

Always Open?



How does the new
**Right-to-Know
Law** affect boroughs
across Pennsylvania?
By J. Stephen Feinour

On February 14, 2008, Governor Rendell signed Act 3 of 2008, better known as the Pennsylvania Right-To-Know Law, into law. Act 3 was the culmination of numerous bills introduced in both the House of Representatives and the Senate, but is primarily based on Senate Bill 1-2007 sponsored by Senate Majority Leader Dominic Pileggi (R-Delaware). The provisions of the Right-To-Know Law take effect on January 1, 2009 with a few exceptions. Sections 101 (Title), 102 (Definitions) and 1310 (Office of Open Records) took effect immediately with the passage of the law. Chapters 15 (State-Related Institutions) and 17 (State Contract Information) and Sections 3102(1)(I) and (2)(I) (Repeals of Existing Statutes) shall take effect on July 1, 2008. The immediate effective dates of the provisions for definitions and the Open Records Office will enable the prompt creation and staffing of the Office of Open Records to allow it ample time to become operational and promulgate regulations prior to the January 1, 2009 effective date of the new law.

Governor Rendell recently appointed Terry Mutchler to serve as the first Executive Director of the Office of Open Records with her term starting in early June. The Office of Open Records is established within the Department of Community and Economic Development and is charged with duties including the following:

(1) Providing information relating to the implementation and enforcement of the law.

(2) Issuing of advisory opinions to agencies and requestors.

(3) Providing annual training courses on the new law and the Open Meeting Law ("Sunshine Act"), 65 Pa.C.S. Ch. 7, to agencies, public officials and public employees.

(4) Providing annual regional training courses to local agencies, public officials and public employees.

(5) Assigning appeals officers to handle appeals of public record request disputes.

(6) Establishing a mediation program for dispute resolution.

(7) Establishing an internet web site.

(8) Establishing fees for records for state and local agencies with a bi-annual review of such fees.

(9) Annually reporting to the Governor and the General Assembly on its activities.

The overarching purpose of the Right-To-Know Law is to afford requestors¹ greater and faster access to public records. The new law will necessitate a cultural shift in borough offices in that the burden of proving what records are public is no longer that of the requestor. The presumption will now be that documents in the possession of boroughs are "public records" unless they (1) fall within one of the 30 enumerated exceptions, (2)

are otherwise barred from being public under state or federal law or regulation or judicial order or (3) are privileged. [Sections 301-304]. The current Right-To-Know Law was often criticized because of its placement of the burden on the requestor to prove that a particular record was a "public record," unlike the public records laws of most other states in the nation.

The requestor had to demonstrate the record requested fit into one of two narrow categories of public record, either an "account, voucher or contract" or a "minute, order or decision" of the agency as defined in the statute. The Better Government Association, in 2002, ranked Pennsylvania tied for 47th place out of the 50 states in the effectiveness of its Open Records Law based upon an evaluation of the response time for public record requests, appeal procedures, the availability of expedited appeal in the courts, the availability of legal fees and costs and the sanction for willfully withholding a public record.

Four categories of agencies are subject to the new Right-To-Know Law. Those agencies include:

- **Commonwealth Agency**

Generally any office, department, authority, board, multi-state agency or commission of the Executive Branch; an independent agency; and a state-affiliated entity which performs or is intended to perform an essential governmental function, including the Governor's Office, the Attorney General, the Auditor General and Treasury Department or any similar organization established by the Constitution, statute or executive order.

- **Local Agency** Any political subdivision (i.e., counties, boroughs, townships, cities, school districts), intermediate unit, charter school, cyber charter

school, public trade or vocational school, or intergovernmental, regional or municipal authority or agency.

- **Legislative Agency** Generally the Senate and House of Representatives and various other committees, commissions and bureaus created by them or under their control.

- **Judicial Agency** A court of the Commonwealth or any other entity or office of the Unified Judicial System.

