the ability to participate before the OOR under § 77.75 (relating to request for direct interest participant status).

Electronic transmission—The sending or submitting of materials through e-mail, facsimile or other online method accepted by the OOR.

Executive Director—The Executive Director of the OOR.

Extension notice—Written correspondence from an agency invoking an extension of time to respond to a request under section 902 of the RTKL.

Final order—The written final determination of the OOR issued by an appeals officer in an appeal concerning access to a record



In camera inspection—A proceeding during which an appeals officer privately reviews records claimed to be nonpublic and submitted by an agency or direct interest participant.

OOR—The Office of Open Records of the Commonwealth.

Open-records officer—An individual designated by an agency under section 502(a) of the RTKL (65 P.S. § 67.502(a)).

Party—The requester, an agency or direct interest participant, if applicable.

Personal information—The term includes  of the following:

- (i) Individual information enumerated in the RTKL.
- (ii) An individual's financial institution account information.
- (iii) Forms required to be filed by a taxpayer with a Federal or Commonwealth taxing authority.
- (iv) Individual employee benefit election information.
- (v) Individual employee contributions to retirement plans and investment options.
- (vi) Individual employee contributions to health care benefits and other benefits.
- (vii) Individual employee contributions to charitable organizations.
- (viii) An individual's home address.
- (ix) Information that affects the legal or safety interests of an individual.

Petition for reconsideration—An application for a readjudication of an appeal based on the contents of the record before the OOR.

Reasonable expectation of privacy—

- (i) An individual's reasonable belief that personal information provided to an agency will not be disclosed to the public.
- (ii) The term does not include a time response log or any record that is  public in nature as established by Federal or Commonwealth statute, common law, regulation  or local agency ordinance.

Request—A written communication seeking a copy of or access to a record under section 703 of the RTKL that is either:

- (i) Sent or addressed to an agency's open-records officer.
- (ii) Sent to an employee of the administrative office of the agency, but contains a citation or reference to the RTKL. 

Respondent—An agency or entity alleged to be subject to the RTKL that either responded or did not issue a response to a request for records that is the subject of an appeal filed by a Requester.

RTKL—The Right-to-Know Law (65 P.S. §§ 67.101—67.3104).

Third party—An individual, including an agency employee, who has provided personal information to an agency  an entity which has contracted with an agency.

Time response log—A log created, received, maintained or retained by a public safety answering point (PSAP), as defined by 35 Pa.C.S. § 5302 (relating to definitions), or a dedicated emergency response organization (DERO), as defined by 35 Pa.C.S. § 7332 (relating to definitions), containing all of the following information:

- (i) The time the call was received by the PSAP.
- (ii) The time the PSAP contacted or dispatched the DERO for response.
- (iii) The time the DERO responded.
- (iv) The time the DERO arrived on the scene.
- (v) The time the DERO became available.
- (vi) The address of the incident or the street block identified, the cross street or mile marker nearest the scene of the incident.

Transaction or activity of an agency—The administration, application, execution, implementation or performance of government business.

- (b) Subsection (a) supplements 1 Pa. Code § 31.3 (relating to definitions) except for “agency,” which supersedes the definition of “agency” in 1 Pa. Code § 31.3.

§ 77.6. Computation of time.

- (a) Except as otherwise provided by law, computation of time will begin as follows:

- (1) For an extension notice or response to a request under sections 901 and 902 of the RTKL (65 P.S. §§ 67.901 and 67.902), time will start on the first business day after the date the written request is received by the open-records officer of the agency.

- (2) For an extension notice under and 902 of the RTKL, the calculation of the extended deadline will start on the first calendar day after the 5 business day response period under section 901 of the RTKL, even if the extension is invoked prior to the 5th business day.

(3) For appeals filed under section 1101 of the RTKL (65 P.S. § 67.1101), time will accrue on the first business day after the mailing date of the agency's response or a deemed denial, whichever is earliest.

(i) Before filing an appeal, a requester shall allow 3 mailing days for receipt of the agency's response or extension notice. Failure to allow 3 mailing days before filing an appeal will result in the appeal being dismissed as premature. An appeal will not be considered premature under this subsection if any of the following occur:

(A) The request is submitted electronically.

(B) The request does not include a physical mailing address.

(C) The request asks the agency to respond electronically.

(ii) If an agency's response or extension notice is untimely (beyond the 5 business day deadline) and the request is deemed denied as a result, the appeal shall be filed within 15 business days of the date the request is deemed denied. For the issuance of a final order of the OOR as required under section 1101 of the RTKL, time begins on the first day after the receipt of the appeal by the OOR.

(4) For the filing of a petition for review of a final order issued by the OOR under section 1301 of the RTKL (65 P.S. § 67.1301), on the "issued and mailed" date on the final page of the final order.

(b) Once the first day has been determined, count each business day or each calendar day depending on which is specified in the applicable section of the RTKL. If unspecified, count by calendar days. The computation of time includes the last day in the calculation. When the last day falls on a Saturday, Sunday or holiday, it will not be counted and the period will run to the next business day.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 31.12 (relating to computation of time).

§ 77.7. Requests made for a commercial purpose.

(a) The uniform request form developed by the OOR under section 505(a) of the RTKL (65 P.S. § 67.1301) will require a requester to certify whether the request is for a commercial purpose. The certification must be made subject to 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities). A request form developed by an agency may also include this requirement.

(b) The OOR may establish a separate fee schedule for agencies responding to a request for a commercial purpose.

Subchapter B. PROCEDURE FOR FILING REQUESTS

§ 77.21. Registration of open-records officers.

- (a) An agency shall register its open-records officer with the OOR:
- (1) On an annual basis, before February 1 of each year.
 - (2) Within 30 days of when a new open-records officer has been designated.
- (b) An agency's registration must include:
- (1) The name of its open-records officer.
 - (2) The contact information of its open-records officer, including a mailing address.
 - (3) The number for receiving RTKL requests submitted by facsimile, if used.
 - (4) The e-mail address for receiving RTKL requests, if used.
 - (4) The URL for the agency's website, if the agency maintains a website.

§ 77.22. General notice.

- (a) The agency shall post a public notice at its administrative office, any agency office where personal information is collected and, if the agency maintains a website, on the agency's website, containing all of the following information:
- (1) The name of the agency issuing the notice.
 - (2) A statement that public records in its possession may contain personal information and may be subject to access under the RTKL.
 - (3) A brief description of the procedures through which third parties can object to the release of their personal information in which there is a reasonable expectation of privacy in response to a future request.
 - (4) The name, address, telephone number and e-mail address of the agency open records officer or agency employee from whom an interested individual may obtain additional information.
- (b) The notice required in subsection (a) shall also be provided through the least burdensome method or methods reasonably likely to provide notice to individuals whose personal information is in the possession of the agency, including any combination of the following:
- (1) Agency newsletter.
 - (2) Agency employee handbook.
 - (2) E-mail list.
 - (3) Press release.
 - (4) *Pennsylvania Bulletin*.
 - (5) Local newspaper of general circulation.
 - (6) Local or State law journal.
 - (7) Statement on agency forms which collect personal information.

§ 77.23. Third party interest policy.

Each agency shall develop a policy to allow third parties to object to the release of personal information in which there is a reasonable expectation of privacy prior to the agency's release of that information in response to a request. The agency's policy must ensure that:

- (1) The agency complies with notice requirements under §§ 77.22 and 77.25(a) (relating to general notice; and notice to third parties of the release of their personal information in which there is a reasonable expectation of privacy.).
- (2) The agency redacts the personal information of third parties that object to the release of their personal information under § 77.25(c).

§ 77.24. Requests for records containing the personal information of third parties.

- (a) On receipt of a request for records, an agency shall determine whether the request seeks a record that contains a third party's personal information in which there is a reasonable expectation of privacy.
- (b) If the records contain information described in subsection (a), the agency shall determine whether the information in which there is a reasonable expectation of privacy is contained in a public record.
 - (1) If a third party's personal information in which there is a reasonable expectation of privacy is contained in a public record and the third party's privacy interest in withholding personal information outweighs the public interest in the requested information, the agency shall redact the third party's personal information in accordance with section 706 of the RTKL (65 P.S. § 67.706).
 - (2) If a third party's personal information in which there is a reasonable expectation of privacy is contained in a public record and public interest in the requested information outweighs the third party's privacy interest in withholding personal information, the agency may release or withhold third party personal information in accordance with sections 506(c) and 708 of the RTKL (65 P.S. §§ 67.506(c) and 67.708) and § 77.25 (relating to notice to third parties of the release of their personal information in which there is a reasonable expectation of privacy).

§ 77.25. Notice to third parties of the release of their personal information in which there is a reasonable expectation of privacy.

- (a) If the agency intends to grant access to records to a requester under § 77.24(b)(2) (relating to requests for records containing the personal information of third parties), the agency shall provide written notice to the third parties whose personal information in which there is a reasonable expectation of privacy is contained in the records within 5 business days of its receipt of the request containing the third party's personal information. The notice must include all of the following information:

(1) The date on which the records will be released.

(2) The deadline for the third party to submit an objection to the agency, which shall be 5 business days before the date the records will be released.

(b) The agency shall invoke a 30-day extension under section 902 of the RTKL (65 P.S. § 67.902) to respond to the request to allow third parties to enter any objection to the release of records.

(c) The agency shall redact the personal information of individuals who object to the release in response to the notice provided under subsection (a).

§ 77.26. Notice to contractors and vendors.

On receipt of a request for records in the possession of an agency's contractor or vendor that are directly related to a contracted nonancillary agency function, the agency shall notify the agency's contractor or vendor of the request and obtain copies of all public records responsive to the request that directly relate to the contracted nonancillary agency function.

§ 77.27. Preserving responsive records during the request and administrative appeal process.

(a) An agency's receipt of a request stays the disposition of records documenting a transaction or activity of the agency that are reasonably responsive to that request. Absent the receipt of a request, an agency may dispose of its records in a manner consistent with applicable agency records retention policies.

(b) An agency may not dispose of records reasonably determined to be responsive to a request until 60 calendar days after the last administrative or judicial appeal period has expired or the expiration of the applicable records retention period, whichever is later.

Subchapter C. PROCEDURE FOR FILING APPEALS

§ 77.41. Communications and filings generally.

(a) Communications, appeals, supplementary documents and all other correspondence shall be addressed as follows unless otherwise designated:

Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street - Plaza Level
Harrisburg, PA 17120-0225
Facsimile: 717-425-5343
E-mail: openrecords@pa.gov

- (b) The OOR will be open from 9 a.m. to 5 p.m. each weekday, except as follows:
- (1) A legal holiday designated by section 1 of the act of May 31, 1893 (P.L. 188, No. 138).
 - (2) Saturdays and Sundays.
 - (3) A day declared a holiday by the Office of Administration.
 - (4) Any other day on which the OOR is closed.
- (c) Appeals submitted through postal mail or in person that are received after 5 p.m. will be stamped or deemed as having been received on the following business day.
- (d) Appeals submitted by electronic transmission will be accepted up to 11:59:59 p.m. and will be date-stamped as being received on the same business day as they are transmitted, unless the date the appeal is transmitted falls outside a business day of the OOR in which case the appeal will be deemed as having been received on the following business day.
- (e) Subsections (a)—(d) supersede 1 Pa. Code § 31.5 (relating to communications and filings generally).

§ 77.42. Timely filing of appeal required.

- (a) An appeal before the RTKL shall be filed with the OOR within the earliest of either of the following:
- (1) Fifteen business days of the mailing date of the agency's response.
 - (2) Fifteen business days of the agency's deemed denial of a request.
- (b) Appeals received after the statutory deadline will be dismissed.
- (c) The OOR will presume that a letter from an agency was in fact properly mailed and timely received. Evidence that a letter has been mailed in the ordinary course of agency business will be sufficient to permit the OOR to find that the letter was in fact received by the party to whom it was addressed. To rebut this presumption, it is not sufficient merely to deny receipt.
- (d) If a requester is incarcerated, the OOR will consider appeal submissions timely filed with evidence that the appeal was placed into the institutional mail within the 15 business day appeal period provided under section 1101(a)(1) of the RTKL (65 P.S. § 67.1101(a)(1)).
- (e) If an appeal fails to be received by the OOR due to an administrative breakdown involving the OOR's procedures or practices, the OOR may choose to accept an otherwise untimely appeal.
- (f) Subsections (a)—(e) supersede 1 Pa. Code §§ 31.11 and 31.15 (relating to timely filing required; and extensions of time).

§ 77.43. Method of filing an appeal.

(a) *Methods of filing.* The OOR will accept an appeal filed by any of the following methods:

- (1) Personal delivery.
- (2) Postal or commercial delivery service.
- (3) Electronic transmission.

(b) *Paper requirements.*

- (1) Except as provided in paragraphs (3) and (4), an appeal filed by personal delivery or through a postal or commercial delivery service must be submitted on 8 ½-inch x 11-inch or 8 ½-inch x 14-inch paper.
- (2) Subsequent hard copy submissions after an appeal has been docketed should be submitted on 8 ½-inch x 11-inch or 8 ½-inch x 14-inch paper to the extent possible.
- (3) The OOR may dismiss a hard copy appeal that is not submitted on 8 ½-inch x 11-inch or 8 ½-inch x 14-inch paper, unless the party filing the document specifically seeks and is granted permission to file nonconforming papers.
- (4) The OOR will not dismiss an appeal containing paper that does not conform with the size requirements in this subsection if either:
 - (i) The request is submitted by the requester to an agency on a form provided by the agency that does not conform to the size requirements listed above.
 - (ii) The agency's response to a request is provided on paper that does not conform to the size requirements in this subsection.

§ 77.44. Determination of filing date.

