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What Lawyers Need to Know About the New Right-to-Know Law

By Michael Berry

During the past year, Pennsylvania politicians from across the political spectrum have said that transparency and open access to government records are the hallmarks of good government. Indeed, legislative leaders placed open records reform at the top of the General Assembly's reform agenda this session, and on Feb. 14, Gov. Edward G. Rendell signed legislation enacting a new Right-to-Know Law.

The new law is the culmination of a yearlong debate in the General Assembly and a vigorous lobbying effort by citizen activists and the press. The resulting legislation dramatically overhauls Pennsylvania's open records law, which had been widely regarded as one of the most restrictive in the country. The new law expands public access to records, creates a new Office of Open Records and modifies the process for making requests and appealing denials.

Although the substantive and procedural provisions of the new law will not take effect until Jan. 1, 2009, lawyers advising government agencies and assisting citizens in accessing public records will need to understand the intricacies of the statute — which runs more than 50 pages in print — much sooner.

In this column, and in a subsequent column, I will attempt to offer an overview of the law. This column highlights the significant substantive changes in the law, discussing what agencies are covered by the laws, what records are publicly accessible and which documents are hidden from public view. My next column will explore the procedure for requesting a record and filing an appeal when a request is denied.

It would be impossible to explain in detail the new law's many intricacies and nuances in the limited space of these columns. Instead, these thumbnail descriptions are designed to summarize the law's complex provisions in a way that highlights its key provisions.

The Current Right-to-Know Law

When Pennsylvania enacted its Right-to-Know Law in 1957, it was one of the first states in the country to codify a citizen's right to access government records. Unfortunately, the law's title was a misnomer, and the public was left with a right to know little about its government.

Under the current law, which largely reflects the substance of the original statute, people primarily can obtain two kinds of documents: (1) a financial record, if it is

considered an “account, voucher or contract;” and (2) “any minute, order or decision” that “fix[es] personal or property rights, privileges, immunities, duties or obligations of any person.” Although Pennsylvania’s courts have permitted access to some other documents that are closely connected to these two categories, the statute itself includes several broad exceptions, which, among other things, bar access to any record that “would disclose the institution, progress or result of an investigation” or which would “prejudice or impair[] a person’s reputation or personal security.” Over the years, Pennsylvania courts have read other exceptions into the statute, further restricting the public’s access to records.

To make matters worse, the existing law does not extend to certain agencies’ records, and the person requesting any government record bears the burden of proving that the record is “public” and thus even subject to the law.

As a result, Pennsylvania citizens have not been able to access important information about their government and how their tax dollars are being used. The effort to rewrite the law set out to change that.

The New Law Covers More Agencies’ Records

The new law expands the number of government entities that must publicly disclose their records. The law covers local agencies, commonwealth agencies and state-affiliated agencies, including the Gaming Control Board, the Pennsylvania Higher Education Assistance Agency, the Pennsylvania Interscholastic Athletic Association and community colleges. The law also extends to private entities that perform government functions. And, for the first time, the law covers legislative agencies (including the General Assembly), the judiciary and state-related universities (Temple University, The University of Pittsburgh, The Pennsylvania State University and Lincoln University), although these three groups must disclose only a specific set of information.

The New Law Presumes Records Are Public

The most important aspect of the new Right-to-Know Law is that it unambiguously presumes any record in the possession, custody or control of a government agency that relates to the agency’s activities is a public record. Consistent with this presumption, the burden of proving that a record is not publicly accessible lies squarely with the government.

These two provisions represent the key to understanding the new law’s substantive provisions and the scope of the public’s right to know. Simply put, a record is considered public unless the government proves that it is exempt from disclosure under one of the law’s stated exceptions. The law, however, treats different types of records differently.

First, the new law heeds the Pennsylvania Supreme Court's recent admonition that "the public has a right to know how the commonwealth spends its money." The law thus guarantees that the public has access to all government financial records, subject to several limited exceptions. The law broadly defines "financial records" to include any document "dealing with the receipt or disbursement of funds ... or an agency's acquisition, use or disposal of services, supplies, materials, equipment or property."

The General Assembly ensured greater transparency by requiring the Treasury Department to post on its Web site every contract (or a summary of every contract) entered into by a state agency, the legislature or the judiciary valued at \$5,000 or more. These measures go a long way to guaranteeing that the use of taxpayers' money and resources is truly transparent.

