

## RIGHT-TO-KNOW UPDATE

### 1. WHAT'S CHANGED

- a. Definition of Public Record
- b. Burden of proof/Presumption record is public
- c. Time to respond
- d. No local appeals
- e. New Open Records Officer/Office

### 2. What is a Record?

- a. *Old Version:*
  - i. *Any document maintained by an agency, in any form, whether public or not.*
- b. *New Version:*
  - i. Information, regardless of physical form or characteristics, that document 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.

### 3. Financial Record

- a. *Old Version:*
  - i. Not defined
- b. *New Version:*
  - i. Any account, voucher or contract dealing with:
  - ii. The receipt or disbursement of funds by an agency; or
  - iii. An agency's acquisition, use or disposal of services, supplies, materials, equipment or property.
  - iv. The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
  - v. A financial audit report. The term does not include work papers underlying an audit.

### 4. Public Record

- a. *Old Version:*
  - i. 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.

- b. New Version:
    - i. A RECORD, including a FINANCIAL RECORD, of a commonwealth or local agency that:
    - ii. Is not exempt under §708;
    - iii. Is not exempt from being disclosed under any other federal or state law or regulation or judicial order or decree; or
    - iv. Is not protected by a privilege.
  - c. Possession of the record
    - i. Possessed by the agency, or; a public record that is in the possession of a 3rd party with whom the agency has contracted.
5. Burden of Proof
- a. *Old Version:*
    - i. *The fact that a record is merely in the possession of an agency does not create the presumption that the record is a public record subject or disclosure under the Right to Know Act.*
    - ii. *The burden of proof is placed on the requesting party to establish that the documents sought are public records under the Right to Know Law.*
  - b. New Version:
    - i. General rule - **A record** in the possession of a commonwealth agency or local agency **shall be presumed to be a public record**. The presumption shall not apply if:
      - ii. The record is exempt under §708;
      - iii. The record is protected by a privilege; or
      - iv. The record is exempt from disclosure under any other federal or state law or regulation or judicial order or decree.
- 6.
7. University Issues
- a. One "Open Records Officer" at each University
  - b. No Exceptions Officer
    - i. Get it right the first time.
  - c. Five (5) days to respond to a written request.
  - d. Response Issues:
    - i. Agency can require that applicable fees be paid prior to release of information.
    - ii. If there is no agency response within five (5) business days then it is a deemed denial.
8. Requests

- a. Requests can be received in any format: verbal, e-mail, facsimile, written.
  - b. All universities will have the requirement to post a link on their web page that has contact information for:
    - i. Their Open Records Officer;
    - ii. Their Open Records Policy;
    - iii. The Office of Open Records; and,
    - iv. A form that can be used to request open records.
      - 1. You are able to develop your own forms as long as it contains the required information.
  - c. Agencies can request an extension of time of up to thirty (30) days in addition to the 5 business days (total approx. 35 days) if the following applies:
    - i. Request requires redaction.
    - ii. Request requires retrieval of records from remote location.
    - iii. Response cannot be completed due to bona fide staffing issue.
    - iv. Legal review is required to determine if record is subject to access.
    - v. Requestor has not complied with agency's policies.
    - vi. Requestor refuses to pay applicable fees.
    - vii. The extent or nature of the request precludes response within the required time period.
  - d. Extensions
    - i. Written notice of the requested extension must occur within the 5 day window.
    - ii. Extension can be longer than 30 day if the requestor agrees in writing to a longer extension. However, if the agency does not produce the records by the date agreed to by the requestor, it is deemed denied the day following the end of the extension.
  - e. WRITTEN RESPONSE
    - i. If the agency's response is a denial of a written request, whole or in part, the written denial must include:
      - 1. A description of the record.
      - 2. The specific reason for the denial, including citation to supporting legal authority.
      - 3. The name, title, business address, business phone number, and signature of the Open Records Officer on whose authority the denial is issued.
      - 4. Date of response.
      - 5. The procedure to appeal the denial.
  - f. The requestor can request certified copies which shall be provided with the payment of applicable fees established under §1307.904
  - g. If the agency notifies the requestor that copies are available at the agency office and the requestor fails to retrieve the records within 60 days of the response, the agency can dispose of the documents and keep the fees.
9. Office of Open Records
- a. New Office within the Department of Community and Economic Development.
    - i. Why is it there? Why not?
    - ii. Will handle all appeals from University/PASSHE decisions.

iii. Appeals from Office of Open Records go to the Commonwealth Court.

#### 10. Other Changes - Repeals

- a. Effective January 1, 2009, the new RTK repeals §106 of the Procurement Code. This section prohibited the disclosure of proposals submitted by unsuccessful bidders even after the contract was executed.
- b. WHAT THE NEW RTK LAW DOES NOT CHANGE
  - i. You do not have to initially provide the following prior to a contract award:
    1. A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to,
    2. Demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S §513 (relating to competitive sealed proposals). §708(b)(26).
  - c. Major Change Regarding RTK Requests After the Contract is Awarded
    - i. 62 PA.C.S. §106(b)(relating to confidentiality of unsuccessful proposals) is to make all proposals-successful and unsuccessful-public records at the time a contract is awarded.
    - ii. Currently, unsuccessful proposals are never released and the winning proposal is not released until the contract is executed. There will no doubt be pressure to release all proposals promptly after award of contract so as to permit review of the proposals by a prospective bid protester within the seven day time period permitted for filing. States with similar open records provisions frequently add notice provisions to their solicitations and contracts advising prospective bidders and proposers of the ramifications of the RTKL.
    - iii. Until January 1, 2009 we maintain the status quo regarding bid proposals.

#### 11. What Has Not Changed

- a. The university is under not obligation to create a record that does not exist or to compile, maintain, format, or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.
- b. You can still charge for the cost of copying. The OOR is to be providing a list of acceptable charges for copying, for disk costs, etc. As soon as we have the information, it will be passed on.