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Pennsylvania's 2008 Right to Know Law: Open Access at Last

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*John L. Gedid**

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This article will examine the growth of the Pennsylvania Right to Know Law (RTKL) since its first version was enacted in 1957 to its latest amendments enacted in 2008. After examining problems with prior versions of RTKL, the article will analyze the 2008 amendments in order to determine whether they correct the serious deficiencies of earlier acts. The primary emphasis will be on the text of the RTKL. Particular attention will be directed at the major definitional changes and the totally revised procedural structure that the Pennsylvania Legislature created in the 2008 RTKL. There will be a focus on comparing provisions of earlier versions of the RTKL with the current version, particularly in areas where public access problems occurred under the text of the earlier RTKL. A later article will examine the growing number of cases in which the courts are construing the meaning and application of the exceptions to the 2008 RTKL.

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The Founding Fathers understood the necessity for public access to government information in a democracy. Referring to the need of the people to obtain information from their national government, James Madison stated that “[k]nowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹ One justification for right to know, or freedom of information, acts is that in a democratic government decisions belong to the people; therefore, the people have a right to learn of those decisions and the information on which they are based.² Public inability to access government information enables public official corruption to flourish.³ Further, as government has grown more complex, the more important public access to information has become.⁴ It is especially important that the public have the right to obtain information from agencies, because they are not accountable to any electorate.⁵

Pennsylvania recently enacted revisions to a deeply flawed Right to Know statute that governed the public right to access government information. The bill sponsors explained that:

Pennsylvania needs a stronger open records law because openness builds trust in government. Transparency gives the public the ability to review government actions, to understand what government does, to see when government performs well, and when government should be held accountable.⁶

. . . [O]penness in government is extremely important [I]t is extremely important that the people know exactly what is taking place legislatively, how . . . the wide range of governmental issues are dealt with⁷

1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), quoted by Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L. J. 649, 653 (1984).

2. Elias Clarke, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 742 (1975).

3. Sarah Klaper, *The Sun Peeking Around the Corner: Illinois New Freedom of Information Act as a National Model*, 10 CONN. PUB. INT. L. J. 63, 65 (2010).

4. James E. Hakes, 40 NOTRE DAME L. REV. 417 (1965).

5. Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L.L. REV. 1 (1970).

6. *Third Consideration and Final Passage of Right to Know Law: Hearing on SB 1 Before the General Assembly*, 2007 Leg., 191st Sess. (Pa. 2007) (statement of Sen. Pileggi, Bill Sponsor).

7. *Third Consideration and Final Passage of Right to Know Law: Hearing on SB 1 Before the General Assembly*, 2007 Leg., 191st Sess. (Pa. 2007) (statement of Sen. Menlow).

Pennsylvania has had a Right to Know Law (RTKL or Law) since 1957.⁸ The 1957 RTKL provided for the release of information by the government of “public records.” For purposes of the 1957 RTKL, there were three types of public records: 1) each “account, voucher, or contract” that dealt with receipt, disbursement or acquisition of funds;⁹ 2) all records that dealt with “use or disposal of services or of supplies;”¹⁰ and 3) each agency “minute, order, or decision” that fixed “personal or property rights, privileges, immunities, duties or obligations of any person or group of persons.”¹¹

Under the 1957 RTKL the person seeking information from the government had the burden of proving that the record sought was a public record. However, the Act also contained exceptions to that definition that excluded “any record, document, material, . . . or other paper access to . . . would operate to the prejudice or impairment of a person’s reputation or personal security, or which would result in the loss . . . of Federal funds”¹² This language led the courts to conclude that the issue of whether information was to be released or not when one of the exceptions was raised depended on a balancing of public access against the need for confidentiality.¹³ Moreover, under the 1957 RTKL the Pennsylvania courts interpreted this balancing to mean that the citizen requester had the burden of proving that the document or information sought was a public record.¹⁴ Placing the burden on the requester to show that the record sought was public was widely considered to make it one of the worst right to know laws in the United States in the sense that it made citizen access to government information difficult to obtain.¹⁵ Local municipality solicitors and many common pleas judges were unfamiliar with the provisions of the 1957 RTKL, and that lack of familiarity led to

8. 65 P.S. § 66.1, et seq. (1957) (repealed 2008).

9. *Id.*

10. *Id.*

11. *Id.* It may be important to the judicial interpretation of this section to note that it is identical to the definition of “adjudication” in the Pennsylvania Administrative Agency Law, which defines the term as: “Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.” 2 P.S. § 101 (2007).

