



House State Government Committee

The Honorable Seth M. Grove, Chair

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The Impact of the COVID-19 Pandemic on Access to Public Records in Pennsylvania

The resulting local and state government closures created yet another unprecedented impact of the COVID-19 pandemic. With the length of the disaster declaration and dangers of the virus uncertain, the initial weeks slowed down the Right-to-Know Law (RTKL) and appeals process. Generally, requesters were patient and worked with agencies as they developed new processes and procedures to deal with the pandemic.

By way of background, the RTKL dictates that an agency must respond to a request for a record in five business days, or 30 additional days if an extension is applied. Within 15 business days of being denied a record by a local or commonwealth agency, an individual can appeal the agency's decision to the Office of Open Records (OOR). The OOR decision of the appeal must normally be made within 30 days; either party may appeal the OOR's decision to the courts.

The burden is on the agency to prove why the requested records should not be released. The OOR is an independent, quasi-judicial agency; when reviewing an appeal, it analyzes evidence, usually in the form of sworn written testimony (affidavits), and legal arguments from the parties, and applies the RTKL and relevant case law to the facts and issues a Final Determination (FD). Though a study suggested that less than three percent of RTKL requests are appealed, the OOR decides approximately three thousand cases each year. Of the appeals decided by the OOR, roughly seven to eight percent are appealed to the courts.

The OOR remained operational through the pandemic. Initially, the OOR issued indefinite stays (essentially a pause) for all appeals filed with the OOR from late March to early April 2020.

In practice, this meant that the OOR continued to receive appeals, and would communicate with the parties and monitor their abilities to submit evidence and legal argument in support of their respective positions. The appeal would be decided after the OOR determined that both parties had been given a fair and meaningful opportunity to participate in the appeal process. This allowed agencies to assess any steps needed to comply with the RTKL under the new safety precautions developed in response to the pandemic. It also protected the parties' right to due process and gave the OOR flexibility in allowing agencies and requesters additional time to present evidence and arguments.

In late April, agency capabilities improved and the OOR switched from issuing indefinite stays to 30 day stays for all appeals filed with the OOR. Parties were now given a specific date by which to file evidence and legal arguments. The appeal would be decided after the OOR determined that both parties had been given a fair and meaningful opportunity to participate in the appeal process. In August of 2020, the OOR began issuing stays for appeals only as needed. These were issued in unique situations where COVID-19 impacted a specific agency and its ability to meet appeal deadlines set by the OOR. (e.g. employees or attorneys required to quarantine after a positive test).

On July 27, 2020, Act 77 became law and required the OOR to publish guidelines specifying how a Commonwealth agency must respond to a request for records made during a disaster declaration when the governor orders the closure of the Commonwealth agency's physical location. Within five days, the OOR published guidelines (complete language in Appendix A) for agencies on the following:

- Public notification of changes to RTKL process;
- Ensuring agency establishes the capability to remotely respond to RTKL requests;
- Confirming that the normal timelines for response to RTKL requests continue;
- Procedures for obtaining records located in a building that is physically closed;
- Procedures for when a requestor needs to inspect records on site and the physical building is closed;
- OOR's ability to invoke reasonable extensions when a physical office building is closed; and
- Need for agencies to update policies to ensure compliance with Act 77.

Combined with the OOR's use of stays, Act 77 clarified the steps Commonwealth agencies must take to provide access to government records while under the Governor's disaster declaration. However, Act 77 did present new challenging legal issues.

Challenges Remaining After Act 77

At this time, the biggest issues surrounding Act 77 involve the application of terms. Most significantly, defining “data” that may have been previously protected under the Disease Prevention and Control Law. Section 2805-H says of Act 77 says:

Subject to section 708 of the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, the following information shall be considered a public record under the Right-to-Know Law during a disaster declaration:

(1) Data used by a Commonwealth agency for any rules, policies or actions taken by the Commonwealth agency in relation to a disaster declaration.

(2) The process by which a Commonwealth agency determines how the Commonwealth agency will collect the data used by the Commonwealth agency for any rules, policies or actions taken by the Commonwealth agency in relation to a disaster declaration.

(3) Any quantitative or predictive models based on the data collected by a Commonwealth agency which are then used by the Commonwealth agency for any rules, policies or actions taken by the Commonwealth agency in relation to a disaster declaration.

