OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

PENNSYLVANIA

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

Open Government Guide

Open Records and Meetings Laws in

PENNSYLVANIA

Prepared by:
Robert C. Clothier
Beth L. Weisser
Fox Rothschild LLP
2000 Market Street
Tenth Floor
Philadelphia, PA 19103
215-299-2000
rclothier@foxrothschild.com
bweisser@foxrothschild.com

Sixth Edition
2011

OPEN GOVERNMENT GUIDE

Access to Public Records and Meetings in

PENNSYLVANIA

SIXTH EDITION
2011

Previously Titled
Tapping Officials' Secrets

Published by The Reporters Committee for Freedom of the Press
Lucy A. Dalglish, Executive Director

EDITORS
Gregg Leslie, Legal Defense Director
Mark Caramanica, Freedom of Information Director

ASSISTANT EDITORS
Christine Beckett, Jack Nelson Legal Fellow
Aaron Mackey
Emily Peterson

Production of the sixth edition of this compendium was possible
due to the generous financial contributions of:
The Stanton Foundation

ISBN: 1-58078-239-6

Contents

Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as Tapping Officials' Secrets — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words supra or infra to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

Prepared by:

Robert C. Clothier
Beth L. Weisser
Fox Rothschild LLP
2000 Market Street
Tenth Floor
Philadelphia, PA 19103
215-299-2000
rclothier@foxrothschild.com
bweisser@foxrothschild.com

FOREWORD

Open Records. The Pennsylvania Open Records Law (popularly known as the "Right to Know" Act) was originally enacted in 1957. In 2002, the Pennsylvania Assembly amended the Act, setting forth for the first time a number of procedures and requirements governing, *inter alia*, requests, the agency's response and appellate review.

In January 2008, Pennsylvania enacted a new Right to Know Act. While much of the Act is completely new, it borrows and modifies some of the procedures adopted by the 2002 amendments. The most significant change is that the new act has a presumption that state and local agency records are open for inspection and copying and places the burden on the government agency to show that they are not public records to which access is required. The new act has a broad definition of what is a record, subject to a much longer list of exemptions. The new act extends to certain entities not previously subject to the Right to Know Act. For example, it applies to the General Assembly, state related institutions (Penn State, Temple, the University of Pittsburgh and Lincoln) and government contractors performing governmental functions on behalf of an agency. The new act expands upon the procedures governing access and appeals that were first promulgated in the 2002 amendments; it shortens agency response times and increases the civil penalties that can be awarded against an agency acting in bad faith. And the new act creates an Office of Open Records that will disseminate information, handle appeals, issue advisory opinions, create a mediation program, and ensure compliance with the act's requirements.

The Act became fully effective on January 1, 2009. The Act's mandated creation of an Office of Open Records was "effective immediately" upon its passage. Section 3104. And the Act's requirements for "state-related institutions" and "state contract information" were effective July 1, 2008.

A distinctive feature of Pennsylvania law is the existence of a multitude of individual provisions, separate from the Right to Know Act and scattered throughout the Pennsylvania statutes and the Pennsylvania Administrative Code, either permitting or prohibiting access to particular records. Courts have read these statutes and regulations into the Right to Know Act. Thus, in addition to determining whether the Act itself applies, anyone seeking an agency record in Pennsylvania must also carefully review the statutes and regulations governing the agency with which she is dealing, to determine whether any additional access provisions exist.

Open Meetings. The current Pennsylvania Open Meetings Act (the "Sunshine Act") took effect on January 3, 1987. The Act was in large part a result of the efforts of the Pennsylvania Newspaper Publishers' Association (now Pennsylvania Newspapers Association), and was intended to eliminate some of the problems with the previous Sunshine Act, 65 Pa. Cons. Stat. § 261, *et seq.*

The effectiveness of the old Act had been substantially undercut by the Commonwealth Court's decision in *Judge v. Pocius*, 367 A.2d 788 (Pa. Commw. Ct. 1977). That decision held that only the act of formal voting had to be conducted in public, and that "preliminary activities of deliberation, discussion and decision which lead up to affirmative formal action" could be conducted in private.

The 1987 Act expressly forbids this practice. It also prohibits secret ballots and requires that all votes be publicly cast and that roll call votes be recorded. Finally, it contains a strong policy statement which can help to persuade a court of the legislature's intent:

> (a) Findings. — The General Assembly finds that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society.
>
> (b) Declarations. — The General Assembly hereby declares it to be the public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this act.

See In Re Condemnation by West Chester Area Sch. Dist., 50 Pa. D. & C. 4th 449 (Chester Cty. C.C.P. 2001) (giving explanation of the Sunshine Act's purpose).

Though the 1987 Act is stronger than the prior statute in terms of requiring public discussions, it also provides for a greater number of exceptions to the openness requirement. The law provides a greater number of reasons to conduct executive sessions (for example, to consider the purchase of real estate and to discuss pending or threatened litigation) and permits such sessions to interrupt an open meeting, or to be held at the end of a meeting, or at an announced time in the future.

The law also permits two other exceptions to the openness requirement. First, an agency is not required to take administrative action — defined as the execution of policies either previously authorized or required by prior official action — in public. Second, the law permits an agency to participate in a closed "conference," defined as a seminar or convention, or a briefing organized by federal or state officials. Agency business may not be deliberated at such a conference.

The outline that follows will occasionally cite to a decision under the pre-1987 version of the Sunshine Act if it appears that the recent version would be interpreted similarly.

Open Records

I. STATUTE -- BASIC APPLICATION

A. Who can request records?

1. Status of requestor.

A requester need only be a " [a] person that is a legal resident of the United States." Section 102. Thus, illegal aliens have no rights of access in Pennsylvania. However, the term "person" is not limited to individuals. *See*, *e.g. Lukes v. Dep't of Public Welfare*, 976 A.2d 609, 615 (Pa. Commw. Ct. 2009)(citing *Tribune-Review Publishing Co. v. Bodack*, 961 A.2d 110 (Pa. 2008); *Digital-Ink, Inc. v. Department of General Services*, 923 A.2d 1262 (Pa. Commw. Ct. 2007); *Sapp Roofing Co., Inc. v. Sheet Metal Workers' International Association*, 713 A.2d 627 (Pa. 1998); *Tapco, Inc. v. Township of Neville*, 695 A.2d 460 (Pa. Commw. Ct. 1997)).

2. Purpose of request.

The Act states that a commonwealth, local, legislative or judicial agency "may not deny a requester access to a record due to the intended use of the record by a requester unless otherwise provided by law." Sections 301(b), 302(b), 303(b) & 304(b); *see also* Section 703 ("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."). Indeed, agencies are forbidden from even asking for this information. *See* Section 1308 (expressly prohibiting agencies from creating a policy or regulation that requires a requester to "disclose the purpose or motive in requesting access to records").

This is consistent with precedent set under the old Act holding that a requester's purpose and intended use of the requested records are irrelevant to his or her right of access. See, e.g., Pennsylvania State Educ. Ass'n v. Comm. Dep't of Comm. of Pennsylvania and Econ. Dev., 4 A.3d 1156, 1162 (Pa. Commw. Ct. 2010)(citing amendments to the 1957 Right-to-Know Law making the motive of a request irrelevant to accessibility of the record at issue); *see also Wiley v. Woods*, 141 A.2d 844, 849 (Pa. 1958); *Envirotest Partners v. Commonwealth Dep't of Transp.*, 664 A.2d 208, 213 (Pa. Commw. Ct. 1995); *Hoffman v. Pennsylvania Game Comm'n*, 455 A.2d 731 (Pa. Commw. Ct. 1983).

3. Use of records.

Although the Act is silent, cases applying the old act have held that the act imposes no restrictions on subsequent use of the material obtained. *See Hoffman v. Pennsylvania Game Comm'n*, 455 A.2d 731 (Pa. Commw. Ct. 1983) (rejecting Game Commission's objections to access based on grounds that requester sought the information "for commercial purposes")(interpreting prior version of Right to Know Act). Under the new Act, the rule persists.

However, the Commonwealth Court recently noted that this does not restrict the application of the exemptions articulated in Section 708.Note, however, that Section 708 exemptions may still apply. *See*, *e.g.*, Section 708(b)(2); *Woods v. Office of Open Records*, 998 A.2d 665 (Pa. Commw. Ct. 2010)(denying public access to sex-offender "Supervision Strategies" under the "public security" exemption of the Right to Know Act discussed infra*). Id.

The Act does not act as a bar to discovery or use of information in a civil proceeding. *See Commonwealth v. Kauffman*, 605 A.2d 1243, 1245-46 (Pa. Super. 1992) (interpreting prior version of Right to Know Act).

B. Whose records are and are not subject to the act?

The Act identifies several different kinds of agencies and entities subject to access requirements under the Act: Commonwealth agencies, independent agencies, state-affiliated entities, local agencies, legislative agencies, judicial agencies, and state-related institutions.

1. Executive branch.

The Act applies to the executive branches at the state and local agency level, both of which are defined in the Act.

Commonwealth Agency: This is defined as follows: "Any office, department, authority, board, multistate agency or commission of the executive branch; an independent agency; and a State-affiliated entity." It includes: "(i) The Governor's Office; (ii) The Office of Attorney General, the Department of the Auditor General and the Treasury Department; and (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." Section 102.

This definition includes an "independent agency" and "state-affiliated entity," which are both defined separately. It does not include a judicial or legislative agency.

1. An *independent agency* is defined as follows: "Any board, commission or other agency or officer of the Commonwealth, that is not subject to the policy supervision and control of the Governor. The term does not include a legislative or judicial agency."

2. A *state-affiliated entity* is defined as follows: "A Commonwealth authority or Commonwealth entity. The term includes the Pennsylvania Higher Education Assistance Agency and any entity established thereby, the Pennsylvania Gaming Control Board, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement Board, the State System of Higher Education, a community college, the Pennsylvania Turnpike Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Interscholastic Athletic Association and the Pennsylvania Educational Facilities Authority. The term does not include a State-related institution."

This definition contains a "catch-all" provision that includes organizations that perform essential government functions. This provision is similar to the version contained in the old act, except that it no longer requires that the entity's statutory origins "declare[] in substance or in purpose" such a function. Under the prior act, this catch-all was construed fairly narrowly, and applied only where "the organization provides constitutionally mandated services or services indisputably necessary to the continued existence of the Commonwealth." *See Safety, Agriculture, Villages and Environment (S.A.V.E.) v. Delaware Valley Regional Planning Commission*, 819 A.2d 1235 (Pa. Commw. Ct. 2003) (citing *Community College of Philadelphia v. Brown*, 674 A.2d 670 (Pa. 1996)); *see also Lukes v. Dep't of Public* Welfare, 976 A.2d 609, 615-16 (Pa. Commw. Ct. 2009)(citing *S.A.V.E.*, 819 A.2d at 1235).

Commonwealth agencies are required to provide access to "public records" as set forth in the Act. Section 301.

Local Agency: This includes "any of the following: (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." Section 102.

Local agencies are required to provide access to "public records" as set forth in the Act. Section 302.

a. Records of the executives themselves.

By its terms, the act applies to the public records of "the executive branch," and specifically includes the "governor's office."

b. Records of certain but not all functions.

The Act makes no accessibility distinction based on function.

2. Legislative bodies.

The Act applies to "legislative agencies." This "includes 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 of Research Liaison. (15) The Legislative Audit Advisory Commission. "." Section 102.

Legislative agencies are required to provide access to "legislative records" as set forth in the Act. Section 303.

The old act did not apply to the legislative branch of state government. *See Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987).

3. Courts.

The Act applies to "judicial agencies." This is defined as follows: "A court of the Commonwealth or any other entity or office of the unified judicial system." Section 102.

However, judicial agencies need only provide access to "financial records" as set forth in the Act. *See* Section 304. In 2009, the Administrative Office of Pennsylvania Courts ("AOPC") modified Pennsylvania Rule of Judicial Administration 509. *See* Pa. R.J.A. 509 ("'financial records' is defined as any account, contract, invoice or equivalent dealing with: 1) the receipt or disbursement of funds appropriated to the system; or 2) acquisition, use or disposal of services, supplies, materials, equipment or property secured through funds appropriated to the system"). By eliminating the phrase "custody or control," the AOPC now permits access to judicial agency "financial records" even when that entity does not currently possess them.

The old act did not apply to the judicial branch of state government. *See Commonwealth v. Fenstermaker*, 530 A.2d 414, 420 (Pa. 1987).

4. Nongovernmental bodies.

a. Bodies receiving public funds or benefits.

The Act provides a number of examples where records in the hands of bodies receiving public funds or benefits are public records.

The Act expressly applies to certain records of "state-related institutions." This includes Temple University, the University of Pittsburgh, Pennsylvania State University and Lincoln University. Sections 102 & 1501. State-related institutions are required to file "reports" as set forth in Sections 1502-1504.

The Act also states that a "public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under the act, shall be considered a public record of the agency for purposes of this act." Section 506(d).

The Commonwealth Court has recently interpreted the phrase "directly relates to the governmental function" in Section 506(d). *See Edinboro Univ. of Pa. v. Ford*, 2011 WL 1499446 at *1 (Pa. Commw. Ct. 2011); *Giurintano v. Dep't of Gen. Svcs.*, 2011 WL 1566741 at *1 (Pa. Commw. Ct. 2011) (holding that services performed on behalf of a private entity outside of the government contract are not accessible); *Allegheny Cnty. Dep't of Admin. Svcs. v. A Second Chance, Inc.*, 2011 WL 527105 at *1 (Pa. Commw. Ct. 2011)(remanding the case to the trial court because it failed to hear evidence regarding the private entity's government contract); *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010); *East Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. Ct. 2010). Pennsylvania courts analyze that phrase in two parts, the document must have: 1) a governmental function and 2) a direct relationship.

Under the first prong, the Commonwealth Court considered whether fundraising for a state university constitutes a "governmental function." *East Stroudsburg*, 995 A.2d at 499-500. Relying on Iowa case law, the Court held that a non-governmental body performs governmental functions when it performs "normal government business." *Id.* at 505(citing *Gannon v. Bd. of Regents*, 692 N.W.2d 31 (Iowa 2005)). The Commonwealth Court construed the term business to mean any duty arising out of a contract with a government agency. *Id.* Hence, non-governmental entities' records will be subject to the Act so long as they owe a contractual duty to a government agency. *Id.*

Under the second prong, *Buehl* considered whether contractual duties owing to a governmental agency directly related to records requested by an inmate. *Buehl*, 6 A.3d at 28. The Commonwealth Court affirmed the Office of Open Records' denial of the inmate's request for documentation of the wholesale cost of goods a private entity sold through a state prison's commissary system. *Id.* The Court distinguished records kept in the private company's "normal scope of business" from those which directly relate to the performance of the government contract. *Id.* at 30 (citing *East Stroudsburg Univ. Found.*, 995 A.2d at 504); *see also Office of Gov. v. Bari*, 2011 WL 1662849 at *5 (Pa. Commwlth. Ct. 2011) (holding that when an agency appoints a member to a private non-profit board it is not transacting business with that organization). The Court reasoned that the private company's obligations under the contract only pertained to the sale of goods in the prison and not the purchase of those goods from its supplier. *Id.* Hence it held that the inmate had requested documents which were not "public records" under the language of Section 506(d)(2). *Id*; *see also A Second Chance, Inc.*, 2011 WL 527105 at *16 (remanding to the fact-finder to hear evidence on the relationship between the record requested and the government contract).

But the requester may not seek such records from the third party; rather the requester must seek them from the agency: "A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency." Section 506(d)(3).

Of course, if the legislature says that a particular body is an agency under the Act, then the body must comply with the Act's requirements. *Cf. Harristown Dev. Corp. v. Commonwealth*, 614 A.2d 1128 (Pa. 1992) (A private non-profit corporation that leases land, offices or accommodations to a Commonwealth agency for a rental amount in excess of $1.5 million per year was held to be an agency because the statute creating the non-profit corporation specifically stated that it was deemed an agency under the Sunshine Act) (interpreting 71 Pa. Cons. Stat. § 632(d)).

b. Bodies whose members include governmental officials.

The presence of 12 state-appointed trustees on a 36-member university board did not transform an essentially private university into a state "agency" under the old act. *Mooney v. Board of Trustees of Temple Univ.*, 292 A.2d 395, 399 (Pa. 1972) (interpreting the old act). Temple, however, is a state-related institution that is now subject to certain access requirements under the Act.

5. Multi-state or regional bodies.

The Act does not identify any such bodies.

6. Advisory boards and commissions, quasi-governmental entities.

No advisory boards, commissions or quasi-governmental bodies are explicitly identified in the Act. Under the old act, purely advisory entities were not agencies subject to the Act. *See Safety, Agriculture, Villages and Environment (S.A.V.E.) v. Delaware Valley Regional Planning Commission*, 819 A.2d 1235 (Pa. Commw. Ct. 2003) (the Delaware Valley Regional Planning Commission is not an agency subject to the Act because it acts only in an advisory capacity and "cannot be considered an organization performing 'essential' services.") (interpreting the old act).

7. Others.

None other than those identified *infra*.

C. What records are and are not subject to the act?

The Right to Know Act requires that commonwealth and local agencies provide access to "public records," that legislative agencies

provide access to "legislative records," and that judicial agencies provide access to "financial records." Sections 301-304. As a threshold matter, the requester bears the burden of proving that the agency possesses or controls the relevant records. *See*, *e.g.*, *Office of Gov. v. Bari*, 2011 WL 1662849 at *5 (Pa. Commw. Ct. 2011). The Act states that such records are then "presumed to be available in accordance with the act." Section 305; *see also Edinboro Univ. of Pa. v. Ford*, 2011 WL 1499446 at *1 (Pa. Commw. Ct. 2011) (holding that records are deemed "public" as soon as an agency "receives" them from a non-governmental entity). That presumption, however, "shall not apply" if the record is "exempt" under the Act, "protected by privilege," or "exempt from disclosure under any other state or federal law or regulation or judicial order or decree." Section 305.