Except as provided in § 77.41(c) and (d) (relating to communications and filings generally), the OOR will determine the filing date of an appeal as follows:

- (1) Personal delivery. The date indicated on the OOR's time and date stamp.
- (2) Postal or commercial delivery service. The date indicated on the OOR's time and date stamp.
- (3) Electronic transmission. The date of receipt indicated on the OOR's computer network or facsimile machine.

§ 77.45. Form and contents of appeal.

(a) An appeal must be in writing and include the following documents and information:

- (1) A copy of the request filed with the agency.
- (2) A copy of the agency's response, if any.

- (3) A statement containing grounds on which a requester believes the requested record to be public.
- (4) A statement addressing any grounds stated by the agency for denying the request.
- (5) Other information the requester believes to be relevant.

(b) An appeal may be submitted using the appeal form found on <http://openrecords.pa.gov>.

§ 77.46. Docketing of appeals.

- (a) On receipt of an appeal, the OOR will determine if an appeal contains the information and documents required under § 77.45 (relating to form and contents of appeal) and will docket and number the appeal.
- (b) The OOR will advise the requester and agency of the docket number, the deadline for submitting additional information and the contact information for the assigned appeals officer by sending an official Notice of Appeal.
- (c) The OOR will maintain a docket of all proceedings. Each proceeding is assigned a number. The OOR will make the docket available for inspection and copying by the public under the RTKL insofar as consistent with the proper discharge of the duties of the OOR.

§ 77.47. Deficient appeal.

- (a) The OOR will consider an appeal that does not include the documents required under § 77.45(a)(1) and (2) (relating to form and contents of appeal) to be a deficient appeal.
- (b) On receipt of a deficient appeal, the OOR will issue an order requiring the requester to provide the missing documents required under § 77.45(a)(1) and (2) within 7 calendar days.
 - (1) If the 15 business day appeal period has expired before the OOR's receipt of a deficient appeal, the OOR will dismiss the deficient appeal without notice of the deficiency.
 - (2) In the event an appeal is dismissed, a requester may refile the appeal unless the appeal period provided under section 1101(a)(1) of the RTKL (65 P.S. § 67.1101(a)(1)) has elapsed. All required components and documents, including any submitted in the dismissed appeal, shall be refiled with the OOR when an appeal is refiled.
- (c) The filing of a deficient appeal tolls the 15 business day appeal period provided under section 1101(a)(1) of the RTKL, except as provided by subsection (b)(1).

§ 77.48. Entry of appearance.

- (a) A party is not required to be represented by counsel.
- (b) A party may be represented by counsel in good standing and admitted to practice before the highest court of any state.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 31.21—31.24.

§ 77.49. Tolling.

Except as provided by § 77.46(c) (relating to docketing of appeals), there will not be tolling of the deadlines in this part based on the receipt of an inquiry from the requester about the denial of a request.

§ 77.50. Public access to OOR appeal files.

(a) The contents of an appeal filed with the OOR and subsequent submissions related to that appeal are subject to public access, except as provided in §§ 77.94 and 77.104 (relating to records of the mediation process; and maintaining the confidentiality of records submitted for in camera inspection).

(b) Individuals making a submission to the OOR shall ensure that only information intended for public access is included in the submission. An individual's failure to exclude sensitive information from a submission does not affect the public's right to access OOR appeal files, although the OOR may in its discretion redact the information enumerated in this subsection prior to releasing an appeal file. All of following information may not be included in any document filed with the OOR, except as permitted in Subchapter F (relating to procedure for conducting in camera review):

- (1) Social Security numbers.
- (2) Financial account numbers.
- (3) Credit card numbers.
- (4) Driver's license numbers.
- (5) State identification numbers.
- (6) Minors' names and dates of birth.
- (7) Passwords and PINs.

(c) In response to a request for bulk distribution of electronic case records, information maintained in the OOR database used to log and track RTKL appeals is subject to public access except for a requester's telephone number, fax number, e-mail address, and street address. A requester's city, state, and ZIP code may be released.

Subchapter D. PROCEDURE FOR ADMINISTERING APPEALS

§ 77.71. Submission of filings after the docketing of an appeal.

After the OOR has docketed an appeal, a party may make supplemental filings.

- (1) A party shall provide one copy of all paper filings to the OOR, except as otherwise provided.

- (2) Parties shall provide electronic submissions in a file format accepted by OOR. The OOR will maintain a list of accepted electronic file formats on its website.
- (3) The appeals officer may extend the deadline for submissions.

§ 77.72. Deciding procedural matters.

- (a) The appeals officer will rule on procedural matters on the basis of justice, fairness and expeditious resolution of the dispute in the absence of a regulation, policy or procedure expressly governing appeals as set forth in the RTKL or by the OOR.
- (b) The appeals officer will consolidate matters if appropriate.

§ 77.73. Additional information.

- (a) The appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute.
- (b) The appeals officer may require the submission of an exemption log contain the following information, unless otherwise directed by the appeals officer:
 - (1) The date of the record.
 - (2) A description of the type of record (such as e-mail, memo or text message).
 - (3) The name and status of the author and each recipient of the record (such as attorney, county official or employee).
 - (4) A general description of the subject matter of the record.
 - (5) A citation to the legal basis on which each record is withheld or information redacted from the record.
- (c) An appeals officer may at any time seek additional information from a requester, agency and direct interest participant and will provide an appropriate deadline for submitting additional information.

§ 77.74. Agency notice of appeal to third parties and agency contractors or vendors.

- (a) In the event records requested contain the personal information of third parties that were withheld by the agency or are records held by an agency contractor or vendor, the agency shall notify those persons of the appeal before the OOR and advise them of their ability to participate under section 1101(c) of the RTKL (65 P.S. § 67.1101(c)).
- (b) Notice required under subsection (a) shall be accomplished within 7 business days of the date of official Notice of Appeal by providing the entire contents of the appeal as provided by the OOR, with notice that they may participate before the OOR under section 1101(c) of the RTKL.
- (c) The agency shall provide proof of the notice required under subsection (b) to the OOR within 7 business days of the date of official Notice of Appeal.

- (d) If the agency cannot provide notice as within the time required under subsection (b), the agency shall request an extension to provide the required notice and shall provide the OOR with an estimate of the length of time required to provide the notice. The OOR will grant a reasonable extension to allow the agency to provide the notice required under subsection (a) and submit proof of that notice as required by this section. The OOR will issue a final order within 30 days of the agency's submission of proof of notice.
- (e) The OOR will not order the release of a third party's personal information unless the agency provides proof of notice required under subsection (b) or (c) or the public interest in the requested information outweighs the third party's privacy interest in withholding personal information.

§ 77.75. Request for direct interest participant status.

- (a) A person may request direct interest participant status in an appeal by filing a written request to provide information, to appear before the assigned appeals officer or to file information in support of the requester's or agency's position.
- (b) A written request for direct interest participant status shall be filed within 15 days of the notice required under § 77.74 (relating to agency notice of appeal to third parties and agency contractors or vendors) or actual notice, whichever is later, except that a written request for direct interest participant status can be filed no later than:
 - (1) The date the appeals officer holds a hearing.
 - (2) The date the appeals officer issues a final order.
- (c) A written request for direct interest participant status shall be sent to the OOR, the agency involved in the appeal and the requester involved in the appeal.
- (d) A written request for direct interest participant status must explain the direct interest and why the person will be aggrieved by actions or adjudications of the OOR.
- (e) The appeals officer will act on a written request to provide information from persons seeking to participate as a direct interest participant.
- (f) The appeals officer will grant direct interest participation status to persons that establish that they will be aggrieved by actions or adjudications of the OOR.
- (g) The appeals officer will provide copies of a written request from a person with a direct interest to the requester and agency, as well as any documents thereafter submitted by a direct interest participant before ruling on the request.
- (h) The direct interest participant shall serve copies of anything submitted to the OOR on all parties.

(i) Subsections (a)—(e) supplements 1 Pa. Code §§ 35.27—35.32 (relating to intervention).

§ 77.76. Appeals officers extending the final order deadline.

- (a) The appeals officer may extend the deadline for a final order by up to 15 days by providing notice to all parties to the appeal. If a hearing or in camera review is ordered, the appeals officer may extend the deadline up to 90 additional days.
- (b) If the issue in an appeal pending before the OOR is substantially the same as an issue currently on appeal to a court of common pleas, the Commonwealth Court, or the Supreme Court, the appeals officer may stay the OOR's final order until 30 days beyond the date the appeal is decided.
- (c) If the agency requires additional time to prepare and submit evidence to the OOR due to a large amount of responsive records, the agency shall provide the OOR with an estimate of the number of documents being requested and the length of time that people charged with reviewing the request to conduct a document-by-document review. If the request involves documents in electronic format, the agency shall explain any difficulties it faces when attempting to deliver the documents in that format. The OOR may grant the additional time warranted so that the agency can reasonably discern whether any exemptions apply and appropriately develop the record before the OOR. The OOR will issue a final order within 30 days of an agency providing the supplemental submission.

Subchapter E. PROCEDURE FOR MEDIATIONS

§ 77.91. Participating in the mediation process.

- (a) The parties of an appeal may participate in the OOR Mediation Program.
- (b) The parties may agree to enter the mediation process at any time before the issuance of the final order.
- (c) To participate in the OOR Mediation Program:
 - (1) The parties shall agree in writing to participate in the mediation process
 - (2) The requester shall agree to extend the deadline to issue a final order until 30 days after the date the mediation process concludes.

§ 77.92. Facilitating the mediation process.

- (a) The mediation process begins when the parties consent to mediation and the OOR assigns the appeal to a mediator.
- (b) The mediator's role is to facilitate the mediation process in an effort to settle the contested issues between or among the parties. The mediator will not or may not make a decision on the merits of the issues.

§ 77.93. Concluding the mediation process.

- (a) If an agreement between the parties is reached through the mediation process, the requester shall withdraw the appeal before the OOR.
- (b) If the mediator or the parties determine that mediation is unsuccessful:
 - (1) The mediator shall send correspondence to the parties indicating that the mediation process is concluded.
 - (2) The OOR will transfer the appeal to an appeals officer who shall issue a final order.

§ 77.94. Records of the mediation process.

- (a) All written mediation communications and mediation documents sent by or submitted to a mediator or the OOR Mediation Program will be excluded from the public appeal file and disposed of securely at the conclusion of the mediation process in accordance with OOR records retention policies.
- (b) The OOR's mediation file will contain a mediator report that includes the docket number, the date the parties agreed to mediation, the parties' contact information, dates of mediation sessions, names of the mediators, the disposition of the mediation and the date mediation concluded.

Subchapter F. PROCEDURE FOR CONDUCTING IN CAMERA REVIEW

§ 77.101. Ordering the in camera inspection of records.

- (a) The appeals officer may order an in camera inspection of the records sought at the appeals officer's discretion, on the motion of a party or at the direction of a court on remand. See *Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 59 (Pa. Commw. Ct. 2016); *Office of Open Records v. Center Twp.*, 95 A.3d 354, 369 (Pa. Commw. Ct. 2014).
- (b) An appeals officer's grant of a request for in camera inspection may be conditioned on the requester's agreement to an extension of time to issue a final order.
- (c) The appeals officer shall issue an order directing the party to submit the records in accordance with the requirements of this subchapter.

§ 77.102. Submitting records to the OOR for in camera inspection.

- (a) Submissions of records for in camera inspection must include:
 - (1) A consecutively Bates numbered copy of the records contained in an envelope marked "CONFIDENTIAL" and labeled with the docket number of the appeal.
 - (2) An in camera inspection index referencing each record submitted.

- (b) The in camera inspection index must contain the following information, unless otherwise directed by the appeals officer:
 - (1) The Bates number or range of numbers where the record appears.
 - (2) The date of the record.
 - (3) A description of the type of record (such as, e-mail, memo, text message).
 - (4) The name and status of the author and each recipient of the record (such as, attorney, county official or employee).
 - (5) A general description of the subject matter of the record.
 - (6) A citation to the legal basis on which each record is withheld or information redacted from the record.
- (c) The in camera inspection index and records submitted for in camera inspection shall be provided to the OOR by one of the following methods, unless the records total 100 pages or more:
 - (1) Regular mail.
 - (2) Certified mail.
 - (3) E-mail.
 - (4) Hand delivery.
 - (5) Other forms of electronic transmission at the OOR's discretion.
- (d) If the records total 100 pages or more, the records shall be submitted in a format approved by the OOR.
- (e) The party shall provide a copy of the in camera inspection index to all parties to the appeal.
- (f) The party shall certify that the records submitted for an in camera inspection are true and correct and complete copies of the records at issue in the appeal and that the in camera inspection index accurately describes the content of the records. If a hearing is held, the party shall make available for direct and cross-examination the official who certified the accuracy of the records submitted for in camera inspection and the contents of the in camera inspection index.

§ 77.103. Receiving records submitted for in camera inspection.

- (a) The OOR will record the date records are received for in camera inspection.
- (b) The appeals officer will verify that the party submission complies with § 77.102 (relating to submitting records to the OOR for in camera inspection). If the submission fails to comply, the appeals officer may return the records, decline to inspect them or otherwise act on the request for in camera inspection on the basis of justice, fairness and the expeditious resolution of the appeal.
- (c) The appeals officer will confirm the receipt of records submitted for in camera inspection by:

- (1) Informing the parties of the date the records were received by the OOR.
- (2) Providing one copy of the in camera inspection index.
- (3) Certifying that neither the records submitted for an in camera inspection, nor their contents, will be disclosed to any unauthorized person, except as provided by court order or this subchapter.

§ 77.104. Maintaining the confidentiality of records submitted for in camera inspection.