12. *See generally* 65 P.S. § 66.1 (1957) (repealed 2008).

13. *Rowland v. Commw. of Pa. Pub. Sch. Ret. Sys*, 885 A.2d 621 (Pa. Commw. Ct. 2005); *Bargeron v. UCBP Dept. of Labor and Indus., Unemployment Comp. Bd. of Review*, 720 A.2d 500, 502 (Pa. Commw. Ct. 1998).

14. *Della Franco v. Dep’t of Labor & Industry*, 722 A.2d 776 (Pa. Commw. Ct. 1999).

15. *Craig Staudenmeir, Something Old, Something New*, 10 PA. LAWYER 38, 40 (2008).

inconsistent interpretations and applications of the act.¹⁶ Many agencies and local government units used ambiguity in the 1957 RTKL to deny release of information to the public.¹⁷ Many state officials were strongly opposed to the release of information to the public. The unrelenting hostility of many officials and agencies to the release of information was a separate problem ever since the enactment of the 1957 RTKL. For example, in *Wiley v. Woods*,¹⁸ the Pennsylvania Supreme Court held that the reason why a citizen sought information from an agency or municipality was irrelevant to the government duty to release; thus, records must be released regardless of the reasons that they were sought.¹⁹ Nevertheless, municipalities regularly refused to release information because of the reason for which the requester sought it.²⁰

The absence of any penalty for unjustified or arbitrary refusal to release information against a municipality, agency or refusing government official was one of several major reasons for lack of public access to government records and information under the 1957 RTKL.²¹ Local government behavior in this area verged on the outrageous: some municipalities required citizens to bring their own copy machines to municipal offices in order to obtain copies of records, even though the municipality possessed copying equipment and the citizens were willing to pay.²² Other municipalities severely limited the hours at which citizens could inspect and copy records.²³ Because the 1957 RTKL was enacted before the advent of computers, it did not make any provision for access to computerized records. As a result, many municipalities and agencies refused access to such records or created roadblocks for persons seeking them.²⁴ Almost from its adoption, the 1957 RTKL failed to make information and government records freely available to the public.

16. Joshua Harmon, *Oversight of State Open Records Laws*, 79 Pa. Bar Assn. Q. 93, 95 (2008).

17. Stephen P. Drexler, *Pennsylvania's Right to Know Act*, 33 Duq. L. Rev. 127, 133 (1994).

18. 141 A.2d 844 (Pa. 1958).

19. *Id.* at 848.

20. Stephen P. Drexler, *Pennsylvania's Right to Know Act: How it is used to Discourage, Delay and Deny Access to Public Documents and Why it Needs to be Changed*, 33 DUQ. L. REV. 127, 133 (1994).

21. *Id.*

22. *Id.* at 134.

23. *Id.*

24. *Id.* at 135.

Particular problems were the coverage of the act and the definition of the terms “public records” and “exceptions.” A public record was defined as an “account, voucher or contract” dealing with receipt or disbursement of funds and “any minute, order or decision” that fixed the “personal or property rights, privileges, duties, obligations or immunities” of any person or group.²⁵ Exceptions were provided from that definition for: (1) agency investigative reports; (2) materials the disclosure of which was prohibited by statute, rule or court order; (3) material that would impair the security or reputation of an individual; and (4) material that would endanger the receipt of federal funds.²⁶ The courts characterized these definitions as ambiguous, and adopted differing interpretations. For example, under the 1957 RTKL one judicially-created rule was that a requester had the burden of establishing that what she sought was a “record.”²⁷ Surprisingly, there was considerable uncertainty over what constituted an account, voucher or contract.²⁸ Furthermore, the statutory exceptions to the 1957 RTKL became subjects of continuous litigation. For example, the RTKL did not contain a definition of investigation in the exceptions section; as a result, agencies and municipalities regularly denied requests for information on the basis that an investigation was involved whenever remotely plausible.²⁹ Furthermore, the term “agency” was given a limited definition under terms of the 1957 RTKL. Agency included only departments, boards or commissions of the executive branch, and all Pennsylvania municipalities or subdivisions.³⁰ The 1957 RTKL did not include the judiciary or the legislature or the agencies that were part of those branches in the definition of agency subject to RTKL.

