



Office of Open Records Appeals Process - Interim Guidelines

PRELIMINARY STATEMENT

The Office of Open Records establishes the following Interim Guidelines to govern the appeals procedure when a Commonwealth or Local Agency denies a request for records, pursuant to Act 3 of 2008, the Right to Know Law, 65 P.S. §§67.101, *et seq.*, hereafter referred to as “the RTKL.”

I. DEFINITIONS

A. The following definitions shall apply to proceedings under the RTKL:

1. Definitions set forth in the RTKL are incorporated by reference.
2. “**Agency**” – a Commonwealth or local agency as defined by the RTKL.
3. “**Agency Head**” – to the extent adopted in these guidelines, any reference in the General Rules of Administrative Practice and Procedure (“GRAPP”) to the “agency head” shall refer to the Executive Director of the Office of Open Records as herein defined.
4. “**Appeals Officer**” – A staff attorney of the Office of Open Records or another individual designated pursuant to section 503(a) of the RTKL to perform duties and issue a Final Determination as described in section 1102.
5. “**Complainant**” – the party who commences an appeal pursuant to the RTKL.
6. “**Final Determination**” – the written decision of an Appeals Officer regarding the status of a document as a public record or status of an entity as an agency subject to the RTKL. A Final Determination is a final order subject to judicial review.
7. “**Direct interest**” – an interest of a person other than the requester or agency that may be directly affected and that is not adequately represented by existing parties. A person with a direct interest may be bound by the action of the Office in the proceeding.
8. “**Executive Director**” – The Executive Director of the Office of Open Records as appointed by the Governor under section 1320 of the RTKL.
9. “**Hearing**” – the opportunity for a Complainant, Respondent and their counsel to appear before an Appeals Officer to present evidence, examine witnesses and present argument as permitted by the Appeals Officer with respect to a

10. **“In camera inspection”** – a review by the Appeals Officer of records submitted by an agency having custody thereof and claiming an exemption from disclosure or a proceeding during which such records are reviewed and which unauthorized persons are not permitted to inspect, copy or otherwise learn the contents of such records, except as provided in these guidelines.
11. **“Office”** – the Office of Open Records.
12. **“Requester”** – a legal resident of United States, including an agency, that requests a record pursuant to the RTKL.
13. **“Respondent”** – an agency or office alleged to be subject to the RTKL that either denied, partially denied or did not issue a response to a request for records that is the subject of an appeal filed by a Complainant.

II. DESCRIPTION OF THE ORGANIZATION

The Office is established pursuant to section 1310 of the RTKL to, among other tasks, provide information related to implementation and enforcement of the RTKL, assign Appeals Officers to review appeals of decisions by Commonwealth and local agencies, and to monitor cases appealed to the Office. The mission of the Office is to enforce the Commonwealth’s Right-to-Know law and to serve as a resource for citizens, public officials and members of the media in obtaining public records of their government. The official address is:

Terry Mutchler, Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street – Plaza Level
Harrisburg, PA 17120-0225
Facsimile: 717-425-4543
Email: openrecords@state.pa.us

The Office shall be open from 8:30 a.m. to 5:00 p.m. each weekday, except Saturdays, Sundays and legal holidays.

III. COMMENCEMENT OF AN APPEAL

A. Appeal to the Office

These guidelines govern the form, filing and administration of appeals before the Office. If the parties resolve the subject of an appeal at any time during its pendency, they shall immediately inform the Office in writing.

B. Form of Appeal

1. All appeals shall be in writing and shall include the following information that may be submitted using the Appeal Form found on <http://openrecords.state.pa.us>:

- a. The Complainant's full name, address, telephone and fax number; and
- b. A concise statement of relevant facts including, but not limited to:
 - i. The name, title, address, telephone and fax numbers, if known, of the agency and any agency official alleged to have denied the Complainant a right conferred by the RTKL;
 - ii. A description of the records requested;
 - iii. The date of the Right to Know request;
 - iv. The date of any response or the date the response was deemed denied;
 - v. A statement of the grounds upon which the requester asserts that the record is a public record;
 - vi. A statement addressing any grounds stated by the agency for delaying or denying the request, including any unusual circumstances or emergency situations that may have contributed to the delay;
 - vii. A copy of any pertinent correspondence or other documents; and
 - viii. A statement that all material provided by the agency has been submitted with the appeal.