The Act, however, has a large list of documents exempted from disclosure. The burden rests on the commonwealth, local, legislative or judicial agency to prove that the record is exempt. Section 708(a). The exemptions are set forth at Section 708(b). *See infra at § II(A).*

The Act also has separate provisions providing for access to certain information and records of "state-related institutions" (Sections 1501-1503) and to certain "state contract information" (Sections 1701-1702).

The scope of records covered by the Act does not "supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." Section 306. Elsewhere the Act makes the same point clear: "If the provisions of this Act regarding access to records conflict with any other federal or state law, the provisions of this Act shall not apply. Section 3101.1. In other words, if some other Pennsylvania or federal statute, regulation or order requires or prohibits access, the Act does not change that. This is consistent with court decisions under the old act holding that "the generic definition of a 'public record' contained within the Right-to-Know Act [incorporates] by implication those specific definitions of public record contained in statutes allowing for public access to particular documents of particular agencies." *Marvel v. Dalrymple*, 393 A.2d 494, 498 (Pa. Commw. Ct. 1978) (interpreting old act); *see also Pennsylvania State Police v. Office Open Records*5 A.3d 473*Office of Open Records*, 5 A.3d 473, 483 (Pa. Commw. Ct. 2010)(citations omitted); *Jones v. Office of Open Records*, 993 A.2d 339 (Pa. Commw. Ct. 2010)(holding 37 Pa. Code § 61.2 excludes probation and parole investigation reports from the definition of "public record").

Under the old act, Pennsylvania courts held that even documents that are not available under the Right-to-Know law may still be subject to discovery under the Rules of Civil Procedure in a civil suit against a government agency. *Commonwealth v. Kauffman*, 605 A.2d 1243, 1245-46 (Pa. Super. 1992) (interpreting the old act). *Compare Pastore v. Commonwealth Ins. Dep't.*, 558 A.2d 909, 913-14 (Pa. Commw. Ct. 1989) (where the court refused to allow documents to be discovered when they fell within the investigation exception to the Right-to-Know law) (interpreting the old act). This principle should remain the law under the new act.

1. What kind of records are covered?

The Act provides access to the following kinds of records:

Public Records: Commonwealth and local agencies must provide access to "public records." A public record is defined as follows: "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."

The word "record" has an extremely broad definition and essentially covers any agency information or document: "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."

Financial Records: Commonwealth, independent, local and legislative agencies must provide access to financial records. Sections 301-302. For judicial agencies, financial records are the only records to which access is required under the Act. Section 304.

Financial records are [a]ny of the following: "(1) Any account, voucher or contract dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property. (2) 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. (3) A financial audit report. The term does not include work papers underlying an audit."

Subsections (2) and (3) of this definition are new. Subsection (2) makes clear that records showing payments of money to an agency officer or employee are public records. Subsection (3) requires access to financial audit reports though not any of the underlying work papers.

Subsection (1), however, parallels part of the old act's definition of records subject to the act. As a result, prior case law interpreting that language will likely remain good law. The following addresses Pennsylvania decisions interpreting the "account, voucher or contract" kinds of records:

The "account, voucher and contract" category deals generally with fiscal aspects of governance, providing for public review of accounts, vouchers or contracts, dealing with receipts and disbursements of funds by an agency. *The Pennsylvania State University v. State Employees' Retirement Board*, 880 A.2d 757, (Pa. Commw. Ct. 2005) *aff'd* 935 A.2d 530 (Pa. 2007). An account is "a record of business dealings between parties," *Carbondale Township v. Murray*, 440 A.2d 1273, 1274 (Pa. Commw. Ct. 1982); *see also Sipe v. Snyder*, 640 A.2d 1374, 1382 (Pa. Commw. Ct. 1994) (an "'account' ; include[s] any 'record of business dealings between the parties' as well as the documentary record of a business transaction.'"). In a narrower, more technical definition, one court ruled that an account is a "record of debit and credit entries to cover transactions during a fiscal period of time" rather than a statement of facts or events. *Butera v. Commonwealth Office of the Budget, 370 A.2d 1248*, *1249* (Pa. Commw. Ct. 1977)(departmental budget reports provided to Pennsylvania Budget Secretary not public record),) *overruled by LaValle v. Office of General Counsel*, ,769 A.2d 449 (Pa. Commw. Ct. 2000). A voucher is a documentary record of a business transaction. *Carbondale*, 440 A.2d at 1274 n.2. Thus, a municipality's canceled checks have been held to be both "accounts" and "vouchers" under the act. *Id. See also Inkpen v. Roberts*, 862 A.2d 700 (Pa. Commw. Ct. 2004) (deeds and mortgages filed with County Recorder of Deeds are not accounts, vouchers and contracts and, therefore, are not public records under the Act).

Contracts are also public records under the Act's definition. *See*, *e.g.*, *Lukes v. Dep't of Public* Welfare, 976 A.2d 609 (Pa. Commw. Ct. 2009) (provider agreements between a Medicaid managed care program and the Department of Public Welfare constitute "public records" subject to disclosure). While "a proposal itself is not a public record under the Act because it does not lead to the expenditure of public funds," once a proposal is "formalized into a contract, [it] as well as competing proposals [are] subject to disclosure." *Tapco, Inc. v. Township of Neville*, 695 A.2d 460, 463-64 (Pa. Commw. Ct. 1997). The fact that the contract may not necessarily involve the receipt or disbursement of public funds is "irrelevant": "[S]o long as the contract dealt with the possible appropriation of public funds, the contract was a public record subject to inspection." *Envirotest Partners v. Commonwealth Dep't of Transport.*, 664 A.2d 208 (Pa. Commw. Ct. 1995) *citing The Morning Call, Inc. v. Lower Saucon Township*, 627 A.2d 297 (Pa. Commw. Ct. 1993). However, contracts that are required to be filed with an agency, such as deeds and mortgages, to which the agency is not a party, are not public records. *Inkpen v. Roberts*, 862 A.2d 700 (Pa. Commw. Ct. 2004).

Under the old act, an agreement settling litigation between an agency and a third party is a public record notwithstanding a confidentiality agreement contained therein. *Tribune-Review Pub. Co. v. Westmoreland County Housing Auth.*, 833 A.2d 112 (Pa. 2003) (a confidentiality clause in a settlement agreement involving an agency is void as against public policy); *Cogen, Sklar and Levick v. Commonwealth of Pennsylvania*, 814 A.2d 825, 31 Media L. Rep. 1478 (Pa. Commw. Ct. 2003); *The Morning Call, Inc. v. Housing Auth. Of the City of Allentown*, 769 A. 2d 1246 (Pa. Commw. Ct. 2001); *The Morning Call, Inc. v. Lower Saucon Township*, 627 A.2d 297 (Pa. Commw. Ct. 1993); *Korczakowski v. Hwan*, 68 Pa.D.&C.4th 129 (Lackawanna Cty. C.C.P. 2005) (a settlement agreement which utilized public monies from cigarette taxes from the MCARE fund cannot be placed under seal, in part, because it is a public record).

The Commonwealth Court's holding requiring the disclosure of written arbitration suggests the continuing validity of the above case law relating to settlement agreements. *See Lutz v. City of Philadelphia*, 6 A.3d 669 (Pa. Commw. Ct. 2010). The police officer arbitrations at issue in *Lutz* "essentially settled" grievances made by members of the police union and the City of Philadelphia. *Id.* atat 67. *See Lutz v. City of Philadelphia*, 6 A.3d 669, 671. (Pa. Commw. Ct. 2010). The Commonwealth Court rejected the argument that resolutions of such "private disputes" are not a "public record" and thus denied a request to enjoin the City of Philadelphia from disclosing arbitration opinions. *Id.* at 676.

"The Act does not permit an agency; to avoid its obligation to disclose documents by contracting indirectly through a third party." *Associated Builders & Contractors, Inc. v. Pennsylvania Dep't of General Services*, 747 A.2d 962, 966 (Pa. Commw. Ct. 2000) (requiring DGS to turn over contract between DGS's construction manager and insurance broker).

Pennsylvania courts have ruled that this category "reaches some range of records beyond those which on their face constitute actual accounts, vouchers or contracts." *North Hills News Record v. Town of McCandless*, 722 A.2d 1037 (Pa. 1999). For example, in *Sipe v. Snyder*, 640 A.2d 1374 (Pa. Commw. Ct. 1994), *appeal denied*, 668 A.2d 1138 (Pa. 1995), the Commonwealth court held that the Department of Public Welfare's nursing home "Settlement and Appeal Activity Reports" were "accounts" under the Act because they deal with the receipt and disbursement of agency funds. *Sipe*, 640 A.2d at 1381-82. In *Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union 12*, 713 A.2d 627 (Pa. 1998), the Court held that a private roofing contractor's payroll records, which had been submitted to the government in connection with the performance of a public project, were public records under the Act because "they are records evidencing a disbursement by the school district."

Nonetheless, "it is clear that, to constitute a public record, the material at issue must bear a sufficient connection to fiscally related accounts, vouchers or contracts." *North Hills News Record v. Town of McCandless*, 722 A.2d 1037 (Pa. 1999); *LaValle v. Office of General Counsel*, 769 A.2d 449 (Pa. 2001). Since the *North Hills* case, the Commonwealth Court has ruled that insurance policies purchased by DGS were public records because they were paid for by public funds. *Associated Builders & Contractors, Inc. v. Pennsylvania Dep't of General Services*, 747 A.2d 962 (Pa. Commw. Ct. 2000). The current salaries and salary histories of employees of state related institutions (which is not obtainable from the state institution) is obtainable from those employees who participate in the public employees' retirement fund, because the employees' salary information is closely related to "accounts" and "contracts" and is therefore subject to the Act. *The Pennsylvania State University v. State Employees' Retirement Board*, 880 A.2d 757 (Pa. Commw. Ct. 2005).

Under the new Act, the legislature included substantially similar "accounts, vouchers or contracts" language in its definition of "financial records" under Section 102. *See, e.g., Dep't of Conservation and Nat. Res. v. Office of Open Records*, 1 A.3d 929, 940-41 (Pa. Commw. Ct. 2010) (citing *North Hills*, 722 A.2d at 1038-39; *Sapp Roofing*, 713 A.2d at 628). Thus, prior case law construing the "accounts, vouchers or contracts" language in the old Act has been cited as binding precedent under the new Act. *Id.* So, just as a roofing contractor's payroll records were public records in *Sapp*, private contractors' payroll records were accessible "financial records" under the new Act. *Id.* at 940-41.

Chemical disbursement sheets, which record the use of chemicals at a state prison, are not public records because they are unrelated to the fiscal governance of the Department of Corrections and are therefore not "accounts." *Heffran v. Dept. of Corrections*, 878 A.2d 985, 991 (Pa. Commw. Ct. 2005).

Not addressed in the case law is whether a contract that deals with an agency's "acquisition, use or disposal of services or of supplies, materials, equipment or other property" is a public record *even where the agency pays or receives no funds*. A strict reading of the Act suggests that such contracts are public records, but agencies have argued to the contrary.

Legislative Records: This includes "any of the following relating to a legislative agency or a standing committee, subcommittee or conference committee of a legislative agency: (1) A financial record. (2) A bill or resolution that has been introduced and amendments offered thereto in committee or in legislative session, including resolutions to adopt or amend the rules of a chamber. (3) Fiscal notes. (4) A cosponsorship memorandum. (5) The journal of a chamber. (6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting. (7) The transcript of a public hearing when available. (8) Executive nomination calendars. (9) The rules of a chamber. (10) A record of all recorded votes taken in a legislative session. (11) Any administrative staff manuals or written policies. (12) An audit report prepared pursuant to the act of June 30, 1970 (P.L.442, No.151) entitled, 'An act implementing the provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission.' (13) Final or annual reports required by law to be submitted to the General Assembly. (14) Legislative Budget and Finance Committee reports. (15) Daily Legislative Session Calendars and marked calendars. (16) A record communicating to an agency the official appointment of a legislative appointee. (17) A record communicating to the appointing authority the resignation of a legislative appointee. (18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency. (19) The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

Reports filed by State-related Institutions: The Act states that state-related institutions (Penn State, University of Pittsburgh, Temple and Lincoln) must, no later than May 30 of each year, file with the Governor's Office, the General Assembly, the Auditor General and the State Library, a report containing certain information. Section 1502. The report "shall include" the following information: (1) "all information required by a Form 990 or equivalent form ; regardless of whether the State-related institution is required to file the form"; (2) "the salaries of all officers and directors of the State-related institution"; (3) "the highest 25 salaries paid to employees of the institution that are not included under paragraph 2." Section 1503(1)-(3). The report "shall not include information relating to individual donors." Section 1503(4). The Act requires that State-related institutions "shall maintain, for at least seven years, a copy of the report in the institution's library and shall provide free access to the report on the institution's Internet website." Section 1504.

State Contract Information: The Act requires that when any commonwealth, legislative or judicial agency (this excludes local agen-

cies) enter into any "contract involving any property, real, personal or mixed of any kind or description or any contract for personal services where the consideration involved in the contract is $5,000 or more, a copy of the contract shall be filed with the Treasury Department within ten days after the contract is fully executed on behalf of the Commonwealth agency, legislative agency or judicial agency or otherwise becomes an obligation of the Commonwealth agency, legislative agency or judicial agency." Section 1701(a).

This obligation does not apply to "contracts for services protected by a privilege," referring, inter alia, to the attorney client privilege, attorney work product doctrine, the doctor patient privilege and the speech and debate privilege. Section 1701(a); 102 (definition of "privilege"). It also does not apply to "a purchase order evidencing fulfillment of an existing contract but shall apply to a purchase order evidencing new obligations." Section 1701(a). And it does not apply to contracts "submitted to the Treasury Department, the Office of Auditor General or other agency for purposes of audits and warrants for disbursements" under the Fiscal Code.

When an open records officer discloses records protected by the attorney-client privilege without prior consent from the municipality's solicitor, the agency has not waived its attorney-client privilege. *See Bd. of Supervisors of Milford Twp. v. McGogney*, 2011 WL 31535 at *1 (Pa. Commw. Ct. 2011). The majority in *McGogney* analyzed inadvertent disclosures through the five factor test articulated in *Carbis Walker, LLP v. Hill, Barth & King, LLC* (, 930 A.2d 573 (Pa. Super. 2007)). The Court found that open records officers' have "ministerial and administrative" duties. *McGogney*, 2011 WL 31535 at *3. Therefore, they have no power either as client or attorney to waive the attorney-client privilege. *Id.*

However, the dissent cited Section 902's notice provisions for delay in responding to a request. *Id.* at *5. Section 902 permits an agency to extend the time for response under Section 901 if a "legal review is necessary to determine whether the record is a record subject to access under the Act." Section 902(a)(4). Thus, the dissent reasoned that the open records officer had the power to and did waive the attorney-client privilege by disclosing documents without waiting for a legal review. *See id.* at *6.

The contract must be "in a form and structure mutually agreed upon" by the agency and State Treasurer. The Treasury Department may require the agency to "provide a summary with each contract" that "shall include" the date of execution, amount of the contract, beginning and end date of the contract, name of agency and all parties and subject matter. Every contract filed shall remain on file with the Treasury Department "for a period of not less than four years after the end date of the contract." The agency is "responsible for verifying the accuracy and completeness of the information" submitted to the State Treasurer. The contract "shall be redacted" in accordance with the Act by the agency filing it. Section 1701(a)(1), (2)(a) & (b).

The Treasury Department shall make each filed contract available for public inspection in one of two ways: (1) "by posting a copy of the contract on the Treasury Department's publicly accessible Internet website," or (2) "by posting a contract summary on the department's publicly accessible Internet website." Section 1702(a). The posted information must allow the public to "search contracts or contract summaries by the categories of information that must be contained in summaries." Section 1702(b).

A requester may obtain a "paper copy" of the contract from the agency that executed the contract. Section 1702(d).

2. What physical form of records are covered?

The Act's definition of "record" includes records in any form, including records containing "information stored or maintained electronically and a data-processed or image-processed document." Section 102. Moreover, it states: "A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists." Section 701(a). But the Act cautions that "[n]othing in this act shall be construed to require access to any computer either of an agency or individual employee of an agency." Section 701(a).

3. Are certain records available for inspection but not copying?

The Act requires agencies to make public, legislative and financial records "accessible for inspection and duplication. . ." 65 Pa. Cons. Stat. § 66.2(a). This is consistent with prior case law. *See City of Philadelphia v. Ruczynski*, 24 Pa. D. & C.2d 478 (Phila. Cty. C.P. 1961) (interpreting old act).

Round-the-clock access is not required: "Public records, legislative records or financial records shall be available for access during the regular business hours of an agency." Section 701(a).

Although the Act is silent, it is unlikely that an agency has any obligation to send a copy to a requester. Applying the old act, Pennsylvania courts held that an agency is not required to do so. *Owens v. Horn*, 684 A.2d 208, 210 (Pa. Commw. Ct. 1996) (Dep't of Corrections not required to make copy of record for inmate or to transport record to inmate) (applying old act). Likewise, under the old act, the requester must make his or her own copies and could not compel the agency to do so. *See Township of Shenango v. West Middlesex Area Sch. Dist.*, 33 Pa. D. & C. 3d 515 (Mercer Cty. C.P. 1984) (interpreting old act).

