

Pennsylvania's Right to Know Law Act 3 of 2008

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Background

- Original law enacted in 1957
- Amended by Act 100 of 2002
 - Procedural changes
 - No change to definition of “public record”
- Act 3 of 2008
 - Effective Dates

Significant Changes

- Presumption of access
- Burden of proof for denial
- Definition of record, public record
- General Assembly, Courts
- Office of Open Records
- E-mail requests
- Contractors performing “governmental functions”
- State-related institutions
- Online, searchable database for state contracts
- Financial records, aggregated data

Agencies

- Commonwealth agencies
 - State agencies, independent agencies, state-affiliated entities
- Local Agencies
 - Including any “similar governmental entity”
- Legislative Agencies
- Judicial Agencies

Public Records of Commonwealth and Local Agencies

- All records in the possession of a Commonwealth or local agency are presumed to be public records, unless:
 - The record is exempt under Section 708
 - The record is protected by a privilege
 - The record is confidential by law, regulation, or court order

Definition of “Record”

- Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency **and** that is created, received or retained pursuant to law **or** in connection with a transaction, business or activity of the agency
- Term includes document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document

Definition of “Public Record”

- A record, including a financial record, of a Commonwealth or Local agency that:
 - Is not exempt under section 708;
 - Is not exempt from being disclosed under another law, regulation, or court order; or
 - Is not protected by a privilege

Privilege

- The attorney work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege, or other privilege recognized by a court interpreting the laws of this Commonwealth

Financial Records

- Financial Records
 - Any account, voucher or contract dealing with:
 - the receipt or disbursement of funds by an agency; or
 - an agency's acquisition, use or disposal of services, supplies, materials, equipment or property
 - The salary or other payment or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee
 - A financial audit report, not including the work papers underlying an audit

Public Records of Legislative Agencies

- Legislative records in the possession of legislative agencies are presumed to be public, unless:
 - The record is exempt under section 708;
 - The record is protected by a privilege; or
 - The record is exempt from disclosure under any other law, regulation, or court order

Definition of “Legislative Records”

- Nineteen categories of records
- Includes Financial Records

Public Records of Judicial Agencies

- Financial records in the possession of judicial agencies are presumed to be public, unless:
 - The record is exempt under section 708;
 - The record is protected by a privilege; or
 - The record is exempt from disclosure under any other law, regulation, or court order

Financial Records

- Public for all agencies
- Section 708(c):
 - The exceptions in 708(b) shall not apply to financial records, except that agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17)
 - An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity

Aggregated Data

- A tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories
- Section 708(d):
 - The exceptions set forth in subsection (b) shall not apply to aggregated data, except for data protected under (b)(1), (2), (3), (4) or (5)

Government Contractors

- Public records that are not in possession of an agency, but are in the possession of a party with whom the agency has contracted to perform a **governmental function** on behalf of the agency, and which directly relate to the governmental function and are not exempt under this act, shall be considered public records of the agency
- No access to contractor's records unrelated to governmental function
- Requests still submitted to agency

Presumption of Access Does Not Apply If:

1. Exempt Under Any Federal or State Law, Regulation, Judicial Order, or Decree
2. Protected by a Privilege
3. Exempt Under Right to Know Law

Categories of Exemptions

- Security
- Privacy
- Strategy
- Business-related
- Investigations
- Education
- Personnel
- Other

Security Exemptions

- Homeland Security
- Infrastructure Security
- Computer Security
- Personal Security/Harm to Individual

Homeland Security

- Maintained in Connection with Military, Homeland Security, National Defense, Law Enforcement or Other Public Safety Activity
- If Disclosed Would be *Reasonably Likely* to Jeopardize or Threaten Public Safety or Preparedness

§ 708(b)(2)

Infrastructure Security

- If Disclosed Would Create *Reasonable Likelihood* of Endangering Safety or Physical Security
- Building, Public Utility, Resource, Infrastructure, Facility or Information Storage System

Computer Security

- Record Regarding Computer Hardware, Software and Networks
- If Disclosed, Would be *Reasonably Likely* to Jeopardize Computer Security

§ 708(b)(4)

Personal Security

Old Standard

- Whether Disclosure Would “Potentially Impair” Personal Security
- Whether Potential Impairment Outweighs Public Interest in Dissemination

Personal Security

New Standard

- *Reasonably Likely to Result in Substantial and Demonstrable Risk of Physical Harm or to Personal Security*

§ 708(b)(1)(ii)

Privacy

- **Medical/psychiatric/disability history**
Includes DNA and RNA records, and anything that would disclose individually identifiable health information. 65 P.S. §67.708(b)(5, 19)
- **Certain personal information**
 - Social security #, drivers license #, employee #
 - “Home, cellular or personal” phone #
 - Personal email address
 - “Personal financial information”
 - Spouse’s name, marital status, beneficiary or dependent information
 - Home addresses of law enforcement and judges
 - Identity of covert law enforcement