C. Filing an Appeal

1. Docketing – An appeal shall be deemed to have commenced on the date it is recorded as having been docketed by the Office (*see section IV(A) below*). Appeals may be filed via United States mail or any other recognized mail delivery service, hand-delivery, facsimile, or electronically.

2. Electronic filings – May be submitted in Microsoft Word or Adobe PDF to openrecords@state.pa.us . Electronic Filings received outside of normal business hours shall be deemed received and date stamped on the next business day of the Office.

3. Receipt by the Office – Receipt of electronic and regular mail filings must be verified by the sender. Please contact 717.346.9903.

4. Number of Copies – Parties shall provide two (2) copies of all paper filings to the Office of Open Records.

5. Service Upon the Respondent – The Complainant also shall send a copy of the appeal to the Respondent agency at the same time of filing the appeal with the Office and using the same mode of service.

6. Timely Filing Required – An appeal pursuant to the RTKL must be filed with the Office within fifteen (15) business days of the mailing date of the agency’s response or within fifteen (15) business days of a deemed denial pursuant to section 901 of the RTKL. Appeals received after the statutory deadline will not be docketed or considered by the Office.

7. Computation of Time – Except as otherwise provided by law, computation of time shall begin on the first business day after receipt or issuance. Then, count each business day or each calendar day depending on which is specified in the section of applicable law. If unspecified, count calendar days.

The computation of time includes the last day in the calculation. However, if the last day falls on a weekend or holiday, it shall not be counted, and the period shall run to the next business or calendar day, whichever is specified.

8. No Tolling – There will be no tolling of the deadlines in these guidelines based upon the receipt of an inquiry by the Office.

D. Entry of Appearance

Parties to an appeal are not required to have counsel but, if they so choose, may be represented by an attorney admitted to practice before the Supreme Court of Pennsylvania. Attorneys shall adhere to the requirements of 1 Pa. Code. §§31.24, *et seq.*

E. Docketing

The Office shall maintain a docket of all proceedings and each proceeding shall be assigned a number. The docket shall be available for inspection and copying by the public under the RTKL insofar as consistent with the proper discharge of the duties of the Office. Section IV requires that appeals be docketed immediately upon receipt.

IV. PROCEDURE FOR ADMINISTERING APPEALS

A. When the Office receives an appeal, it shall do the following:

1. Immediately assign a docket number and designate an Appeals Officer; and
2. Acknowledge receipt by letter to the Complainant with a copy to Respondent, and provide the docket number and contact information for the Appeals Officer who is vested with all necessary powers of the Office to preside over the case and issue a Final Determination.

B. The Office may at any time request additional information in writing from the Complainant or Respondent agency.

C. Role of the Appeals Officer:

Upon assignment of an appeal to review a denial or partial denial of records, the Appeals Officer's responsibilities include the following:

1. Review all information related to the request;
2. Establish a schedule for the Complainant and Respondent to submit documents in support of their positions if additional documentation is necessary;
3. Consult with agency counsel and the Executive Director as appropriate;
4. Review all Advisory Opinions and Final Determinations previously issued by the Office; and
5. Act upon requests from persons with direct interest.
 - a. The Appeals Officer may grant a request from a person with a direct interest if the following conditions are met:
 - i. A written request is received by the Office that explains the direct interest and any reasons this interest is not adequately represented by the actual parties to the appeal;
 - ii. The Appeals Officer has not held a hearing;
 - iii. No Final Determination has been issued; and
 - iv. The Appeals Officer believes the information will be probative.
 - b. The Appeals Officer shall provide copies of any written request from a person with direct interest to the Complainant and Respondent, as well as any documents thereafter submitted by the person with direct interest prior to ruling on the request.
 - c. When a hearing is held, 1 Pa. Code Pt. II shall apply and persons with direct interest shall be subject to rules applicable to intervention, 1 Pa. Code §§ 35.27, *et seq.*
6. The Appeals Officer shall recommend mediation to resolve the matter and offer it as an option to the parties where appropriate in his/her discretion. Mediation may only take place if both parties agree.
7. The Appeals Officer may decide to hold a hearing after consultation with the Executive Director and shall consider any input received prior to making his/her decision.