- (a) Records submitted for in camera inspection will not be subject to public access.
- (b) The appeals officer will store records submitted for an in camera inspection and a copy of the in camera inspection index in a secure OOR file.
- (c) The appeals officer may print copies of the records for review and immediately destroy and discard duplicate copies after the need for review has passed. The appeals officer will secure all printed records in the same manner as records submitted to the OOR in a nonelectronic format.
- (d) A person authorized to review records submitted for in camera inspection may take notes referring to specific information contained in those records and secure the notes with the records submitted for in camera inspection.
- (e) References to a specific record submitted for in camera inspection, or the content of the record, in the final order is limited to all of the following:
 - (1) The Bates number printed on the record.
 - (2) Reference to the generic descriptions or characterizations as set forth in the in camera inspection index.
 - (3) If the in camera inspection index provides an insufficient description of the records, a generic description or characterization of the in camera records themselves.
- (f) At public hearings, the appeals officer will not allow any mention of the specific contents of records submitted for an in camera inspection. Identification of these records may be made by reference to the assigned numbers endorsed on the records or by reference to generic descriptions or characterizations as set forth in the in camera inspection index or in other public records.

§ 77.105. Submitting records submitted for in camera inspection as part of the certified record for appellate review.

- (a) The OOR's official record certified to the court will include records submitted for in camera inspection. The OOR will submit the records submitted for in camera inspection to the court, under seal, in a separate supplemental certified record.

- (b) The OOR will continue to retain records submitted for an in camera inspection in the OOR's secure file apart from the remainder of the record on appeal until delivery of the certified record to the court.

§ 77.106. Returning records submitted for in camera inspection.

- (a) The OOR will notify the party of the OOR's intent to return records submitted for in camera inspection when one of the following occurs:
 - (1) If the final order has not been appealed, 45 calendar days from the issuance of the final order.
 - (2) If a final order is appealed to a court and a certified record is not submitted, 45 calendar days from the court order concluding the appellate proceedings related to a final order.
 - (3) If a final order is appealed to a court and a certified record is submitted by the OOR, when the court remits the record of its proceedings involving records submitted for an in camera inspection to the OOR.
- (b) The OOR will return records submitted for in camera inspection by providing a copy of the in camera inspection index and all records submitted for in camera inspection contained in an envelope marked "CONFIDENTIAL" and labeled with the docket number of the appeal.
- (c) The official taking possession of the records on behalf of the party is required to sign a receipt for the records returned.

§ 77.107. Disposing of abandoned in camera records.

If the OOR cannot return records submitted for in camera inspection, the OOR may securely dispose of those records after 45 calendar days following the OOR's notification of the party as set forth in § 77.106 (relating to returning records submitted for in camera inspection).

Subchapter G. PROCEDURE FOR HEARINGS AND CONDUCTING HEARINGS

§ 77.121. Decision to hold a hearing.

The appeals officer may decide to hold a hearing after consultation with the Executive Director and Chief Counsel. The decision of whether to hold a hearing is not subject to appeal under section 1102 of the RTKL (65 P.S. § 67.1102(a)(2)). If the appeals officer requires additional time, the appeals officer may obtain a requester's agreement for additional time to issue a final order.

§ 77.122. Procedure for scheduling a hearing.

- (a) Hearings will generally be open to the public.
- (b) If the appeals officer elects to hold a hearing in accordance with § 77.121 (relating to decision to hold a hearing), the following procedures followed:

- (1) The OOR will publish the time, date and location of the hearing in the *Pennsylvania Bulletin*, along with a description of the subjects and issues associated with the hearing, before the date fixed in the notice.
 - (2) The OOR will send notice of the time, date and location of the hearing, along with a description of the subjects and issues associated with the hearing, to the parties.
 - (3) The OOR will post a notification of the time, date and location of the hearing, along with a description of the subjects and issues associated with the hearing, on its website.
- (c) The appeals officer may decide to hold the hearing at any location designated by the OOR, including by videoconference or teleconference if accessible to all parties (in this event, the address of all locations where the hearing may be viewed or heard will appear on the OOR publication notice). If a hearing will be conducted by videoconference, the appeals officer will arrange for the submission of any documentary evidence before the hearing and distribute copies of any materials to the parties.
- (d) Subsections (a)—(c) supplement 1 Pa. Code § 35.102 (relating to hearing calendar).

§ 77.123. Hearing calendar.

- (a) The OOR will maintain a hearing calendar of all appeals set for hearing and will post the calendar on its website. The OOR, in its discretion with or without motion, may at any time, with due notice to the parties, advance or postpone any proceeding on the hearing calendar.
- (b) The OOR will include on the hearing calendar a description of the records and issues subject to the appeals set for hearing.
- (c) Subsections (a) and (b) supplement 1 Pa. Code § 35.102 (relating to hearing calendar).

§ 77.124. Prehearing conference.

- (a) The appeals officer may schedule a prehearing conference to provide opportunity for the parties to submit witness and document lists, stipulations and settlement proposals.
- (b) During a prehearing conference, the following may be considered:
 - (1) Simplification of the issues.
 - (2) Exchange and acceptance of service of exhibits proposed to be offered in evidence.
 - (3) Obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents that might properly shorten the hearing.
 - (4) Limitation of the number of witnesses.
 - (5) Discovery or production of data.
 - (6) Other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.
- (c) Prehearing conferences will not be open to the public.

(d) Subsections (a)—(c) supplement 1 Pa. Code §§ 35.111—35.116 (relating to prehearing conferences).

§ 77.125. Issuance of subpoenas.

(a) Subpoenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the OOR on its own motion, shall be issued only on application in writing to the assigned appeals officer, except that during a hearing the application may be made orally on the record before the appeals officer, who is hereby given authority to determine the relevancy and materiality of the evidence sought and to issue the subpoenas accordingly. The appeals officer and parties shall adhere to the rules for issuance, service and witness fees as set forth in 1 Pa. Code § 35.142 (relating to subpoenas) as adopted in these regulations.

(b) Subsection (1) supplements 1 Pa. Code § 35.142.

§ 77.126. Depositions.

Appeals officers and parties shall adhere to 1 Pa. Code §§ 35.145—35.152 (relating to depositions). A deposition may not be taken except on approval of the appeals officer.

§ 77.127. Purpose of hearing.

The purpose of the hearing is to provide parties an opportunity to present evidence and argument, if permitted by the appeals officer, on issues to be considered by the appeals officer.

§ 77.128. Authority delegated to appeals officers.

(a) Appeals officers designated by the Executive Director to preside at hearings have authority to:

- (1) Regulate the course of hearings, including the scheduling, subject to the approval of the Executive Director, and the recessing, reconvening and adjournment as provided in 1 Pa. Code § 35.102(b) (relating to hearing calendar).
- (2) Administer oaths and affirmations.
- (3) Issue subpoenas.
- (4) Rule on offers of proof and receive evidence.
- (5) Take or cause depositions to be taken.
- (6) Hold appropriate conferences before or during hearings.
- (7) Dispose of procedural matters and motions made during hearings.
- (8) Take other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authorities under which the OOR functions and the regulations and policies of the OOR.

(b) Subsection (a) supersedes 1 Pa. Code § 35.187 (relating to authority delegated to presiding officers).

§ 77.129. Recording of hearings.

- (a) Hearings will be recorded by a stenographer or court reporter. The appeals officer will not or may not omit anything from the recording except as directed.
- (b) The recording will be transcribed, and a transcript of the proceedings will be included as part of the certified record of the appeal.
- (c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.131—35.133 (relating to transcript).

§ 77.130. Order of presentation.

- (a) The agency shall open the hearing and present any evidence and witnesses in accordance with 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure), followed by the requester who may also present evidence and witnesses.
- (b) All witnesses will be sworn.
- (c) Cross examination may be conducted if the appeals officer finds it is required for a full and true disclosure of the facts.
- (d) The appeals officer will decide whether to hear closing arguments and, if so permitted, the requester shall go first, followed by the agency, which has the burden of proof under the RTKL.
- (e) If a direct interest participant is involved, the direct interest participant may present evidence and witnesses after the agency, and before the requester.
- (f) Subsections (a)—(e) supersede 1 Pa. Code §§ 35.125 and 35.126 (relating to order of procedure; and presentation by the parties).

§ 77.131. Limiting the number of witnesses.

- (a) The appeals officer has the discretion to limit the number of witnesses or the time for testimony on a particular issue in the course of the hearing.
- (b) Subsection (a) supersedes 1 Pa. Code § 35.127 (relating to limiting number of witnesses).

§ 77.132. Written testimony.

The appeals officer may permit any party to offer testimony in written form. Written testimony is received in evidence with the same force and effect as though it were stated orally by the witness who has given the evidence, provided that each witness will be present at the hearing at which testimony is offered, shall adopt the written testimony under oath, and will be made available for cross examination as directed by the appeals officer. Before its admission the written testimony will be subject to objections by parties.

§ 77.133. Stipulations.

Appeals officers and parties shall adhere to 1 Pa. Code § 35.155 (relating to presentation and effect of stipulations).

§ 77.134. Evidence.

Appeals officers and parties shall adhere to 1 Pa. Code §§ 35.161–35.169 (relating to evidence).

§ 77.135. Procedure following hearing.

At the conclusion of the hearing, the appeals officer will permit copies of the hearing transcript to be delivered to the parties and will establish a briefing schedule for the parties to submit briefs and reply briefs. At the conclusion of the briefing schedule, the appeals officer will certify the record of the proceedings. Participants desiring copies of the transcript may obtain copies from the official reporter on payment of the fees fixed therefor. The appeals officer will issue a final order within the time frame set by section 1101(b)(1) of the RTKL (65 P.S. § 67.1101(b)(1)).

Subchapter H. PROCEDURE FOR FILING PETITIONS FOR RECONSIDERATION

§ 77.151. Petitions for reconsideration.

- (a) The OOR will accept petitions for reconsideration of its final order. The application shall be filed within 15 calendar days after the issuance of a final order. The application must be made by petition, stating specifically the grounds relied on.
- (b) With respect to petitions of reconsideration, the OOR will follow the procedures in 1 Pa. Code § 35.241 (relating to application for rehearing or reconsideration), except as otherwise provided in this subchapter.
- (c) The filing of a petition for reconsideration does not toll the time period for seeking judicial review under sections 1301 and 1302 of the RTKL (65 P.S. §§ 67.1301 and 67.1302).
- (d) The OOR may deny a petition for reconsideration in writing. Otherwise, a petition for reconsideration will be deemed denied if no response is made within 15 calendar days after it is filed.
- (e) If the OOR grants a petition for reconsideration, the respondent to the petition may file a response in the nature of an answer within 15 calendar days of the issuance of the order granting reconsideration.
- (f) The OOR will not accept additional evidence if a petition for reconsideration is granted.
- (g) The OOR will issue a final order on reconsideration within 45 calendar days of the deadline for the respondent's response, if any.

Subchapter I. FINAL ORDERS AND JUDICIAL REVIEW

§ 77.161. Final orders.

- (a) The appeals officer will issue a final order and send it to the parties within 30 calendar days of docketing the appeal unless the requester has agreed to allow the OOR additional time to issue the final order.
- (b) The final order will include:
 - (1) The docket number of the appeal.
 - (2) The name of the appeals officer.
 - (3) The name of the parties.
 - (4) A factual summary of proceedings before the OOR.
 - (5) A written explanation containing findings of fact and conclusions of law.
 - (6) A statement explaining the agency action required to comply with the final order and the date by which the agency must comply.
 - (7) The date of issuance and mailing to the parties.
- (c) The appeals officer will send the final order by e-mail only and use delivery receipt, if a party has provided an e-mail address. The appeals officer will maintain a copy of the delivery receipt in the appeal file. This will satisfy the requirements of section 1101(b)(1) of the RTKL (65 P.S. § 67.1101(b)(1)) and a hard copy will not be mailed.
- (d) The appeals officer will transfer the appeal to another appeals officer designated under section 503 of the RTKL (65 P.S. § 67.503) with jurisdiction over a matter if an appeals officer does not have jurisdiction to hear an appeal, but another appeals officer designated under section 503 of the RTKL has jurisdiction.
- (e) The appeals officer will include a final order in the official file after the conclusion of the appeal.
- (f) The appeals officer will issue an amended final order with correspondence indicating the revisions if a typographical error which does not substantively impact the outcome of the appeal. The issuance of an amended final order will not alter the deadline for judicial appeal in the issuance of the original final order.

§ 77.162. Effect of final orders if no appeal is filed.

- (a) If a final order orders the release of records, and the requester, agency or direct interest participant does not appeal the final order under section 1301 or 1302 of the RTKL (65 P.S. §§ 67.1301 and 67.1302), the agency shall grant access to the records to the requester within 30 days of the issuance of the final order.
- (b) Failure to provide access to the records in accordance with a final order may subject the agency to sanctions and penalties as permitted by the RTKL.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.251 (relating to reports of compliance).

§ 77.163. Judicial review of the final order.

- (a) The final order is subject to judicial review.
- (b) Within 30 calendar days of the issuing date of the final order of the appeals officer or the date an appeal is deemed denied, a party may file a petition for review or other document as might be required under the rule of court with either:
 - (1) Commonwealth Court, if the decision involves a Commonwealth agency.
 - (2) The county court of common pleas for the county in which the local agency is located, if the decision involves a local agency.
- (c) Notice of appeals to reviewing courts under section 1301 or 1302 of the RTKL (65 P.S. §§ 67.1301 and 67.1302) is served on all parties and the OOR, which will have an opportunity to respond in accordance with applicable court rules. The OOR will also be served with notice of any subsequent appeal to an appellate court.
- (d) The OOR may not be named a party to an appeal filed under section 1301 of the RTKL, involving appeals to Commonwealth Court, or section 1302 of the RTKL, involving appeals to local courts of common pleas.
- (e) The filing of an appeal under this section shall stay the release of the documents at issue until a decision or order of the court is issued.