Each municipality, consistent with current law, is required to designate an official or employee who shall act as the Open Records Officer [Section 502]. The duties of the Open Records Officer include receiving right-to-know requests, directing the request to the appropriate person(s) within the agency or to the appropriate person(s) in another agency, tracking the progress of the agency in responding to the request and issuing interim and final responses under the law. All boroughs are required to post the following information (on their web sites, if they have one) for right-to-know requests: (1) contact information for the Open-Records Officer, (2) contact information for the Office of Open Records or other appeals officer, (3) a right-to-know request form and (4) regulations, policies and procedures of the agency regarding right-to-know requests, if any [Section 504(b)]. Most boroughs presumably already have an Open Records Officer, but training under the new law will be instrumental to ensure the Officer and borough staff is aware of the more expansive coverage of the law. Boroughs may promulgate their own policies and procedures and should look to the guidance of the Office of Open Records in that regard. The Office of Open Records shall provide a uniform form which is to be accepted by all

¹ A "requestor" under the new law is no longer required to be a resident of the Commonwealth but can be any citizen of the United States, including an agency.

Commonwealth and local agencies in addition to any right-to-know form adopted by the agency.

As is the case under the current law, boroughs have five business days within which to respond to the requestor. Because the exceptions are so extensive, borough officials are well advised in cases of doubt to forward the request to their solicitor to determine whether the record is protected. In certain circumstances it may be necessary to extend the time for response if the request for access requires redaction or retrieval of a record stored in a remote location, timely response cannot be made due to bona fide and specified staffing limitations, legal review is necessary, the requestor fails to comply with access policies, the requestor fails to pay the fees or the extent or nature of the request precludes response within the required time. The Open Records Officer shall note the date of receipt on the written request, compute the date on which the five-day response period expires and maintain an electronic or paper copy of the request, including all documents submitted with the request. The written request is to be maintained for 30 days unless an appeal is filed, in which case the request shall be maintained until a final determination is issued or the appeal is deemed denied. Appeals from the denial or deemed denial of access by a local agency are filed with the Office of Open Records, which will assign an appeal officer to review the denial. A petition for review of the final determination of the appeal officer shall be taken to the Court of Common Pleas for the County in which the local agency is located.

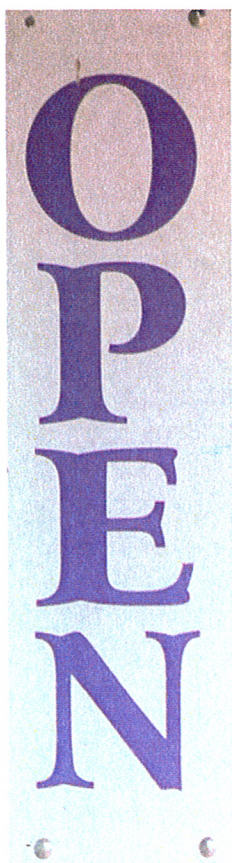
Recognizing that agencies on occasion may be subject to harassing or disruptive requests, the law authorizes the agency to deny access to a record if the requestor has made repeated requests for the same

The List of 30

Exemptions that are not Public Records

Listed below are the exempt records under section 708 (b) of Act 3-2008. These records are most definitely not public records subject to duplication or examination. We recommend posting this information in the office or in the Open Records Officer's Office for quick reference.