8. The decision of whether or not to hold a hearing is not subject to appeal.
9. In the absence of a regulation, policy or procedure expressly governing appeals as set forth in the RTKL or by the Office, the Appeals Officer shall rule on procedural matters on the basis of justice, fairness and expeditious resolution of the dispute.
10. Subpoenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the Office upon its own motion, shall issue only upon application in writing to the Appeals Officer, except that during a hearing such application may be made orally on the record before the Appeals Officer, who is hereby given authority to determine the relevancy and materiality of the evidence sought and to issue such subpoenas accordingly. Appeals Officers and parties shall adhere to the rules for issuance, service and witness fees as set forth in General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.142 as adopted in these guidelines.
11. The Appeals Officer shall issue a Final Determination and send it to the Complainant and Respondent within thirty (30) days of docketing the appeal. The Final Determination shall include: the docket number of the appeal, name of the Appeals Officer and parties, dates of any hearings, date of Final Determination and a written explanation of the reason(s) for the Appeal Officer's findings and conclusions.
12. If the Appeals Officer fails to issue a Final Determination within thirty (30) days, the appeal is deemed denied unless an extension of time has been agreed to by the requester. Requests for extensions of time shall not be unreasonably withheld.
13. Upon mailing the Final Determination to the parties, the matter is concluded at the Office and the Appeals Officer shall include the Final Determination in the official file.

V. PROCEDURE FOR HEARING APPEALS

If the Appeals Officer, after consultation with the Executive Director, elects to hold a hearing, the following procedures shall be followed:

A. Calendar, Notice and Location of Hearings

1. The Office shall maintain a hearing calendar of all proceedings set for hearing and shall post the calendar on its website. The Office, in its discretion with or without motion, for cause may at any time with due notice to the parties advance or postpone any proceeding on the hearing calendar.

2. In the absence of cause requiring otherwise, a description of the subjects and issues associated with all proceedings set for hearing shall be included in the calendar.
3. Notice fixing the time and place for the hearing shall be published in the *Pennsylvania Bulletin*, prior to the date fixed in the notice.
4. Contents of Notice – notice scheduling a hearing shall set forth the authority and jurisdiction under which the hearing is to be held, the nature of the proceeding and shall specify the final date for the filing of petitions and notices to intervene.
5. Copies of the above-described notice shall be sent to the parties.
6. The Appeals Officer may schedule the hearing to occur at any reasonable time and location in accordance with section 1310 of the RTKL including, but not limited to:
 - a. The Office; or
 - b. The office of counsel for the agency if counsel has entered an appearance in the matter; or
 - c. The office of Complainant’s counsel if counsel has entered an appearance in the matter; or
 - d. By video teleconference if accessible to all parties (in this event, the address of all locations where the hearing may be viewed will appear on the Office calendar); or
 - e. At a location mutually agreed upon by the parties.
7. Appeals Officers shall give due regard to the convenience and necessity of the parties and their attorneys in scheduling hearings so far as time, the proper execution of the functions of the Office, and compliance with the deadline for a Final Determination under the RTKL permits. Extensions of time shall not be granted if the Office shall be precluded from meeting the deadlines in the RTKL.
8. Requests for extensions of time for issuing a Final Determination shall not be unreasonably withheld by the requester.