D. Fee provisions or practices.

The Act spells out what fees agencies may and may not charge. *See* http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/fees/481854 (last visited September 9, 2011). Other statutory law may supersede the fees required by the Right-to-Know Law. *See, e.g.*, 42 P.S. § 21051 (permits Recorder of Deeds to charge a copy fee of 50 cents per uncertified page and $1.50 per certified page); 75 Pa.C.S. §3751 (b)(2) (permits police departments to charge up to $15 per report for providing a copy of a vehicle accident report).

1. Levels or limitations on fees.

In general, the Act permits fees to cover the costs of duplication and postage costs. No other fees may be charged "unless the agency necessarily incurs costs for complying with the request." In such case, "such fees must be reasonable." Section 1307(g). This requirement prevents an agency from charging for overhead costs (staff payroll, utilities, etc.), which are not "necessarily" incurred as a result of a request. Section 1307(g).

2. Particular fee specifications or provisions.

a. Search.

A fee to review a document is not permissible. No fee may be charged for "an agency's review of a record to determine whether the record is a public record, legislative record or financial record subject to access in accordance with this act." Section 1307(g).

b. Duplication.

The Act requires that the fees "shall be established" by the Office of Open Records for Commonwealth and local agencies, by each judicial agency and by each legislative agency. Section 1307(b)(1).

Fees for duplication – whether by "photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication" – "must be reasonable and based on prevailing fees for comparable duplication services provided by local business entities." Section 1307(b)(2). "Fees for local agencies may reflect regional price differences." Section 1307(b)(3).

A retrieval and copying fee of 25 cents per page was held reasonable under the Act. *Weiss v. Williamsport Area Sch. Dist.*, 872 A.2d 269 (Pa. Commw. Ct. 2005) (interpreting the old act). In so holding, the Court permitted the School District to rely on comparable charges levied by other local colleges and banks and rejected the requester's evidence of lower fees charged by such local businesses as Staples. *Id.*

If the public record is only maintained electronically or in non-paper form, the agency may charge only the lesser of the fee for duplication on paper or the fee for duplication in the original media, unless the request is specifically for duplication in the more expensive medium. Section 1307(d); *see*, *e.g.*, *State Employees' Retirement System v. Office of Open Records*, 10 A.3d 358 (Pa. Commw. Ct. 2010)(limiting fees to the cost of duplication at 25 cents per page rather than the more expensive labor costs of compiling data electronically because the state agency had no duty to produce non-paper copies).

c. Other.

"Fees for postage may not exceed the actual cost of mailing." Section 1307(a).

Agencies may offer "enhanced electronic access" to public records using a different rate structure – *e.g.*, flat rate, subscription fee, per transaction fee, etc. – so long as the enhanced electronic access is "in addition to making the records accessible for inspection and duplication" as required by the Act. "The user fees for enhanced electronic access must be reasonable, must be approved by the Office of Open Records, and may not be established with the intent or effect of excluding persons from access to records or duplicates thereof or of creating profit for the agency." Section 1307(e).

The Act has special rules for "complex and extensive data sets, including geographic information systems or integrated property assessment lists." In such situations, "[f]ees for copying may be based on the reasonable market value of the same or closely related data sets." Section 1307(b)(4)(i). Such fees, however, "shall not apply" to requests by (1) newspapers, magazines, broadcast stations, weekly publications and press associations "for the purpose of obtaining information for publication or broadcast" or (2) "nonprofit organizations for the conduct of educational research." Section 1307(b)(4)(ii).

The Act allows agencies to "impose reasonable fees for the official certification of copies if the certification is at the request of the requester and for the purpose of legally verifying the public record." Section 1307(c). Once an agency grants a request for access, the Act obligates an agency to provide a certified copy if the requester pays the applicable fees under Section 1307. Section 904.

The Act permits different fees for transcripts depending on whether the adjudication is final. Prior to an adjudication becoming "final, binding and nonappealable," transcripts of an administrative proceeding are available from the agency stenographer or court reporter "in accordance with agency procedure or an applicable contract." Section 707(c)(1). But where the adjudication is final, the "duplication rate" may not exceed that established by Section 1307(b), i.e., they must be "reasonable and based on prevailing fees for comparable duplication services provided by local business entities." Section 707(c)(2). In other words, until an adjudication is final, fees may be a much higher charge consistent with per page rates set by court reporters and stenographers.

3. Provisions for fee waivers.

An agency may – but is not legally required to – waive fees for duplication where, for example, the "requester duplicates the record" or "the agency deems it is in the public interest to do so." Section 1307(f).

4. Requirements or prohibitions regarding advance payment.

Before granting a request for access, an agency may require a requester to "prepay an estimate of the fees authorized [by the Act] if the fees required to fulfill the request are expected to exceed $100." Section 1307(h).

5. Have agencies imposed prohibitive fees to discourage requesters?

Under the old act, some agencies tried to charge fees that sought to make profit on Right to Know Act requests, even though prior case law and the 2002 amendments have generally prohibited such efforts.

E. Who enforces the act?

The Act mandates the creation of an Office of Open Records in the Department of Community and Economic Development. Section 1310(a). The Office is led by an Executive Director who is appointed by the Governor for a term of six years (with a maximum of two terms) and who may appoint attorneys to act as appeals officers as well as other staff as appropriate. Section 1310(b).

The Office of Open Records has the following responsibilities:

1. Provide information relating to the implementation and enforcement of the Act.

2. Issue advisory opinions to agencies and requesters.

3. Provide annual training to agencies, public officials and public employees.

4. Provide annual, regional training courses to local agencies, public officials and public employees.

5. Assign appeals officers to review appeals of decisions by commonwealth and local agencies, and issue orders and opinions. The Office must retain attorneys to serve as appeals officers and review appeals and, if necessary, hold hearings on a regional basis.

6. Establish an informal mediation program to resolve disputes under the Act.

7. Establish an Internet website with information relating to the Act, including information on fees, advisory opinions and the name and address of all open records officers in the Commonwealth.

8. Conduct a biannual review of fees charged under the Act.

9. Annually report on "its activities and findings" to the Governor and General Assembly. This report shall be "posted and maintained" on the Office's Web site.

Section 1310(a)(1)-(9).

1. Attorney General's role.

None.

2. Availability of an ombudsman.

None.

3. Commission or agency enforcement.

None.

F. Are there sanctions for noncompliance?

See Sections V(D)(8)-(10).

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

1. Character of exemptions.

a. General or specific?

Section 708 of the Act contains numerous exemptions. Some are general, while others are specific.

b. Mandatory or discretionary?

The Act gives agencies "discretion" to make any "otherwise exempt" record accessible for inspection and copying, but only if (1) "disclosure is not prohibited" by a "Federal or State law or regulation," or a "Judicial order or decree," (2) the "record is not protected by a privilege," and (3) "[t]he agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access." Section 506(c).

This is consistent with case law interpreting the old act. *See Scranton Times, L.P. v. Scranton Single Tax* Office, 736 A.2d 711 (Pa. Commw. Ct. 1999) ("[T]here are three types of records kept by government agencies: 1) records that *must* be made public because they are subject to the Act; 2) records that *may* be made public because they fall within the discretion of the public official to make them public because they either fall within an exception under the Act or are otherwise not prohibited from being released; and 3) those records that *cannot* be released because there is an express statutory prohibition against their release, *i.e.*, social security numbers, criminal records and tax records.") (emphasis in original); *Bangor Area Educ. Ass'n v. Angle*, 720 A.2d 198, 202 (Pa. Commw. Ct. 1998), *aff'd*, 750 A.2d 282 (Pa. 1998) (where the court concluded that the Act "prohibited" the agency from providing access to teacher personnel files, which are protected by the constitutional right of privacy).

c. Patterned after federal Freedom of Information Act?

No.

2. Discussion of each exemption.

The Act lists thirty exemptions. The burden of proving that a record is exempt rests on the agency receiving the request by a preponderance of the evidence. Section 708(a)(1)-(3).

All of these exemptions apply to public and judicial records. Only a few of them apply to financial records. Section 708(c). In particular, an agency "may redact that portion of a financial record protected by" Section 708(b)(1)-(6), (16), & (17). *Id.*

The exemptions do not apply to "aggregated data maintained or received by an agency, except for data protected under" Section 708(b)(1), (2), (3), (4) or (5). Section 708(d).

The Act states that agencies must "consider and apply each exemption separately." Section 708(e). In other words, the exemptions are not cumulative and must instead be assessed independently.

In addition to these exemptions, the Act permits an agency to deny a requester access in two situations:

1. "when timely access is not possible due to fire, flood or other disaster"; or

2. "to historical, ancient or rare documents, records, archives and manuscripts when access may, in the professional judgment of the curator or custodian of records, cause physical damage or irreparable harm to the record."

Section 506(b)(1)(i), (ii). But "to the extent possible, the contents of a record under this subsection shall be made accessible to a requester even when the record is physically unavailable." Section 506(b)(2).

Lastly, the Act states categorically that an "agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity." Section 708(c).

The exemptions are as follows. Some exemptions are modeled after the old act's exemptions or appear to have codified prior case law. In those situations, a summary of case law applying the old act is provided.

(1) A record the disclosure of which: (i) would result in the loss of Federal or State funds by an agency or the Commonwealth; or (ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

The old act included a nearly identical exception for records that "if disclosed would result in loss by the Commonwealth or any subdivision or authority of federal funds, except records of criminal convictions." Thus, the new act extends this exemption to "State" funds as well as federal funds. This old act's exception was rarely invoked. In *Envirotest Partners v. Commonwealth Dep't of Transportation*, 664 A.2d 208 (Pa. Commw. Ct. 1995), the court held that "the possibility that an agency would lose Federal funds is insufficient to trigger an exemption from inspection under the Act." The court cited *Ryan v. Pennsylvania Higher Educ. Assistance Agency*, 448 A.2d 669 (Pa. Cwmlth. 1982), where the court ruled that the exemption was inapplicable "where no Federal law or regulation mandated that Federal funds be cut off if public access to the contracts was allowed." The court concluded that because the Clean Air Act did "not provide that federal funds be withheld if information set forth in a contract ; is disclosed," the exemption is inapplicable. *See also Anders v. Commonwealth Dep't of Treasury*, 585 A.2d 568, 572 (Pa. Commw. Ct. 1991).

The old act also contained an exception for records "which if disclosed would operate to prejudice or impair a person's reputation or personal security." In decisions applying that exception, Pennsylvania courts held that "[p]ersonal security has been defined as 'freedom from harm, danger, fear or anxiety.'" *See Times Publ'g Co., Inc. v. Michel*, 633 A.2d 1233 (Pa. Commw. Ct. 1993). Disclosure of information "must be 'intrinsically harmful' to fall within the personal security exception to the Act." *Id.* (quoting *Moak v. Philadelphia Newspapers, Inc.*, 336 A.2d 920 (Pa. Commw. Ct. 1975)).

> To be intrinsically harmful, the requested record must itself operate to impair the personal security of another, and not merely be capable of being used with other information for harmful purposes. If a particular disclosure is not intrinsically harmful, however, concerns about personal security are more likely to be outweighed by the public interest in dissemination of the information.

Buehl v. Pennsylvania Dep't of Corrections 6 A.3d 27 (Pa. Commw. Ct. 2010).

Because the new Act narrows the "personal security" exemption, the continuing validity of the "privacy exception" balancing test is "fraught with challenge." *See Pennsylvania State Education Association v. Pennsylvania Dep't of Community and Economic Dev.*, 4 A.3d 1156, 1162 (Pa. Commw. Ct. 2010) (hereinafter "*PSEA*"). In *PSEA*, the Pennsylvania teachers' union sought to enjoin the Office of Open Records from permitting the release of some or all of its members' home addresses. *Id.* at 1158. The Commonwealth Court avoided basing its decision on the "privacy exception" by holding that it lacked subject matter jurisdiction. *Id.* at 1164. In *dicta*, however, the majority questioned the validity of the privacy exception balancing test under the new Act. *Id.* at 1162. The dissent, on the other hand, stated that the Pennsylvania Supreme Court relied upon the "personal security" language in the old Act and thus its precedent continued to bind the Commonwealth Court. *Id.* at 1172-73. The dissent did note, however, that the presumption in prior case law had shifted to favoring disclosure under the new Act. *Id.*

While there is always "some speculation" to this exception, it is insufficient to offer "only conclusory or alarmist statements of potential harm." *Id. See, e.g., Gutman v. Pennsylvania State Police*, 612 A.2d 553, 556 (Pa. Commw. Ct. 1992) (denying access to police documents regarding drug and alcohol checkpoints because they could endanger police officers), *appeal denied*, 621 A.2d 583 (Pa. 1993); *Vargo v. Dep't of Corrections*, 715 A.2d 1233, 1238 (Pa. Commw. Ct. 1998) (denying access to information and policies regarding drug screening equipment which, if disclosed, "could lead to dangerous consequences for prison personnel and inmates"); *Ciccinelli v. Pennsylvania Board of Probation and Parole*, 760 A.2d 914 (Pa. Commw. Ct. 2000) (denying inmate's request for access to victim impact statements submitted by his juvenile victims of sexual assault "because release of the information could operate to impair the victim's personal security or reputation").

Yet, the new act narrows the "personal security" exemption by deleting the term "reputation" from this exemption. *See, e.g. Pa. State Troopers Ass'n v. Scolforo*, 2011 WL 1347006 at *4 (Pa. Commw. Ct. 2011) (citing *Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (permitting access to redacted arbitration opinions involving police officers because disclosure of non-exempt sections of the

opinion did not threaten the physical safety of officers). Now, the exemption only applies to records which "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." Thus, Pennsylvania courts focus on the risk of physical rather than reputational harm. *Id.*Section 708(b)(1)(ii). Section 708 requires an agency to present sufficient evidence supporting the proposition that disclosure would cause physical harm to its employees. *See Scolforo*, 2011 WL 1347006 at *4; *but see id.* at *7 (J. McCullough, in his concurring opinion, states that the test under Section 708 should be the reasonable likelihood of physical harm rather than sufficient evidence that disclosure would cause such harm).

(2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity, or a record that is designated classified by an appropriate Federal or State military authority.

"Homeland security" is defined by the Act to mean: "Governmental actions designed to prevent, detect, respond to and recover from acts of terrorism, major disasters and other emergencies, whether natural or manmade." The term includes activities relating to the following: (1) emergency preparedness and response, including preparedness and response activities by volunteer medical, police, emergency management, hazardous materials and fire personnel; (2) intelligence activities; (3) critical infrastructure protection; (4) border security; (5) ground, aviation and maritime transportation security; (6) biodefense; (7) detection of nuclear and radiological materials; and (8) research on next-generation securities technologies.

"Terrorist act" is defined as a "violent or life-threatening act that violates the criminal laws of the United States or any state and appears to be intended to: (1) intimidate or coerce a civilian population; (2) influence the policy of a government; or (3) affect the conduct of a government by mass destruction, assassination or kidnapping."

"Supervision Strategies" employed by the Board of Probation and Parole (the "Board") employees to monitor sex offenders fall within this exemption. *Woods v. Office of Open Records*, 998 A.2d 665 (Pa. Commw. Ct. 2010). The Court reasoned that releasing "Supervision Strategies" might aid sex offenders wishing to avoid Board supervision and monitoring and thus facilitate recidivism. *Id.*; *compare Bowling v. Office of Open Records*, 990 A.2d 813 (Pa Commw. Ct. 2010)(discussed *infra*)(requiring an analysis of the "reasonable likelihood" of a threat to public safety as a result of disclosure).

(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.

The Pennsylvania Emergency Management Agency (PEMA) must disclose records of goods and services purchased with Department of Homeland Security grant funds unless disclosure is "reasonably likely" to endanger public infrastructure. *See Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Commw. Ct. 2010). Although the Court recognized "the enormity of the task before PEMA," it held that PEMA cannot redact the names of all recipients of goods or services purchased with such funds. *Id.* at 826. Instead, the Court held that PEMA must analyze its documents to determine the "reasonable likelihood" of a threat to the Commonwealth's infrastructure resulting from disclosure. *Id.* at 825-26.

(4) A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.

(5) A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

(6) (i) The following personal identification information: (A) A record containing all or part of a person's Social Security number; driver's license number; personal financial information; home, cellular or personal telephone numbers; personal e-mail addresses; employee number or other confidential personal identification number. (B) A spouse's name; marital status, beneficiary or dependent information. (C) The home address of a law enforcement officer or judge. (ii) Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee. (iii) An agency may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.

The Act defines "personal financial information" as follows: "An individual's personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account or PIN numbers and other information relating to an individual's personal finances." The Commonwealth Court does not include hours an employee works at a third-party entity in the definition of "personal financial information." *Scolforo*, 2011 WL 1347006 at *5 (Pa Commw. Ct. 2011).

Under the old Act, the Pennsylvania Supreme Court held that there was, under the facts of the particular case, no right of access to billing records for cell phones purchased by a city and issued to city council members. *See Tribune-Review Pub. Co. v. Bodack*, 961 A.2d 110 (Pa. 2008); *but see PG Publ'g Co. v. County of Washington*, 638 A.2d 422, 427 (Pa. Cmwlth. 1994) (holding that cellular telephone bills of county officials were subject to disclosure under the condition that the District Attorney and Drug Task Force may first redact telephone numbers involving an investigation). However, the

The new Act distinguishes between public and private employees. *See, e.g. Dep't of Conservation and Nat. Res. v. Office of Open Records*, 1 A.3d 929 (Pa. Commw. Ct. 2010) (holding that a private organization contracting with a governmental agency must disclose its certified payroll but may redact names, homes and addresses of its employees) *but see Allegheny Cnty. v. Office of Open Records* (remanding the case to the trial court to determine the relationship between the employees' names and addresses with the government contract).

Section 708(b)(6)(iii) gives law enforcement agencies the discretion to redact the personal identifying information, including the name, of undercover officers. *See, e.g. Scolforo*, 2011 WL 1347006 at *5 (Pa Commw. Ct. 2011).