The new law also provides broad access to "aggregated data" and statistics, subject to several narrow exceptions, and as long as it is not possible to identify individual people from the data. Such access should facilitate more informed policy debates and greater understanding of the issues facing our commonwealth.

The new law does not provide the same transparency in other areas. The law contains more than 30 different provisions exempting various kinds of information from disclosure, and many of those provisions contain multiple exemptions. Understanding the range of these exemptions is critical to determining whether a record is actually public and accessible.

Several of the exemptions mirror exemptions that are common in other states' open records laws. For example, the law seeks to protect homeland security, trade secrets and other confidential proprietary information. It also shields records reflecting an individual's medical, psychiatric or psychological history, as well as personal financial information, like credit card numbers, PIN numbers and bank statements. The law also blocks access to records identifying applicants or recipients of social services. Likewise, the government is not required to disclose any documents that are privileged or protected from disclosure under federal or state law or by court order.

Other exceptions stem from the old law, like the personal security exception, which covers any record that, if disclosed, is "reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual."

The law continues to contain a criminal investigation exception, which extends to all records "relating to or resulting in a criminal investigation." The new law also seals off access to all autopsy records, some of which had been considered public under the old law. Nevertheless, the new law permits access to police blotters, traffic reports and 911 time response logs. Tapes and transcripts of 911 communications are accessible as well, if "the public interest in disclosure outweighs the interest in nondisclosure."

The new law not only exempts criminal investigation records, it also exempts records relating to “noncriminal” investigations, sweeping under the rug complaints, “investigative materials,” and records that “reveal the institution, progress or result of an agency investigation.” Agencies, however, are required to disclose when a fine or civil penalty is imposed as a result of a noncriminal investigation, or if a person’s license or permit is suspended or revoked following an investigation.

The new law includes exemptions for telephone numbers, e-mail addresses, marital status and even the name of someone’s spouse. And, in a last minute amendment, the General Assembly exempted from disclosure records “identifying the name, home address or date of birth of a child 17 years of age or younger.” Still, information such as birth dates and home addresses are considered public in most instances.

Several exceptions address specific concerns. For example, the law provides that the government is not required to reveal the location of archaeological sites or endangered plants or animals, unless those locations were previously known to the public. The government also need not disclose the identity of people who make donations to agencies, “unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency.”

The law similarly exempts “notes and working papers ... used solely for [an] official’s or employee’s own personal use.” And, a number of school records fall outside the government’s disclosure requirements, including professor’s lecture notes, unpublished manuscripts, exams, answer keys and students’ transcripts.

A few of the exemptions focus on employment issues. One exemption denies access to records “pertaining to strategy or negotiations relating to labor relations or collective bargaining.” Another exempts employee performance ratings, “written criticisms of an employee,” and “grievance material, including documents related to discrimination or sexual harassment.”

Other exemptions address government contracts. For example, agencies are not required to disclose certain records made in connection with the government’s purchase, sale or lease of property until the government has decided to proceed with the transaction. Likewise, agencies do not need to turn over bids for government contracts until the contract is awarded or all bids are rejected. The law also protects financial information that bidders submit to demonstrate their “economic capability.”

Finally, the new law exempts records that reflect “the internal, predecisional deliberations of an agency, its members, employees or officials,” including deliberations relating to a “contemplated or proposed policy or course of action,” as well as “any research, memos or other documents used in the predecisional deliberations.” A predecisional document, however, must be disclosed if it was presented at a meeting

subject to Pennsylvania's Sunshine Act, is a request for commonwealth funds, or contains public opinion research.

Any government employee responsible for responding to a request for information must wade through these exceptions — and exceptions to the exceptions — to determine whether the public has a right to the requested information, bearing in mind that all government records are presumed to be open to the public. Although the number and range of exceptions may appear daunting, an agency still may permit the public to access an exempt record if: (1) disclosure of the record is not prohibited by federal or state law or a court order; (2) the record is not protected by privilege; and (3) the “public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.” And, even if some information in a record is exempt, the government must produce the record with the exempt information redacted.

The new law is a marked improvement over the old law, particularly in ensuring access to financial records and ensuring that Pennsylvanians have access to more agencies' records. For citizens, agencies, and lawyers alike, navigating the new law's maze of exemptions may prove challenging. Indeed, in the coming years, the scope of many of the exemptions likely will be debated and litigated as the government and public grapple with their meaning.

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