

“All You Need to Know About the New ‘Right to Know’ Law”

“A Complete Re-Writing of Pennsylvania’s 1957 Right to Know Law Results in New Burdens and Duties on All School Districts and Municipalities”

Pennsylvania’s Right to Know Law has been in place since 1957. Although the Law was amended in 2002, the 2002 Amendments pale into insignificance when compared to the far reaching amendments contained in Act 3 of 2008. Everything from the expansive new definition section, containing 25 terms compared to the seven in the old section, to establishing a presumption that “a record in the possession of a ... local agency shall be presumed to be a public record,” to placing the burden of proof on School Districts and municipalities to prove that a record falls within one of the 30 listed exceptions to public records, to the creation of an Office of Open Records within the Department of Community and Economic Development (DCED), the new Right to Know Law imposes significant burdens on all School Districts and municipalities throughout the Commonwealth. Although the provisions which apply to School Districts and municipalities do not take effect until January 1, 2009 and only apply to requests made after December 31, 2008, School Districts and municipalities must take immediate steps to ensure their compliance with the new law, especially considering the significantly higher civil penalty of as much as \$1,500.00, compared to the \$300.00 maximum penalty in the old law, for denying access to a public record in bad faith. This summary is only intended to review the key provisions of the new Right to Know Law and should not serve as a substitute for each School District’s and municipality’s review and application of the entire Act to each individual record request. The 25 page Act may be viewed on our website at www.mbm-law.net.

The new Act’s definition section expands the defined terms from seven to 25. Of relevance, “local agency” is specifically defined as “any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school” and “any local, inter-governmental, regional or municipal agency, authority, counsel, board, commission or similar

governmental entity.” As with the old Law, under the new Act, School Districts and municipalities cannot deny access to a public record based upon how the record will be used by the person requesting it. Section 305 of the new Act creates a presumption that a record in the School District’s or municipality’s possession “shall be presumed to be a public record”, which is defined as “a record, including a financial record” (which does not include the work papers underlying an audit), “of a local agency that: (1) is not exempt under Section 708” (which contains the 30 exceptions which are not considered public records); “(2) is not exempt from being disclosed under any other federal or state law or regulation or judicial order or decree” (such as records already protected from disclosure under such federal statutes such as HIPAA and FERPA); “or (3) is not protected by a privilege.” Privilege is defined to include “the attorney work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privileges recognized by a Court interpreting the law of this Commonwealth.” These are the only exceptions to the presumption.

In processing requests for public records, Section 502 requires every School District and municipality to designate an official or employee as their Open Records Officer. The Open Records Officer is required to mark the date of receipt and when the five-day response period will expire on the written request. Either an electronic or paper copy of each written request, including all documents submitted with the request, must be maintained until the request has been fulfilled, or if the request is denied, for a period of thirty (30) days after the denial, or if an appeal is filed, until a final determination is issued or the appeal is deemed denied.

Once a request for record is received, Section 901 of the Act reduces the initial response period from ten days under the old law to only five days. However, the new Act preserves the District’s and municipality’s ability to extend the response period up to 30 days due to record redaction, storage in a remote location, staffing limitations, necessary legal review, failure to comply with the District or municipality policy regarding access to records, refusal to pay the applicable fees

authorized by the Act or for the additional condition contained in the new Act, that the “extent or nature of the request prevents a response within the required five-day period.” If a response is not provided within 30 days, the request will be deemed denied. Absent a deemed denial, Section 903 of the Act mirrors the old law that a denial must be issued in writing and include a description of the requested record, the specific reason for denial with reference to supporting legal authority, information regarding the Open Records Officer on whose authority the denial was issued, the date of the response and the procedure to appeal the denial.

Under Section 506 of the Act, School Districts and municipalities may deny a “disruptive request” when the requester has made repeated and duplicative requests for the same record, placing an unreasonable burden on the School District or municipality. However, even if a “disruptive request” is denied, it does not restrict the same person from requesting a different record. Also, the new Act does not supersede a properly adopted record retention policy, including a disposition/destruction schedule. In addition, Section 905 permits Districts and municipalities to discard copies which have not been retrieved by the requester within sixty (60) days of the District’s or municipality’s response, and retain all fees paid by the requester.

The new Act incorporates provisions from the old law regarding a District’s and municipality’s option to fulfill verbal requests for records, not requiring the creation of a record which does not currently exist in that format and permitting the redaction of information from a record where the redacted information would not otherwise be subject to access. In addition, new Section 701 prohibits access to any computer of the School District or municipality or an individual employee of either; new Section 703 permits the written request to be submitted by e-mail, and although they should be addressed to the Open Records Officer of the District or municipality, Districts and municipalities are required to direct their employees to forward requests for records to the Open Records Officer; new Section 707 requires Districts and municipalities which inadvertently

produced a record that is not a public record to notify the third party who provided the record to the District or municipality, the person who is the subject of the record and the requester; and new Section 707 provides a procedure regarding trade secrets and transcripts of proceedings.