1. Result in the loss of funds from Federal or State agencies
2. Jeopardize physical or personal security
3. Imperil the military, homeland security, or threaten public safety or activities
4. Endanger physical security of buildings, infrastructure or computer storage
5. Jeopardize employees' health information including workers' compensation or unemployment compensation records
6. Personal information such as employee identification number, Social Security Number, drivers' license number or home information
7. Personnel documents such as letters of reference, performance rating or grievance materials (until a decision is made based on the latter)
8. Material which details negotiation strategy for collective bargaining agreements
9. Drafts of ordinances, policies or resolutions until they are finally adopted
10. Pre-decisional information/deliberations for proposals or budgets, until presented to a quorum of the local agency
11. Information that discloses a trade secret or other confidential proprietary material
12. Personal notes for public official's own use; also includes telephone notes if not used for an official use
13. The identity of a donor, except when the donation is for "the personal benefit of either a public official or agency employee"
14. Unpublished lecture notes, manuscripts, articles or other creative works in progress
15. Academic transcripts (including licensing exams)
16. Police investigative materials, except for the police blotter
17. Reports of non-criminal investigations (this includes complaints)
18. 911 tapes; however response time logs are public
19. DNA & RNA records
20. Autopsy records
21. Draft minutes, until the next regularly scheduled meeting, or minutes from an executive session
22. Real estate appraisals, engineering studies or environmental reports
23. Library circulation records
24. Certain archival records and museum materials
25. Any material that would identify a protected archaeological site or endangerment to any habitat for a threatened animal/plant species, which is not public
26. Any material such as contract bids, construction, etc. until the contract has been awarded
27. A record related to communications between an insurance carriers, administrative service organization or risk office except for contracts
28. The identity of anyone who applies for social services
29. Correspondence between legislator and constituent
30. Records that identify, home address or birth date of a child 17 years or younger



record and the repeated requests have placed an unreasonable burden on the agency. However, that determination shall not restrict the ability of the requestor to request a different record. Municipal officials must be mindful that the purpose or reason for a request is irrelevant and cannot be the basis for denial. Access

may be denied when such access is not possible due to fire, flood or other disaster, or in the case of historical, ancient or rare documents, records, archives or manuscripts when access may, in the professional judgment of the curator or custodian of records, cause physical damage or irreparable harm to the record.

Notably, the new law recognizes that in many cases, a record of an agency may be housed elsewhere due to contracting arrangements or space constraints, etc. The law also extends public records to those directly related to the "governmental function" and held by third parties contracted by the agency to perform a "governmental function." This could include records in the possession of a municipality's engineer, building codes officer (BCO), solicitor and other similar individuals. While "governmental function" is not defined in the law, the effect of Section 506(d) is to place some contractors within the scope of

"agencies" subject to the law. Such third-party contractors would be well-advised to develop their own in-house public records policies.

Section 708(b) sets forth 30 enumerated exceptions to the public records, legislative records or judicial records which must be made accessible. Borough staff/Open Records Officers should secure training on these categories of excepted records. A number of the exceptions continue the current law or represent codification of judicial decisions. Those include records which, if disclosed, would (1) result in a loss of federal or state funds by the agency, or (2) be reasonably likely to result in substantial and demonstrable risk of physical harm to an individual or harm to the personal security of an individual. Other excepted records include most medical; psychiatric and disability records; personal identifiers such as Social Security Number, driver's license number and telephone numbers; and criminal and non-criminal investigation material. Additional categories of records exempted from disclosure under the new Right-To-Know Law include the following:

- Records regarding computer hardware, software and networks or technical records.
- Drafts of a resolution, ordinance or amendment thereto prepared by or for an agency.
- Records reflecting the internal, pre-decisional deliberations of an agency, its members, employees or officials, or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency.
- Records constituting or containing trade secrets or confidential proprietary information.
- Notes and working papers

prepared by or for a public official or agency employee used solely for that official's or employee's own personal use.

- Records pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings unless the agency or a court determines that the public interest in disclosure outweighs the interest in non-disclosure.
- Records or information relating to communications between an agency and its insurance carrier, administrative service organization or risk management office.
- Records identifying the name, home address or date of birth of a minor child (17 years of age or younger).

As under the current law, boroughs are not required to create a record which does not exist at the time of the request [Section 705]. Most records are maintained in one or more of the following media: paper, electronic, audio visual, photographic and cartographic (drawings, plans, maps, etc.). The medium in which a record is maintained will dictate the medium in which it is provided. If a borough maintains a record in electronic form, then the borough may be required to make it available to the requestor in that form. However, the borough will not be required to create a record that does not already exist by abstracting information or creating a separate compilation, with the exception that a requestor may request to have a record in a publicly available form converted to paper provided the requestor bear the cost of duplication.

