



House State Government Subcommittee on Government

Integrity and Transparency

The Honorable Paul Schemel, Chair

November 4, 2021

Written Testimony of Liz Wagenseller

Executive Director, Office of Open Records

www.openrecords.pa.gov

Thank you for inviting the Office of Open Records (OOR) to testify today. In my nearly ten months since becoming executive director, I have spoken to many members of the General Assembly, and I am greatly encouraged by their interest and dedication to improving transparency in Pennsylvania government.

The Right-to-Know Law (RTKL) provides that the OOR serve as a quasi-judicial, independent agency that hears appeals when a request for a government record is denied by a state or local agency. The RTKL also mandates that the OOR provide training on the Sunshine Act, which dictates open meetings rules.

Open records and open meetings did not escape the impact of the COVID-19 pandemic. As government operations have returned mostly to normal, it is an opportune time to review the functioning of both the RTKL and Sunshine Act. My testimony seeks to provide an update on both pieces.

Record-Breaking Number of RTKL Appeals

The 2008 revamping of the RTKL dramatically changed how state and local government records could be accessed in Pennsylvania. By putting the burden on agencies to prove why records should be denied, the public is in a much stronger position to successfully obtain records.

The COVID-19 pandemic put the decisions of state and local government in the forefront like never before, resulting in an increased appetite for information on how policies and decisions were made. Overall, RTKL appeals to the OOR increased 41 percent as compared to five years ago. The most dramatic increases in appeals came from the Department of Health, State Police, police departments, and school districts. Notably, the OOR only sees those RTKL requests that are appealed, estimated to be less than three percent.

A few media outlets reported that the OOR closed down during the early days of the pandemic. This is inaccurate; the OOR never stopped operating and continued to receive and process appeals, respond to RTKL requests, and answer hundreds of calls about the RTKL and Sunshine Act.

RTKL Continues to Make a Big Impact

The impact of the RTKL continues to be felt throughout the Commonwealth. Since July of this year, three major stories came from media RTKL requests:

- More than \$104 million in PA Turnpike tolls went uncollected due to failures with the new “toll-by-plate” system;
- The total amount (\$33 million) paid to the state in a legal settlement by IBM for a botched upgrade to the Department of Labor and Industry’s electronic unemployment compensation system; and
- The communications involved in a 2017 investigation that found that hundreds of thousands of people were overcharged a total of more than \$14 million by the Department of Labor and Industry.

Another encouraging development in the past year is the courts’ willingness to assess legal fees and fines against agencies that have acted in bad faith in response to RTKL requests. This helps underscore the seriousness with which agencies should take when searching for records in response to a request.

- In 2020, Commonwealth Court found that the Department of Corrections “acted in bad faith” in its search for responsive records to a RTKL request and required the Department to pay the newspaper \$118,458 in legal fees; and
- Just last month, Commonwealth Court ordered California University of Pennsylvania to pay over \$14,000 in legal fees to a newspaper for frivolous conduct and acting in bad faith for how it handled a RTKL request.

RTKL Efforts Challenged on Several Fronts

The increasing volume of RTKL is accompanied by numerous challenges. Some are ripe for responsive legislation; others are more complex.

The most imminent challenge is to the OOR's capacity to meet its statutory duties in face of a crushing increase of appeals. Despite not receiving a funding increase after being cut two years ago, we have restructured the office to hire two additional staff and replaced one senior management position with an Appeals Officer. Even with those changes, the current staffing level leaves the OOR in an unsustainable position to continually hear appeals within the statutory mandated 30 days. Without funding to hire additional Appeals Officers, the OOR will quickly reach a breaking point where we are unable to issue timely decisions, and the public will be forced to go to the courts to obtain the records they seek.

Delayed access to records due to a lengthy appeal process in the courts continues to be a challenge across all levels of government. The most striking example is the experience of state Representative Frank Burns' effort to obtain records from the PA Liquor Control Board; though ultimately successful, it took nearly two years, thousands of dollars, and court resources for Rep. Burns to receive the records because the PLCB appealed decisions from the OOR and Commonwealth Court. State Rep. Frank Ryan also recently experienced a year-long wait for data from the Department of Health after the agency appealed the OOR's decision to the Commonwealth Court.

The OOR also continues to observe shortcomings in agencies' responses to some appeals. These issues can result in unnecessary appeals as well as grants to records that may not exist. Notably, the OOR offers training on all of these issues.

Each of the following could result in further legal review:

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

One common complaint the OOR hears is the time and money it takes for agencies to respond to commercial requesters. These types of requests are rarely appealed; however, agencies report spending hours of time collecting records that a private organization ultimately uses to sell their products. Senator Michele Brooks has introduced SB 312 which allows agencies

to charge some additional fees to commercial requesters; several other states charge such fees already.

Pennsylvania's Sunshine Act Dictates Rules for Public Meetings

Any state or local government body, including committees, is subject to the Sunshine Act. This law seeks to ensure public access to any government meeting at which deliberation or official action is taken. The law outlines requirements related to public notice, public comment, meeting minutes, executive session, and recording of meetings. An alleged violation of the Sunshine Act may be taken to the court, or a District Attorney may investigate, with voided meetings and fines of officials a possible outcome.

Lack of Authority, Enforcement in Sunshine Act Creates Confusion and Uncertainty

Agencies which desire to appropriately follow the Sunshine Act often feel helpless in the face of unique situations. The OOR fields hundreds of inquiries a year and we attempt to provide some guidance, but only a court has the statutory authority to offer a binding opinion. In addition, any alleged violation of the Sunshine Act must be taken up by the courts or a District Attorney. Thus, legally binding guidance as well as repercussions for violations would occur many months after a meeting is held.

The pandemic underscored the challenges that arise due to this setup. The General Assembly acted swiftly to allow fully remote public meetings so long as Pennsylvania is under a state of emergency. Once the state of emergency ended, the OOR was flooded with inquiries as to how and if remote meetings may continue. We advised that all meetings must include a physical, in-person component. While some agencies followed that guidance, others have their own interpretation and act accordingly.

On this narrow issue, we urge the General Assembly to act soon to pass legislation that clearly delineates remote meeting rules for all levels of state and local government.

On the broader, we urge a larger discussion and exploration of how to offer agencies authoritative advice, as well as more time-sensitive and less costly review of alleged violations. The current process throws cold water on the public's ability to hold boards accountable because of the cost and difficulty of filing court complaints. This is evidenced by the lack of case law and precedent despite an ever-increasing stream of phone calls and emails to the OOR expressing concern over how meetings are being conducted.

One idea to explore is to create and fund an agency assigned to enforce the Sunshine Act, much like the Ethics Commission has an Investigations Enforcement Counsel. This could allow citizens to challenge an alleged violation of the Sunshine Act without incurring court filing fees, as well as lead to a quicker resolution.

Conclusion

We are observing unprecedented levels of public engagement, as evidenced by our continually growing numbers and the volume of Sunshine Act questions we receive from the public. The RTKL and Sunshine Act continue to be major forces in efforts to increase transparency and accountability in Pennsylvania government. In order to continue to be effective tools, the issues discussed here should be considered so that the laws' purposes may continue to be achieved.