(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.

(8) (i) A record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings. This subparagraph shall not apply to a final or executed contract or agreement between the parties in a collective bargaining procedure. (ii) In the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion. This subparagraph shall not apply to the final award or order of the arbitrator in a dispute or grievance procedure.

This exemption appears borrowed from a similar exception under the Pennsylvania Sunshine Act. *See* § 708(2). *(9) The draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.*

(10) (i) A record that reflects: (A) The internal, pre-decisional deliberations of an agency, its members, employees or officials or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including pre-decisional 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 pre-decisional deliberations. (B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation. (ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record. (iii) This paragraph shall not apply to a written or Internet application or other document that has been submitted to request Commonwealth funds. (iv) This paragraph shall not apply to the results of public opinion surveys, polls, focus groups, marketing research or similar effort designed to measure public opinion.

This exemption flows out of prior case law interpreting the old act's definition of public record. *See, e.g.*, *LaValle v. Office of General Counsel*, 769 A.2d 449 (Pa. 2001) (where the Pennsylvania Supreme Court ruled that the old act's definition of public record "does not apply to materials or portions thereof which reflect; predecisional, internal deliberative aspects of agency decisionmaking.").

Under the new Act, the Commonwealth Court adopted a three-factor test to determine whether records are exempt under this section. A government agency must prove communications are: 1) internal to the agency; 2) predecisional and 3) deliberative in character. *See Kaplin v. Lower Merion Twp.*, 2011 WL 1707211 at *2 (Pa. Cmwlth. Ct. 2011). In *Kaplin*, the requester sought records relating to agency communications about a pending application. *See id.* at *1. He argued that the agency had not met the third prong because their communications did not fall within the definition of "deliberation" under the Section 913.2(b)(1) of the Sunshine Act. *See id.* Because the Sunshine Act prohibits "deliberations" until the close of hearings, the requester argued that no communications prior to the close of the hearings were "deliberative in character." *See id.* at *4. The Court disagreed. *See id.* It held that the Sunshine Act did not prohibit deliberative communications regarding the merits of the application prior to the close of hearings. *See id.* Therefore, the Sunshine Act "deliberations" definition did not bear on the deliberative character of the parties' communications. Under the first prong, the Court also held that communications between executive and adjudicatory members of the same agency are internal for purposes of this section. *See id.* at *5.

(11) A record that constitutes or reveals a trade secret or confidential proprietary information.

The Act defines "trade secret" as "Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure."

The Act defines "confidential proprietary information" as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." *See*, *generally Office of Gov. v. Bari*, 2011 WL 1662849 at *11 - *12 (Pa. Commwlth. Ct. 2011) (distinguishing *Crum v. Bridgestone/Firestone North American Tire, LLC*, 907 A.2d 578, 585 (Pa. Super. 2006) for determining what constitutes "confidential proprietary information" and remanding to trial court for further findings of fact on the issue); *Giurintano v. Dep't of Gen. Svcs.*, 2011 WL 1566741 at *3. In *Giurintano*, the Commonwealth Court considered whether a language interpreter service had to disclose the identity of interpreters it used in service of a government contract. *See Giurintano*, 2011 WL 1566741 at *2. The Court held that such information was exempt under Section 708(b)(11) because the company sought to protect its investment in business assets, the relevant interpreters. *See id.* at *3. In addition, disclosure of their identities would have caused the firm substantial harm in its industry. *See id.*

If a request for access seeks trade secrets or confidential proprietary information, the agency must, within five business days of receipt of the request, notify the third party that provided the record so long as the third party had given a written, signed statement that the record contained a trade secret or confidential proprietary information. Upon such notice, the third party has five business days "to provide input on the release of the record." The agency shall either deny the request or release the record within ten business days of providing the third party with notice of the request, and shall notify the third party of the decision. Section 707(b).

(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

(13) Records that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

(14) Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.

(15) (i) Academic Transcripts. (ii) Examinations, examination questions, scoring keys or answers to examinations. This subparagraph shall include licensing and other examinations relating to the qualifications of an individual and to examinations given in primary and secondary schools and institutions of higher education.

(16) A record of an agency relating to or resulting in a criminal investigation, including: (i) Complaints of potential criminal conduct other than a private criminal complaint. (ii) Investigative materials, notes, correspondence, videos and reports. (iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised. (iv) A record that includes information made confidential by law or court order. (v) Victim information, including any information that would jeopardize the safety of the victim. (vi) A record that, if disclosed, would do any of the following: (A) Reveal the institution, progress or result of a criminal investigation, except the filing of crimi-

nal charges. (B) Deprive a person of the right to a fair trial or an impartial adjudication. (C) Impair the ability to locate a defendant or codefendant. (D) Hinder an agency's ability to secure an arrest, prosecution or conviction. (E) Endanger the life or physical safety of an individual. This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).

This exemption is consistent with (and broader than) the old act's "investigation" exception. Under that exception, "information related to police investigations [were] excluded from the Act's definition of public records." *Tapco, Inc. v. Township of Neville*, 695 A.2d 460, 464 (Pa. Commw. Ct. 1997) (citing *Sullivan v. City of Pittsburgh*, 561 A.2d 863 (Pa. Commw. Ct. 1989), *petition for allowance of appeal denied*, 575 A.2d 120 (Pa. 1990)); *see also Commonwealth v. Mines*, 680 A.2d 1227 (Pa. Commw. Ct. 1996) ("Information relating to police investigations ; is excluded from the definition of public records and therefore, its disclosure is not mandatory under the Act.").

This exemption applies to a record containing facts regarding Pennsylvania State Police troopers' execution of a search warrant. *Mitchell v. Office of Open Records*, 997 A.2d 1262, 1263 (Pa. Commw. Ct. 2010). That agency met its burden of proof by submitting its open records officer's affidavit explaining such involvement. *Id.* Following *Mitchell*, the Commonwealth Court also held that "incident reports" may fall within this exemption if they contain "notes of interview with alleged victims/perpetrators, [witnesses and performance of] certain investigative tasks." *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Commw. Ct. 2010). However, the dissenter in this opinion noted that "incident reports" resemble police blotters more than "investigative reports" and should be subject to disclosure. *Id.* at 484. This disagreement suggests that Pennsylvania courts will inquire into the substance of an "investigative report" rather than relying upon an agency's characterization of its own record.

(17) A record of an agency relating to a non-criminal investigation, including: (i) Complaints submitted to an agency. (ii) Investigative materials, notes, correspondence and reports. (iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169), known as the Whistleblower Law. (iv) A record that includes information made confidential by law. (v) Work papers underlying an audit. (vi) A record that, if disclosed, would do any of the following: (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court. (B) Deprive a person of the right to an impartial adjudication. (C) Constitute an unwarranted invasion of privacy. (D) Hinder an agency's ability to secure an administrative or civil sanction. (E) Endanger the life or physical safety of an individual.

Pennsylvania courts have defined "investigation" as "a systematic or searching inquiry, a detailed examination, or an official probe." *See, e.g.*., *Sherry v. Radnor Twn. Sch. Dist.*, 2011 WL 1226262 at *6 (Pa. Commw. Ct. 2011) (citing *Dep't of Health v. Office of Open Records*, 4 A.3d 803, 811 (Pa. Commw. Ct. 2010)). In *Dep't of Health*, an agency reviewed and observed the records and facilities of a nursing home to ensure compliance with Pennsylvania and federal regulations. *Id. See Dep't of Health*, 4 A.3d at 811. The Court held that the deletion of a reference to investigations conducted as part of an agency's official duties in the new Act was inapposite. *Id. See id.* Thus, all agencies perform their duties whenever they act pursuant to their statutory authority. *Id.See id.* Similarly, in *Sherry*, when a school district investigates an "Honor Code" violation their records are exempt under this section. *See Sherry*, 2011 WL 1226262 at *6. "Non-criminal investigations" fall under this exemption even in the absence of a triggering event like a complaint. *Id. See Dep't of Health*, 4 A.3d at 811. Moreover, all information obtained from the investigation falls within this exemption. *See, e.g. Stein v. Plymouth Township*, 994 A.2d 1179 (Pa. Commw. Ct. 2010).

(18) (i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings. (ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure. (19) DNA and RNA records.

Under Section 708(b)(18), agencies must disclose "time response logs" and they must include destination addresses or cross-street information. *See Cnty. of York v. Office of Open Records*, 2011 WL 526231 (Pa. Commw. Ct. 2011). The Court held that, as a matter of policy, access to information regarding agency response times without knowing their destination defeated the statutory purpose of providing a public benefit because the times provided have no meaning without destination information. *d.* at *8.

(20) An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death. See § IVA infra. (21) (i) Draft minutes of any meeting of an agency until the next regularly scheduled meeting of the agency. (ii) Minutes of an executive session and any record of discussions held in executive session.

This exemption goes beyond the Sunshine Act's requirements that minutes of agency meetings be open to the public.

(22) (i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following: (A) The leasing, acquiring or disposing of real property or an interest in real property. (B) The purchase of public supplies or equipment included in the real estate transaction. (C) Construction projects. (ii) This paragraph shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.

(23) Library and archive circulation and order records of an identifiable individual or groups of individuals.

(24) Library archived and museum materials, or valuable or rare book collections or documents contributed by gift, grant, bequest or devise, to the extent of any limitations imposed by the donor as a condition of the contribution. (25) A record identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public. (26) 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 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).

(27) A record or information relating to a communication between an agency and its insurance carrier, administrative service organization or risk management office. This paragraph shall not apply to a contract with an insurance carrier, administrative service organization or risk management office or to financial records relating to the provision of insurance.

(28) A record or information: (i) identifying an individual who applies for or receives social services; or (ii) relating to the following: (A) the type of social services received by an individual; (B) an individual's application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or (C) eligibility to receive social services, including the individual's income, assets, physical or mental health, age, disability, family circumstances or record of abuse.

The Act defines "social services" as "[c]ash assistance and other welfare benefits, medical, mental and other health care services, drug and alcohol treatment, adoption services, vocational services and training, occupational training, education services, counseling services, workers' compensation services and unemployment compensation services, foster care services, services for the elderly, services for individuals with disabilities, and services for victims of crimes and domestic violence." Section 102.

(29) Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbyist disclosure).

(30) A record identifying the name, home address or date of birth of a child 17 years of age or younger.

B. Other statutory exclusions.

Other Pennsylvania statutes, administrative code provisions, and policies either specifically grant or deny access to information from the government. Some important examples are:

(1) *Abortion Consent Proceedings:* Under the current version of Pennsylvania's abortion control statute, a pregnant woman who is less than 18 years old must obtain the consent of a parent, a guardian, or the courts before she can have an abortion. 18 Pa. Cons. Stat. § 3206. Court proceedings under the Act are confidential, all records of such proceedings are to be sealed, and the name of the person seeking court consent for an abortion may not be entered on a docket. *Id.*

(2) *Abortion Facility Listings/Maternal Death Rate Data:* Every facility which performs abortions in Pennsylvania must file a quarterly report showing the number of abortions performed there, and these reports are available to the public if the facility has received State-appropriated funds within the twelve months before the filing. 18 Pa. Cons. Stat. § 3214. The public also has access to an annual statistical report regarding maternal death rates arising from pregnancy, childbirth or intentional abortion. *Id.*

(3) *Adoption Records:* The Pennsylvania Adoption Act limits the ability of the adoptee and parties to the adoption to access information contained in adoption records, and it generally prohibits the inspection of adoption records by the public. 23 Pa. Cons. Stat. § 2905.

(4) *AIDS (Acquired Immune Deficiency Syndrome) Information:* Records of AIDS-related testing, treatment and counseling are confidential and may not be released except as specified by the Pennsylvania Confidentiality of HIV-Related Information Act. *See* 35 Pa. Cons. Stat. § § 7607-7608. The person who is the subject of such records may give his or her written consent to disclose HIV-related information, but the form, content, and expiration dates of such consensual disclosures are strictly regulated by law. *Id.* § 7607. Courts may also release AIDS records when the person seeking the information or the person seeking to disclose the information establishes a "compelling need" for the information. *Id.* § 7608. This is a very high standard of proof that rarely will be met.

(5) *Boat Registration Documents:* All records relating to registration, and numbering of boats shall be public records. 30 Pa. Cons. Stat. § 5313.

(6) *Campus Security Information:* The campus police or campus security officers of each institution of higher education must maintain a daily log as a public record. 18 Pa. Stat. § 20.303. These logs will include all complaints and crime reports, the disposition of any charges filed, the names and addresses of only those adult persons arrested and charged, and the charges filed against those persons. *Id.*

(7) *Charitable Organization Information:* According to the Solicitation of Funds for Charitable Purposes Act, registration statements and applications, reports, notices, contracts or agreements between charitable organizations and professional fundraising counsels, professional solicitors and commercial coventurers, and other similar documents are generally available to the public for review. 10 Pa. Cons. Stat. § § 162.11-.12. In addition, these charitable organizations, professional fundraising counsels and professional solicitors are required to keep accurate fiscal records of their activities in Pennsylvania, which will be made available to the public after removing any information that could identify specific contributors. *Id.*

(8) *Child Abuse Reports:* People who work with children on a regular basis (such as physicians, day-care center workers or police officers) are required to report suspected instances of child abuse to county child welfare officials. 23 Pa. Cons. Stat. § 6311. These reports, the identity of reporting individuals, and other information compiled in connection with investigations of child abuse allegations are confidential and may be disclosed only to certain persons or agencies as provided by law. *Id.*

(9) *Civil Service Commission Records:* The commission must make an annual report to the mayor, showing its own actions and rules and regulations, which is made available for public inspection five days after being delivered to the mayor. 53 Pa. Stat. § 39862.

(10) *Criminal Histories:* While Pennsylvania's Criminal History Record Information Act classifies records maintained in a central repository as confidential, it expressly reserves the public's right to access certain other information. *See* 18 Pa. Cons. Stat. § § 9101-9183. For example, a criminal justice agency can disclose any information that can be found in police blotters, documents prepared or maintained by or filed in any court in Pennsylvania, posters, announcements, or lists for identifying or apprehending fugitives or wanted persons, or announcements of executive clemency. *Id.* § 9104. Under Pennsylvania's Megan's Law (42 Pa. Cons. Stat. § 9791, et seq.) certain information regarding sexually violent offenders is public information, including name, alias, year of birth, address of home and employer and description of the underlying offense. 42 Pa. Cons. Stat. § 9798.1. Information regarding non-sexually violent predators (*i.e.*, persons not likely to engage in predatory sexually violent offenses upon release from custody) is "investigative information" and not accessible. *Dept. of Auditor General v. Pennsylvania State Police*, 844 A.2d 78 (Pa. Commw. Ct. 2004).

(11) *District Justice Records:* The general policy of the Administrative Office of Pennsylvania Courts is to make case indexes, dockets, and files for all matters originating in a District Justice office available to the public for inspection and photocopying. Pub. Access Policy of the Unified Judicial Sys. of Pa.: Dist. Justice Records (Admin. Office of Pa. Courts 1997). Access to certain information may be limited due to personal privacy and security concerns, such as the protection of the identity of child victims of sexual or physical abuse. *Id.*

(12) *Hazardous Substance Information:* According to the Hazardous Sites Cleanup Act, most records, reports or other information obtained under the Act that relate to health or safety effects of a hazardous substance or contaminant can be obtained from the Department of Health. 35 Pa. Stat. § 6020.503.

According to the Worker and Community Right-to-Know Act, any person living in Pennsylvania who is not a competitor may request from the Department of Health a copy of any Material Safety Data Sheet or Hazardous Substance Fact Sheet on file for a particular workplace. *Id.* § 7305.

(13) *Health Care Cost Containment Council Data:* The Health Care Cost Containment Act requires the council to provide the general public with reports, which include information regarding health care providers and services available in the area, such as comparisons among providers of provider service effectiveness, differences in mortality rates, differences in length of stay, ancillary services provided, and incidence rates of selected procedures. 35 Pa. Stat. § 449.7. The council may also, at its discretion, provide the public with access to special reports derived from its raw data for a reasonable fee. *Id.*

(14) *Higher Education Gift Disclosure:* According to the Higher Education Gift Disclosure Act, every college and university must disclose, and make available to the public for review and copying, information regarding gifts of at least $100,000 that are given to the institution from a foreign government, foreign legal entity or foreign person. 24 Pa. Stat. § § 6303, 6305.

(15) *House of Representatives Employee List/ Voucher Submission Information:* A central personnel file for all House of Representatives employees, containing the employees' job titles, duties, and compensation, must be maintained and kept available for public inspection. 46 Pa. Stat. § 42.121g. In addition, all vouchers submitted for reimbursement from any House Appropriation Account are available for public inspection. *Id.* § 42.121h.

(16) *Information Regarding Disposal of Refuse from Mines:* All papers, records, and documents of the Department of Mines, and applications for permits pending before the department that relate to the disposal of refuse from mines, except for information pertaining only to the chemical and physical properties of coal, are available to the public for inspection. 52 Pa. Stat. § 30.55.

(17) *Insurance Information:* Working papers, recorded information, and documents produced or obtained by the Insurance Department or any other person in the course of an insurance examination are generally treated as confidential. 40 Pa. Stat. § 323.5. The only exception to this rule is that thirty days after an examination report is adopted it may be treated as a public record, as long as no court has stayed its publication. *Id.*

(18) *Liquor License Information:* The public should be able to access the names and addresses of all persons that have a pecuniary interest in the conduct of business on premises that are licensed for the sale of liquor, alcohol, and malt and brewed beverages. 47 Pa. Stat. § 4-473.