B. Pre-hearing Conference

1. In order to provide opportunity for the submission and consideration of facts, arguments, settlement proposals, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the participants for such purposes may be held at any time prior to or during hearings before the Appeals Officer as time, the nature of the proceeding, and the public interest may permit.

2. During a pre-hearing conference, the following may be considered:
 - a. Simplification of the issues;
 - b. Exchange and acceptance of service of exhibits proposed to be offered in evidence;
 - c. Obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing;
 - d. Limitation of the number of witnesses;
 - e. Discovery or production of data; and
 - f. Other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.
3. Pre-hearing conferences shall not be open to the public.

C. Depositions

Appeals Officers and parties shall adhere to the rules set forth in GRAPP, 1 Pa. Code §§ 35.145 through 35.152.

VI. PROCEDURE FOR CONDUCTING HEARINGS

A. General Provisions

These rules are adopted to the extent not inconsistent with Office policies, regulations and procedures and apply to hearings before Appeals Officers pursuant to the RTKL. GRAPP shall be construed liberally to secure a just, speedy and inexpensive determination of the issues presented.

1. GRAPP, 1 Pa. Code Part II are incorporated by reference for any case that proceeds to a hearing in accordance with the RTKL with the exception of Subchapter G on Proposed Reports, Subchapter H on Agency Action, and Subchapter I on Reopening and Rehearing, which sections shall not apply.
2. All hearings conducted pursuant to the RTKL shall be done in the presence of a qualified court reporter pursuant to Pennsylvania Uniform Rules Governing Court Reporting and Transcripts, 201 Pa. Code 5000.1, *et seq.*

B. Purpose of Hearing

The purpose of the hearing shall be to provide all parties an opportunity to present evidence and argument, if permitted by the Appeals Officer, on all issues to be considered by the Appeals Officer.

C. Authority Delegated to Appeals Officers

Appeals Officers designated by the Executive Director to preside at hearings shall have authority, within the powers and subject to the regulations of the Office, as follows:

1. To regulate the course of hearings, including the scheduling thereof, subject to the approval of the Executive Director, and the recessing, reconvening, and the adjournment thereof, as provided in 1 Pa. Code § 35.102(b);
2. To administer oaths and affirmations;
3. To issue subpoenas;
4. To rule upon offers of proof and receive evidence;
5. To take or cause depositions to be taken;
6. To hold appropriate conferences before or during hearings;
7. To dispose of procedural matters and motions made during hearings; and
8. To take other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authorities under which the Office functions and the regulations and policies of the Office.

D. Order of Presentation

The Respondent shall open the hearing and present any evidence and witnesses in accordance with GRAPP, followed by the Complainant who may also present evidence and witnesses. All witnesses shall be sworn in. Cross examination may be conducted as the Appeals Officer shall find to be required for a full and true disclosure of the facts. The Appeals Officer shall decide whether or not to hear closing argument and, if so permitted, the Complainant shall go first, followed by Respondent, which has the burden of proof pursuant to the RTKL.

E. Limiting Number of Witnesses

The Appeals Officer, in his or her discretion, may limit the number of witnesses or the time for testimony upon a particular issue in the course of any hearing.

F. Written Testimony

The Appeals Officer may permit any party to offer testimony in written form. Such written testimony shall be received in evidence with the same force and effect as though it were stated orally by the witness who has given the evidence, provided that each such witness shall be present at the hearing at which testimony is offered, shall adopt the written testimony under oath, and shall be made available for cross examination as

directed by the Appeals Officer. Prior to its admission such written testimony shall be subject to objections by parties.

G. Stipulations

Appeals Officers and parties shall adhere to the rules set forth in GRAPP, 1 Pa. Code §35.155.

H. Evidence

Appeals Officers and parties shall adhere to the rules set forth in GRAPP, 1 Pa. Code §§ 35.161 through 35.169.

I. Hearing Transcript

Testimony shall be recorded on tape and by a duly qualified court reporter. Hearings shall not be transcribed unless an appeal to the Commonwealth Court or Court of Common Pleas is commenced pursuant to section 1301(a) of the RTKL.