§ 77.164. Record on appeal.

- (a) The record consists of the request, the agency's response, the appeal filed with the OOR under section 1101 of the RTKL (65 P.S. § 67.1101), any information or evidence submitted to the OOR and considered by the assigned appeals officer, the hearing transcript, if any, and the final order.
- (b) Records reviewed by the appeals officer in camera will not be part of the record except as provided by § 77.99 (relating to submitting records submitted for in camera inspection as part of the certified record for appellate review).

Shawn Kerns

Office of Open Records Regulatory Process Under the Right-To-Know Law
Comments on Draft Regulations

Page 1, § 77.3

Speedy and inexpensive adjudication of Right-To-Know Law (“RTKL”) appeals is desirable for local agencies that already must allocate substantial budget and human resources to satisfying RTKL requests for records.

Page 2, § 77.5

The definition for *Commercial Purpose* adequately addresses issues local agencies face with certain requestors who are merely compiling agency records for profit.

Page 3, § 77.5

The definition for *Personal Information* satisfactorily protects individuals’ privacy interests balanced against an agency’s disclosure mandates pursuant to the RTKL.

The definition for *Reasonable Expectation of Privacy* properly shields personal data from public disclosure.

Page 4, § 77.5

The definition for *Time Response Log* necessarily categorizes certain emergency response data as public accessible.

Page 4-5, § 77.6

Except for the immediately following two below-referenced proposed regulations (§§ 77.6(a)(3)(i)(A) and (C)), computation of time provisions offer helpful and reasonable timing clarifications for agencies, allowing for greater agency efficiency in responding to RTKL requests.

Page 5, § 77.6(a)(3)(i)

A requestor may submit a request electronically and ask for paper records to be mailed; if this requestor files an appeal before allowing 3 mailing days for receipt of the agency’s response or extension notice, it should be deemed premature by the OOR, sparing the agency unnecessary appeal costs, which runs contrary to the proposed § 77.6(a)(3)(i)(A).

If a requestor, who asks the agency to respond electronically to that requestor's RTKL request for records, files an appeal before allowing 3 mailing days for receipt of the agency's response or extension notice, that appeal should be deemed premature by the OOR, sparing the agency unnecessary appeal costs, which runs contrary to the proposed § 77.6(a)(3)(i)(C). The agency may not produce the records to requestor electronically for a number of reasons, including:

- the records don't already exist in that form and requestor refuses to pay for the conversion costs;
- some aspect of the records does not lend itself to electronic conversion (i.e. book, film, tape, photo);
- requestor fails to provide the agency a valid email address; or
- due to agency system malfunctions, the records cannot be timely electronically converted by the agency.

Page 5, § 77.7

Commercial purpose certification and a separate commercial purpose fee schedule will favorably curtail nonessential RTKL requests for records and trim agency RTKL expenditures.

Page 6, § 77.22

Agency public notice is paramount in connection with the agency's collection and protection of individuals' personal information, for reasons that include:

- reminds the individual that the agency is subject to the RTKL, as is all the agency data;
- tempers expectations in connection with the agency's use and protection of the individual's personal information;

Page 7, § 77.23

Such agency policy should also note that, in keeping with the goal of agency efficiency, the agency need not notify a third party of a RTKL request if it does not intend to release any personal information where a reasonable expectation of privacy exists.

Page 7, § 77.24

The referenced balancing test is a fair and reasonable tool to determine whether personal information should be withheld from public disclosure; however, the nature of the personal information should necessitate a jumping-off point presumption of the privacy interest outweighing the public interest in disclosing such information.

Page 7, § 77.25

Again, per the goal of agency efficiency, important is that an agency need not have to notify a third party about a RTKL request if the agency does not plan to release records where personal information is made available publically. Otherwise, the referenced procedures and timelines are acceptable to agencies.

Page 8, § 77.26

But if not going to disclose nonancillary related function records, why notify?

Page 8, § 77.27

The referenced preservation of records is a reasonable mandate which parallels an agency's legal interest in retaining such records until it is clear all appeals in connection with a RTKL request have been exhausted.

Page 9-11, §§77.42, 77.43, 77.44, 77.45, 77.46, 77.47, 77.48, 77.49

Appeal requirements are fair.

Page 12, § 77.50

Subject to future RTKL requests, there is no expectation of privacy in connection with OOR appeal submissions and what data and documentation is chosen for such submissions should reflect that assumption.

Page 12-14, §§ 77.71, 77.72, 77.73, 77.74

Fair appeal procedures.

Page 14, § 77.75

Important provision to ensure aggrieved nonparties to OOR appeals are afforded a timely voice in such appeals.

Page 15, § 77.76

It is reasonable that the OOR appeals officer be able to extend final order deadlines under circumstances referenced.

Page 15-16, §§ 77.91, 77.92, 77.93, 77.94

The mediation procedure properly offers an equitable alternative to litigating an alleged RTKL denial to a final order.

Page 16-19, §§ 77.101, 77.102, 77.103, 77.104, 77.105, 77.106, 77.107

In camera review procedures adequately safeguard relevant records from public disclosure while allowing the appeals officer the means for a necessary review, along with the parties' explanatory advocacy.

Page 19-23, §§ 77.121, 77.122, to 77.135

Hearing procedures are fair and fiscally efficient.

Page 23, § 77.151

Procedures for petitions for reconsideration allow for a satisfactory second look at the issues in dispute.

Page 24-25, §§ 77.161 to 77.164

Timeframes and procedures noted in connection with final orders and judicial review afford adequate avenues for judicial scrutiny of the relevant issues and time-sensitive protections of the requested records.

Respectfully Submitted,

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Emily Leader



VIA EMAIL TO: Erik Arneson c/o
RegulationsOOR@pa.gov

Dear Mr. Arneson:

We thank you for this opportunity to provide comment on the draft regulations. OOR has obviously put a lot of time and thought into them and in many respects, we can support them or at least have no objections. We do have some specific and general comments that we wish to raise and that PSBA would likely raise during the regulatory process.

First, we note that many of these regulations may exceed OOR's rule making authority, which is set forth in 65 P.S. §67.504 (a). Nevertheless, we are commenting primarily on provisions which do not relate to that authority to promulgate regulations relating to appeals. This limitation on OOR's authority is further supported by language in Chapter 11 of the Right-to-Know Law.

§77.5 – Definition of “Commercial purpose.”

We would ask that you clarify the definition section (i)(C) to read, “for the purpose of generating revenue or in a manner through which the requester can reasonably expect to generate revenue.”

Reason: Many people requesting records for commercial reasons may not expect a profit at the point when the records requests are being made or they may turn out to be unsuccessful. It is still a commercial “purpose,” albeit a failed one.

Throughout the Regulations – informational privacy concerns.

There is an overarching interpretation of what may be done to address the Pennsylvania Supreme Court decision in *Pennsylvania State Education Association v. Commonwealth, et al*, 148 A 3d 142 (Pa. 2016) (“*PSEA*”). Our concerns, as raised here are all couched in the fact that agencies will be forced to violate an individual's constitutional rights to informational privacy if they comply with the regulations. Under this case, individuals have a right to “informational privacy” which may not be violated unless this right is outweighed by a public interest favoring disclosure.” The Court found that in this case there is no public interest in disclosing the school employees' home addresses in response to this request which outweighs their interest in privacy in their home addresses. It noted, “To the contrary, nothing in the RTKL suggests that it was ever intended to be used as a tool to procure personal information about private citizens or, in the

worst sense, to be a generator of mailing lists. Public agencies are not clearinghouses of “bulk” personal information otherwise protected by constitutional privacy rights.”

Some critical, relevant information PSBA takes from the Court’s majority opinion includes:

- “Informational privacy” includes “the right to ‘immunity of the person,’ the ‘right to be let alone,’ and the ‘right to one’s personality.’” *Id.* at 150.
- The right to enjoy privacy is coextensive with the right to title in real estate and to own the clothes on our back.
- Right to privacy includes avoiding disclosure of personal matters.
- The right to privacy includes the right to be left alone.
- The right to privacy extends to requiring provision of information about immediate family members’ financial information in financial information statements required to be filed by public officials.
- “...government disclosures of personal information must, under all circumstances, be made with **proper** recognition and respect for the constitutionally protected privacy interests of the citizens of this Commonwealth.” *Id.* at 153.
- The court gave numerous examples of personal information found to implicate privacy interests but it was not an exhaustive list.
- The balancing tests required under the prior Right-to-Know Act was necessary to “protect the rights granted to our citizens under” the Pennsylvania Constitution. *Id.* at 156.
- A balancing test is still required under the present Right-to-Know Law for the same reason, to protect **constitutional rights to privacy** for Pennsylvania citizens. (emphasis supplied).
- The balancing test looks to “the nature of the privacy right and its important relationship to other basic rights.” *Id.* at 152. It requires that courts “apply a balancing test, weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.” *Id.* at 153.
- Citizens should not be required to give up strong privacy interests protected by the constitution “as a precondition to, or by virtue of, their decision to be employed as public... employees.” *Id.* at 158.
- “The right to informational privacy is guaranteed by Article 1, Section 1 of the Pennsylvania Constitution and **may not be violated unless outweighed by a public interest favoring disclosure.**” *Id.* (emphasis supplied).
- In each case, the individual facts and circumstances surrounding the request and the respective interests need to be considered.
- While the goal of the legislature to make more, rather than less, information available to public scrutiny is laudable, the constitutional rights of the citizens of this Commonwealth to be left alone remains a significant countervailing force.” *Id.*
- OOR might be called to task in future cases regarding its need to promulgate regulations which afford individuals procedural due process in connection with Right-to-Know Law requests and appeals but the court will defer a definitive rule on this until that matter is before it because this case did not require a review of procedural due process.

It is in light of these considerations that we raise a number of my concerns as you will see throughout our comments.

§77.5 Definitions

Definition of Personal information

This definition is too specific and fails to provide a necessarily broad definition of what may fall within “informational privacy” protection. Therefore, to the extent OOR is suggesting that only information included in this definition is constitutionally protected, we disagree.

Definition of Reasonable Expectation of Privacy.

We do not yet know the contours of informational privacy, but nothing at all in the opinion suggests it is limited to those items in which an individual has “a reasonable expectation of privacy,” so that definition may well not survive a constitutional review. Much was made of the fact that home addresses are easy to find on the Internet and in various public records in arguments relating to the public or private nature of home addresses. “First, as the courts of this Commonwealth have held and as we have stated above, any **expectation of privacy** that an individual may have in his or her home address information is **not objectively reasonable** in modern society.” *Office of the Lieutenant Governor v. Mohn*, 67 A. 3d 123, 132 (Pa. Cmwlth. 2013) (emphasis supplied). The Pennsylvania Supreme Court soundly rejected this in its determination that citizens have a privacy interest in their home addresses, notwithstanding the fact that the Right-to-Know Law did not explicitly recognize that.

Further, we are very concerned about violating citizens’ constitutional protections via the adoption of the part of this definition which finds that individuals have no reasonable expectation of privacy and no constitutional protections from disclosure of records just because the record is “public in nature as established by Federal or Commonwealth statute, common law, regulation or local agency ordinance.”

Voter lists, which include home addresses, might be public but they may only be purchased pursuant to a representation that they will be used for specific purposes. Many “public in nature” records could fall under this concept. This provision appears to go well beyond OOR’s rulemaking authority and is likely to run afoul of constitutional protections.

§77.22 General notice.

(2) Much personal information will not be subject to access under the RTKL and so this notice would be misleading.

(3) In PSBA’s opinion, there cannot be a general waiver of one’s personal information protection. Again, PSBA argues the definitions used for “personal information” and the application of a “reasonable expectation of privacy” standard violates the opinion in *PSEA*.

Throughout the provisions on third party notice, the flawed “reasonable expectation of privacy” standard is included and makes them likely to be found unconstitutional. §§77.23, 77.24, 77.25.

PSBA has further concerns that the extent of matters that go beyond OOR’s authority to promulgate regulations regarding the appeal’s process will result in legal challenges, leaving the public uncertain as to the proper way to conduct affairs under the Right-to-Know Law. We would suggest these regulations be fully pared down and that the legislature, not OOR, be asked to address the many issues that fall outside of your rulemaking authority.

Thank you for this opportunity.

Sincerely,
Pennsylvania School Boards Association



Emily J. Leader
Member Services Counsel

Melissa Melewsky



April 7, 2017

Erik Arneson, Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street - Plaza Level
Harrisburg, PA 17120-0225

Via email

Re: Comments on proposed OOR regulations

Dear Erik:

Thank you for the opportunity to review and provide comments on the Office of Open Records' (OOR) proposed regulations. As you know, the Pennsylvania News Media Association represents the interests of more than 300 print and digital news media and related organizations across the Commonwealth, and we monitor public access laws to ensure continued meaningful access and accountability state wide.

We appreciate the significant work that has gone into the development of these draft regulations, and believe that many of the proposed provisions are appropriate and helpful for requesters and agencies in navigating the Right to Know Law (RTKL) appeals process. However, we are concerned that some provisions exceed the authority of the OOR and that others would benefit from revision and/or clarification. Our comments below will highlight our areas of concern.