(19) *Lists of Large Political Contributions from Business Entities:* Any business entity, which has received any non-bid contracts from the Commonwealth or its political subdivisions during the previous year, must submit to the Secretary of the Commonwealth an itemized list of all political contributions made by any officer, director, associate, owner or member of their immediate family when the contributions exceed an aggregate of $1,000, and all political contributions made by any employee or members of his immediate family when contributions exceed $1,000. 25 Pa. Stat. § 3260a. It is the responsibility of the Secretary of the Commonwealth to publish and make available to the public a complete list of all contributions for inspection and copying. *Id.*

(20) *Mental Health Records:* The records of patients who have been admitted or committed to mental health care institutions, or who have received services covered by the Act are confidential. 50 Pa. Cons. Stat. § 7111.

(21) *Noncoal Surface Mining Permit Information:* All documents of the Department of Mines, and applications for permits pending before the department that relate to noncoal surface mining, except for information pertaining only to the chemical and physical properties of the mineral or elemental content that is potentially toxic to the environment, are available to the public. 52 Pa. Stat. § 3310.

(22) *Oil and Gas Conservation Commission Documents:* All rules, regulations, and orders issued by the Oil and Gas Conservation Commission must be kept in writing, and they must be made available to the public. 58 Pa. Stat. § 410.

(23) *Overdue Support Information:* Absent a court order stating that disclosure of such information would unreasonably put a child or party's health, liberty or safety at risk, the identity of and the amount of overdue support owed by any person who has failed to pay his or her support obligation will be made available to the public either by a paper listing, diskette or any other electronic means, and it will be updated at least monthly. 23 Pa. Cons. Stat. § 4352.

(24) *PENNDOT Motor Vehicle Records:* Information contained in state motor vehicle records is generally considered confidential, absent the express consent of the person who is the subject of the record. 75 Pa. Cons. Stat. § 6114. Under federal law, however, personal information found in a motor vehicle record may be disclosed for use in research activities, such as the production of statistical reports, "so long as the personal information is not published, redisclosed, or used to contact individuals." 18 U.S.C. § 2721.

(25) *Precious Metal Dealer Licensing Information:* All applications for licenses to become a dealer in precious metals are public records. 73 Pa. Cons. Stat. § 1932.

(26) *Public Employee Retirement Study Information:* All reports and analyses compiled by or filed with the Public Employee Retirement Study Commission shall be available for public inspection at the offices of the commission. 43 Pa. Cons. Stat. § 1409.

(27) *Public Utility Information:* The Public Utility Commission must make the following information available to the public: (i) records of the names of each consultant hired, the services performed for the commission, and the amounts expended for these services, (ii) copies of reports regarding increased rates charged by public utilities due to fluctuations in fuel costs, and (iii) copies of similar reports regarding tariffs filed by natural gas companies due to fluctuations in natural gas costs. 66 Pa. Cons. Stat. §§ 305, 1307.

(28) *Public Welfare Information:* The Department of Aging will only furnish the identities of and other personal or confidential information regarding welfare recipients to adult residents of the Commonwealth of Pennsylvania who will not use the information for commercial or political purposes. Information regarding any person's application or receipt of medical assistance is not public. 62 Pa. Cons. Stat. § 404; *see also McMullen v. Wohlgemuth*, 308 A.2d 888 (Pa. 1973), *appeal dismissed*, 415 U.S. 970 (1974); *Argo v. Goodstein*, 265 A.2d 783 (Pa. 1970).

(29) *River Basin Commissions' Records:* According to each commission's respective River Basin Compact, both the Delaware River Basin Commission and the Susquehanna River Basin Commission must make annual reports discussing their programs, operations and finances, and annual audits of their financial accounts available to the public. 32 Pa. Stat. § 815.101 (regarding the Delaware River Basin Compact); 32 Pa. Cons. Stat. § 820.1 (regarding the Susquehanna River Basin Compact).

(30) *Senate Employee Lists/Voucher Submission Information:* The following information regarding Senate employees must be made available to the public: employees' names, addresses, job titles, duties, and compensation. 46 Pa.. Stat. § 42.102d. The public also has access to all vouchers submitted for reimbursement or payment for any appropriation made to the Senate. *Id.*

(31) *Sentencing Data:* The Pennsylvania Commission on Sentencing, through the Inter-University Consortium for Political and Social Research, releases entire sentencing data sets for each year, as well as a variety of standard reports which include specific types of information. Sentencing in Pennsylvania, 2009 Annual Report (available at http://pcs.la.psu.edu/publications/annual-reports/PCS2009AR-07072010Web.pdf#navpanes=0) (Pa. Comm'n on Sentencing 2010) (last visited April 1May 20, 2011). The names and Social Security numbers of the offenders, as well as the names of the sentencing judges, will be removed from any data sets that are made available to the public. *Id.*

(32) *State Ethics Commission:* The State Ethics Commission is authorized to investigate potential violations of the Act, to make findings of fact regarding violations, and to hold hearings to determine whether a violation of the Act has in fact occurred. 65 Pa. Cons. Stat. § 1107. While the Commission is required to keep its investigative records, including records of its proceedings, confidential, all commission "determinations," which consist of final orders and findings of fact that are entered after the conclusion of an investigation, must be made available to the public. *Id.* § 1108.

(33) *Tax Information:* State law requires that information gained by the Department of Revenue or any administrative department, board

or commission, as a result of a tax return or investigation required or authorized under Pennsylvania statutes that impose taxes or provide for the collection of taxes, is to be kept confidential. 72 Pa. Cons. Stat. § 7274; *see also id.* § 731. Similarly, local taxing authorities such as school districts are statutorily prohibited from disclosing tax information. *See* 53 Pa. Cons. Stat. § § 6913(V)(f), 8437; *see, e.g.*, *Juniata Valley Sch. Dist. v. Wargo*, 797 A.2d 428 (Pa. Commw. Ct. 2002); *Scranton Times, L.P. v. Scranton Single Tax Office*, 736 A.2d 711 (Pa. Commw. Ct. 1999).

(34) *Tenement-House Licensing Information:* The mayor must maintain a public record of all tenement-house licenses issued, and the original applications must be preserved for one year. 53 Pa. Stat. § 15093.

(35) *Veterans' Grave Registration Records:* The county commissioners of each county in Pennsylvania are directed to compile a list, known as the Veterans' Grave Registration Record, of the burial places within such county of service persons. 16 Pa. Cons. Stat. § § 1923, 5123, 8041, 8069. The lists are available for public inspection, and they should include the name of the service person, the location and characteristics of the gravesite, and other information relating to his or her service in the military. *Id.*

(36) *Vital Statistics:* Vital statistics records, such as birth and death certificates, are generally not available to the public. 35 Pa. Stat. § 450.801. At the least, the applicant is required to show a direct interest in the content of the record and that the information is necessary for the determination of personal or property rights. *Id.* § 450.804.

(37) *Voter Information:* The following documents are generally open to public inspection: records of registration commissions and district registers, street lists, official voter registration applications, petitions and appeals, witness lists, accounts and contracts, and reports. 25 Pa. Cons. Stat. § 1207.

Street lists include the names and addresses of all registered electors residing in the district. *Id.* § 1403. The commission may, for a reasonable fee, distribute the list to "organized bodies of citizens."

Public information lists contain the name, address, date of birth and voting history of each registered voter in the county, and they may also contain information on voting districts. *Id.* § 1404. Any individual who inspects the list, or who acquires names of registered voters from the list, must state in writing that any information obtained from the list will not be used for purposes unrelated to elections, political activities or law enforcement. *Id.*

Each commission must preserve computer lists used as district registers for five years. *Id.* § 1405. The department and each commission must preserve for two years and make available to the public all records pertaining to the implementation of programs and activities conducted for the purposes of ensuring the accuracy and currency of official lists of registered electors except to the extent that the records relate to a declination to register to vote or to the identity of a voter registration agency through which any qualified elector is registered. *Id.*

(38) *Water Right Acquisition Records:* An up-to-date Water Acquisition Record, containing information on all confirmed water right acquisitions and all permits for the acquisition of water rights, must be made available for public inspection. 32 Pa. Cons. Stat. § 634 (2000).

(39) *Family Educational Rights and Privacy Act ("FERPA"):* Aside from directory information, data which identifies an individual student cannot be released to non-education entities except for the student and her parent. *See* 20 U.S.C. § 1232g(b)(1) – (7); *Sherry v. Radnor Twp. Sch. Dist.*, 2011 WL 1226262 (Pa. Commw. Ct. 2011).

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

The scope of records covered by the Act does not "supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." Section 306. Elsewhere the Act makes the same point clear: "If the provisions of this Act regarding access to records conflict with any other federal or state law, the provisions of this Act shall not apply." Section 3101.1. In other words, if some other Pennsylvania or federal statute, regulation or order requires or prohibits access, the Act does not change that.

Note: The Pennsylvania Supreme Court held that there was no separate First Amendment right to agency records in *McMullan v. Wohlgemuth*, 308 A.2d 888, 895-98 (Pa. 1973). And, in *Capital Cities Media Inc. v. Chester*, 797 F.2d 1164, 1175-76 (3d Cir. 1986) (*en banc*), the United States Court of Appeals for the Third Circuit (which includes Pennsylvania) rejected the contention that the First Amendment afforded the public a right of access to documents and records held by a Pennsylvania administrative agency. *See also First Amendment Coalition v. Judicial Inquiry and Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (denying access to administrative hearings when hearings do not result in recommendation for judicial discipline).

D. Are segregable portions of records containing exempt material available?

Yes. Where a document contains information that is subject to access as well as information that is not subject to access, the agency must provide access to the document while redacting or omitting the information not subject to access. Section 706 *See e.g.*, *Pa. State Troopers Ass'n v. Scolforo*, 2011 WL 1347006 at *6 - *7 (Pa. Commw. Ct. 2011) (holding otherwise exempt records may be disclosed and redacted at the agency's discretion); *Lutz v. City of Philadelphia*, 6 A.3d 669 (Pa. Commw. Ct. 2010)(requiring access to non-exempt portions of arbitration decisions).

This is consistent with case law interpreting the old act. *Times Publ'g Co. v. Michel*, 633 A.2d 1233, 1239 (Pa. Commw. Ct. 1993), *appeal denied*, 645 A.2d 1321 (Pa. 1994) (interpreting the old act); *Bell of Pennsylvania Informal Investigation*, 1989 Pa. PUC LEXIS 21 (Mar. 30, 1989) (interpreting the old act).

E. Homeland Security Measures.

The Act has several provisions that implicate homeland security measures.

Most importantly, the Act contains an exemption for any "record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority." Section 708(b)(2). "Homeland security" is defined as any "Government actions designed to prevent, detect, respond to and recover from acts of terrorism, major disasters and other emergencies, whether natural or manmade." Section 102.

The Act also has an exemption applicable to records that, if disclosed, "creates a reasonable likelihood of endangering the safety or physical security of a building, public utility, resource, infrastructure, facility or information storage system." Section 708(b)(3); *See Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Commw. Ct. 2010)(requiring the Pennsylvania Emergency Management Agency to analyze each requested record to determine whether disclosure is "reasonably likely" to threaten the Commonwealth's infrastructure). *See supra* part II.A.

III. STATE LAW ON ELECTRONIC RECORDS

A. Can the requester choose a format for receiving records?

Yes. The Act's definition of "record" includes records in any form, including records containing "information stored or maintained electronically and a data-processed or image-processed document." Section 102. Moreover, it states: "A public record being provided to a requester shall be provided in the medium requested if the record exists in that medium; otherwise, it shall be provided in the medium in which it exists." Section 701(a).

The agency has the option of making its records available through "any publicly accessible electronic means" and may respond to a requester by stating that "the record is available through publicly accessible electronic means or that the agency will provide access to inspect the record electronically." If the requester is "unwilling or unable to access the record electronically," the requester may submit, within 30 days of the agency's notification, a written request "to the agency to have the record converted to paper," and the agency "shall provide access to the record in printed form within five days or the receipt of the written request for conversion to paper." Section 704.

The Act cautions that "[n]othing in this act shall be construed to require access to any computer either of an agency or individual employee of an agency." Section 701(a).

B. Can the requester obtain a customized search of computer databases to fit particular needs?

No. In responding to a request under the Act, an agency is not required to create a document that does not exist. *See* Section 705 ("[A] n agency shall not be required to create a record which does not currently 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").

Nonetheless, some agencies have allowed such requests.

C. Does the existence of information in electronic format affect its openness?

No.

D. How is e-mail treated?

So long as an e-mail satisfies the Act's requirements, the Act requires access. *See*, *e.g.*, *In the Matter of Kenneth M. Silberstein*, 2011 WL 31550 (Pa. Commw. Ct. 2011).

1. Does e-mail constitute a record?

Yes. Under Section 102, "record" is defined as "…information stored or maintained electronically."

2. Public matter on government e-mail or government hardware

Although no case law exists on this precise issue, it is clear from the holding in *Silberstein* (discussed *infra*) that public matter on government email or hardware is subject to the Act. *See Silberstein*, 2011 WL 31550 at *3. *Silberstein* suggests that a public official who "possesses, controls or has custody" of a public record, no matter where it exists, must disclose that information to a requester. *Id.*

3. Private matter on government e-mail or government hardware

Private matter emails on government accounts or hardware are presumptively accessible.

4. Public matter on private e-mail

An open records officer must make a good faith determination as to whether any relevant document on a public official's private email constitutes a "public record." *See* 65 P.S. §§ 67.502; 67.901; *Silberstein*, 2011 WL 31550 at *1 (the open records officer is required to direct relevant requests to appropriate public officials and determine whether that official is in possession, custody or control of a "public record").

5. Private matter on private e-mail

Private matter emails stored on a public employee's private account do not constitute public records subject to disclosure under Pennsylvania's Right to Know Law. *See*, *e.g.*, *In the Matter of Kenneth M. Silberstein*, 2011 WL 31550 (Pa. Commw. Ct. 2011)(a public official's electronic communications do not fall within the definition of a "record" under Pennsylvania's Right to Know Law when the official has no authority to act on behalf of a governmental agency without its authorization).

E. How are text messages and instant messages treated?

Text messages and instant messages are presumptively accessible unless the governmental agency proves some exemption from disclosure applies.

1. Do text messages and/or instant messages constitute a record?

Yes. Under Section 102, "record" is defined as "…information stored or maintained electronically."

2. Public matter message on government hardware.

The Act is silent regarding any type of message on government hardware. Given that emails have been held to be accessible to the public no matter where they exist, instant messages and text messages must also likely be made publicly available upon proper request. *See Silberstein*, 2011 WL 31550 at *1.

3. Private matter message on government hardware.

Private matter messages stored on government hardware are presumptively accessible.

4. Public matter message on private hardware.

An open records officer must make a good faith determination as to the existence of public records on private hardware. *See*, *e.g.*, *Silberstein*, 2011 WL 31550 at *1.

5. Private matter message on private hardware.

Although no case law has considered this precise issue, private matter messages on private hardware likely need not be disclosed. *See id.*

F. How are social media postings and messages treated?

Social media postings and messages are presumptively accessible.

G. How are online discussion board posts treated?

Discussion board posts are presumptively accessible.

H. Computer software

1. Is software public?

Under Section 708(b)(4), software is presumptively accessible unless it "would be reasonably likely to jeopardize [the agency's] computer security."

2. Is software and/or file metadata public?

Software and metadata are public so long as they "would [not] be reasonably likely to jeopardize [the agency's] computer security."

I. How are fees for electronic records assessed?

Pursuant to Section 1307(e), agencies may impose a flat rate, a subscription fee for a period of time, a per-transaction fee, a fee based on the cumulative time of system access or any other reasonable method for "enhanced electronic access." The user fees for enhanced electronic access must be reasonable, pre-approved by the Office of Open Records and absent an intent or effect of excluding persons or creating profit for the agency. Section 1307(e).

J. Money-making schemes.

1. Revenues.

An agency cannot profit from responding to a request for public records by receiving more revenue than the cost of copying the record. Section 1307.

2. Geographic Information Systems.

Any information gathered from such systems are presumptively accessible.

K. On-line dissemination.

Many agencies make some of their records publicly available on-line in their own discretion and by statute. However, the Act does not require on-line dissemination of public records.

IV. RECORD CATEGORIES -- OPEN OR CLOSED

A. Autopsy reports.

The Act specifically exempts an "autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner." Section 708(b)(20). This exemption, however, "shall not limit the reporting of the name or the deceased individual and the cause and manner of death." *Id.*

16 Pa. Stat. § 1251, however, requires county coroners annually to transmit all official records to the prothonotary for public inspection within 30 days of the close of the calendar year. *See also* 16 Pa. Cons. Stat. § 405(a) (county records open to public). Autopsy reports are part of the official records of the Coroner and are, as a result, public records under the Act. *See Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632 (Pa. 2009). While the Pennsylvania Supreme Court "express[ed] no opinion" on whether the result would be different under the new Right to Know Act, its analysis strongly suggested the outcome would be the same. *See Hearst Television, Inc. v. Norris*, 8 A.3d 420 (Pa Commw. Ct. 2010)(following the rule in *Penn Jersey* under the new Right to Know Act to conclude that "manner of death" records are not exempt under Section 708(b)(20)); *In re Randy Buchanan*, 583 Pa. 620 (2005) (holding that the Coroner's Act does require a Coroner to make public Autopsy Reports). The Supreme Court's decision in *Buchanan* implicitly overruled the Commonwealth Court's decision in *Johnstown-Tribune Pub. Co. v. Ross*, 871 A.2d 234 (Pa. Commw. Ct. 2005), which held that under the Coroner's Act, "official records" means only documentation showing the "cause and manner of deaths investigated by the coroner" and does not include autopsy reports.