I. THE 2002 AMENDMENTS TO THE RIGHT TO KNOW LAW

As a result of these and other problems with the 1957 RTKL, the Pennsylvania Legislature amended it in 2002.³¹ But, although improving the Act, the amendments did not cure many of its flaws.

25. 65 P.S. § 66.1 (1957) (repealed 2008).

26. *Id.*

27. *LaVelle v. Office of General Counsel of the Commw. of Pa.*, 769 A.2d 449 (Pa. 2001); *West Shore Sch. Dist. v. Homick*, 353 A.2d 93 (Pa. Commw. Ct. 1976).

28. Joshua Harmon, *Oversight of State Open Records Laws: A Study of Pennsylvania's New Right to Know Law And the Office of Open Records*, 79 PA. BAR ASS'N. Q. 93, 104 (2008).

29. *Id.* at 108.

30. 65 P.S. § 66.1 (1957) (repealed 2008).

31. Act of Jun. 29, 2002, P.L. 663, No. 100.

The 2002 RTKL was intended to foster prompt agency response and to give requesters a written explanation of agency refusals to release information.³² For example, the 2002 RTKL made some minor adjustments to the term “agency,” but continued the limitation to the executive branch only.³³ The 2002 RTKL also retained the definition of public record of the 1957 RTKL.³⁴ Generally, a record is “public” for purposes of the RTKL if it is an account, voucher, contract, minute, order, or decision.³⁵ The 2002 RTKL recognized that some records are by separate statute defined not to constitute public records.³⁶ Generally, records were defined as any document that an agency maintained “in any form.”³⁷ This definition was broad enough to include electronic documents, which were not included in the 1957 RTKL.³⁸

The 2002 RTKL added some agency procedure for handling requests for information, which was potentially a major improvement.³⁹ In general, agencies were required to respond to requests in the manner described in the 2002 RTKL in “good faith,” to do so within certain time limits, and in case of a denial to give a requester the reasons in writing for the denial.⁴⁰ While the 1957 RTKL had only one sentence dealing with appeals from agency

32. Julia Gencer & Jason Oyler, *Pennsylvania's New Right to Know Law: Improving Access and Accountability*, 74 PA. BAR ASS'N. Q. 123 (2008).

33. *Id.*; see also *id.* at n.5-14.

34. 65 P.S. § 66.1 (2002) (repealed 2008). Specifically, the relevant portion of the statute stated that a “public record” was:

Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, That the term ‘public records’ shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those reports filed by agencies pertaining to safety and health in industrial plants; it shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, excepting therefrom however the record of any conviction for any criminal act.

Id.

35. Gencer, *supra* note 29, at 125.

36. Gencer, *supra* note 29, at 125.

37. 65 P.S. § 66.1 (2002) (repealed 2008).

38. 65 P.S. § 66.1 (2002) (repealed 2008).

39. 65 P.S. § 66.1 (2002) (repealed 2008).

40. 65 P.S. § 66.1 (2002) (repealed 2008).

denials, the 2002 RTKL contained limited provisions for taking appeals and provided for court costs and attorneys fees as well as penalties against agency officials who disregarded the provisions of the RTKL.⁴¹

The 2002 RTKL was a considerable improvement over the 1957 RTKL. It added a procedure for Pennsylvania citizens to follow to obtain access to public records and sought to bind covered agencies to follow those procedures. Not only did those provisions help requesters at the initial request stage, but mandated information about denials.⁴² That provision, in turn, made appeal more rational under the new provisions for appeal in the 2002 RTKL. And for the first time, the 2002 RTKL contained a limited appeal procedure.

However, there were several serious problems that the 2002 RTKL amendments did not cure: the definitions of agency and of public record, and the scope of the exceptions to the definition of public record.

II. THE 2008 RIGHT TO KNOW LAW

A. *Definitions, Scope, and Policy*

The new act is applicable to all agencies and branches of government.⁴³ The RTKL's mandate is that:

Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act.⁴⁴

The definitions section of the Act describes four types of agency: Commonwealth agencies,⁴⁵ local agencies,⁴⁶ judicial agencies,⁴⁷

41. Gencer, *supra* note 29, at 130-32.

42. 65 P.S. § § 66.3, 66.4 (repealed 2008).

43. 65 P.S. § 67.501 (2008).

44. 65 P.S. § 67.701 (a).