As a preliminary matter, we believe that a number of provisions in the proposal exceed the statutory authority granted to the OOR, including much of Subchapter B. Under Sections 505 and 504(a) of the RTKL, the OOR is empowered to develop a uniform request form and to promulgate regulations, "relating to appeals involving a Commonwealth or local agency." In the draft rules, however, there are numerous provisions that regulate how agencies respond to requests, redefine terms that appear (or don't appear) in the text of the Law, and impose additional requirements on agencies and requesters that are not related to appeals and are not otherwise authorized by the RTKL.

Subchapter A, General Provisions.

The draft rules include definitions that are not authorized by existing law. Among other things, they include a new definition for "Commercial Purpose," an expanded definition of "Personal

Information,” to include, among other things, forms filed by taxpayers, employee contribution and benefit information, all home addresses, and a new definition of “Time Response Log¹.” The rules would also now protect “(i)nformation that affects the legal or safety interests of an individual,” a new and undefined term that seems likely to cause confusion and is not authorized or defined by existing law. Similarly, Section 77.7 imposes additional requirements on commercial requesters that are not authorized by current law. Although we recognize that some of these definitions and procedures have been the subject of bills introduced across multiple legislative sessions, including language we support regarding exclusions from the definition of “commercial purpose.” However, to date, none have become law, and we believe that it exceeds the authority of the OOR to attempt to make new law through regulation.

Subchapter B, Procedure for Filing Requests.

Similarly, we believe that much of Subchapter B, “Procedure for Filing Requests,” exceeds the OOR’s regulatory authority, either because the provisions do not relate to “appeals involving a Commonwealth or local agency,” or because they impose new requirements not authorized by the RTKL. Subchapter B deals almost exclusively with agency procedures at the request level. With the exception of § 77.27(b) governing preservation of records during the appeal process, and perhaps the registration of open records officers provision, much of Subchapter B, including numerous notice and redaction requirements related to personal information, are issues that must be left to the General Assembly.

We are particularly concerned about the proposed rules as they relate to notice to individuals and third parties, which permit those parties to object to the release of the expanded definition of ‘personal information,’ and seem to grant third parties the unilateral right to prevent disclosure of public records. See 77.23(2) and 77.25(c).

Section 77.25 contains a burdensome, and we believe, unnecessary, notice process that could significantly interfere with public access to public records. To the extent that such a notice process is within the authority of the OOR, we urge the OOR to consider a general notice procedure along the lines of 77.22, as a means to notify third parties that records in the possession of public agencies may be subject to access under the RTKL, along with notice of the process to prospectively challenge the release of specific documents, where applicable. To employ a notice process in response to each individual request is, we believe, overly burdensome, unnecessary, and is likely to create significant obstacles to public access to public records.

Section 77.23 also uses the term “reasonable expectation of privacy,” a term that is well-defined by case law and seems unnecessary to include in the regulations. At a minimum, the definition of

¹ We believe this term must be defined by statute, not regulation, and in any case, must be expanded to include information about the type of call, the nature of the emergency and identifying information about the unit(s) responding to the incident.

“reasonable expectation of privacy” must recognize the test that has been used by Pennsylvania courts in the Right to Know context and cannot redefine the term without reference to the relevant standards and decisions.

Additional Issues

With regard to the remaining provisions, we submit the following:

1. § 77.21. Registration of open-records officers

This proposed regulation would require agencies to register the names and contact information of open-records officers annually and within 30 days of a staff change. This is a positive change that would ameliorate issues that our members routinely face when trying to submit RTKL requests. Often, there is no information provided on agency websites, and when it is provided, it is often outdated or incomplete. An accurate, comprehensive list of open-records officers is critical to the public’s ability to use the law, and inaccurate or missing contact information creates a significant barrier to access.

This provision does raise concerns, however, with its use of limiting language. It requires agencies to submit to the OOR:

- (1) The name of its open-records officer.
- (2) The contact information of its open-records officer, including a mailing address.
- (3) The number for receiving RTKL requests submitted by facsimile, *if used (emphasis added)*.
- (4) The e-mail address for receiving RTKL requests, *if used (emphasis added)*.
- (5) The URL for the agency’s website, if the agency maintains a website.

The “if used” language suggests that agencies can choose the manner in which to receive requests and exclude email and facsimile.

As you know, section 703 of the RTKL vests with the requester the power to choose which method of delivery to utilize. Section 703 expressly allows requesters to submit a request “in person, by mail, by e-mail, by facsimile or, to the extent provided by agency rules, by any other electronic means.” The General Assembly vested the public with the power to choose the method of delivery, not the agency, but the limiting language in this provision could encourage agencies to exercise discretion they do not possess. The only discretion granted to agencies by section 703 is to create additional methods of acceptance via policy that accepts requests electronically. If agencies could refuse to accept emailed or faxed requests, it would constitute a departure from the language of the law and create a significant step backward for public access, resulting in a policy that is even more restrictive than the prior RTKL. The law does not grant agencies discretion to limit methods of acceptance, and we believe the qualifying language must be removed or clarified to maintain consistency with both the plain letter and intent of the law.

2. § 77.42. Timely filing of appeal required.

Subsection (c) presumes that a letter from an agency was in fact properly mailed by an agency and timely received by a requester. The proposal goes on to accept “evidence” that a letter has been mailed as sufficient to permit the OOR to find that the letter was in fact received by the party to whom it was addressed. However, the proposal does not define what type of evidence is required in this circumstance, and it is equally silent on the evidence needed to rebut this presumption, other than to disregard the requester’s denial of receipt. If a requester denies receipt of a mailed response letter, we believe that the burden of proof must rest with the agency, which solely possesses the knowledge and documentary evidence of its response procedures. We believe the policy should also require documentary evidence to support an agency’s assertion.

3. § 77.46 (b). Docketing of appeals; § 77.71. Submission of filings.

We believe these provisions are a missed opportunity for the OOR to provide structure and clarity to the appeal submission process. Current practice, which is preserved by this provision, sets one deadline for all parties to submit evidence as part of an appeal. This encourages agencies to wait until the last day of the submission deadline to submit evidence and additional bases for denial, which leaves little or no time for a requester to respond. While the OOR has granted extensions for requesters in some circumstances, most requesters are non-lawyers who are not aware of or do not know how to make such an extension request. We believe the public, agencies and the OOR would be better served by a staggered submission deadline with an agency permitted a specific amount of time in which to respond to an appeal, and a requester permitted a reasonable amount of time to respond to the agency’s position before a final submission deadline.

4. § 77.74. Agency notice of appeal to third parties and agency contractors or vendors.

This section requires the agency to provide notice to third parties, when “personal information” is contained in records withheld by an agency, and when records are held by contractors or vendors. Subsection (e) expressly prohibits OOR from ordering release of “personal information” absent proof of notice or a determination that public interest outweighs any interest in privacy. In addition to the concerns referenced above, this provision fails to account for the myriad of laws that *require* public access to personal information such as voter registration records and property tax records. We believe that this provision should be significantly revised, and at a minimum, should remove individual request-based notice requirements and expressly require public access to records that include personal information when release is provided for by law.

Subsection (d) requires agencies to request an extension when such notice cannot be provided as required in (a), and provides that the OOR will grant a reasonable extension. While an extension may be appropriate in some cases, the RTKL vests solely in requesters the ability to extend the deadlines on appeal. The agency and OOR can request an extension, and we encourage our

members to grant such requests, but the ultimate decision to extend the deadline on appeal lies exclusively with the requester under § 1101(b) of the RTKL.

5. § 77.76. Appeals officers extending the final order deadline.

As with § 77.74(d), discussed above, this provision allows the OOR to extend the deadlines for final determinations, but extension power is vested by statute in the requester. PNA supports the OOR's ability to extend deadlines in appropriate circumstances, as outlined in proposed legislation, but as a strictly legal matter, the proposal goes beyond the terms of current law.

6. § 77.93. Concluding the mediation process.

When mediation is successful, the proposal requires the requester to withdraw the appeal before the OOR, but it does not provide guidance on how to accomplish withdrawal. We believe this provision would be more helpful to requesters by including information on how to withdraw an appeal and/or referencing a form to facilitate the withdrawal process.

7. § 77.101. Ordering the *in camera* inspection of records.

We support the OOR's ability to conduct *in camera* review, and we encourage our members to seek this review process as part of appeals. However, we are concerned with subsection (b) and the requirement for extension. Subsection (b) allows *in camera* review to be conditioned on the requester's agreement to extend the deadline for final response, and in most cases extension is appropriate. However, a number of PNA members have been presented with proposals to agree to an indefinite extension of time when seeking *in camera* review. We believe an indefinite extension is inappropriate in light of the time limits imposed by law and the intent underlying the statute. Extensions are often appropriate for *in camera* review and we encourage our members to grant them, but a definite deadline must be part of any extension agreement. We believe subsection (c) should expressly require the OOR to set deadlines for agency submission and OOR final determination as part of an *in camera* order.

8. § 77.129. Recording of hearings.

This provision states that, "The appeals officer will not or may not omit anything from the recording *except as directed*" (emphasis added). What are the circumstances under which the stenographer would be instructed to omit information? And whom would give those instructions? We believe this language is vague and should be clarified.

9. § 77.130. Order of Presentation; § 77.132. Written testimony.

We believe that cross examination should be permitted in all cases, subject to the ability of the Appeals Officer to regulate the orderly process of an appeals hearing. Similarly, if written testimony is accepted, the witness should be subject to reasonable cross examination.

10. § 77.151. Petitions for reconsideration.

Subsection (c) makes it clear that the filing of a petition for reconsideration does not toll the time period for seeking judicial review. It may be helpful to state explicitly in subsection (e) that the granting of a petition for reconsideration likewise does not toll the time period for seeking judicial review.

We believe the proposed regulations are a good first step in the regulatory process, and we appreciate the opportunity to weigh in on provisions that cause concern. We look forward to working with the Office of Open Records during the regulatory process, and we would welcome the opportunity to discuss these comments in more detail.

Sincerely,

A handwritten signature in cursive script that reads "Melissa Bevan Melewsky". The signature is written in black ink and is positioned below the word "Sincerely,".

Melissa Bevan Melewsky
Media Law Counsel

CC: Teri Henning, PNA President

Mark McKillop

Dear Mr. Arneson,

Thank you for allowing PASR to participate in the Office of Open Records' (OOR) regulatory process under the Right-to-Know Law (RTKL).

We have reviewed the regulations sent to us via e-mail, and we have several thoughts we believe are important to consider.

Regarding Section 77.24, PASR believes in the case of personal addresses, allowing third-party choice, instead of automatic denial, might be an option worthy of consideration.

Regarding Section 77.5 (C) (ii), the inclusion of non-profit associations that provide services and information potentially of value to the individuals who are the subject of the Right-to-Know request might be worthy of consideration.

In a global context, PASR is seeking access to the contact information regarding recent annuitants of PSERS. Much of the information sought by PASR is already information "in the public realm," such as addresses and contact information for registered voters, to use an example, when matched with the name other additional information currently provided by PSERS. There is a valid argument that an unnecessary burden is placed on PASR due to the denial of access to public records that will be only used for the purpose of membership recruitment.

In addition to our written comments, and if it would be helpful, we would welcome the opportunity to speak with you or anyone at the Office of Open Records regarding our positions and comments contained in this letter.

Once again, thank you for the opportunity to comment and give our point of view.

Sincerely,



Mark A. McKillop
Executive Director, PASR

Susan Schwartz

3185 Lackawana Ave.
Bloomsburg PA 17815

April 28, 2017

Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120

To the Office of Open Records:

Thank you for giving us the opportunity to comment on the draft proposal for the new Office of Open Records regulations.

The Pennsylvania Freedom of Information Coalition is made up of citizens, companies, non-profit groups and others dedicated to open government, and therefore to open records.

We have seen the Pennsylvania NewsMedia Association's comments on the proposal and agree with them. We also have suggestions of our own.

We appreciate your office's efforts to clarify its procedures and the procedures that should be followed by agencies covered by the Right to Know Law. We especially liked the explanation of the timelines for responses, appeals and rulings – calendar days versus business days is a frequent source of confusion.

However, other parts of the new regulations concern us.

Our biggest worries are the sections dealing with a “reasonable expectation of privacy” and the notification of third parties. We believe it would be expensive and unwieldy for agencies to follow the proposed rules. More importantly, we think it would result in information being wrongfully withheld and would reduce the accountability of government officials. We also think these rules will cause a lot of unnecessary litigation.

Previously, there has been no “expectation of privacy” written into the law. We don't believe the Office of Open Records has the authority to create such a right. Furthermore, the draft regulations don't explain what exactly constitutes a “reasonable belief” that personal information will not be disclosed. The Right to Know Law provides what information must be disclosed and what records may be withheld, thereby setting people's “reasonable” expectations. Any expectation that other information will be withheld from the public is unreasonable.

While we question the Office of Open Records' authority to regulate agencies, we believe in the wisdom of the idea in Subchapter B Section 77.22 requiring agencies collecting data to post several notices warning people the information could be subject to public disclosure and explaining how to request an exemption. If there is such a posting, there can be no actual or reasonable belief the information will be kept private.

We also believe third parties who wish to object to the release of their information should do so when they provide the information to the agency in the first place, or when they first become aware of a special need to keep the information confidential. We realize some people have valid security concerns and other reasons to keep some information, such as addresses, private, and they should be informed how to request an exemption from public release of that data. But to expect an agency to send out mass mailings — even by email — every time a citizen requests a large database of information is unreasonable. It will be expensive and time-consuming for the agency, and will delay record releases so long, they may well become useless. The problem is exacerbated by Subchapter B Section 77.74, requiring notification of all third parties again if the request is appealed.

We don't understand why, in Subchapter B Section 77.24(2), if it's determined the public interest in the information outweighs the individual's interest in privacy and the information doesn't qualify for an automatic exemption under the Right to Know Law, the open records officer should still be allowed to withhold the information. Such information should be required to be made public.