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

1. Rules for active investigations.

All records produced during an administrative investigation are exempted from disclosure under Section 708(17). *See, e.g., Dep't of Health v. Office of Open Records*, 4 A.3d 803, 811 (Pa. Commw. Ct. 2010); *Stein v. Plymouth Township*, 994 A.2d 1179 (Pa. Commw. Ct. 2010).

2. Rules for closed investigations.

The Act makes no distinction between active and closed investigations.

C. Bank records.

The canceled checks of a township's bank account and payroll account are public records accessible to the public, even if in the possession of a private bank. *Carbondale Township v. Murray*, 440 A.2d 1273, 1274-75 (Pa. Commw. Ct. 1982) (interpreting old act). *Contra Commonwealth v. Barclay*, 47 Del. Cty. Rptr. 203 (1960) (interpreting old act).

E. Business records, financial data, trade secrets.

The Act exempts any "record that constitutes or reveals a trade secret or confidential proprietary information." Section 708(b)(11).

A trade secret is defined as "[i]nformation, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 102.

The Act sets forth notification requirements where requests implicate trade secrets or confidential proprietary information of a third party. If a request for access seeks trade secrets or confidential proprietary information, the agency must, within five business days of receipt of the request, notify the third party that provided the record so long as the third party had given a written, signed statement that the record contained a trade secret or confidential proprietary information. Upon such notice, the third party has five business days "to provide input on the release of the record." The agency shall either deny the request or release the record within ten business days of providing the third party of the request, and shall notify the third party of the decision. Section 707(b).

What constitutes a trade secret has been litigated under the prior act. One Pennsylvania court rejected the notion of trade secret "when the function is recognized as governmental rather than that of a private business." *Hoffman v. Pennsylvania Game Commission*, 455 A.2d 731 (Pa. Commw. Ct. 1983) (rejecting Game Commission's contention that its subscribers' mailing list of the *Pennsylvania Game News* is a trade secret) (interpreting the old act).

Confidential proprietary information is defined as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information."

The Act also exempts proposals regarding an agency's procurement or disposal of goods and services, including "financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability." Section 708(b)(26). This provision specifically overturns prior case law that held that trade secrets and other confidential information are publicly available if a state contractor voluntarily includes them as part of the bid package for a public contract. *See Envirotest Partners v. Commonwealth Dep't of Transp.*, 664 A.2d 208, 213-14 (Pa. Commw. Ct. 1995).

F. Contracts, proposals and bids.

The Act specifically states that "contracts" are public records unless subject to an exemption. Sections 301-303 (requiring access to public records); 102 (definition of "public record" and "financial record"). This requirement is virtually identical to the old act. *See, e.g., Dep't of Conservation and Nat. Res. v. Office of Open Records*, 1 A.3d 929, 940-41 (Pa. Commw. Ct. 2010) (approvingly citing interpretations of the "contracts" language in the old Act); *Envirotest Partners v. Commonwealth Dep't of Transp.*, 664 A.2d 208, 212 (Pa. Commw. Ct. 1995) (interpreting the old act); *Ryan v. Pennsylvania Higher Educ. Assistance Agency*, 448 A.2d 669 (Pa. Commw. Ct. 1982) (interpreting the old act).

Proposals and bids are exempt from disclosure "prior to the award of the contract or prior to the opening and rejection of all bids." In addition, the Act specifically exempts "financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability." Section 708(b)(26).

G. Collective bargaining records.

The Act exempts several types of records pertaining to collective bargaining proceedings while they are pending.

It exempts any "record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings." Section 708(b)(8). But this exemption does not extend to "a final or executed contract or agreement between the parties in a collective bargaining procedure." *Id.*

It also exempts, in "the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion." Section 708(b)(8). This exemption, however, does "not apply to the final award or order of the arbitrator in a dispute or grievance procedure." *Id.*

H. Coroners reports.

See § IV(A) *supra*.

J. Election records.

Records of the voter registration commission, except the general registers, must be open to public inspection and copying. *See* 25 Pa. Cons. Stat. § 623-13; 25 Pa. Cons. Stat. § 951-12. This requirement applies to computerized records. *Macurdy v. Staisey*, 120 Pitts.L.J. 151 (1971).

The election records of the Secretary of the Commonwealth, including "all returns, nomination petitions, certificates and papers" must be open to public inspection and may be inspected and copied by any person qualified to vote in Pennsylvania. 25 Pa. Cons. Stat. § 2622.

The records of county boards of election, except for the contents of ballot boxes and voting machines, must be open for inspection and copying by any person qualified to vote in Pennsylvania. 25 Pa. Cons. Stat. § 2648.

In each case the inspection must take place in the presence of a board or commission member, or a representative of the secretary of the Commonwealth.

K. Gun permits.

While the Act does not specifically address gun permits, gun permits, with certain personal information redacted pursuant to Section 708(b)(6), are likely public records under the Act.

Under the old act, certain information in a gun permit application is public, *e.g.*, name, race, reason for requesting the license, personal references and answers to background questions. Other information – *e.g.*, home addresses, telephone numbers and social security numbers – is protected from disclosure under the personal security exception to the Act. *Times Publishing Co. v. Michel*, 633 A.2d 1233, 1239 (Pa. Commw. Ct. 1993).

L. Hospital reports.

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") required that regulations be adopted concerning the disclosure of protected health information. HIPAA protects all "individually identifiable information" from disclosure without the release of the patient. 45 C.F.R. § 160.103. De-identified health information may be disclosed. 45 C.F.R. § § 164.502 and 164.514. Identifiable health information may be disclosed without a patient release in limited situations. 45 C.F.R. § 164.502(a)(1). In general, state laws that are contrary to the HIPAA privacy rule are preempted by the federal requirements. 45 C.F.R. § 160.203.

The Act similarly contains a broad exemption for medical information. Section 708(b)(5). It exempts any "record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information."

M. Personnel records.

The Act contains an exemption for certain "records relating to an agency employee." Section 708(b)(7). The exemption includes the following records: "(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."

1. Salary.

Salary information is presumptively accessible.

2. Disciplinary records.

Disciplinary records are not publicly available unless included in a "final action" resulting in "demotion or discharge." Section 708(b)(7)(viii).

3. Applications.

Not publicly available under 708(b)(7)(iv) for individuals who have not been hired by the agency.

4. Personally identifying information.

See discussion of the implications of deleting the phrase "reputation" from the "personal security" exemption.

5. Expense reports.

Expense reports are presumptively accessible.

N. Police records.

The Act contains a broad exemption for records "relating to or resulting in a criminal investigation." This exemption includes complaints, investigative materials, confidential source records, victim information and other records. Section 708(b)(16). *See* § IV((K)(4) *supra*.

1. Accident reports.

Only reports created pursuant to 75 Pa.C.S. § 3754(b)(accident prevention investigations) are exempt under Section 708(b)(16).

2. Police blotter.

Police blotters are not exempt from disclosure. Section 708(b)(16); 18 Pa.C.S. § 9102 (defining "police blotter" as a chronological listing of arrests, including but not limited to: the name and address of the individual charged and the alleged offenses). The definition cited in 18 Pa.C.S. § 9102 is the minimum information required before a record will be considered a "police blotter." See, e.g., *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Commw. Ct. 2010). However, courts have not yet discussed the quantity or quality of additional information on a police record necessary to transform such a record from a "police blotter" to an exempt police report under Section 708(b)(16).

3. 911 tapes.

Section 708(b)(18) exempts 911 tapes unless public interest outweighs any interest against disclosure.

4. Investigatory records.

a. Rules for active investigations.

Section 708(b)(16)(vi) exempts:

A record that, if disclosed, would do any of the following: (A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges. (B) Deprive a person of the right to a fair trial or an impartial adjudication. (C) Impair the ability to locate a defendant or codefendant. (D) Hinder an agency's ability to secure an arrest, prosecution or conviction. (E) Endanger the life or physical safety of an individual.

b. Rules for closed investigations.

Under the new Act, Pennsylvania courts have defined "investigatory records" to include both closed and active investigations. *See*, *e.g.*, *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Commw. Ct. 2010). Therefore, closed investigations fall within the 708(b)(16)(vi) exemption.

5. Arrest records.

Section 708(b)(16)(vi)(A) suggests that an arrest records falls within its exemption because it would likely reveal the institution, progress or result of a criminal investigation prior to the filing of criminal charges.

6. Compilations of criminal histories.

Criminal histories maintained in the Commonwealth's central criminal repository are statutorily confidential. See 18 Pa. Cons. Stat. § § 9101-9183. However, certain criminal history compilations are publicly accessible. See Part II.A (10).

7. Victims.

Section 708(b)(16)(v) exempts "[v]ictim information, including any information that would jeopardize the safety of the victim."

8. Confessions.

Confessions are presumptively accessible.

9. Confidential informants.

Section 708(b)(16)(iii) exempts "[a] record that includes the identity of a confidential source."

10. Police techniques.

The Act does not explicitly exempt police techniques from its requirements, but the language of Section 708(b)(16) suggests police agencies may argue the relationship between the revelation of specific investigations to police techniques generally.

11. Mug shots.

The Act is silent on this issue.

12. Sex offender records.

42 Pa. C.S.A. § 9798.1 sets forth the affirmative duty of the Pennsylvania State Police to post sex offender registry records on the internet. The following information must be posted: name and all known aliases; year of birth; the street address, municipality, county and zip code of all residences, including, where applicable, the name of the prison or other place of confinement; the street address, municipality, county, zip code and name of any institution or location at which the person is enrolled as a student; the municipality, county and zip code of any employment location; a photograph of the offender, which shall be updated not less than annually; a physical description of the offender, including sex, height, weight, eye color, hair color and race; any identifying marks, including scars, birthmarks and tattoos; the license plate number and description of any vehicle owned or registered to the offender; whether the offender is currently compliant with registration requirements; whether the victim is a minor; a description of the offense or offenses which triggered the application of this subchapter; and the date of the offense and conviction, if available.

13. Emergency medical services records.

Aside from "time response logs," emergency medical service records are exempt from disclosure. See Section 708(b)(18)(i); *Cnty. of York v. Office of Open Records*, 2011 WL 526231 (Pa. Commw. Ct. 2011)(requiring "time response logs" to include destination addresses or cross-street information).

O. Prison, parole and probation reports.

Although the Act contains no exemption for such records, 37 Pa. Code § 61.2 classifies all parole and probation recommendations as "private and confidential" and thus exempt from disclosure under Section 305(a)(3). *See*, *e.g. Jones v. Office of Open Records*, 993 A.2d 339 (Pa. Commw. Ct. 2010). Other kinds of prison, parole and probation report records could implicate the exemption for records relating to law enforcement or other public safety activity "that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity. . .." Section 708(b)(2); *Woods v. Office of Open Records*, 998 A.2d 665 (Pa. Commw. Ct. 2010) (denying public access to sex-offender "Supervision Strategies" on the grounds that sex-offenders in the general public would better evade parole and probation supervision and monitoring).

P. Public utility records.

The Pennsylvania Public Utility Commission is an agency subject to the Act.

There are several exemptions that may apply to public utility records.

The Act contains an exemption for 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." That exemption includes "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." Section 708(b)(3)(iii).

Q. Real estate appraisals, negotiations.

1. Appraisals.

Real estate appraisals are presumptively accessible.

2. Negotiations.

Real estate negotiations are presumptively accessible.

3. Transactions.

Real estate transactions are presumptively accessible.

4. Deeds, liens, foreclosures, title history.

Under the old Act, deeds and mortgages, to which the agency is not a party, are not public records. *See*, *e.g.*, *Inkpen v. Roberts*, 862 A.2d 700 (Pa. Commw. Ct. 2004). However, under *Inkpen*, the requesting party bore the burden of proving that the record was a public record. *Id.* Under the new act, deeds and mortgages are presumptively accessible.

5. Zoning records.

Zoning records are presumptively accessible.

R. School and university records.

1. Athletic records.

The Act is silent on this issue.

2. Trustee records.

Given the Commonwealth Court's recent holding subjecting a private foundation to the requirements of the Act, it is likely that trustee records directly relating to its "governmental function" are accessible. *See*, *e.g. East Stroudsburg Univ. Foundation v. Office of Open Records*, 995 A.2d 49 (Pa. Commw. Ct. 2010).

3. Student records.

Transcripts are exempt from disclosure under the Act. Section 708(b)(15)(i).

S. Vital statistics.

1. Birth certificates.

Under a statutory exclusion, the requesting party is required to show a direct interest in the content of the record and that the information is necessary for the determination of personal or property rights. 35 Pa. Stat. § 450.804.

2. Marriage & divorce.

Marriage and divorce information is presumptively accessible.

3. Death certificates.

Under a statutory exclusion, the requesting party is required to show a direct interest in the content of the record and that the information is necessary for the determination of personal or property rights. 35 Pa. Stat. § 450.804.

4. Infectious disease and health epidemics.

See II(B) § (4) related to HIV/AIDS testing records.

V. PROCEDURE FOR OBTAINING RECORDS

The Act sets forth in detail the required procedures for requesting public records.

The Act permits but does not require an agency to "promulgate regulations and policies necessary for the agency to implement this act." Section 504(a).

A. How to start.

1. Who receives a request?

The Act states that "written request[s] must be addressed to the open-records officer" that agencies are required to designate under the Act. If such a request is directed to some other agency employee, such employee "shall be directed to forward requests for records to the [agency's] open records officer." Section 703.

The Act sets forth how "open-records officers" are established and their responsibilities.

Agencies must designate an official or employee to act as the open-records officer. For a legislative agency other than the Senate or House of Representatives, the Legislative Reference Bureau must designate an open-records officer. Section 502(a)(1), (2).

The open –records officer has the following "functions":

1. Receive requests submitted to the agency. Upon receiving a request, the officer must (a) note the date of receipt on the written request; (b) determine the day on which the 5-day period to respond expires and note that date on the written request; (c) maintain an electronic or paper copy of the request, including all documents submitted with the request; (d) maintain written requests for 10 days or, if an appeal is filed, until a final determination is issued or the appeal is deemed denied; and, for Commonwealth agencies only, (e) create a file for retention of the request, response, written communications.

2. Direct requests to other appropriate persons within the agency or in another agency.

3. Track the agency's progress in responding to requests.

4. Issue interim and final responses under the Act. Section 502(a) & (b)(1)-(2)(i)-(iv).

The Act also permits, but does not require, the Office of Open Records to "promulgate regulations relating to appeals involving a Commonwealth agency or local agency." Section 504(a).

The Act permits a written request to be submitted in a variety of ways – "in person, by mail, by email, by facsimile or, to the extent provided by agency rules, any other electronic means." Section 703.

2. Does the law cover oral requests?

Agencies may, but are not required to, fulfill "verbal" (presumably meaning "oral") and anonymous requests. Section 702. If the requester wants to pursue "the relief and remedies" provided by the Act, *e.g.*, receive the required form of agency response and take an appeal from any denial of access, "the request for access to records must be a written request." *Id.* While agencies may have the statutory discretion to accept oral requests, it appears that Commonwealth agencies under the control of the governor have been instructed to refuse oral requests. *See* Management Directive No. 205.36 (November 27, 2002).

a. Arrangements to inspect & copy.

Round the clock access is not required: "Public records, legislative records or financial records shall be available for access during the regular business hours of an agency." Section 701(a).

b. If an oral request is denied:

(1). How does the requester memorialize the refusal?

The requester must send a written request and obtain a written denial if the requester wants to take advantage of any appeals permitted by the Act.

(2). Do subsequent steps need to be in writing?

Yes.

3. Contents of a written request.

The Act requires that the Office of Open Records "develop a uniform form which shall be accepted by all Commonwealth and local agencies in addition to any form used by the agency to file a request;" Section 505(a).

The Act states that judicial agencies or the Administrative Office of Pennsylvania Courts "may develop a form to request financial records or may accept a form developed by the Office of Open Records." Section 505(b).

And the Act similarly states that legislative agencies "may develop a form to request legislative records or may accept a form developed by the Office of Open Records." Section 505(c).

If any agency develops policies and procedures, they must be "posted at each agency" or "on the agency's website" (if any). Section 504(b).

a. Description of the records.

The request must be specific: "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." Section 703.

Case law under the old act sets forth certain requirements that may remain good law. "[W]hen an agency regards a particular request as lacking sufficient specificity, it has a duty in good faith to communicate that opinion to the person making the request so that the parties may attempt to resolve the question before resorting to an appeal. *Hunt*, *supra*. "Where the request is not sufficiently specific, the agency has no obligation to comply with the request because the lack of specificity prevents the agency from determining whether to grant or deny the request." *Associated Builders & Contractors, Inc. v. Pennsylvania Dep't of General Services*, 747 A.2d 962 (Pa. Commw. Ct. 2000) (holding that requests using "phraseology akin to document requests under the civil

discovery rules, *i.e.*, 'any and all documents relating to [subject matter]'" fail to provide sufficient specificity). "Further, a lack of specificity in the request makes it difficult, if not impossible, for th[e] court to conduct meaningful review of the agency's decision." *Id.; see also Arduino v. Borough of Dunmore*, 720 A.2d 827 (Pa. Commw. Ct. 1998) (request for "all records relating to ;" was insufficiently specific and the agency "was not required to comply"); *Tapco, Inc. v. Township of Neville*, 695 A.2d 460, 461 (Pa. Commw. Ct. 1997) (criticizing requests that "read like discovery requests rather than Right to Know Act requests").

b. Need to address fee issues.

The Act states that "[a]ll applicable fees shall be paid in order to receive access to the record requested." Section 901. For information regarding fees, *see infra* § I(D).

c. Plea for quick response.

While nothing precludes a requester from seeking a quicker response, the Act imposes no such obligation on the agency.

d. Can the request be for future records?

The Act has no provision for future records.

e. Other.