J. *In Camera* Inspection of Records

The procedure for an *in camera* inspection of records shall be as follows:

1. Any party or intervener may request an *in camera* inspection of the records claimed to be exempt from disclosure in a contested case and the Appeals Officer may undertake such an inspection on request, in such Appeal Officer's own discretion, or on remand by a court.
2. If an *in camera* inspection is conducted, the party having custody of the records claimed to be exempt from disclosure shall be required to submit a copy of the records together with an *in camera* inspection index referencing each record, and each item within each record, claimed to be exempt from disclosure.
3. In each case in which an *in camera* inspection is conducted, the Appeals Officer shall verify that each record submitted for such inspection has been identified by the party having custody of the record by reference to an individual reference number or numbers and included in an accompanying *in camera* inspection index.
4. In each case in which an *in camera* inspection is conducted, an *in camera* inspection index shall be prepared in triplicate by the party having custody of the records submitted for such inspection. One copy shall be given to the party submitting the records as a receipt, indicating the records and date received by the

Appeals Officer. The receipt shall also certify that neither the records received for *in camera* inspection, nor their contents, shall be disclosed to any unauthorized person, except as provided by court order and as provided below. The second copy shall be retained by the Appeals Officer and kept for both inventory and decision-making purposes as part of the secure file in which the subject records themselves are kept. The third copy shall be retained by the Office as a public record and kept as part of the public file of the contested case. A copy of the completed index form shall be given to all other parties to the proceedings.

5. It shall be the responsibility of the party submitting records for *in camera* inspection to certify that the copies of the records so submitted are true copies of the records at issue in the contested case. It shall also be the responsibility of such party to make available for examination and cross-examination at a hearing on the matter the official who issued the certification.

6. After receiving records submitted for *in camera* inspection, the Appeals Officer shall deliver the records for storage in a secure Office file.

7. Only the Appeals Officer, the Executive Director, and staff counsel are authorized access to inspect records submitted for *in camera* inspection.

8. The copying of records submitted to the Appeals Officer for *in camera* inspection shall not be permitted. Likewise, no person authorized access to such records may take any notes making reference to specific information contained in such records and claimed to be exempt from disclosure. References to specific records submitted for *in camera* inspection, or the contents of such records, in Final Determinations shall be by the assigned reference numbers as endorsed on the records themselves or by reference to generic descriptions or characterizations as set forth in the related *in camera* inspection index.

9. At hearings, which are always open to the public, all mention of the specific contents of records submitted for *in camera* inspection shall be avoided. Mention of specific records submitted for *in camera* inspection, however, may be made by use of the assigned reference numbers as endorsed on the records themselves or by reference to generic descriptions or characterizations as set forth in the related *in camera* inspection index or in other public records.

10. Unless a judicial appeal is properly and timely filed in accordance with the RTKL, the Appeals Officer shall disclose on request those records in its possession submitted for *in camera* inspection and ordered disclosed by the Final Determination in that case after the expiration of forty-five (45) days from the mailing of the notice of the Final Determination. If no court appeal is filed, the records submitted for *in camera* inspection and ordered disclosed shall be transferred from their secure file to the Office's public file after the expiration of the applicable time period.

11. Unless a judicial appeal is properly and timely filed, after issuing its Final Determination in a particular contested case, the Appeals Officer shall notify the party that submitted records for *in camera* inspection in writing that it may make appropriate arrangements with the Office staff to take possession of such records after the expiration of the operative time periods set forth in number 10 of this subsection. The party taking possession shall be required to sign a receipt for the records returned. If no arrangements are made for the return of such records, the Office shall adhere to the expiration of time periods for the retention of contested case evidence in the Office's current schedule for the retention and destruction of records. In accordance with Pennsylvania law, the records will then be discarded.