45. 65 P.S. § 67.102. In pertinent part, the 2008 RTKL states that a "Commonwealth agency" is any of the following:

(1) Any office, department, authority, board, multistate agency or commission of the executive branch, an independent agency and a State-affiliated entity. The term includes: (i) The Governor's Office. (ii) The Office of Attorney General, the Department of the Auditor General and the Treasury Department. (iii) An organization established by the Constitution of Pennsylvania, a statute or an executive order which performs or is intended to perform an essential governmental function. (2) The term does not include a judicial or legislative agency.

Id.

and legislative agencies, and it adds the judicial and legislative branches themselves.⁴⁸ The addition of the legislature and the judiciary and their agencies is an important expansion in coverage of the RTKL. Furthermore, like the 2002 RTKL, the express language of the 2008 RTKL mandates that agencies cannot deny a record because of the use to which the requester intends to put it.⁴⁹ This provision will prevent agencies, especially local agencies, from refusing information to persons who they identify as “troublemakers.” It also makes the provision binding on all of government, since it is part of a statute and binds all persons and entities within the jurisdiction of the Pennsylvania Legislature. In addition, the 2008 RTKL contains another provision that will further discourage local and other agencies from ignoring this provision, which is what occurred under the 1957 and 2002 RTKL. As will be discussed below,⁵⁰ the 2008 RTKL adds penalties for unreasonable refusals to release records. Once lawyers begin to use this device; and, if the courts do not adopt an interpretation that limits or restricts this provision (which would appear to be a contradiction of express statutory language), the penalty and costs provisions as they relate to this section should be a useful tool for compelling compliance with the Law.

The 2008 RTKL defines “record” and “public record” broadly, thus expanding the types of record that a citizen can obtain from government. The definitions section of the new RTKL provides that a “record” is information that pertains to an agency transaction or activity “created, received, or retained” in connection with

46. *Id.* Specifically, a “local agency” is defined as: “(1) Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school. (2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.” *Id.*

47. *Id.* A “judicial agency” is “A court of the Commonwealth or any other entity or office of the unified judicial system.” 65 P.S. § 67.102.

48. *Id.* “Legislative agencies” can be any of the following:

(1) The Senate; (2) The House of Representatives; (3) The Capitol Preservation Committee; (4) The Center for Rural Pennsylvania; (5) The Joint Legislative Air and Water Pollution Control and Conservation Committee; (6) The Joint State Government Commission; (7) The Legislative Budget and Finance Committee; (8) The Legislative Data Processing Committee; (9) The Independent Regulatory Review Commission; (10) The Legislative Reference Bureau; (11) The Local Government Commission; (12) The Pennsylvania Commission on Sentencing; (13) The Legislative Reapportionment Commission; (14) The Legislative Office for Research Liaison; [and] (15) The Legislative Audit Advisory Commission.

Id.

49. 65 P.S. §§ 67.301-67.304.

50. See Judicial Review, Costs and Penalties, *infra* at notes 70-77 and accompanying text.

agency business in any form whatsoever.⁵¹ Thus, virtually any information item that produces or consists of information constitutes a record, as long as it is connected to the duties of the agency under its charter or any statute that it administers and does not fall under one of the exemptions provided for in the statute. It is possible that at the margins a few agency activities might be so loosely connected to its statutory mission, area of regulation, or administration that courts will hold that they do not constitute public records. Still, this basic, broad definition of record will cover most situations. Among other things, this definition also clearly includes computer and electronic data.

Under the 2008 RTKL, a “public record” is separately described in the definitions section of the statute as a record that is not “protected by a privilege” or exempt under the RTKL or another statute.⁵² Thus, if something is a record under the RTKL—and records, as noted, are defined in the broadest of terms—it is by definition public in nature. These definitions of record and public record are transparent and “self-executing”: there should be no question in most situations about whether information held or generated by an agency is a public record or not. Under the 2008 RTKL, the days when a citizen was forced to prove to an agency that requested information is a public record are over.

The broad definition of public record, however, is not the most compelling legislative provision relating to that term. The 2008 RTKL also provides that “[a] record in the possession of a[n] agency . . . shall be *presumed* to be a public record.”⁵³ In addition to this presumption of discoverability by the public, the revised RTKL further provides that information is not discoverable only if it is exempted by law, which in the statute is defined to mean that it is made exempt under an express provision of the RTKL or another statute.⁵⁴ These provisions reverse earlier prac-

51. 65 P.S. § 67.102. Overall, a “record” under the 2008 RTKL is any of the following: 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. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

Id.

52. *Id.* More specifically, a “public record” is “[a] record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.” *Id.*

53. 65 P.S. § 67.305(a) (emphasis added).