Under the Act, an agency may not limit the number of records sought. Section 1308 (prohibiting agencies from establishing policies or regulations that include a "limitation on the number of public records which may be requested or made available for inspection or duplication."). This is consistent with cases applying the old act. *Hunt v. Pennsylvania Dep't of Corrections*, 698 A.2d 147 (Pa. Commw. Ct. 1997) ("No provision of the Right to Know Act limits a person seeking information to a single request.").

However, the Act states that an "agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency." Section 506(a)(1). But a denial of access "shall not restrict the ability to request a different record." Section 506(a)(2). An agency also cannot refuse a request under Section 506(a)(1) merely because it is duplicative. *See, e.g.*, *Office of Gov. v. Bari*, 2011 WL 1662849 at *9 - *10 (Pa. Cmwlth. Ct. 2011). In *Bari*, the Commonwealth Court held that requesting the same record a second time constitutes "repeated requests" under Section 506(a)(1). However, the governmental entity must also prove that it was unreasonably burdened by the repetitive request. *See id.* The Court then held that duplicating efforts and budgetary and staffing constraints are inapposite to what it considers an unreasonable burden. *See id.* It stated that both of these reasons for "unreasonable burden" are too broad and implied that a particularized burden on the agency must be proved. *See id.* at *10.

B. How long to wait.

The Act states how an agency must respond to a Right to Know Act request. An agency must "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;" Section 901.

If an agency denies a written request in whole or in part, the agency must deny the request in writing. Section 903. That writing must include:

1. a description of the record requested

2. the "specific reasons for the denial, including a citation of supporting legal authority"

3. the "typed or printed name, title, business address, business telephone number and signature of the open-records officer on whose authority the denial is issued"

4. the date of the response

5. the procedure to appeal the denial of access under the Act

Section 903(1)-(5).

Several cases applying the old act are probably still good law. In one, if an agency fails to explain the basis for its denial, "such a response arguably fails to raise and preserve for appeal the question of the application of any particular authority." *Hunt v. Pennsylvania Dep't of Corrections*, 698 A.2d 147 (Pa. Commw. Ct. 1997). In another case, the Pennsylvania Supreme Court held that "[w]here a requester has identified material with reasonable specificity and made a colorable claim that it may contain information subject to disclosure pursuant to the Act, the agency should be required to provide sufficiently detailed information concerning the contents of the requested document to enable a reviewing court to make an independent assessment of whether it meets the statutory requirements for mandatory disclosure." *LaValle v. Office of General Counsel*, 769 A.2d 449 (Pa. 2001). The Court did not elaborate further, instead leaving it to the Commonwealth Court to "develop standards to ensure that state agencies provide sufficiently detailed information concerning the contents of requested records to permit meaningful appellate review." *Id.* In dicta, the Supreme Court added that "sound policy would appear to support the availability of an *in camera* procedure, where appropriate, and perhaps, in some circumstances, its requirement upon proper demand." *Id.*

The Act has several additional provisions regarding access to records.

1. *Certified Copies*: If the agency grants access, the agency is required, upon request, to provide a "certified copy of the record if the requester pays the applicable fees;" Section 904.

2. *Production of Non-Public Records:* If an agency produces a record that is *not* a public record, legislative record or financial record, "the agency shall notify any third party that provided the record to the agency, the person that is the subject of the record and the requester." Section 707(a).

3. *Trade Secrets/Confidential Proprietary Information:* If a request for access seeks trade secrets or confidential proprietary information, the agency must, within five business days of receipt of the request, notify the third party that provided the record so long as the third party had given a written, signed statement that the record contained a trade secret or confidential proprietary information. Upon such notice, the third party has five business days "to provide input on the release of the record." The agency shall either deny the request or release the record within ten business days of providing notice to the third party of the request, and shall notify the third party of the decision. Section 707(b).

4. *Failure to Retrieve Records:* If the agency's response states that records are available for delivery at the agency's office and the requester fails to retrieve the records within 60 days, "the agency may dispose of any copies which have not been retrieved and retain any fees paid to date." Section 905.

1. Statutory, regulatory or court-set time limits for agency response.

The Act requires that an agency "respond as promptly as possible under the circumstances existing at the time of the request." Section 901. The agency must respond no later than "five business days from the date the written request is received by the open-records officer for the agency." If an agency fails to send a response within that time period, "the written request for access shall be deemed denied." *Id.*

The Act, however, allows agencies a longer time to respond – 30 days – if the agency determines that one of seven exceptions apply:

1. the request requires redaction

2. the request requires "retrieval" of a record "stored in a remote location"

3. a timely response to the request cannot be accomplished "due to bona fide and specified staffing limitations"

4. a "legal review" is necessary to determine whether the record is a record subject to access under the Act

5. the requester has "not complied" with the agency's policies

6. the requester refuses to pay applicable fees authorized by the Act

7. the "extent and nature of the request precludes a response within the required time period."

Section 902(a)(1)-(7). In such situations, the agency must "send written notice" to the requester "within five business days of receipt of the request." The notice shall include the statement "that the request for access is being reviewed, the reason for the review, a reasonable date that a response is expected to be provided, and an estimate of the applicable fees owed when the record becomes available." Section 902(b)(2). If the agency's expected response date is "in excess of 30 days," "the request for access shall be deemed denied unless the requester has agreed in writing to an extension to the date specified in the notice." *Id.* If the requester agrees to the extension and the agency fails to respond by the date agreed upon, "the request shall be deemed denied."

In summary:

Agencies must respond within 5 business days of receiving a request, and may have up to 30 days to respond if one of the enumerated exceptions described above is satisfied.

If the agency fails to respond within the statutory time period or within any, "the request for access shall be deemed denied." Section 902(b)(2), (3).

2. Informal telephone inquiry as to status.

The Act does not prohibit such an inquiry, but the agency is under no legal obligation to respond to the inquiry.

3. Is delay recognized as a denial for appeal purposes?

Yes.

4. Any other recourse to encourage a response.

None by statute.

C. Administrative appeal.

The Act requires an administrative appeal process before any court action.

Requesters may file an appeal with either the Office of Open Records or the designated appeals officer within 15 days of the mailing date of the agency's response or a deemed denial. A final determination must be mailed to the requester and agency within 30 days of receipt of the appeal.

The Act permits but does not require the Office of Open Records to "promulgate regulations relating to appeals involving a Commonwealth agency or local agency. Section 504(a).

The procedures for administrative appeals are set forth below.

1. Time limit.

Within 15 business days of the mailing date of the agency's response or within 15 business days of a deemed denial. Section 1101(a)(1).

2. To whom is an appeal directed?

a. Individual agencies.

The Office of Open Records or the "judicial, legislative or other appeals officer designated" by an agency. Section 1101(a)(1).

The Act requires that Commonwealth, local, judicial and legislative agencies designate an appeals officer. Section 503(a)-(c). It also requires that the Pennsylvania Senate, House of Representatives, Attorney General, State Treasurer, Auditor General and district attorney for each county shall each designate an appeals officer. Section 503(c)-(d).

b. A state commission or ombudsman.

No.

c. State attorney general.

No.

3. Fee issues.

The Act is silent.

4. Contents of appeal letter.

The Act requires that the appeal "state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request." Section 1101(a)(1).

a. Description of records or portions of records denied.

The Act envisions that the appeal must identify the record requested.

b. Refuting the reasons for denial.

The Act requires that the appeal "address any grounds stated by the agency for delaying or denying the request." Section 1101(a)(1); *see, e.g.*, *Dep't of Corrections v. Office of Open Records*, 2011 WL 1261311 (Pa. Commw. Ct. 2011) (reversing Office of Open Records determination that the requester sufficiently addressed the grounds for denial by articulating the procedural history of the request and stating that the "right to know requests are public").

5. Waiting for a response.

The appeals officer is required to make a "final determination" that must be mailed to the requester and agency "within 30 days of receipt of the appeal." Section 1101(b)(1). If the appeals officer fails to do so, "the appeal is deemed denied." Section 1101(b)(2). The appeals officer is required to do the following:

1. Set a schedule for the requester and open records officer to submit documents in support of their positions;

2. Review all information filed relating to the request;

3. Consult with agency counsel as appropriate;

4. Issue a final determination. Section 1102(a).

If a person other than an agency or requester has a direct interest in the appeal, that person may, "within 15 days following receipt of actual knowledge of the appeal but no later than the date the appeals officer issues an order, file a written request to provide information or to appeal before the appeals officer or to file information in support of the requester's or agency's position." Section 1101(c)(1). The appeals officer may grant the request if no hearing has been held, no order has been issued and the appeals officer believes the information will be "probative." Section 1101(c)(2). Copies of the written request shall be sent to the requester and agency. Section 1101(c)(3).

Prior to issuing the final determination, the appeals officer may, but is not required to, conduct a hearing. Section 1102(a)(2). That decision "is not appealable. Section 1102(a)(2). If a hearing is held, Pennsylvania rules governing administrative practice and procedure (1 Pa. Code Pt. II) shall apply; if a hearing is not held, those rules do not apply "except to the extent that the agency has adopted these chapters in its regulations or rules under this subsection." Section 1102(b)(1)-(2).

The appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes is reasonably probative

and relevant, and may limit the nature and extent of evidence found to be cumulative. Section 1102(a)(2).

The Office of Open Records, a judicial agency, legislative agency, the Attorney General, Auditor General, State Treasurer or district attorney may adopt procedures relating to appeals. Section 1102(b).

6. Subsequent remedies.

A dissatisfied requester or agency may file an appeal with the Commonwealth Court. Section 1301(a).

If an appeal is filed, the agency, the requester and the Office of Open Records or designated appeals officer shall be served with notice and shall have an opportunity to respond. Section 1303(a).

D. Court action.

1. Who may sue?

A requester or agency may file an appeal. Pennsylvania law no longer limits appeal right to citizens.

The Act remains silent on the issue of whether it is possible to bring a declaratory judgment action seeking a ruling that certain documents are or are not public records under the Act. In a case brought under the old act, the Commonwealth Court permitted the successful bidder on a government contract to bring a declaratory judgment action (in the form of a petition for review) for a declaration that certain documents not be produced by DOT to a competitor under the Act. *Envirotest Partners v. Commonwealth Dep't of Transport.*, 664 A.2d 208 (Pa. Commw. 1995).

2. Priority.

Possibly yes, if the requester asks for expedited consideration. However, the Act contains no specific provision enabling expedited consideration.

3. Pro se.

Pro se suits are possible, although the complexity of the public records determination and the interplay of the various statutes make legal representation advisable.

4. Issues the court will address:

Stay Pending Appeal. The filing of a petition for review or appeal "shall stay the release of documents" until a decision is issued. Sections 1301(b), 1302(b).

a. Denial.

Yes. An agency must set forth a specific reason for denying a request and cannot assert new grounds for denial on appeal. *See*, *e.g. Signature Information Solutions, LLC v. Aston Township*, 995 A.2d 510, 512 (Pa. Commw. Ct. 2010).

b. Fees for records.

Yes.

c. Delays.

A delay in providing a response to a request is a deemed denial under the Act and may be appealed.

d. Patterns for future access (declaratory judgment).

Yes.

5. Pleading format.

The Act states the requester may "file a petition for review or other document as might be required by rule of court;" Sections 1301(a), 1302(a). The Act provides no further guidance.

For appeals involving Commonwealth agencies that are filed in Commonwealth Court, the proper format is a petition for review pursuant to Pa. R.A.P. 1501. *See Nanayakkara v. Casella*, 681 A.2d 857 (Pa. Commw. Ct. 1996) (noting, under the old act, that appeal from a Commonwealth agency "should have been brought as a petition for review in our appellate jurisdiction under 42 Pa. Cons. Stat. § 763(a)(1)"). For appeals filed in the local court of common pleas, counsel should consult the local court rules for guidance. For example, in Philadelphia County, a Right to Know Act appeal from a Philadelphia agency is commenced by filing a short notice of appeal that does little more than identify the agency decision being appealed.

Some Pennsylvania decisions applying the old act may be instructive. In *Knopsnider v. Derry Township Board of Supervisors*, 725 A.2d 245 (Pa. Commw. Ct. 1999), the Commonwealth Court noted that "[w]e have been unable to ascertain what is specifically required to be pled in a statutory appeal, if anything." The court concluded that "fact pleading is not required; but at the very most, all that an appellant must plead is that an appeal is being taken and the reasons for the appeal in order to put the governmental entity on notice of why an appeal is being taken."

Because the Pennsylvania Rules of Civil Procedure are inapplicable, the agency cannot challenge the appeal by filing what are known in Pennsylvania as preliminary objections (*i.e.*, motion to dismiss). *Weiss v. Williamsport Area Sch. Dist.*, 872 A.2d 269 (Pa. Commw. Ct. 2005) (but affirming grant of preliminary objections "in the interest of judicial economy"); *Knopsnider v. Derry Township Board of Supervisors*, 725 A.2d 245 (Pa. Commw. Ct. 1999). Nor is discovery pursuant to the Pennsylvania Rules of Civil Procedure permitted in Right to Know Act appeals. *See Morning Call, Inc. v. Lower Saucon Township*, 627 A.2d 297 (Pa. Commw. Ct. 1993); *Shultz v. Board of Supervisors of Jackson Township*, 505 A.2d 1127 (Pa. Commw. Ct. 1986).

6. Time limit for filing suit.

An appeal must be filed "within 30 days of the mailing date of the final determination of the appeals officer" for the Commonwealth, legislative, judicial or local agency.

7. What court.

The Commonwealth Court has jurisdiction over appeals from Commonwealth, legislative and judicial agencies. Section 1301(a); *Pennsylvania State Education Association v. Pennsylvania Dep't of Community and Economic Dev.*, 4 A.3d 1156 (Pa. Commw. Ct. 2010)(holding the Commonwealth Court does not have original jurisdiction over disputes over records held by local school districts).

The applicable local court of common pleas has jurisdiction over appeals from local agencies. Section 1302(a).

Note: A court reviewing an appeal from an OOR hearing officer may independently review all of the following: the request for public records, the agency's response, the appeal, the hearing transcript, if any, the final written determination of the appeals officer, a stipulation of the parties, the documents at issue *in camera*, and any supplementation of the record through hearing or remand. *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Commw. Ct. 2010)(*en banc*)("a reviewing court, in its appellate jurisdiction, independently reviews the [Office of Open Records'] orders and may substitute its own findings of fact for that of the agency.")

8. Judicial remedies available.

The reviewing court may affirm or reverse the agency's decision and, in certain situations discussed below, award reasonable attorneys fees and costs.

The Act spells out what the court must include in its decision: "The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision." Sections 1301(a), 1302(a).

The Act defines the record on appeal: "The record before a court shall consist of the request, the agency's response, the appeal filed un-

der section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." Section 1303(b).

9. Litigation expenses.

The Act provides for the possibility that attorneys fees and costs may be awarded to the prevailing party. "If a court reverses the final determination of the appeals officer or grants access to a record after a request for access was deemed denied, the court may award reasonable attorneys fees and costs of litigation or an appropriate portion thereof to a requester if the court finds either of the following:

1. the agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access under the provisions of this act; or

2. the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of the law." Section 1304(a)(1)(2).

See, *e.g.*, *Sherry v. Radnor Township Sch. Dist.* (Delaware County Court of Common Pleas; No. 07-08995 June 30, 2008) (ordering the school district to pay nearly $30,000 in costs and attorneys fees to the requester for "willfully or with wanton disregard" denying access); *but see Scolforo*, 2011 WL 1347006 at *6 (citing *Hearst*, 8 A.3d at 420) (denying costs and attorneys fees to the requester for failure to show that the intervening party objecting disclosure did so in bad faith, arbitrarily or to vex the request or requester).

The court may also award fees and costs to an agency or requester as a "sanction for frivolous requests or appeals." The Act states: "The court may award reasonable attorneys fees and costs of litigation or an appropriate portion thereof to the agency or the requester if the court finds that the legal challenge under this chapter was frivolous." Section 1304(b).

10. Fines.

The Act does not preclude fines: "Nothing in this act shall prohibit a court from imposing penalties and costs in accordance with applicable rules of court." Section 1304(c).

11. Other penalties.

The Act provides for a civil penalty in two situations:

1. A civil penalty of "not more than $1,500" if an agency denied access to a public record "in bad faith."

2. A civil penalty of "not more than $500 per day until the public records are provided" if the agency or public official "does not promptly comply with a court order." Section 1305(a)(b).

The Act does not explicitly provide for criminal liability. Yet it provides for immunity from civil and criminal liability in certain circumstances.

It states that "[e]xcept as provided for in sections 1304 and 1305 and other statutes governing the release of records, no agency, public official or public employee shall be liable for civil damages or penalties resulting from compliance or failure to comply with this act." Section 1306(a).

Moreover, "[n]o agency, public official or public employees shall be liable for civil or criminal damages or penalties under this act for complying with any written public record retention and disposition schedule." Section 1306(b).

Other statutory provisions penalize a failure to disclose. *See*, *e.g.*, 25 Pa. Cons. Stat. § 3503-04 (misdemeanor, punishable by fine or imprisonment, to refuse to permit inspection of election records).

12. Settlement, pros and cons.

For a number of reasons, including the lack of an expedited hearing mechanism, viable settlements should be pursued.

E. Appealing initial court decisions.

1. Appeal routes.

Access decisions of the Common Pleas Courts may be appealed to the Commonwealth Court, 42 Pa. Cons. Stat. § 762, within 30 days of the entry of the order appealed from Pa. R.A.P. 903(a). Appeal from the Commonwealth Court to the Supreme Court is discretionary. 42 Pa. Cons. Stat. § 724(a); Pa. R.A.P. 1113.

2. Time limits for filing appeals.

30 days.