The definition and application of “data” in this context will initially fall to the OOR and then shift to the courts. The OOR will continue to hear arguments from the parties as to what they believe some of these terms mean. The interaction between Act 77, the Disease and Prevention and Control Law and RTKL continues to evolve. Specifically:

- What does data include?
- How many and what type of data do Commonwealth agencies have that were used by for any actions taken by that agency in relation to a disaster declaration?
- Is it limited to data related to policy and rules or to all actions? What is an action taken in relation to the disaster declaration and how far does that reach?

Conclusion

Act 77 provided significant clarification on how Commonwealth agencies must respond to RTKL requests during a declared emergency. Questions do remain regarding application of some terms. To date, the OOR is not hearing any significant complaints about agencies ignoring RTKL requests, nor seeing any increase in agencies disengaging during the appeal process. However, the number of appeals filed with OOR continues to increase. The OOR is on track to decide on 3,200 appeals this fiscal year, a 31% increase in one year.

Appendix A: Act 77 Guidelines Provided by the Office of Open Records

Published on July 31, 2020.

When a disaster declaration is issued by the Governor, and the Governor has ordered a Commonwealth agency to close its physical location, the following shall apply:

1. **Public notification.** The agency shall, as promptly as reasonably possible, but not later than three business days following the closure, update the section of its website required by Section 504(b) of the RTKL to notify the public that the agency's physical location is closed and to provide information regarding any necessary changes in the agency's RTKL process, including any limitations on receiving RTKL requests in person, via postal mail, via facsimile, or other method. The agency shall also use its social media accounts to notify the public of any such changes and limitations and shall notify the OOR of any such changes and limitations. (The OOR notes that having an online request form and proactively posting commonly requested records online can save agencies time and effort.)
2. **Remote responses.** The agency shall ensure that its Agency Open Records Officer ("AORO") is able to receive and respond to RTKL requests remotely. If this is not possible, the agency shall, as promptly as reasonably possible, but not later than three business days following the closure, appoint an alternate or temporary AORO who is able to receive and respond to RTKL requests remotely. The contact information for the alternate or temporary AORO shall be posted on the section of the agency's website required by Section 504(b) of the RTKL and shall be provided to the OOR.
3. **Response time.** The agency shall respond to a RTKL request within five business days of the AORO receiving the request. The response shall comply with Section 901 of the RTKL. In its response, the agency may, as appropriate, invoke an extension of time of up to 30 calendar days pursuant to Section 902 of the RTKL.
4. **Entering a closed physical location.** No agency employee shall be required to enter a physical location which has been closed pursuant to a gubernatorial disaster declaration. If gathering records responsive to a RTKL request requires any agency employee to enter such a physical location, the agency shall provide the requester with an estimate of the time it will take to access the records. To the extent possible, the contents of a record shall be made accessible to a requester even when the record is physically unavailable. Nothing shall prevent a requester from requesting the same records after the closure ends. If the closure ends while the request or a related appeal remains pending, the agency shall notify the requester and proceed to review the responsive records under Section 901 of the RTKL.
5. **Inspection of records.** If a requester seeks to inspect records while the agency's physical location is closed pursuant to a gubernatorial disaster declaration, the agency shall make

a reasonable attempt to accommodate inspection. If it is not possible to do so, the agency shall provide electronic copies of the requested records, if possible, and shall provide the requester with an estimate of the time it will take to schedule inspection for any records that cannot be provided electronically.

6. **Appeal process.** After receiving any appeal involving an agency which has been ordered to close its physical location following a gubernatorial disaster declaration, the OOR may invoke reasonable extensions to ensure due process and to provide all parties with a full and fair opportunity to meaningfully participate in the appeal. The OOR shall take into consideration all evidence and/or argument provided by the agency regarding any limitations on its ability to access requested records or otherwise process the RTKL request underlying the appeal.
7. **Additional policies and procedures.** Agencies should review any existing Continuity of Operations Plans (COOPs) and revise them, if necessary, to reflect the requirements of Act 77 and these guidelines. Agencies may also develop additional policies and procedures intended to help them comply with the RTKL, Act 77 of 2020, and these guidelines. Such policies and procedures may not contradict the RTKL, Act 77 of 2020, or these guidelines. Such policies and procedures shall be posted on the section of the agency's website required by Section 504(b) of the RTKL and shall be provided to the OOR.

The OOR notes that Act 77 of 2020 does not preclude an agency from invoking, as appropriate, the existing exemptions in Section 708 of the RTKL, or any other law or regulation which may govern access to records.

These guidelines may be updated. Before any update, the OOR shall provide, to the extent reasonably possible, advance notice of at least seven days to allow for public comment.