54. 65 P.S. § 67.305(b).

tice that placed the burden on the requester to establish that what was sought was a public record. Taken together, it should be difficult to miss or to mistake the legislative intent to drastically enlarge the definition and scope of the term “public record.” The guiding light under the Rules of Construction for Statutory Construction under the Pennsylvania Statutory Construction Act of 1972⁵⁵ is that, in construing a statute, legislative intent⁵⁶ controls. Under the same section, when the text of a statute is clear and not ambiguous, then the “letter of it” (the plain meaning) is not to be disregarded.⁵⁷ In connection with “records” and “public records” under the 2008 RTKL the combination of (1) broadly inclusive statutory definitions of the terms; (2) an express presumption that all information in possession of the government is a public record; and (3) a statement that the only exceptions to this broad public record definition are the express statutory exemptions under the 2008 RTKL or another statute, the intent of the Pennsylvania Legislature to make virtually all information or data in the possession of the government or one of its agencies available to the public is manifest.

B. New RTKL Procedure

1. The Request for a Record

Under the 2008 RTKL the OOR is required to create a uniform request form that must be accepted as sufficient by each commonwealth and local agency.⁵⁸ Legislative and Judicial agencies are given the discretion to accept the OOR request form or to adopt one of their own.⁵⁹ The first step that a resident takes to obtain a record is to make a verbal or written request;⁶⁰ the RTKL specifically provides that a request may be made in person, in hard copy writing, by email, or by other electronic means defined

55. See generally 1 PA. CONSOL. STAT. ANN. § 1501 (2010).

56. Section 1921 states that legislative intent controls “the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.” 1 PA. CONSOL. STAT. ANN. § 1921(a).

57. 1 PA. CONSOL. STAT. ANN. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”) (2008).

58. 65 P.S. § 67.505(a).

59. 65 P.S. § 67.506(b), (c).

60. 65 P.S. § 67.702: “[a]gencies may fulfill verbal, written or anonymous verbal or written requests for access to records under this act. . . .”

by agency regulation.⁶¹ However, in order to take advantage of the appeal and remedy provisions of the Law, the request must be in writing.⁶² A request must be “sufficiently specific” to enable the agency to identify the records sought.⁶³ An agency is not required to create a record not currently in existence.⁶⁴

2. *Agency Grant or Denial*

Upon receiving a request, the agency is required to make a good faith effort to determine whether the record is a public record and within its possession.⁶⁵ As previously discussed, in doing so, the agency faces the presumption that information in any form in its possession constitutes a public record. The time for agency response cannot exceed five days,⁶⁶ unless an extension is agreed to by the requester.⁶⁷ An agency response that takes more than five days without an agreed upon extension is deemed denied.⁶⁸ If the agency denies the request, the denial must be in writing and contain detailed reasons for denial, the legal authority for denial, and the procedure for taking an appeal.⁶⁹ If the requester wishes to

61. 65 P.S. § 67.703.

62. 65 P.S. § 67.702: . . . If the requester wishes to pursue the relief and remedies provided for in this act, the request for access to records must be a written request

63. 65 P.S. § 67.703 (2010). The statute reads,

A written request for access to records may be submitted in person, by mail, by e-mail, by facsimile or, to the extent provided by agency rules, by any other electronic means. A written request must be addressed to the open-records officer designated pursuant to section 502. Employees of an agency shall be directed to forward requests for records to the open-records officer. A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested and shall include the name and address to which the agency should address its response. A written request need not include any explanation of the requester's reason for requesting or intended use of the records unless otherwise required by law.

Id. (internal citations omitted).

64. 65 P.S. § 67.705 (2010).

65. 65 P.S. § 67.901 (2010). Specifically, the statute reads:

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested. The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.

Id.

66. *Id.*

67. 65 P.S. § 67.902 (2010).

68. 65 P.S. § 67.901.