Also, Section 77.25 seems to indicate that anyone who objects to having their personal information released will automatically be allowed to order it to be withheld. Public information shouldn't be withheld unless it falls under one of the specific, required exemptions listed in the Right to Know Law or is permitted to be withheld under the balancing test referenced in the Supreme Court decision in PSEA vs. PDCED. If it qualifies for the balancing test and the public's interest is found to outweigh the individual's interest in keeping the information private, it should be released.

There are many reasons personal information — particularly addresses — at times should be released to the public. For example, if voters want to make sure elected officers live in the required district, they must have access to those officers' addresses. Likewise, citizens who fear voter fraud and want to compare addresses of actual voters to those on the rolls need to have access to those addresses.

Finally, addresses are one of the few ways left to distinguish people with the same names. Social Security numbers and in many cases birth dates have been closed off because of identity theft concerns. If one wants to know if, say, a drunken driver arrested shortly before the school day is indeed the teacher who has the same name, one must have access to the teacher's address.

In other concerns, we don't believe the Office of Open Records has the authority to create new laws. Yet that is exactly what it is doing by creating the new “personal information” category of records, a category that doesn't exist in the Right to Know Law.

The regulations appear to be treading in areas reserved for legislators again in Subchapter A Section 77.7 regarding information used for commercial purposes. The Right to Know Law does not distinguish between commercial and non-commercial purposes. Neither should the Office of Open Records, unless the legislature and governor pass a new law creating the distinction.

In Subchapter G Section 77.122, the regulations say hearings for the Office of Open Records are “generally” open to the public. Why wouldn't they always be open to the public?

Finally, Subchapter G Section 77.161(f) appears to be missing some words.

Once again, thank you for letting us comment on this draft. We look forward to working with you to improve public access to government records in Pennsylvania.

Sincerely,

A handwritten signature in cursive script that reads "Susan R. Schwartz". The signature is written in a dark ink and has a fluid, connected style.

Susan Schwartz
Secretary
Pennsylvania Freedom of Information Coalition

Craig Staudenmaier

MEMORANDUM

TO: DELENE LANTZ-JOHNSON
FROM: CRAIG J. STAUDENMAIER, ESQUIRE
DATE: APRIL 3, 2017
RE: COMMENTS TO DRAFT OOR REGULATIONS

Below are my comments regarding the draft regulations forwarded earlier. First, I want to thank you and your colleagues involved in preparing these regulations. I can only imagine the amount of time and effort that was needed to reach this point. Hopefully, my comments below will be of use in reviewing and finalizing the draft of proposed regulations that will be published for public comment later. I have listed my comments with the section number of the proposed regulation below, hopefully, for ease of reference.

§ 77.5. Definitions

- I note you have included a definition of "commercial purpose" and several exceptions thereto. This is listed as a predicate to § 77.7, requests made for commercial purpose. Although I understand that the last bill, Senate Bill 411, contained language regarding commercial purpose and the ability to charge labor retrieval fees for those, it is my understanding that bill and similar ones died in the last session. Thus, there is no statutory authority for the OOR to "regulate" commercial requestors or to establish regulations regarding commercial requests.

- I also note that under "personal information" you have included "forms required to be filed by a tax payer with a federal or commonwealth taxing authority." This would appear to include real estate tax information which is a public record outside of the Right to Know Law, including name, address, etc. Also, subsections iv, v, and vi concern individual employee benefit and contribution information. I do not believe there is any legal basis to include these as personal information or to exclude them from right to know requests. Finally, in ix, it indicates that "personal information" could include "information that affects the legal or safety interests of an individual." I believe the legal interest designation needs clarification. In addition, the term "safety interests" has no meaning in the Right to Know Law. Section 708(b)(1)(ii) speaks to exempt information that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." If any such definition is used, it should be the one from the statute as, I believe, "legal or safety interests" is too amorphous to be meaningful and could be subject to abuse.

- The definition section contains a definition for "reasonable expectation of privacy". Under Pennsylvania law, this term is already defined as a two-part test. Not only must the individual profess a "reasonable belief" that certain information will be private, but, the second prong of the test requires that expectation must be reasonable and recognized within the

community in which that individual professes the expectation. I believe the definition omits the second prong. I question whether the definition is even needed as the caselaw defines the term. Under the same section, subsection (ii) does not include federal or state judicial decision or orders.

§ 77.6 Computation of Time

- The indication in subsection (a)(2) that the 30 calendar extension invoked under 902 does not begin until after calculation of the fifth business day of initial grant or denial, I do not believe has any statutory basis. I have the same concern with regard to subsection (a)(3)(ii), as it is not defined what a "mailing day" is and regulating a requester to have to wait such "mailing days" until filing of an appeal, and if he does so earlier, declaring the appeal premature. I understand the ill that is attempted to be remedied by this, but I do not believe there is statutory authority in OOR for the proposed regulation.

§ 77.7 Request made for commercial purpose

- See my comments under § 77.5 above.

§ 77.22 through 77.26

- I have grave concerns over the extent of the burden of notice placed upon the agency. I also am concerned that the notices and various deadlines will be used as a method to delay or block access. I believe that the current case law would support a position by the Office that once the general notice provided for in § 77.22 is provided to public employees and/or persons supplying information to government agencies, that the failure to take any steps to notify or request that the information be withheld negates any reasonable expectation of privacy or further duty on the agency to balance or redact any such information.

§ 77.27

- I applaud this regulation, however, if an agency has no such policy for retention, unfortunately, I do not believe that the OOR can force an agency to have such, and, if it does not have one is there any punishment or penalty to it if it prematurely disposes of records and who enforces that?

§ 77.41 through 77.50

- Generally, I applaud these regulations as they provide needed guidance in the filing of appeals. I would only note that with regard to §77.43(b) that the guidelines with regard to paper and printing requirements be liberally interpreted with regard to pro se requestors and that a statement to that effect appear in the regulation. Also, with regard to § 77.45, I would start off subsection (a)(3) as follows: "a brief statement containing grounds on which the requester believes the requested record to be public." I believe this is all the case law requires.

§ 77.73

- With regard to subsection (b), I would suggest that a provision be added that the exemption log be required to be served on the requester or his or her counsel as well. I have had occasions where this is not done.

§ 77.74

- With regard to subsection (d), although I appreciate the reason for this section, I do not believe that there is statutory authority for the OOR to unilaterally extend time periods. I am aware of the APSCUF case, however, this case involved a unique million-page request. I believe the subsection as written is overly broad for these few unique circumstances and would ask to consider additional language to limit it to such circumstances.

§ 77.75 Request for Direct Interest Participant Status

- With regard to subsection (e), I would request that the phrase "and any response or objection of requester or the agency" be added to the end of that section. Along this line, I do not see anything in this section that allows a requester or the agency to submit an objection to participation for the appeals officer to consider?

§ 77.76 Appeals Officers Extending the Final Order Deadline

- Once again, I appreciate the sentiment behind the section in situations involving in-camera or complicated requests. However, I do not believe there is any statutory authority in the RTK for the OOR to unilaterally adopt regulations extending the deadline for specified times.

§ 77.93 Concluding the Mediation Process

- I would suggest that the phrase "within ____ days after final execution of the mediation agreement" be added to the end of subsection (a). As to the number of days, I leave that to your good consideration based upon your experience as to how quickly this can occur.

§ 77.101 through 107

- Are well done.

§ 77.122 Procedure for Scheduling a Hearing

- I have no specific comment here, however, we had a hearing several years ago where, after the hearing was held, obtaining a final determination from the appeals office took fourteen months. I would request that you consider a potential for the regulations some indication that a decision would be rendered within a certain number of days or months after the conclusion of the hearing and submission of briefs.

§ 77.124 Prehearing Conference

- I would suggest that you add to subsection (b) that the parties also divulge the identity of potential witnesses.

§ 77.125 through 128

- I would suggest that a section be added as to how the OOR would handle objections to depositions, subpoenas or motions for protective orders.

§ 77.129 Recording of Hearings

- I do not see any provision as to who pays for the transcription of any recording made?

§ 77.130 Order of Presentation

- Under subsection (c) it indicates the cross examination "may be conducted if the appeals officer finds it is required for a full and true disclosure of the facts." I believe that under Levy, that the considerations of due process would require that the appeals officer permit cross examination. I do not believe there is any case law or statutory authority to deny cross examination.

§ 77.132 Written Testimony

- Once again, I appreciate the sentiment here, however, I do not know if such written testimony is permitted under the sections of the Administrative Code that are incorporated (I was unable to go through all of them) however, I do not see the purpose of allowing written testimony and yet requiring the witness to be present and testify under oath that the testimony is true and accurate?

David Strassburger

From: "David A. Strassburger" <dstrassburger@smgglaw.com>
Date: March 27, 2017 at 5:53:03 PM EDT
To: "dlantz-joh@pa.gov" <dlantz-joh@pa.gov>
Subject: Regs

Delene,

I think these regulations are terrific. They obviously reflect a lot of hard work and careful thought, which is a credit to the work of Mr. Arneson and his team. I hope the comments below are viewed as constructive, because that's I how intend them.

1. Stare Decisis

In *Department of Corrections v. Maulsby*, 121 A.3d 585 (Pa. Cmwlth. 2015), the Commonwealth Court applied to OOR the general rule that, while “an administrative agency is not bound by the rule of *stare decisis*, an agency does have the obligation to render consistent opinions, and should either follow, distinguish or overrule its own precedent.” *Id.* at 589. The difference between this obligation of the OOR and the rule of *stare decisis* is not apparent to me. In matters of statutory interpretation, “*stare decisis* does implicate greater sanctity because the legislature can prospectively amend the statute if it disagrees with a court’s interpretation.” *Com. v. Doughty*, 126 A.3d 951, 955 (Pa. 2015).

When the RTKL passed nine years ago, there was some question whether OOR had to follow its own decisions. I think there should be a regulation making clear that OOR does need to follow its own decisions unless overruled by the Commonwealth Court. I also think OOR does not need to follow a trial court decision unless the agency in question is located in the county where the trial court is located. Therefore, I recommend a new Subchapter J that contains the following regulation:

77.165. Precedent

A final determination of an appeals officer is binding precedent. An appeals officer must follow precedent set by a prior final determination, distinguish it, or explain why intervening authority has undermined the prior final determination as precedent. A decision of the Court of Common Pleas is binding only on those agencies located in the county of the Court deciding the petition for review.

2. Personal Information of Third Parties

I believe the interplay between 77.24(b)(2) and 77.25(c) is confusing and may reflect unsound policy. In section 77.24(b)(2), the agency has concluded that the public's interest in a third party's personal information outweighs the third party's privacy interest, which means public access will prevail, unless the third party receives notice and objects. In section 77.25(c), an objection by the third party requires the agency to redact the personal information, which eliminates the discretion in 77.25(b)(2). In other words, even though 77.25(b)(2) seems to suggest the agency may release the records, that possibility is foreclosed by section 77.25(c). The third party has an unconditional veto power with respect to personal information, even where the record is not otherwise exempt and the agency thinks the public interest should prevail. That feature of the regulations places an additional burden on the requester that is inconsistent with the presumption of access. Judicial criticism of the current law has always focused on procedural due process of absent, interested parties. Someone who wants to keep confidential his personal information contained in a public record is entitled to notice and an opportunity to be heard, but not veto power. The regulations in their current form do more than resolve the procedural due process problem. They place the burden on the requester to overcome the third party's objection. In my view, 77.24(b) should be revised as follows:

".... The agency ~~may~~ shall release ~~or withhold~~ third party personal information, provided it has complied with in accordance with sections 506(c) and 708 of the RTKL (65 P.S. 67.506(c) and 67.708) and 77.25 (relating to notice to third parties of the release of their personal information in which there is a reasonable expectation of privacy), and considered any objections received.

I would then eliminate 77.25(c) entirely. In my view, this procedure gives the third party all the process that he is due. I recognize it would not give the objector a right of appeal, but we must calibrate due process rights to the nature of the interest we are trying to protect. The General Assembly has announced there is a presumption of access to public records. In the absence of an exemption, there is no statutory reason to redact anything. A non-statutory right

to protect personal information in the possession of a public agency is a very weak right. It may be entitled to some due process, but it's not entitled to much. The current draft of the regulations gives far too much power to the objector. It forces the requester to file an appeal where no statutory exemption exists. We should not burden public access and requesters in this fashion.

I understand these changes would impact 77.74(a).

3. Enforcement

Section 504(a) of the RTKL empowers the Office of Open Records to promulgate regulations relating to appeals involving a Commonwealth or local agency.

Section 1310(a) lists some of the powers of the Office of Open Records. The list does not expressly state that the OOR's powers are limited only to what is enumerated in section 1310(a). The authority of administrative agencies is limited to the powers granted by legislative enactment. *Mack v. Civil Service Commission*, 817 A.2d 571, 574 (Pa. Cmwlth. 2003).

There is nothing in the RTKL that addresses how to address the recalcitrant agency. The remedy of mandamus and peremptory judgment seems to be available to the requester. It should be available to the OOR, too, because the OOR has long had problems with local agencies that fail to comply with OOR orders. I propose to add the following regulation granting OOR limited enforcement powers as follows:

77.166 Enforcement of Final Determinations

The final determination of an appeals officer granting a request in whole or in part may be enforced by the requester or OOR in any court of competent jurisdiction 60 days after the date of the final determination if the agency has not sought judicial review of the final determination.

4. In 77.76(c), line 2, first word, I think you mean “number,” not “amount.”

Thank you for the opportunity to provide this commentary.