However, the salary and other compensation, and the length of service, of a government employee is public. 65 P.S. §67.708(b)(6)

Privacy

- **Autopsy Records, except that name, cause, and manner of death are public.**
65 P.S. §67.708(b)(20) (See Also 16 P.S. §1251)
- **Records identifying recipients of welfare or other social services.** 65 P.S. §67.708(b)(28)
- **Minor's Name, Home Address, Date of Birth.** 65 P.S. §67.708(b)(30)

Privacy

- **Constituent Requests to Member of General Assembly.** Exemption does not apply to communications from lobbyists. 65 P.S. §67.708(b)(29)
- **Individually Identifiable Library Circulation Records.** 65 P.S. §67.708(b)(23)

Exemptions Based on Strategy

- **Strategies for labor negotiation and arbitration, except that final contracts and agreements and final awards and orders of arbitrators are public.** 65 P.S. §67.708(b)(8)
- **Drafts of laws, regulations, policies.** 65 P.S. §67.708(b)(9)

Exemptions Based on Strategy

- Research, memos or other documents reflecting pre-decisional deliberations and strategies, but public opinion surveys, requests for government funds (including grant applications), and documents presented to a quorum for public deliberation (i.e. board packets) are public. 65 P.S. §67.708(b)(10).
- Draft Minutes of Agency Meetings (until next regularly scheduled meeting) and Minutes of Executive Sessions. 65 P.S. §67.708(b)(21)

Predecisional Deliberations

- Must be Internal
- Must be Predecisional
- Must be Deliberative
- Not Purely Factual Information
- Not Decisional Documents

§ 708(b)(10)

Predecisional Exemption Does Not Apply

- Records Presented for Deliberations by Quorum at Meeting Subject to the Sunshine Act
- Applications or Requests for Commonwealth Funds
- Results of Public Opinion Research

More Exemptions Based on Strategy

- **Real Estate Appraisals, Environmental Reviews, studies, estimates, etc.**

Documents regarding the feasibility or value of a planned purchase or construction, but they become public once the decision is made to proceed. 65 P.S. §67.708(b)(22)

- **Risk management communications.**

Communications between an agency and its insurance carrier, administrative service organization, or risk management office, **but insurance contracts and financial records relating to insurance are public.** 65 P.S. §67.708(b)(27).

Exemptions that protect businesses

- Trade secrets and confidential proprietary information. 65 P.S. §67.708(b)(11)
- Competitive bids and proposals until they are unsealed (become public whether bid is awarded or not). 65 P.S. §67.708(b)(26)
- Financial capability information required to be submitted by a bidder. 65 P.S. §67.708(b)(26)

Investigation Exemptions

- Records “Relating to or Resulting in a Criminal Investigation,” except...
- Records “Relating to a Noncriminal Investigation,” except...

Criminal Investigation

Not Public

- Investigative Materials
- Confidential Source
- Victim Information
- Other Information
- 911 calls, transcripts, except time response logs

§ 708(b)(16)

What Criminal Investigation Records Are Public?

- Private Criminal Complaints
- Police Blotters/Incident Reports
- Traffic Reports
- Emergency Time Response Logs

Noncriminal Investigation

Not Public

- Complaints
- Investigative Materials
- Confidential Sources
- Work Papers Underlying Audits

§ 708(b)(17)

What Noncriminal Investigation Records Are Public?

- Records of Fines and Civil Penalties
- Suspension, Modification, or Revocation of License, Permit, Registration, or Certification (and similar actions)
- Executed Settlement Agreements

Education Exemptions

- Unpublished Lecture Notes
- Unpublished Manuscripts
- Research Materials
- Academic Transcripts
- Exams and Scoring Keys

§ 708(b)(14), (15)

Personnel Exemption

Not Public

- Letters of reference, unless related to appointment to fill vacancy in elected office or office requiring Senate confirmation.
- Performance ratings or reviews.
- State civil service test results and local results if restricted by collective bargaining agreement.
- Applications of those not hired.
- Workplace support services program information.
- Written criticisms of employee, grievance material
- Information relating to discipline, demotion or discharge, except for final action of agency that results in demotion or discharge.
- Academic transcripts.

§ 708(b)(7)

Personnel Records That Are Public

- Applications, Resumes of Employees (past and present)
- Records Reflecting Demotion or Discharge
- Financial records, including name, title, salary, actual compensation, payments or expenses received.
- Some letters of reference, civil service test scores.

