

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 pro 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 an 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 all 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, or 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).