David A. Strassburger | *Shareholder*



**Strassburger McKenna
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Richard Varn



COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

March 31, 2017

To: Pennsylvania Office of Open Records (OOR)

Re: **Proposed Rules**

Who We Are

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public record access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, governmental, commercial, and societal benefit. Members of CSPRA are just a few of the many entities that comprise a vital link in the flow of information for these purposes and provide services that are widely used by constituents in your state. Collectively, CSPRA members alone employ over 40,000 persons across the U.S. The economic and societal activity that relies on entities such as CSPRA members is valued in the trillions of dollars. Our economy and society depend on value-added information and services that includes public record data for so many important aspects of our daily lives and work.

Concerns and Comments Regarding the Proposed Rules

Statutory Authority

There have been various unsuccessful attempts over the last few years to amend Pennsylvania law in nearly the exact manner as is proposed in the draft rules. This causes us to wonder: Upon what statutory authority is the OOR relying to promulgate these rules? We would request that the specific statutory authority be identified for each new substantive provision of the rules. Without proper statutory grounding and guidance, the rules would be subject to legal challenge. If there is not explicit statutory authorization, the proposed rules could appear to be a method of bypassing the legislative process.

Commercial Record Requests

It is often said that we live in an information economy. The natural resource on which that economy depends is information and public records and commercial users of those records are a critical source. Public and private data is used in combination to equalize access to

business opportunities, provide convenient and personalized customer service, protect consumers, increase markets and market efficiency, manage and reduce risk, support many public services such as law enforcement, and contribute substantially to economic growth. It is so ubiquitous, it is easy to forget that good information leads to the decisions, marketing, and communications that help businesses get started or grow and to help for government to efficiently serve its people. We have achieved a degree of democratization of opportunity through equal and reasonably priced access to public information that strengthens the vitality of our entrepreneurial and small business sectors. Public policy regarding commercial use of public records should not imperil the free flow of information that is a major job creation engine for our economy.

We have attached a white paper highlighting the value of the use of public records for personal and commercial uses. We hope you also find this helpful. We would also note that scholarly research also makes extensive use of commercial resources drawn from public records in many fields such as criminal and civil justice, housing, public expenditures, public health, and economic forecasting.

We have historically opposed public records laws and rules that have the potential for differential treatment, more limited access, or greater charges for certain “commercial” uses and users of public records. Pennsylvania is now considering all three. We understand that one of the motivating factors is the issue of dealing with records requests that are burdensome and considered excessive. If this is a consideration, we suggest instead a direct approach to that problem. To assist in your deliberations, we have attached a second white paper that lays out an approach and framework for addressing burdensome or excessive records requests while preserving the principles and benefits of public access. The paper urges you to look for the root causes of the problems you are experiencing and adopt a balanced solution to those problems. We also suggest you look at pending legislation in Washington state (HB 1595, and in particular sections 2 and 3) that is the result of a very inclusive interim process that brought stakeholders together to address this problem.

We note that the proposed rule already has exceptions for some commercial entities that are classified as press or media entities as well scholarly research. Others may be proposed as the rule progresses. That policy makers often choose to propose such exceptions in this type of rule or law is a red flag that drawing such a line can be difficult and those on the exceptions list

may be there from lobbying or perceived political clout rather than any defensible and sustainable legal framework. Commercial entities in the information business are increasingly difficult to distinguish by such categorizations, and it is unfair to treat lawful commercial entities dealing with the same raw material differently because of the way they choose to add value and sell their products and services.

We also urge you to approve a policy that maintains the tradition of obtaining public records for any purpose at a price that is as close to the marginal cost of reproduction as possible. This is the “gold standard” for public records and has been a critical part of our democracy and economy for many decades. Straying from marginal cost undermines public access and doing so only for certain commercial users amounts to an information tax by another name.

The Home Address Exemption

We are concerned about removing home address from the public record. We support withholding public address only in limited classes of exceptions and on a case-by-case basis where the life and safety of a person is at stake and withholding their address would be an effective means of protecting them. Where we live is neither secret nor a defensible secret. We are part of a community. We must be publicly known to own property for our property ownership system to work.

Our addresses are used for countless services, billing processes, and transactions across many public and private entities. Address information can also provide a way of distinguishing between two people with the same or similar names. Addresses in public records are also used in consumer and identity theft protection alerting services (such as Life Lock and credit monitoring services) to make people aware of how their name and address, if different from their own true history, has appeared in the public record. This alerts them to the possibility that someone is using their name and impersonating them. Addresses are also used in academic and accountability studies and news stories to relate where people live to relevant public policy facts. Restrictions on home addresses in the public record must be narrowly tailored to achieve and specific and important public purpose. More general restrictions do more harm than good, give a false sense of security, and may actually hurt those it is intended to help. If the restriction under consideration in the proposed rule would apply to only public employees, it could potentially remove the home addresses of over 10% of the Pennsylvania population from all public records. If it is applied to all citizens it would have proportionately larger negative repercussions. The

property ownership and lending issues alone raised by this are staggering. How will systems that depend on a reliable association between name and address in accurately applying the facts of public record work without this data? The short answer is they will not and the effects on individuals and the state's economy will be substantial.

A New Broad and Subjective Right of Privacy in Public Information

The rule proposes a new right of privacy based on a person's "reasonable expectations of privacy" regarding information that with few exceptions, is public by its nature and by necessity. This subjective standard will have to be expensively defined in numerous legal forums with uncertain results and no clearly defined benefits from its adjudication, and will also be initially decided by each agency resulting in a patchwork of policies on the same or similar information. Further, the notice and objection provisions will impose a massive and costly burden on government, delaying many routine releases of public information.

We have found that the best public policy begins with a presumption of openness in government records with narrowly defined exceptions where the benefits and costs are carefully weighed and known in advance. Creating such an expansive right by administrative rule is not likely to yield public benefits without substantial legal and practical challenges. . Please instead consider specific exemptions where new developments have created a serious problem that can only be ameliorated by a targeted, sensible, and well-defined solution or exemptions. Please also consider proposing and pursuing these changes in legislation rather than rule where a more full debate and public participation in the process can be achieved.

Conclusion

Public records are for all to use as they see fit under the law and need to be available to all without unduly burdensome fees or categorical limitations. The effect of any new fees or access limits needs to be understood and carefully considered to ensure this critical resource continues to flow and support our civic and economic needs.

Please remain vigilant in protecting open and reasonably priced public access to public records. Thank you for your consideration of our input.

Regards,

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Executive Director

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COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

Managing Excessive Requests While Preserving Public Records Access

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public records access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, commercial, and societal benefit. It is CSPRA's belief that the records of how our society governs itself at all levels and manner of government ought to be open and accessible to all.

Policymakers and records managers in all levels and branches of government endeavor to fulfill public records requests with fidelity to the purpose and requirements of the law. Occasionally, some of these requests are seen as excessive and a solution is sought for dealing with such requests. CSPRA has developed the principles and framework below to assist those developing solutions to this problem.

Always a Need for Balance

- Maintaining and defending an open and accessible government is not easy and not without challenges
- Addressing the need to be fair and open in our records and government should be not presumed to be a lesser value than other governmental services
- The best approach is to be fair, open, and low cost—and technology and shared services often make that possible
- The weight and value placed on fairness and openness should be measured in both its great value to a free and open society and the economic benefits of open public records access
- When the values at stake and the effects of decisions are properly weighted, a proper balance can be struck

What to Avoid

- Do not judge records requestors by who they are or where they are from rather than by the nature or effect of their request
- Do not use the “excessive” label as a pretext or excuse to:
 - Avoid maintaining a modern records system
 - Hide records and thereby avoid responsibility for government misdeeds or mismanagement
 - Deny requests for trivial or personal reasons
 - Collect more taxes and fees from users or categories of users
 - Cut the budgets for records management

How to Judge a Request to Be “Excessive”

- A request may be considered excessive if it:
 - Is not foreseeable and therefore beyond record managers’ ability to plan ahead to meet such requests in a routine manual or automated manner
 - Is done in a manner that is harassing, is repetitive, or is voluminous beyond reason when compared to comparable requests from other similar requestors of this type of record
 - Requires substantial manual processing because the technology to automate responding to this type of request does not exist or is not cost effective
 - Is done in such a manner that it approximates the effect of a denial of service attack by overburdening the system of record so that it cannot function and there is no reasonable and cost-effective way to anticipate and scale up the system to address such requests
 - Requires interpretation of the data and judgment as to its meaning

Framework for Solutions

- Determine what requests are actually causing a problem beyond the records system’s operational parameters and inventory the systems and tools available to records custodians for records management and access
 - This can be accomplished through a survey mechanism or annual reporting process

- Determine the key factors causing the requests to be problematic and a possible response to that factor or issue. For example:
 - Is it that the requests are not clear or overly broad and difficult to interpret and fulfill?
 - If so, consider using smart forms or a record request portal that helps requesters formulate an understandable and reasonable request
 - Are the requests asking for a response that will require substantial manual processing?
 - Identify and implement technology and software that will reduce the manual processing
 - Are the requests asking for records that could be digitized and made more easily available but still remain in paper form?
 - Consider programs to conduct bulk digitization of records
 - Do the requested records require substantial redaction to remove non-public information before release?
 - Use tools that automate this process such as digital loss prevention tools and intelligent search with automated masking technology for specific non-public information
 - Is there a shortage of staff to process and fulfill the request even when the requests are reasonable and not excessive?
 - Consider new sources of help such as using work-study students and interns from educational institutions or on loan from private industry as a public service to help modernize the system and implement new technology and solutions
 - Some jurisdictions have used the prison industry system to digitize non-sensitive records and provide job and life skills to those in the correctional system
- To the extent possible, work collectively improve the records system to accommodate such requests
 - Identify a funding source for grants or revolving loans that can be used to modernize records systems and implement new technologies that address the most

costly records issues and assist those jurisdictions too small to address the problem by themselves

- Facilitate the formation of shared services between units of government for records management and public access that help jurisdictions leverage economies of scale
 - These can be accomplished by shared use of state government technology infrastructure, by intergovernmental agreement, or by services offered by the associations representing the offices and jurisdictions of local government
- For those remaining, narrowly tailor an exception
- Use quantitative analysis of fulfilling the request, not qualitative analysis of the requestor and their motives in crafting the exception
 - Example: Texas Sec. 552.232. Allows a governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges to avoid providing the copies again with certain exceptions
 - Example: Illinois 5 ILCS 140/3.2 allows a records custodian define a person who asks repeatedly for numerous and various records as a “recurrent requestor” and require them to pay up front for records or tell them their requests are burdensome and ask them to reduce their requests to manageable proportions
- Use a multi-factor formula with allowance for a judgment in favor of granting the request, a chance to reframe the request so it can be granted, and a chance for appeal if denied
- Non-judicial appeal of findings of excessiveness should be to a disinterested third party
- The same entity for appeals should be available for advisory opinions to help guide records managers’ decisions

For additional information, questions, or assistance in adopting and implementing the ideas presented in this document or in addressing any public records issues, please contact us or visit our web site as <http://www.cspra.org>.

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COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

June 21, 2016

To: Senate Judiciary Committee

Re: **Oppose AB 2880**

Who We Are

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public record access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, governmental, commercial, and societal benefit. Members of CSPRA are just a few of the many entities that comprise a vital link in the flow of information for these purposes and provide services that are widely used by constituents in your state. Collectively, CSPRA members alone employ over 40,000 persons across the U.S. The economic and societal activity that relies on entities such as CSPRA members is valued in the trillions of dollars. Our economy and society depend on value-added information and services that includes public record data for so many important aspects of our daily lives and work.

We are writing to express our concerns about AB 2880 and join with several other organizations that have pointed out the impact of this legislation on citizen speech, open government, and access to public records. Specifically we join in the critique provided in a June 6th letter signed by the Electronic Frontier Foundation and 22 other groups concerned about the bill. We do not see any need for this broad new statutory copyright regime for public records and find it antithetical to suggest that public records need to be protected from the public. We favor targeted to solutions to problems and intelligently enhancing access rather than sweeping legal changes that will undoubtedly have negative unintended consequences for public records access and open government.

Public records are for all to use as they see fit under the law and need to be available to all without unduly burdensome categorical or legal limitations. The effect on public access of

any new limitations needs to be understood and carefully considered to make sure the critical resource of public records continues to flow and support our civic and economic needs. Please remain vigilant in protecting open public access to public records. Thank you for your consideration of our input.

Regards,

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Tim Wachter



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March 31, 2017

Erik Arneson
Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
VIA regulationsoor@pa.gov

RE: Review of Draft Office of Open Records Regulations

Dear Mr. Arneson:

I would like to thank you for the opportunity to review the draft regulations created by the Office of Open Records. I have reviewed the draft regulations in detail, and offer the following comments.

I. GENERAL COMMENT

The Pennsylvania Right-to-Know Law provides that “the Office of Open Records may promulgate regulations pertaining to appeals involving a Commonwealth agency or local agency.” 65 P.S. §67.504(a). It is my understanding that these draft regulations have been prepared pursuant to this authority. I do offer the general concern that the regulations proposed in Sections 77.5 through 77.27 all largely pertain to the facilitation of requests. My concern is that these regulations do not meet the statutory authority provided in Section 67.504(a) as these sections do not pertain to appeals.

This comment should not be read to mean that many of the draft regulations are without merit. Rather, it is a concern that by promulgating these regulations the Office of Open Records will be inviting additional litigation. It has been my experience that it is frustrating for open-records officers and other involved in the process when the “rules of the game” change so frequently. These changes are often due to the fact that courts have had to sort out ambiguities and inconsistencies within the Right-to-Know Law. Should these provisions of the draft regulations pertaining to non-appeal related items be promulgated, it is my fear that additional litigation will be required in order to provide clarity, consistency and stability within the law. In

my opinion, these matters should be left alone until such time that the legislature amends the law in order to avoid disruption brought by frequent litigation.