12. If a judicial appeal is filed in a particular contested case, the Office shall notify in writing all known parties to the appeal that, as part of the official record to be delivered to the court, the Office intends to deliver the records submitted for *in camera* inspection. The notice shall also advise the parties that the Office shall not move the court to seal such records, but that other parties may do so if they desire; and that any party seeking to seal the records shall notify the Office of its intent to do so before the date by which the Office must certify the record of its proceedings into court. If notified that a motion to seal shall be made, the Office shall not transfer such records until the court makes its determination on the motion.

13. Records submitted for *in camera* inspection which form part of an Office record on appeal shall, until delivered to the reviewing court, continue to be kept in their secure file and separately from the remainder of the record on appeal. When the record on appeal is to be delivered to court, a person authorized access to such records on behalf of the Office shall deliver such records to the clerk of the applicable court. If the court has ordered such records sealed, such authorized person shall so notify the clerk on delivery.

14. Records submitted for *in camera* inspection by a court and returned to the Office where such records were held by the court to be exempt from disclosure shall be returned to their secure file immediately by a person authorized access to such records on behalf of the Office. Any records submitted for *in camera* inspection, returned to the Office by a court and held by the court to be subject to disclosure shall be placed in the Office's public files. In either case, the Office shall notify the party that submitted such records for *in camera* inspection in writing that such party may make appropriate arrangements with the Office staff to take possession of those records or they shall be discarded as provided in number 11 of this subsection.

VII. EFFECT OF FINAL DETERMINATION WHEN NO APPEAL IS FILED

Where an appeal from the Final Determination is not filed in accordance with Section VIII below, the following shall apply:

- A. In a case where the Appeals Officer has issued a Final Determination ordering the release of records to a Requester/Complainant and the Respondent/Agency does not appeal the Final Determination, records shall be made available on the 30th day, or earlier if no appeal is to be filed, of the mailing date of the Final Determination.
- B. Failure to provide access in accordance with a Final Determination may subject an agency to sanctions and penalties by a court.

VIII. JUDICIAL REVIEW OF THE FINAL DETERMINATION

A. Issuance and Service

As set forth above in these guidelines, an Appeals Officer shall issue a Final Determination within thirty (30) days of commencement of the appeal and mail it to all parties.

B. Finality

The Final Determination is a final order subject to judicial review.

C. Required Notice and Service

Notice of actions commenced in accordance with sections 1301 or 1302 of the RTKL shall be served on all parties and the Office, which shall have an opportunity to respond in accordance with applicable court rules.

D. Record on Appeal

The record shall consist of the right-to-know request, the agency's response, the appeal filed under section 1101 of the RTKL, any information or evidence submitted pursuant to the RTKL, the hearing transcript, if any and the Final Determination of the Appeals Officer. Records reviewed by the Appeals Officer *in camera* shall be part of the record in accordance with the guidelines set forth above in section VI(J).

E. Judicial Review of the Final Determination for Commonwealth Agencies:

1. Within thirty (30) days of the mailing date of the Final Determination of the Appeals Officer relating to a decision by a Commonwealth agency issued pursuant to section 1101(b) of the RTKL or the date an appeal is deemed denied, a Complainant/Requester or the Respondent/Agency may file a petition for review or other document as might be required by rule of court with the Commonwealth Court. The RTKL requires the Court decision to contain findings of fact and conclusions of law based upon the evidence as a whole.

2. Stay. A petition for review under this section shall stay the release of the documents until a decision or order of court is issued.

F. Judicial Review of the Final Determination for Local Agencies:

1. Within thirty (30) days of the mailing date of the Final Determination of the Appeals Officer relating to a decision by a Commonwealth agency issued pursuant to section 1101(b) of the RTKL or the date an appeal is deemed denied, a Complainant/Requester or the Respondent/Agency may file a petition for review or other document as might be required by rule of court with the Commonwealth Court. The RTKL requires the Court decision to contain findings of fact and conclusions of law based upon the evidence as a whole.

2. Stay. A petition for review under this section shall stay the release of the documents until a decision or order of court is issued