69. 65 P.S. § 67.903 (2010).

file a petition for review of a denial by a Commonwealth Agency and has made her request in writing, she must file her petition for review within thirty days as provided in the Commonwealth Court rules for filing a petition for review.⁷⁰ In case of denial by a local agency, she must file within thirty days in accordance with the rules of court of the applicable county court of common pleas.⁷¹ The RTKL also defines the contents of the record on appeal, a provision that should lead to more consistency in this area.⁷²

III. THE NEW STRUCTURE FOR RTKL—OPEN RECORDS OFFICERS, APPEAL OFFICERS, AND THE OFFICE OF OPEN RECORDS

A major problem under the earlier RTKL's was that there was an ill-defined, or nonexistent, procedure for requesters to follow when an agency refused to disclose information.⁷³ This meant, not merely that there was no incentive for agencies to honor requests for information, but that, instead, the incentive was *not* to disclose.⁷⁴ If an employee disclosed information that later was found not to be part of a public record under the earlier RTKL's, release might lead to dismissal.⁷⁵ Moreover, there was no sanction

70. 65 P.S. § 67.1301 (2010).

71. 65 P.S. § 67.1302 (2010).

72. 65 P.S. § 67.1303(b) (2010). The statute defines the record of appeal as "[t]he record before a court shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." *Id.* (internal citations omitted).

73. Right To Know Law Act of 1957, Pub. L. No. 390-212, § 4. The 1957 RTKL provided only a very general, vague power to appeal an agency's refusal to release records:

Any citizen . . . denied any right granted to him under section 2 or 3 of this [RTKL] Act, may appeal from such denial. If such court determines that such denial was not for just and proper cause, under the terms of this Act, it may enter such order for disclosure as it deems proper. It barely needs pointing out that this statute 1) does not identify the court for appeal; 2) the procedure for appeal; 3) the nature of the proceedings on appeal; 4) the standard or scope of review on appeal.

Id.

74. In conducting the research for this article on the 1957 RTKL, the author found a document entitled "Pennsylvania's Sunshine Law, A Guide for Public School Boards" published by the Pennsylvania School Boards Association in 1993. In appendix C, there is a bulletin directed to all members of the Pennsylvania School Boards Association reprinted from the Pennsylvania School Board's Bulletin Vol. 56, No. 6, December 1992 entitled the "Board Secretary's Page, Public's Right to Inspect and Copy Certain Records" in which the Pennsylvania School Board's secretary advises school board members that "[t]he [1957 RTKL] Act imposes no penalties for failure to comply [with a citizen request for disclosure] . . . [and] conversely, there can be some very serious consequences (including your discipline or discharge!) if you permit a document which is not a public record to be inspected and/or photocopied"
<http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ICServlet?accno=ED364989> available at ER-

75. *Id.*

against the agency or branch or employee for any refusal to release information, even one that was made unreasonably, arbitrarily or in bad faith. And, since there was no internal agency appeal procedure, the only choice of a requester was to take an appeal to some (undesignated) court.

The Pennsylvania Legislature made major changes to the RTKL appeal procedure in the 2008 RTKL.⁷⁶ Changes were made, generally, to: 1) provide a procedure for requesting information; 2) create a structure within each agency for RTKL requests to be processed; 3) create a new agency or provide internal agency procedures to hear appeals from initial agency denials of RTKL requests;⁷⁷ and 4) create a procedure for appeals from the RTKL appeal agency to named, identified courts.⁷⁸

Under the RTKL each agency is required to appoint an open records officer to whom all requests for information are directed.⁷⁹ Some agencies are also directed to appoint an appeals officer,⁸⁰ who, if the agency denies the request, will hear an appeal of the agency's initial open records officer decision.⁸¹

An important addition of the 2008 RTKL was creation of the Office of Open Records (OOR).⁸² The OOR is the centerpiece of the new RTKL. The OOR's duties are: 1) to appoint appeals officers for Commonwealth and local agencies;⁸³ 2) to train appeals officers;⁸⁴ 3) to provide information about RTKL⁸⁵; 4) to provide advisory opinions to agencies and requesters⁸⁶; 5) to provide training courses annually to agencies, public officials and public employees⁸⁷; 6) to provide hearings, when necessary, and to act as a central hearing panel by assigning appeals officers to hear appeals from Commonwealth and local agencies and by providing for hearings; 7) to create a mediation program for agencies; 8) to establish

76. Right-To-Know Law of 2008, 65 P.S. § 67.101 (2010).

77. 65 P.S. § 1310 (2010).

78. See generally Chap 13 of the RTKL, 65 P.S. 67.1301-67.1310.

79. 65 P.S. § 67.502 (2010). This section also designates the duties of the open records officer to receive, make copies and otherwise handle the maintenance and possession of requests for information. *Id.* at § 67.502(b).

80. 65 P.S. § 67.503 (2010).

81. 65 P.S. § 67.1102 (2010).