The new Act amends the appeal procedure if a District or municipality either issues a written denial or the request is deemed denied due to expiration of the time to respond. Under the old law, the person requesting a record was required to file exceptions within 15 days with the District or municipality which was then required to issue a final decision within 30 days. Under the new Act, the appeal must be filed with the Office of Open Records within 15 business days of the mailing date of the District's or municipality's response or within 15 days of the deemed denial. The Office of Open Records must then assign the appeal to an Appeal Officer who must render a final decision within 30 days, and upon failing to do so, the appeal will be deemed denied. The Appeals Officer may accept documentation from both the requester and the District or municipality and may conduct a hearing at his discretion. In addition to considering appeals, the Office of Open Records is also required to develop a uniform form for requesting records which all Districts and municipalities are required to use, in addition to any form the District or municipality continues to use. Also, the new Act takes away a District's or municipality's authority to set their own copy charges and gives that authority to the Office of Open Records which is required to conduct a bi-annual review of copy fees. The Office of Open Records may also issue advisory opinions to Districts, municipalities and individuals requesting records.

If the Appeal Officer either issues a written denial or the appeal is deemed denied due to the expiration of time, a second appeal may then be filed, within 30 days of the mailing date of the Appeal Officer's decision or the deemed denial, with the Court of Common Pleas for the County where the District or municipality is located. The new Act removes the option of filing an appeal with the local Magistrate. While the judicial appeal is pending, no documents must be provided. As with the old law, the new Act empowers the court to impose reasonable attorney fees and

costs against the District or municipality if the denial is overturned. Also, the court has the power to impose sanctions, in the nature of reasonable attorney fees and costs of litigation, for frivolous requests or appeals. The new Act increases the civil penalties against a District and municipality if the District or municipality denied access to a public record in bad faith from not more than \$300.00 to not more than \$1,500.00. Also, the civil penalty for not complying with a court order is increased from not more than \$300.00 to not more than \$500.00. These increased penalties must be viewed seriously in that new Section 708 now places the burden of proof that a record is exempt from public access on the Districts and municipalities. Application of the 30 listed exceptions under Section 708 of the Act must be applied separately to each record request. The 30 listed exceptions include the following:

1. a record, the disclosure of which would result in loss of federal or state funds or would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or endanger the personal security of an individual;
2. a record maintained in connection with the military, Homeland Security or other similar entity;
3. a record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility or infrastructure which could include building plans, or infrastructure records;
4. a record regarding computer hardware, software and networks;
5. an individual's medical, psychiatric or psychological history or disability status;
6. personal identification information;
7. records regarding District or municipal employees, including letters of reference or recommendation, performance ratings or reviews, results of civil service or similar testing, employment applications of individuals who are not hired by the District or municipality, workplace support services program information, written criticisms of an

- employee, grievance material, information regarding discipline, demotion or discharge contained in a personnel file or academic transcripts;
8. labor relations or collective bargaining strategy or negotiations records or exhibits in relation to grievance arbitrations;
 9. drafts of resolutions, regulations, policies, directives, ordinances or amendments to them;
 10. records which reflect the pre-decisional deliberations of the District or municipality, including pre-decisional deliberations on budgets or regulation/policy adoption;
 11. trade secret or confidential proprietary records;
 12. notes and working papers of public officials or employees used only for their own personal use;
 13. records which would identify an individual who lawfully makes a donation to the District or municipality;
 14. miscellaneous unpublished materials;
 15. academic transcripts and examination information;
 16. records relating to or resulting in a criminal investigation;
 17. records relating to a non-criminal investigation, including a complaint submitted to the District or municipality and work papers underlying an audit;
 18. records or parts of records received by emergency dispatch personnel, including 911 recordings otherwise not determined by a court to be subject to public disclosure;
 19. DNA and RNA records;
 20. autopsy records;
 21. draft minutes of meetings until the next regularly scheduled meeting of the District or municipality and minutes or any record or discussions held in executive session;
 22. contents of real estate appraisals until the decision is made to proceed to acquire an interest in the property;
 23. library and archive circulation records;

24. library, archived and museum materials;
25. records identifying the location of an archeological site or an endangered or threatened plant or animal species;
26. a proposal pertaining to agency procurement or disposal of supplies prior to the award of a contract for the items;
27. records regarding communications between the District or municipality and its insurance carrier, administrative service organization or risk management office;
28. records or information identifying individuals who apply for or receive social services;
29. correspondence between a person and a member of the general assembly; and
30. records identifying the name, home address or date of birth of a child 17 years of age or younger.

This is a condensed version of the list contained in the Act. You are encouraged to view the full language of the 30 exceptions in Act 3 by visiting our website at www.mbm-law.net.

Due to the far reaching amendments contained in the new Right to Know Law, School Districts and municipalities will face many challenges in implementing its provisions. The Office of Open Records will adopt regulations regarding the manner in which the new Act will be implemented, including the uniform form for requesting records and the establishment of the copy charges which all School Districts and municipalities must follow. Our office will continue to monitor these developments and provide periodic updates to keep you informed of their impact on your operations. The attorneys in our Public Sector Practice Group are prepared to answer any questions which you may have regarding the new Right to Know Law and its impact on your District or municipality.