The law indicates what should be done if the borough determines that a requested public record, legislative record or financial record contains information which is subject to access and information

which is not subject to access, such as the types enumerated above. The borough is required to grant access to the information which is subject to access and deny access to the information which is not. If the information is an integral part of the public record, legislative record or financial record and cannot be separated, the borough should redact from any information the record which is not subject to access [Section 706]. Boroughs will want to err on the side of caution, i.e. disclosure with redactions, rather than withholding a public record as penalties for non-disclosure have been increased under the new law in order to discourage improper withholding. A third party's designation of the records as confidential may be asserted as grounds to withhold it, and the law allows such third parties with a direct interest to appeal [Section 1101(c)]. In the occasion that an agency believes

a trade secret by a third party. The borough is required to notify the third party within five days of a request for records if the record requested contains trade secrets or proprietary information, presumably to allow the third party the opportunity to object. Civil penalties for local agency denial of access in bad faith have been increased to \$1,500. The failure to comply with a Court Order directing access yields a penalty of up to \$500 per day for any agency or public official who does not promptly comply with the Order. Should a court reverse the final determination of an appeals officer or grant access to a record after a request was deemed denied, the court may award attorneys' fees and costs to the requestor if the court determines that the borough denied access willfully or with wanton disregard, acted in bad faith, or the agency's assertion of exemption, exclusion or defense was not based on

a reasonable interpretation of the law.

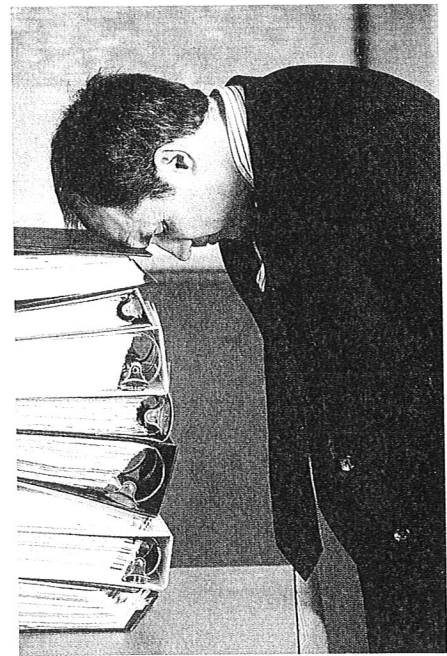
Revisions to the fee provisions of the statute provide

that the Office of Open Records shall establish fees for items such as photocopying, printing from electronic media or microfilm and copying/duplication of data onto electronic media, which will supersede those established at the local level. Importantly, fees chargeable by municipalities are permitted to reflect regional price differences and may include charges at "market value" for certain types of records such as data sets of geographic information systems. Municipalities are also permitted to pass on duplication fees that may be charged by a third party when the record needs to be procured by that party for a fee.

Yet to be determined is whether the new law will bring the desired clarity and consistency to public requests as intended.

that the request was submitted to it in error due to the fact that the document is in another agency's possession, the response should indicate this fact. In addition, a copy of the response should be sent to the Open Records Officer at the second agency. However, the second agency only has an obligation to respond if the requestor submits a proper written request to it.

The new law also provides that the borough has the discretion to make certain documents available even if they do not qualify as a public record. The flip side of the coin is that the borough will want to make sure that it maintains the confidentiality of any information designated as



AN OPEN BOOK Feeling overwhelmed? Don't be. There are plenty of resources for you to use. If you still have questions, be sure to contact PSAB's Research Department at 800-232-7722 extension 18 or 32.

Yet to be determined is whether the new law will bring the desired clarity and consistency to public record requests as intended. Borough officials should begin training on the new law and be on the lookout for the comment period for draft regulations from the Office of Open Records. The PSAB web site at www.boroughs.org has information posted that will assist officials with understanding the new regulations. In addition, the Research Department at 800-232-7722 is prepared to answer member inquiries. It is imperative for all borough officials to understand the effect of the changes, which starts now. **(B)**

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