82. 65 P.S. § 67.1310(a) (2010).

83. 65 P.S. § 67.1310

84. 65 P.S. § 67.1310(a)(5)(i)

85. 65 P.S. § 67.1310a(1)

86. 65 P.S. § 67.1310(a)(2).

87. 65 P.S. § 67.1310(a)(3)

an Internet website with information about the RTKL; and 9) to make an annual report each year.⁸⁸

A. *Judicial Review, Costs, and Penalties*

If a requester wishes to appeal an adverse decision of an appeals officer, the 2008 RTKL contains fairly complete provisions in Chapter 13 for judicial review.⁸⁹ The judicial appeal chapter provides that petitions for review (appeals) from Commonwealth agencies are taken to Commonwealth Court⁹⁰ and petitions for review from local agencies are taken to the common pleas court of the county in which the local agency is located.⁹¹ The Chapter also provides for transmission of the record, the nature of party service,⁹² and court costs.⁹³ Unlike the earlier RTKL's, the new RTKL contains provisions for penalties in case of abuse of the RTKL by unreasonable or bad faith failure to disclose information or release records. For example, the appeals courts are authorized to award attorneys fees in situations where an agency refusal to release information has been willful or wanton or is based on an unreasonable interpretation of law.⁹⁴ The appeals courts are also authorized to impose a civil penalty on any agency for bad faith refusal to release a record;⁹⁵ and, in spite of the specific penalty, cost and fine provisions of the RTKL, the courts are also given authority to impose any penalty authorized under "applicable rules of court."⁹⁶

B. *Exemptions*

The 2008 RTKL creates a presumption that a requested document or record is a public record, as has been described above.⁹⁷ Moreover, the RTKL specifically places the burden of proof on an agency to establish by a "preponderance of the evidence" that a record is exempt from public disclosure.⁹⁸ The only exceptions to

88. 65 P.S. § 67.1310(a)(1)-(9).

89. 65 P.S. §§ 67.1301-67.1309 (2010).

90. 65 P.S. § 67.1301(a).

91. 65 P.S. § 67.1302.

92. 65 P.S. § 67.1303.

93. 65 P.S. § 67.1304.

94. 65 P.S. § 67.1304(a)(1).

95. 65 P.S. § 67.1305(a).

96. 65 P.S. § 67.1304(c).

97. See *supra*, note 49, and accompanying text.

98. 65 P.S. 67.708(1)-(3).

the presumption of discoverability by the public are a substantial number of express textual exemptions under the 2008 RTKL.⁹⁹

There are thirty numbered paragraphs of exceptions¹⁰⁰, and many of them contain multiple subjects.¹⁰¹ Thus, as even this cursory glance at the exceptions section discloses, although the presumption that information in the possession of government is a public record has changed to place the burden on the government,

99. See generally 65 P.S. § 67.708(b).

100. 65 P.S. § 67.708(b)(1)-(30).

101. 65 P.S. § 67.708(b)(3) provides:

... (3) A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

(3) A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

(ii) lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National Infrastructure Protections, which are deemed critical due to their nature and which result from risk analysis; threat assessments; consequences assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and

(iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

and 65 P.S. § 67.708(b)(7) provides:

(7) The following records relating to an agency employee:

(i) A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual, unless it was prepared in relation to the appointment of an individual to fill a vacancy in an elected office or an appointed office requiring Senate confirmation.

(ii) A performance rating or review.

(iii) The result of a civil service or similar test administered by a Commonwealth agency, legislative agency or judicial agency. The result of a civil service or similar test administered by a local agency shall not be disclosed if restricted by a collective bargaining agreement. Only test scores of individuals who obtained a passing score on a test administered by a local agency may be disclosed.

(iv) The employment application of an individual who is not hired by the agency.

(v) Workplace support services program information.

(vi) Written criticisms of an employee.

(vii) Grievance material, including documents related to discrimination or sexual harassment.

(viii) Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.

(ix) An academic transcript.

the Pennsylvania Legislature has added numerous exemptions to the 2008 RTKL. Merely counting the number of exceptions does not tell the whole story. Many exceptions are general¹⁰² or unclear.¹⁰³, so that it is likely that there will be litigation over the extent and content of the exemptions. The generality of many exceptions and their precise coverage will require judicial guidance in formulating how widely or narrowly the exceptions will extend. Unfortunately, this characteristic will not only require extensive judicial construction, but also will probably constitute an incentive to agency personnel who are reluctant to release information to refuse it and hope that the judiciary will adopt a narrow construction of potentially applicable exceptions to the RTKL.