With the above general comment in mind, I offer the specific comments.

II. SUBCHAPTER A – GENERAL PROVISIONS

A. Section 77.2 – Scope of Part.

Section 77.3(c) states that “this section supersedes 1 Pa.Code Section 31.2 (relating to liberal construction).” This provision appears to be unnecessary in light of Section 77.2(c) which notes that Section 31.2 of 1 Pa.Code does not apply or pertain to the practices and procedures before the Office of Open Records.

B. Section 77.5 – Definitions.

- (1) Commercial Purpose. While it is clear that this definition is being included in light of the proposed Section 77.7 regulations pertaining to “request made for commercial purpose”, my concern is that we are introducing a new term into Right-to-Know jurisprudence, that this definition does not pertain to appeals per Section 504(a), and that including provisions related to commercial purpose requests are going to unnecessarily invite litigation as the term is not included within the statute.
- (2) Personal Information. As you will see per my comments to Section 77.23, it appears that the inclusion of “personal information” as a new term is an attempt to create an exception which would otherwise be included in Section 67.708(b). Additionally, the inclusion of this term does not seem to relate to appeals per the requirements of 67.504(a). With respect to the specifics of the definition, it notes that “the term includes all of the following: (i) individual information enumerated in the RTKL...” It is unclear as to which information enumerated in the Right-to-Know Law would be determined to be “individual information”. Confusion could arise as there are specifics enumerated in Section 708 (b)(6) with respect to personal identification information, but that is clearly different than “individual information.” Additionally, the definition includes “(ix) information that affects the legal or safety interests of an individual.” I find that provision is too broad, without sufficient explanation as to a “legal or safety interest of an individual,” and encourages litigation to further define the terms.
- (3) Reasonable Expectation of Privacy. Once again, I do not believe that this definition pertains to appeals, and is thus not authorized pursuant to Section 67.504(a). Notwithstanding that concern, the definition of

“reasonable expectation of privacy” includes “(i) an individual’s reasonable belief that personal information provided to an agency will not be disclosed to the public.” This definition is lacking, as are the regulations, in that there is absolutely no discussion regarding what an individual’s reasonable belief would entail. Once again, this encourages additional litigation.

- (4) Request. The definition of Request limits a request to “a written communication pursuant to Section 67.703 which must be “(i) sent or addressed to the agency’s Open Records Officer” or “sent to an employee of the administrative office of the agency, but contains a citation or reference to the RTKL.” My concern here is that there are decisions from the Pennsylvania Supreme Court which specifically note that in order for a request to be deemed to be a Right-to-Know Request it must be addressed to the Open-Records Officer, as is required by 65 P.S. §67.703. This draft regulation would permit a requester to submit a request to any employee of an administrative office and that request would be determined to be a Right-to-Know Request if there was some citation or reference to the Right-to-Know in it. While that may make practical sense, the regulation appears to be outside the allowances of section 703 of the RTKL and the Pennsylvania Supreme Court’s decision. Additionally, I am concerned that this regulation does not fit with the OOR’s regulatory as this definition does not pertain to appeals pursuant to Section 67.504(a).

C. Section 76.6 – Computation of Time.

- (1) In subsection (a)(2) there appears to be a typographical error. The first sentence in the provision reads “for an extension notice under and 902 of the RTKL . . .” It appears that “901” should be inserted between “under” and “and”.
- (2) Subsection (a)(3)(i) provides that a requestor is to allow three mailing days for receipt of an agency’s response prior to filing an appeal, and that if you fail to allow for the three mailing days then your appeal would be dismissed as being premature. Additionally, the draft regulations provide that an appeal would not be considered premature if the three mailing days were not included if any of the following occur:
- (a) The request is submitted electronically.
 - (b) The request does not include a physical mailing address.
 - (c) The request asks the agency to respond electronically.

I take issue with subsections (a)(3)(i)(a) and (c). The fact that a request was submitted electronically or that the requestor asked the agency to respond electronically should in no way obviate the obligation of the OOR to dismiss an appeal as premature. This draft regulation presupposes that the Open-Records Officer is required to respond electronically. There is no such requirement within the law. Additionally, and practically, while a request may be submitted electronically, or a requestor may request that an answer be provided electronically, there may be situations where the records that are requested do not exist electronically. Additionally, there is no obligation to scan records in so that a request can be fulfilled electronically. As such, this draft regulation would have the practical affect of requiring an electronic response to Right-to-Know Requests or an agency would suffer the consequence of losing the allowance of three mailing days prior to a response being determined to be premature.

- (3) Subsection (a)(4). It does not appear that this provision is a complete sentence.

D. Section 77.7 – Request Made for a Commercial Purpose.

- (1) Regarding this entire Section, and as I noted above in the Section pertaining to definitions, I am concerned that creating regulations pertaining to commercial requests are *ultra vires* acts. As a result, such regulations will encourage additional litigation. Additionally, these regulations do not pertain to appeals, thus and appear to be outside of the bounds of the allowances of Section 67.504(a).
- (2) Regarding Subsection (b), there is no allowance in Section 67.1307 for a separate fee schedule specifically for commercial purposes. Once again, I believe this to be *ultra vires* and would encourage additional legislation.

III. SUBCHAPTER B – PROCEDURE FOR FILING REQUESTS

A. Section 77.21 – Registration of Open-Records Officers.

Subsection (a)(1) provides that there is an annual registration of Open Records Officers before February 1 of each year. This is unnecessary. Subsection (2), which requires that a new Open Records Officer be registered within 30 days of their designation, would take care of any concerns raised as to whether a list at the Office of Open Records is up to date. An annual registration merely generates unnecessary paperwork.

B. Section 77.22 – General Notice.

- (1) Once again, I believe that this provision is beyond the allowances of 67.504(a) in that it does not deal with appeals to the Office of Open Records.
- (2) Subsection (a)(2) and (3) are requirements above and beyond what is required by Section 67.504 (b) on postings. Additionally, Subsection (3) specifically creates a new requirement for Open-Records Officers to track the names of any person who may file such an objection to a future request and would require the Open-Records Officer to review all records to determine if anything may pertain to that individual. Additionally, by reference to “reasonable expectation of privacy” the regulation is requiring that an Open-Records Officer attempt to get inside the head of the third party and determine what the requester may or may not believe to be reasonable.
- (3) Subsection (b) also appears to be beyond the allowances of Section 67.504(a) as the requirement of a notice does not pertain to appeals. Additionally, this entire provision appears to be unenforceable.

C. Section 77.23 – Third Party Interest Policy.

- (1) Once again this entire regulation appears to be outside the bounds of Section 67.504(a).
- (2) Notwithstanding the above, and that the term “personal information” is nebulous, Subsection (2) refers to the redaction of personal information of third parties that object to the release of their “personal information under Section 77.25(c).” Instead, it should be a reference to “individuals who object to release in response to the notice provided under Section 77.25(a).”

D. Section 77.24 – Request for Records Containing the Personal Information of Third Parties.

- (1) This provision also presents an issue with respect to the allowances of Section 67.504(a).
- (2) Subsection (a) adds an additional duty for Open Records Officers which is beyond the extent of the requirements of Section 67.901.
- (3) Subsection (b) creates a privacy balancing test that is not in this statute, and it appears to extend beyond the allowances of the Pennsylvania

Supreme Court's recent determination that there is a right to privacy in one's home address.

- (4) Subsection (b)(2) offers concern in three areas:
- (a) The first part of this provision appears to create a new exception for privacy which should be in Section 67.708.
 - (b) The remainder of the provision provides that if there is information in which there is a reasonable expectation of privacy and it "is contained in a public record and public interest in the requested information outweighs the third party's privacy interest and withholding information, the agency may release or withhold third party personal information in accordance with Sections 506(c) and 708 of the RTKL and Section 77.25.

Regarding this section, my comments are as follows. First, the reference to "Section 77.25" needs some sort of indicator identifying that this is of the Pennsylvania Code and not of the Pennsylvania Right-to-Know Law. Second, it appears that we have an inconsistency between various Sections of the regulations. Here, the agency has the allowance to make a determination as to whether to release or withhold third party personal information. This conflicts with Section 77.23 and Section 77.25(c) which requires redaction of personal information in an objection from a third party is received. Thus, Section 77.23 and Section 77.25 would make this balancing test unnecessary.

E. Section 77.25 – Notice to Third Parties of the Release of their Personal Information in which there is a Reasonable Expectation of Privacy.

- (1) Subsection (a) requires notice to third parties within five (5) business days of "receipt of the request containing the third party's personal information." This provision is problematic in that the request would not contain the third party's personal information. Rather, it is the responsive records which would contain the third party's personal information. Second, the time period should not be from the date of receipt of the request, it should be from the date it was determined by the Open-Records Officer that personal information was included in the responsive records. Section 902 provides an Open Records Officer with the opportunity to take an extension period. That gives you thirty days in which to fulfill a request, and often agencies are not able to get to the request until a

substantial period of time has expired within those thirty days. Thus, this five business day deadline is impractical. This is a similar concern as I have previously testified to regarding the 5 day notice provisions pertaining to confidential information, and which the Courts addresses regarding when an Open-Records Officer can request deposits for large requests.

- (2) Subsection (b) requires that the agency claim a thirty day extension to allow the third party to object to the release of the records. This is in addition to the reasons for extension under Section 67.902. I do not believe that the OOR is permitted to expand the statute through regulation. Also, this draft regulation does not pertain to appeals, as is required by the regulatory allowances of the RTKL.

F. Section 77.26 – Notice to Contractors and Vendors

This Section refers to a “contracted nonancillary agency function.” This is an undefined term. Such undefined terms breed confusion and invite additional litigation.

G. Section 77.27 – Preserving Responsive Records during the Request and Administrative Appeals Process.

Most retention periods are related to appeal periods or periods of statutes of limitations. The sixty day period contained in Subsection (b) appears to be arbitrary and there is no rational relationship between this and any law or statute of limitations. I would change the period to be until the last administrative or judicial appeal period has expired.

IV. SUBCHAPTER C – PROCEDURE FOR FILING APPEALS.

A. Section 77.41 – Communications and Filings Generally.

I note that Subsections (c) and (d) refer to “business days”, but Subsection (b) does not. I would include a reference that the days that the OOR is open per (b) are considered “business days” for purposes of this provision.

B. Section 77.49 – Tolling

This provision says “except as provided by Section 77.46(c) . . .”. That Section merely pertains to maintaining a docket and making the docket accessible. It does not appear that this is the right Section to be cited as it does not have anything to do with the tolling of an appeals period.

C. Section 77.50 – Public Access to OOR Appeal Files

Subsection (b) says that if there is “sensitive information” which is included on a submission to the Office of Open Records, the “OOR may in its discretion redact the information” prior to releasing an appeal file. This regulation appears to state that the OOR does not need to redact confidential information when the record is requested under the RTKL. This provision may also be in conflict with other laws, such as where there is an affirmative legal obligation to redact social security numbers, and certainly it is in confrontation with the Office of Open Records positions staked throughout these regulations related to the protection of individual privacy. The proposed regulation appears to create a different standard for the redaction of sensitive information for the Office of Open Records that is not able to be enjoyed by other agencies throughout the Commonwealth.

V. SUBCHAPTER D – PROCEDURE FOR ADMINISTRATING APPEALS

A. Section 77.74 – Agency Notice of Appeal to Third Parties and Agency Contractors or Vendors.

Subsection (e) allows the Office of Open Records to release a third party’s personal information if the Office of Open Records decides that “the public interest in the requested information outweighs the third party’s privacy interest in withholding personal information.” While I recognize that the Office of Open Records is trying to set up a procedure to rule on privacy matters, it is my understanding that Section 67.506(e) has a higher level of requirements for an agency head to meet prior to making the determination to release information that is otherwise accepted from release. There should be some consistency.

VI. SUBCHAPTER E - PROCEDURE FOR MEDIATIONS

A. Section 77.94 – Records of the Mediation Process.

We need a provision that specifically notes that “all records sent by or submitted to a mediator during an OOR mediation are not subject to public access.” This would make it consistent with Section 77.104 which provides for the confidentiality of records submitted during the in camera review process.

VII. SUBCHAPTER F – PROCEDURE FOR GOVERNING CONDUCT IN CAMERA REVIEW

A. Section 77.101 – Ordering the In Camera Inspection of Records.

Note that this is the only provision throughout the draft regulations in which you cite cases that give the Office of Open Records the power to perform a function. This leads the reader to question whether there is not sufficient statutory or case law authority for the other provisions.

VIII. SUBCHAPTER G- PROCEDURE FOR HEARINGS AND CONDUCTING HEARINGS

A. Section 77.121 – Procedure for Scheduling a Hearing.

Subsection (a) states that “hearings will generally be open to the public.” The term “generally” is far too ambiguous and is going to lead to additional litigation should hearings be held. The Office of Open Records should consider putting restrictions on when a hearing would be public or when it would not be public.

B. Section 77.129 – Recording of Hearings

Subsection (a) states that “hearings will be recorded by a stenographer or court report. The Appeals Officer will not or may not omit anything from the recording except as directed”.

First, the terms “will not or may not,” should just be “may not”. Second, who has the power to direct an Appeals Officer to omit anything from the recording? If that power does actually exist, on what basis should it be done?

* * *

Once again, I would like to thank you for the opportunity to review the draft regulations. Thank you for your attention to this matter and please do not hesitate to contact me should you have any questions. I remain,

Very truly yours,

KNOX McLAUGHLIN GORNALL &
SENNETT, P.C.

By: 

Timothy S. Wachter