Other Exemptions

- **Federal or State Funds.** Records that, if disclosed, would result in the loss of federal or state Funds. 65 P.S. §67.708(b)(1)(i).
- **Personal Notes and Working Papers.** Notes and working papers used by a public official or employee solely for that individual's own personal use. 65 P.S. §67.708(b)(12).
- **Identity of Donors.** The names of lawful donors, except where donation is directed to a specific official or employee. 65 P.S. §67.708(b)(13).

Other Exemptions

- **Academic Materials.** Unpublished creative or scholarly works, 65 P.S. §67.708(b)(14), academic transcripts and exam questions and answers, 65 P.S. §67.708(b)(15).
- **Library and Museum Items** as Restricted by Donors. 65 P.S. §67.708(b)(24)
- **Location of Archaeological Site or Endangered Species.** 65 P.S. §67.708(b)(25)

Agency Discretion to Release Exempt Records

1. Not prohibited by Federal or State law, regulation, judicial order, or decree
2. Not protected by a privilege
3. “Public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access”

§ 506(c)

Procedure

- General rule. A public record, legislative record, or financial record shall be accessible for public inspection and duplication during the regular business hours of an agency (Section 701).

Making a Request

- A requester may make a request in person, by mail, facsimile, or e-mail
- Requests must be directed to agency's "open records officer"
- Request must be "sufficiently specific" and must include the name and address to which an agency should direct its response
- A requester is not required to give the reason for request and agency cannot deny on this basis

Section 703

Who is a Requester?

- Any lawful resident of United States

Uniform Request Form

- Office of Open Records
- Local/State agencies

Agency Response

- Agency must respond as promptly as possible under circumstances
- Agency must do one of the following within 5 business days (or deemed denied):
 - Provide access to or copies of records;
 - Issue a written denial;
 - Request up to a 30-day extension (under some circumstances)

Sections 901, 902, 903

Denials

- Must be in writing
- Must include:
 - Description of record requested;
 - Specific reasons for denial, including citation of supporting legal authority;
 - Name, title, address, telephone number, signature of open records officer;
 - Date of response; and
 - Appeals procedure

Extension

- Agency can request up to 30 more days if:
 - Request requires redaction;
 - Documents stored in remote location;
 - “bona fide and specified” staffing limitations;
 - Legal review is necessary;
 - Requester has not complied with agency policies;
 - Requester has refused to pay applicable fees;
 - Extent or nature of request requires more time

Section 902

If Extension Requested

- Agency must still respond initially within 5 business days or deemed denied
- Response must explain:
 - That request is being reviewed;
 - Reason for review;
 - Reasonable date that response expected to be provided
- If longer than 30 additional days, request deemed denied (unless requester agrees to further extension)

Additional Considerations

- Redaction
- Creation of record
- Production of certain records
- Disruptive requests

Form of Document/Electronic Access

- Medium
- Publicly accessible electronic means
- Paper copies

Fees

- Duplication
- Postage
- Certified copies
- Fee waivers
- Complex and extensive datasets
- Fee limitations
- Prepayment
- Conversion to paper
- Enhanced electronic access

Fee limitations

- Except as provided by statute, no other fees may be imposed unless the agency necessarily incurs costs for complying with a request, and any such fees must be reasonable
- No fee may be imposed for an agency's review of a record to determine whether the record is subject to access under the Act

Office of Open Records

- Within Department of Community and Economic Development
- The Office will:
 - Hear open records appeals from most state and local agencies (assign appeals officers);
 - Provide information relating to implementation of Act;
 - Issue advisory opinions;
 - Provide training courses to agency employees and officials;
 - Establish an informal mediation program;
 - Establish an Internet website;
 - Conduct biannual review of fees;
 - Annually report to Governor and General Assembly

Appeals

- State and Local Agencies
 - Most appeals go to Office of Open Records;
 - Appeals relating to “criminal investigative records;”
 - Appeals from State Treasurer, Auditor General, Attorney General denials;
 - Appeals from Legislative Agency denials;
 - Appeals from Judicial Agency denials

Administrative Appeal

- Must be filed within 15 business days of mailing date of denial or deemed denial
- Must describe records requested, state grounds on which requester believes records are public records, and address any grounds given by agency for delaying or denying the request
- Appeals officer must make a “final determination” within 30 days (or deemed denied)
- Appeals officer may hold hearing
- Third parties with direct interest may ask to participate

Court Appeals

- State agencies, judicial agencies, legislative agencies – appeals filed with Commonwealth Court
- Local agencies – appeals filed with County Court of Common Pleas
- Must be filed within 30 days of final determination or deemed denial

Additional Considerations

- Court costs and attorneys' fees
- Civil penalties
- Immunity

State-related Institutions

- Financial Disclosures
- July 1, 2008

State Contract Information

- Online, searchable database
- State contracts exceeding \$5,000
- Paper copies
- July 1, 2008