IV. CONCLUSION

The exceptions form a potential problem with the 2008 RTKL. As seen above, they are numerous and in some instances not entirely clear. And in any event the exceptions will need substantial judicial construction for guidance for the agencies and citizens seeking information. One can only hope that the courts will construe the RTKL in a manner that is consistent with the legislative intent, and that the courts will use the penalty provisions to enforce the RTKL. The sponsors of the bill and the legislature sought a broad definition of public documents and records in order to bring transparency, trust and accountability to Pennsylvania's democratic form of government. On the other side of the ledger, while the nature of the exceptions is likely to tempt agencies to

102. E.g. 65 P.S. § 67.708(b)(10)(i)(A) & (B) which provide:

10)(i) A record that reflects:

(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

103. E.g. 65 P.S. § 67.708(b)(1) which provides:

(1) A record, the disclosure of which:

...

(ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

refuse disclosure and hope for a narrow judicial application of the RTKL exceptions, Pennsylvania is the only state with a court whose jurisdiction extends primarily to issues that involve government, including agencies: the Commonwealth Court. The Commonwealth Court has developed expertise in administrative law through its specialization in government law.¹⁰⁴ It is to be hoped that the repeated cases involving application of the exceptions to the 2008 RTK will lead that court to an understanding of the intent of the Pennsylvania legislature in enacting the 2008 RTKL and a willingness to enforce agency and government branch compliance with the provisions of the statute.

But the exceptions form only one category of problem. Mention of the exceptions problem should not obscure the fact that the 2008 RTKL is a major improvement for public access to government information. The 2008 RTKL corrects many of the flaws in earlier acts and includes some original and creative attempts to make the RTKL effective. The Pennsylvania Legislature sought to correct numerous problems that became apparent in earlier versions of the RTKL. 1) The 2008 RTKL includes many more agencies and branches within its coverage, thus making previously inaccessible information available to the public. 2) The 2008 RTKL defines "record" broadly, which should eliminate most of the controversies over whether particular items, data or information are discoverable by members of the public. 3) The 2008 RTKL also defines "public records" in the broadest terms, which include a presumption in favor of open release of information by agencies and branches. 4) The 2008 RTKL creates a defined procedure, complete with forms, for a member of the public to seek information from government. 5) The new RTKL creates numerous duties on government and its agencies to respond promptly in writing with plausible reasons for denial. 6) The new RTKL also creates an entirely new agency to oversee and manage the operation of the RTKL. 7) The new RTKL creates an internal appeal procedure within each agency to which an RTKL request is made. This internal review or appeal procedure from an initial denial within an agency is similar to the internal procedure followed in most agencies to review the actions of hearing examiners or ALJs. 8) The 2008 RTKL creates an appeal procedure to review govern-

104. See John L. Gedid, *Procedural Due Process in Pennsylvania: How the Commonwealth Court Clarified an Ambiguous Concept*, 20 WIDENER L. J. 25 (2010). The thesis of the article is that the Commonwealth Court through its exclusive jurisdiction over matters involving government has developed expertise in matters involving government law.

ment denials of RTKL requests to the Commonwealth Court, for state-wide agencies, and to common pleas courts for local agencies. 9) The 2008 RTKL creates a right to costs, attorney's fees and even civil penalties against agencies for bad faith denials of RTKL requests.

Taken together, these changes will transform availability of government information and records to the public. Not only will more information be available, but a procedure for citizens to follow for obtaining it has been provided. Beyond that, the creation of OOR is a master stroke: an instrumentality has been created to police and coordinate a complex program that cuts across and affects all levels of government in Pennsylvania, from each branch at the state level to each state and local agency and each municipality. In addition to the obvious clearinghouse and training functions of OOR, the agency will serve as a watchdog and reporter to the Legislature. In the future, when and if problems with the 2008 RTKL arise, OOR can monitor for, and report to, the Legislature about them. The new RTKL is original in its appeal provisions as well. Along with a named court for appeals, the appellate court has been given weapons—the power to award costs, attorney's fees and even civil penalties—against recalcitrant agencies and employees. The Pennsylvania Legislature has attempted a sea change to past RTKL law: now all information in the possession of the government is discoverable, and only material expressly excepted is not included. The 2008 RTKL is a giant step toward transparency and accountability in Pennsylvania government.