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## **Will Right-to-Know Law Open Commonwealth for Inspection?**

**By Michael Berry**

*Editor's note: This is the second article in a two-part series looking at Pennsylvania's Right-to-Know Law, which was enacted Feb. 14. The first article, "What Lawyers Need to Know About the New Right-to-Know Law," appeared on March 4.*

When Gov. Edward G. Rendell signed Pennsylvania's new Right-to-Know Law on Feb. 14, he declared that government in the Commonwealth is now "open for inspection." While the new law makes the government more transparent, any citizen seeking to exercise his right to inspect public records must understand the procedure for seeking them. And, if the right is denied, citizens, and their lawyers, must understand the procedure for appealing that decision.

Last week, I provided an overview of the substantive provisions of the new Right-to-Know Law, describing what records are considered publicly accessible and what records are exempt from disclosure. In this column, I address the procedural aspects of the new law — how a person requests a record, what the government must do when it receives a request and how someone can appeal when a request is denied.

In some respects, these procedures remain unchanged, but there are several significant changes, most notably a new administrative appeals process. And, central to that process, is the creation of an Office of Open Records.

This new agency is designed to serve as a clearinghouse of information on implementing, enforcing, and exercising rights under the Right-to-Know Law. From a legal perspective, its most important responsibilities will be issuing advisory opinions interpreting the law and adjudicating appeals when Right-to-Know requests are denied. Although the new law's procedural provisions will not take effect until Jan. 1, 2009, the office will open for business much sooner: The governor must appoint the office's first executive director in the next two months.

### **Requesting Records and Responding to Requests**

Given the many complexities of the new law, requesting a record is remarkably simple. Any U.S. resident can obtain a record simply by asking. The request can be made verbally or in writing. Consistent with the old law, however, a person is afforded the procedural protections of the law only if he submits his request in writing.

Requesting a record in writing is now easier than before: Agencies must accept e-mail requests and requests submitted on a standard form created by the Office of Open

Records. Requests should be directed to an agency's designated open records officer, whose name and contact information will be posted on the agency's Web site. A request must only identify the records being requested and "the name and address to which the agency should address its response." Nothing else is required.

When an agency receives a request, it must determine whether it has "possession, custody or control" of the requested record and whether the record is considered public under the law. An agency generally must respond to requests within five business days. (Under the old law, state agencies were given 10 days to respond.) Nevertheless, an agency may take up to 30 days to respond under certain circumstances, such as when the request needs to be reviewed by a lawyer or the record is stored in a remote location. If an agency claims to need more than five days, it must send a written notice to the requester explaining the reason for the delay and providing "a reasonable date that a response is expected to be provided."

If an agency does not respond to a request in time, the request is deemed to have been denied, and the requester may appeal immediately.

If a request is granted, the government must produce the requested record "in the medium requested if it exists in that medium." So, for example, if copies of a record are kept both electronically and on paper, the record must be produced in whichever form the requester chooses. Otherwise, the record will be produced in the medium in which it exists, although the law permits electronic records to be produced in paper form at the requester's expense.

Before a person receives access to the requested record, "all applicable fees shall be paid." The law permits an agency to charge several kinds of fees. For instance, an agency may charge "reasonable" duplication fees. For "complex and extensive data sets," such as geographic information systems, agencies may charge "the reasonable market value of the same or closely related data," although the law exempts the press and nonprofit researchers from paying this fee. The government also may charge reasonable fees for "enhanced electronic access" and costs "necessarily" incurred in "complying with the request." If the total fees are expected to exceed \$100, a requester may be required to pay the agency before it processes the request. Of course, the government is also permitted to waive the fees.

If the government denies a request, the denial must be in writing. The denial must explain the specific reasons the agency denied the request and describe the procedure to appeal. If a record contains both public and exempt information, the agency must disclose the record with the exempt information redacted. The redaction constitutes a denial, and the agency therefore must explain the basis for the redaction.

The government can deny a request only on certain grounds. The most common ground is likely to be that the information requested is subject to one of the law's 30-plus

exemptions. Agencies also may deny a request for several other reasons, including if the same person “has made repeated requests for the same record and the repeated requests have placed an unreasonable burden on the agency.” The government cannot deny a request, however, based on “the intended use of the public record.”

## **The Appeals Process**

When a request is denied, the requester can file an administrative appeal. (Unlike under the old law, and unlike when a request is deemed to be denied because an agency does not respond, the requester cannot appeal directly to the courts.)

The route of administrative appeal is determined by the agency that received the request and the type of document at issue. For most records, administrative appeals are directed to the Office of Open Records, but, when a request is denied by either the legislative or judicial branch, appeals must be filed with those branches. If the request involves “criminal investigative records,” the appeal is filed with an appeals officer appointed by the local district attorney. Litigants also will have the option of mediating their disputes through the Office of Open Records

An administrative appeal must be filed within 15 days from the date the agency mails its letter denying the request. The appeal must “state the grounds upon which the requester asserts that the record is a public record” and must address the agency’s stated grounds for denying the request.

On appeal, the requested record is presumed to be publicly accessible, and the agency bears the burden of proving that the record is exempt from disclosure. The officer presiding over the appeal may choose to hold a hearing and “may admit into evidence testimony, evidence and documents that [he] believes to be reasonably probative and relevant to an issue in dispute.” Nevertheless, a hearing is not required, and the officer’s decision to hold or not hold a hearing is not appealable.

Third parties with a “direct interest” in a contested record may seek permission to intervene in administrative appeals. The appeals officer may grant the request if no hearing has been held yet and the officer “believes the information” to be provided by the third party “will be probative.”

All administrative appeals must be decided within 30 days, unless the appellant consents to a longer time. The losing party may seek judicial review within 30 days of the date the administrative appeals officer mails his decision. Appeals concerning requests made to commonwealth agencies and the legislative and judicial branches are directed to the Commonwealth Court; appeals involving local agencies are directed to the court of common pleas where the agency is located. The record on appeal consists of the request, the agency’s response, the document initiating the administrative appeal, a transcript of any hearing held during the administrative appeal and the appeals officer’s decision.

On appeal, a court may award attorney fees and costs to the requester when (1) an “agency willfully or with wanton disregard deprived the requester of access to a public record . . . or otherwise acted in bad faith”; or (2) an agency’s final determination was “not based on a reasonable interpretation of the law.”

Courts also may impose a civil penalty up to \$1,500 if the agency “denied access to a public record in bad faith.” On the flip side, courts may award legal fees to an agency if the requester’s “legal challenge” was frivolous.

## **Conclusion**

While the new Right-to-Know Law provides greater access to a greater number of agencies’ records, we can expect a substantial learning curve as the law goes into effect. The public will need to be familiar with how to exercise its rights under the law, and the government will need to understand what steps it must take when it receives a request. Given the scope and number of the law’s exemptions, both citizens and agencies will need to know how the appeals process functions. That process and the new Office of Open Records will play key roles in determining whether the new law fulfills its promise of greater transparency and whether Pennsylvania will truly be “open for inspection.”

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