

# "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"

Pennsylvania's new Right to Know Law, Act 3 of 2008, was recently signed by Governor Rendell on February 14. It imposes new and significant burdens and duties on all School Districts. This article provides a summary of the key provisions of the new Right to Know Law. A more detailed comparison of the new and current law may be reviewed on our website at [www.mbm-law.net](http://www.mbm-law.net). We have also provided a link to the full text of the 25 page Act.

The major revisions which will have a direct, significant impact on School Districts include:

- creating a presumption that all records in the School District's possession are public records;
- placing the burden on the District to prove that the record is not public; and
- to overcome the presumption and satisfy the burden of proof that a record is not public, the District must be able to demonstrate that:
  - ◇ the record is already protected from disclosure under a state or federal statute such as HIPAA or FERPA; or
  - ◇ the record is protected by a privilege such as the attorney-client privilege or the doctor-patient privilege; or
  - ◇ the record falls within one of the 30 exceptions contained in the new law. Some of the exceptions which a District may be able to rely upon include:
    - ~ records which would result in loss of federal or state funds or result in risk of physical harm to or endanger the personal security of an individual;
    - ~ records which endanger the safety or the physical security of a building, such as building plans or infrastructure records;
    - ~ personal identification information;
    - ~ personnel records of District employees;
    - ~ records regarding labor relations, collective bargaining strategy or negotiations, or exhibits from grievance arbitrations;
    - ~ drafts of resolutions, regulations or policies or draft amendments to them;
    - ~ records which reflect the pre-decisional deliberations of the Board of Education, including pre-decisional deliberations on budgets or policy adoption;
    - ~ records relating to a non-criminal investigation, including a complaint submitted to the District and work papers underlying an audit;
    - ~ draft minutes of meetings until the next regularly scheduled meeting of the Board of Education and minutes or any record of discussions held in executive session;
    - ~ contents of real estate appraisals until the decision is made to proceed to acquire an interest in the property;

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- ~ a proposal regarding procurement or disposal of supplies prior to the award of a contract for the items;
- ~ records regarding communications between the District and its insurance carrier, administrative service organization or risk management office;
- ~ records identifying the name, home address or date of birth of a child 17 years of age or younger.

A complete checklist of the 30 exceptions appears on the reverse of this article to assist in processing a record request. Additional revisions in Act 3 which will impact District operations include:

- requiring every School District to designate an official or employee as their Open Records Officer and outlining their duties;
- reducing the initial response period from ten days under the old law to five days;
- permitting a School District to deny a "disruptive request" when the requester has made repeated and duplicative requests for the same record;
- not superseding a properly adopted record retention policy, including a disposition/destruction schedule;
- permitting a District to discard copies which have not been retrieved by the requester within sixty (60) days of the District's response, and retain all fees paid by the requester;
- prohibiting public access to any District or District employee computer;
- providing an appeal procedure through the newly created Office of Open Records before a judicial appeal can be filed;
- authorizing the Office of Open Records to develop a uniform form for requesting records which all Districts are required to use;
- removing a District's authority to set their own copy charges and giving that authority to the Office of Open Records which is required to conduct a bi-annual review of copy fees;
- increasing the civil penalties against a District if the District denies access to a public record in bad faith from not more than \$300.00 to not more than \$1,500.00.

Although Act 3 does not take effect until January 1, 2009, due to its far reaching amendments, all Districts should be proactive in implementing its provisions. First, each District should identify and appoint its Open Records Officer. Also, every District must be prepared to implement the uniform form for record requests and the copy charges which the Office of Open Records will adopt. Finally, current Board Policies on document requests must be replaced with a policy which is consistent with Act 3. 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

# EXCEPTION CHECKLIST

When a record request is received by a School District, the District must apply each exception separately to determine which, if any, apply. You may use this checklist when reviewing each record request. Check all exceptions which apply and retain the checklist with the record request for the time period required by the Act. The 30 exceptions to a public record under the new Act are as follows:

- 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 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, 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 Board of Education, 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;
- 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 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 Board of Education and minutes or any record of 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 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.

You are encouraged to view the full language of the 30 exceptions by visiting our website at [www.mbm-law.net](http://www.mbm-law.net) for the entire text of the new Act.