3. Contact of interested amici.

Anyone "interested" in the questions involved in any appeal may file a brief *amicus curiae* without leave; oral argument by an *amicus* is permitted rarely and only at the court's direction. Pa. R.A.P. 531.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

F. Addressing government suits against disclosure.

The Act does not provide a mechanism where an agency may challenge disclosure of records that are responsive under the Act. But agencies have filed lawsuits to prevent the disclosure of records. For example, the Commonwealth has sought to enjoin the disclosure of autopsy records on the theory that disclosure would hinder an ongoing investigation. *In re Randy Buchanan*, 823 A.2d 146 (Pa. Super. 2003), *affirmed* 583 Pa. 620,(2005); *see also Juniata Valley Sch. Dist. v. Wargo*, 797 A.2d 428 (Pa. Commw. Ct. 2002).

Open Meetings

I. STATUTE -- BASIC APPLICATION.

A. Who may attend?

The Sunshine Act provides that covered meetings must be open to the "public." 65 Pa. Cons. Stat. § 704. It also allows "any person" to sue for a violation. On the other hand, the declaration of intent speaks in terms of the right of the Commonwealth's "citizens" to attend meetings. 65 Pa. Cons. Stat. § 702(b).

B. What governments are subject to the law?

1. State.

Yes.

2. County.

Yes.

3. Local or municipal.

Yes.

C. What bodies are covered by the law?

The Sunshine Act generally covers all legislative and executive agencies at the state, county and municipal levels. Specifically, it covers the body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business of all the following: the General Assembly; the executive branch of the government, including the Governor's Cabinet when meeting on official policymaking business; any board, council, authority or commission of the Commonwealth or of any political subdivision of the Commonwealth; or any state, municipal, township or school authority, school board, school governing body, commission, the boards of trustees of all state-aided colleges and universities, the councils of trustees of all state-owned colleges and universities, the boards of trustees of all state-related universities and all community colleges; or similar organizations created by or pursuant to a statute which declares in substance that the organization performs, or has for its purpose the performance of, any governmental function and through the joint action of its members exercises governmental authority and takes official action.

The term does not include a caucus nor a meeting of an ethics committee created under rules of the Senate or House of Representatives. 65 Pa. Cons. Stat. § 703.

The term was recently amended to also include the governing board of any nonprofit corporation which by a mutually binding legal written agreement with a community college or State-aided, State-owned or State-related institution of higher education is granted legally enforceable supervisory and advisory powers regarding the degree programs of the institution of higher education.

See, e.g., *Society Hill Civic Ass'n v. Philadelphia Bd. of License & Inspection Review*, 905 A.2d 579 (Pa. Commw. Ct. 2006) (City Board of License and Inspection Review was created as a quasi-judicial body that performs fact-finding and deliberative functions and thus is subject to the Sunshine Act).

Note: The new Right to Know Act broadened the reach of the act to all organizations who contract to perform any governmental function. *See, e.g. SWB Yankees LLC v. Gretchen Wintermantel*, 999 A.2d 672 (Pa. Commw. Ct. 2010)("an authority clearly created for the benefit of the people of the Commonwealth, and for the increase of their commerce and prosperity…puts a third party in the same position as an agency for purposes of the RTKL"") *allocatur* denied , 2011 WL 1648089 (Pa. 2011); *East Stroudsburg Univ. Foundation v. Office of Open Records*, 995 A.2d 49 (Pa. Commw. Ct. 2010).

1. Executive branch agencies.

The Act covers all executive branch agencies.

a. What officials are covered?

All officials are covered so long as they are acting as the "quorum" of an agency. However, neither the Governor nor a commission appointed by the Governor to advise him on the selection of trial court judges was deemed an "agency" under the Act. *See Ristau v. Casey*, 647 A.2d 642 (Pa. Commw. Ct. 1994).

b. Are certain executive functions covered?

The Act does not base coverage on type of function, except to exempt certain categories of subject matter. *See infra* part II.A. Otherwise, all functions are open so long as they constitute "deliberation" or "official action" on "agency business."

c. Are only certain agencies subject to the act?

All entities deemed "agencies" are subject to the Act.

2. Legislative bodies.

The statute also specifically covers the following meetings of the General Assembly: meetings of committees where bills are considered; all hearings where testimony is taken; and all sessions of the Senate and House of Representatives. Caucuses and ethics committee meetings are excluded. 65 Pa. Cons. Stat. § 712.

Several cases have explained the extent to which the Act applies to legislative bodies. *In Pennsylvania Legislative Correspondents' Ass'n v. Senate of Pennsylvania*, 537 A.2d 96 (Pa. Commw. Ct.), *aff'd*, 551 A.2d 211 (Pa. 1988), a group of journalists alleged that the Pennsylvania legislature violated the Sunshine Act when a group of legislators met informally to discuss the state budget before a House-Senate conference committee was appointed to reach agreement on a budget bill. The court held that the complaint did not state a cause of action under the Act: "Unofficial gatherings of unnamed legislators for whatever purpose do not constitute 'meetings' subject to the provisions of the Sunshine Act."

In *League of Women Voters v. Commonwealth*, 683 A.2d 685 (Pa. Commw. Ct. 1996) the court held that conference committee's preparation of extensive report on the 1996-97 General Appropriations Act prior to first public meeting of the committee was not a violation of Sunshine Act, since: 1) as a general matter, preparation of reports are not covered by the Act; and 2) any violation was cured by the committee's open meeting on the issue. In addition, the court held that even if a violation was stated, it would not enjoin the GAA's operation because of the potential harm that an injunction would bring to the Commonwealth's citizens.

Finally, in *Pennsylvania AFL-CIO v. Commonwealth Rule 10.2.1.f.*, 683 A.2d 691 (Pa. Commw. Ct. 1996), a group of plaintiffs moved to enjoin the newly enacted Workers' Compensation Act, arguing that the procedure used by the House Rules Committee to report the bill to the floor violated the Sunshine Act. Specifically, plaintiffs alleged that the Rules Committee violated the statute by convening a meeting prior to its scheduled time, and prior to the arrival of members of the minority party, the public, and the media. The court held that these allegations were insufficient to establish a Sunshine Act violation, as there was no allegation that improper notice of the meeting was given and no charge that the meeting was not "open."

3. Courts.

The Act does not cover the judiciary. In *In re: 42 PA. C.S. § 1703*, 394 A.2d 444 (Pa. 1978), an advisory opinion in the form of a letter to the executive and legislative branches, the Pennsylvania Supreme Court ruled that a statute subjecting judicial rule making procedures to a prior Sunshine Law violated the separation of powers provisions in the State Constitution.

4. Nongovernmental bodies receiving public funds or benefits.

The definition of agency is certainly broad enough to include such groups, if they perform an essential governmental function and are authorized to take "official action" or "render advice" on agency business. Of course, if the legislation says that a particular body is an agency under the Act, then the body must comply with the Act's requirements. *See Harristown Dev. Corp. v. Commonwealth*, 614 A.2d 1128 (Pa. 1992) (A private non-profit corporation that leases land, offices or accommodations to a Commonwealth agency for a rental amount in excess of $1.5 million per year was held to be an agency because the statute creating the non-profit corporation stated that it was deemed an agency under the Sunshine Act) (interpreting 71 Pa. Cons. Stat. § 632(d)). Under the new Right to Know Act, performance of a governmental function has been broadened to include such non-essential functions as operation of a public baseball stadium. *See*, *e.g. SWB Yankees v. Gretchen Wintermantel*, 999 A.2d at 672 (Pa. Commw. Ct. 2010).

5. Nongovernmental groups whose members include governmental officials.

No cases under the Act, although the definition of "agency" is arguably broad enough to cover such an organization if it performs "an essential governmental function."

6. Multi-state or regional bodies.

No cases under the Act, but regional or multi-state bodies are arguably encompassed by the definition of "agency." If the enabling legislation deems the body an "agency," then the Sunshine Act applies. For example, in *Scott v. Shapiro*, 339 A.2d 597 (Pa. Commw. Ct. 1975), it was not disputed that the Southeastern Pennsylvania Transportation Authority (SEPTA), defined as an agency under Pennsylvania Law, was an agency under the Sunshine Act.

7. Advisory boards and commissions, quasi-governmental entities.

Such entities are generally not agencies subject to the Sunshine Act. In *FOP Lodge No. 5. v. City of Philadelphia*, 500 A.2d 900 (Pa. Commw. Ct. 1985), *app. dismissed*, 518 A.2d 263 (Pa. 1986), the court held that the MOVE Commission, a temporary, advisory body, appointed by the mayor, with a limited purpose, was not an "agency" under the predecessor to the Sunshine Act. One Court of Common Pleas has stated that the Task Force to Address Residents' Concerns of the Solid Waste Disposal Facility, whose purpose was to address concerns regarding a local incinerator, was an "agency" under the Sunshine Act upon passage of the resolution creating the task force. *York Newspapers, Inc. v. Springettsbury Tp.*, (York Ct. C.P., August 15, 1990) (unpublished opinion).

In *Ristau v. Casey*, 647 A.2d 642 (Pa. Commw. Ct. 1994), the Commonwealth Court held that the Governor's Trial Court Nominating Commission was not an "agency" because: 1) the Commission was not created by statute; 2) it neither performed nor was created to perform an "essential" governmental function; and 3) the Commission itself exercised no governmental authority, but merely advised the Governor on how to exercise his constitutional authority to appoint, subject to Senate approval. *Id.* at 646-47. Earlier, the Commonwealth's Office of General Counsel had issued a policy statement concluding that the Act applies to *ad hoc*, advisory commissions appointed by the executive branch, such as the Local Tax Reform Commissions, only when they render advice that affects substantive or procedural rights of the public or that is legally necessary for the exercise of an essential governmental function. *See* 4 Pa. Code § 1.42 (2001).

In *Patriot-News Co. v. Empowerment Team of the Harrisburg Sch. Dist.*, 763 A.2d 539 (Pa. Commw. Ct. 2000), the court addressed whether the Sunshine Act applied to a "empowerment teams' created by two school districts for the purpose of creating "school district improvement plans" and recommending them to the Pennsylvania Department of Education and the school districts for approval and implementation. The court ruled that such teams were "agencies" under the Sunshine Act because they were committees authorized by school districts to render advice on matters of agency business, as set forth in the Act's definition of "agency." *See also Hacker v. Colonial League*, 56 D. & C. 4th 281 (Lehigh Cty. Ct. C.P. 2001) (holding that interscholastic league was acting as de facto school board and came within the definition of "agency" under the Sunshine Act).

In *Mazur v. Washington County Redevelopment Auth.*, 900 A.2d 1024 (Pa. Commw. Ct. 2006), the court held that a "tax increment financing (TIF) committee," composed of members of local taxing authorities and the redevelopment authority, was not an agency required to hold open meetings under the Sunshine Act, given that the TIF Act did not require designated representatives to act jointly, the committee did not exercise any governmental authority or take official action, and committee members, as a group, did not render advice to the redevelopment or taxing authorities.

8. Other bodies to which governmental or public functions are delegated.

A committee that was not created by a vote of the Board of Trustees, was not a "committee authorized by the body" and therefore the committee's meetings were not open to the public. *Lee Publications, Inc. v. Dickinson School of Law*, 848 A.2d 178 (Pa. Commw. Ct. 2004).

9. Appointed as well as elected bodies.

The Act covers commissions and educational institutions, whether they are owned by the state or merely receive state funding pursuant to a statute making them state-related. 65 Pa. Cons. Stat. § 703.

D. What constitutes a meeting subject to the law.

1. Number that must be present.

A meeting is defined as: "Any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action." 65 Pa. Cons. Stat. § 703. In determining whether a quorum was present, the length of time an agency member spent at the "meeting" or whether he participated in the questioning is not relevant. *Ackerman v. Upper Mt. Bethel Tp.*, 567 A.2d 1116 (Pa. Commw. Ct. 1989). Agency members need not be physically present. In *Babac v. Pennsylvania Milk Mktg. Bd.*, 613 A.2d 551 (Pa. 1992), the Court held that members of an agency who participate in a public meeting by speakerphone count toward a quorum.

a. Must a minimum number be present to constitute a "meeting"?

The consultation of as few as two individuals may create a "meeting" if two individuals create a quorum. *See Thomas v. Township of Cherry*, 722 A.2d 1150, 1153 (Pa. Commw. Ct. 1999) (stating "that a 'meeting' took place as contemplated by the Sunshine Act when the two [Board] members got together albeit without notice to the third").

b. What effect does absence of a quorum have?

When those present at a meeting are of an insufficient number to constitute a quorum, there is no requirement that the meeting be open to the public. *See Muncy Creek Twp. Citizens Comm. v. Shipman*, 573 A.2d 662 (Pa. Commw. Ct. 1990). *See also Pennsylvania Legislative Correspondents' Ass'n v. The Senate of Pennsylvania*, 537 A.2d 96, 98 (Pa. Commw. Ct. 1988) ("Unofficial gatherings of unnamed legislators for whatever purpose do not constitute 'meetings' subject to the provisions of the Sunshine Act."). When a city council appointed a committee to review emergency ambulance services, the court held that meetings of the committee were not subject to the provisions of the Sunshine Act, since no committee members were also city council members. *Gowombeck v. City of Reading*, 48 Pa. D.&C.3d 324 (Berks Cty. Ct. C.P. 1988). *See also Babac v. Pennsylvania Milk Marketing Bd.*, 613 A.2d 551 (Pa. 1992) (stating that a "quorum of members can consist of members not physically present at the meeting but who nonetheless participate

in the meeting and that such quorum can take official action. . . .").

2. Nature of business subject to the law.

All "official action" and "deliberation" by a quorum of an agency must take place at a public meeting, unless one of the Act's exceptions applies. 65 Pa. Cons. Stat. § 704. "Official action" is defined as follows:

Recommendations made by an agency pursuant to statute, ordinance or executive order.

The establishment of policy by an agency.

The decisions on agency business made by an agency.

The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

What constitutes "official action." Courts have construed the term "official action" to accommodate a variety of different meanings depending on the context of the situation. *See*, *e.g.*, *Patriot-News Co. v. Empowerment Team of the Harrisburg Sch. Dist.*, 763 A.2d 539 (Pa. Commw. Ct. 2000) (holding that "empowerment teams" created by school districts engaged in official action and deliberation because they were, by statute, acting as "de facto school boards" and could make recommendations that the school boards were "powerless" to alter in any way); *Preston v. Saucon Valley Sch. Dist.*, 666 A.2d 1120 (Pa. Commw. Ct. 1995) (stating that "the term 'official action' includes, *inter alia*, decisions concerning an agency's business made by an agency, and specifically includes decisions of a school board that commit the board to a particular course of conduct, such as hiring a superintendent."); *but see Belitskus v. Hamlin Township*, 764 A.2d 669 (Pa. Commw. Ct. 2000) (holding that township supervisors' conduct in setting up meeting with water association did not constitute official action); *Morning Call v. Board of School Directors*, 642 A.2d 619 (Pa. Commw. Ct. 1994) (holding that action taken by the Board in executive session reducing the number of candidates for superintendent from five to three constituted "merely deliberations or discussions rather than official action."); *Common Cause/Pennsylvania v. Itkin*, 635 A.2d 1113 (Pa. Commw. Ct. 1993) (stating that the revision of the expense guidelines in accord with a prior resolution did not constitute "official action" for purposes of the Sunshine Act, "but was, instead, a ministerial action by which the Rules Committee executed a resolution of the House of Representatives.").

a. "Information gathering" and "fact-finding" sessions.

Whether "information" or "fact-gathering" sessions must be open is an unresolved question. Arguably, fact-gathering is encompassed within "the preparation . . . of law, policy or regulations." *See*, *e.g.*, *Times Leader v. Dallas Sch. Dist*, 49 D. & C. 3d 329 (Luzeme Cty. Ct. C.P. 1988) (finding that an "informational" session of school board is not a "conference" and therefore cannot be closed under that exception to the Act); *but see Taylor v. Borough Council Emmaus*, 721 A.2d 388 (Pa. Commw. Ct. 1998) (holding that the taking of witness testimony qualifies as neither "official action" nor "deliberation" as those terms are used in the Act). However, the definition of "deliberation" in the Act is vague enough to allow an argument that it excepts the early stages of legislating or policymaking. Other decisions have attempted to draw a distinction between "official" action or deliberations, and pre-meeting discussions not covered by the Act. *See*, *e.g.*, *Ackerman v. Upper Mt. Bethel Tp.*, 567 A.2d 1116 (Pa. Commw. Ct. 1989) (holding that there was no "official action" taken when no votes, decisions, or policy recommendations were produced); *Sunset Dev., Inc. v. Board of Supervisors of East Pikeland Tp.*, 600 A.2d 641 (Pa. Commw. Ct. 1991) (where the court noted that the Board of Supervisors did not violate the Sunshine Act, because the Board's written decision did not involve official action or deliberation; only oral comments would have required an open meeting, and such oral comments were not the subject of the appeal.); *see also Piecknick v. South Strabane Tp. Zoning Hearing Bd.*, 607 A.2d 829 (Pa. Commw. Ct. 1992).

b. Deliberations toward decisions.

"Deliberation" is "the discussion of agency business held for the purpose of making a decision." *Ackerman v. Upper Mt. Bethel Twp.*, 567 A.2d 1116 (Pa. Commw. Ct. 1989) (holding that private conference among three members of township board of supervisors concerning amendment to zoning ordinance was "deliberation" on agency business, even though no official action was taken). One court has distinguished between "deliberation," which must be open, and "discussion," which need not be open. *See Conners v. West Greene School Dist.*, 569 A.2d 978 (Pa. Commw. Ct. 1989), *appeal denied*, 581 A.2d 574 (Pa. 1990) (finding that apparent discussion among some school board members during recess in public budget proposal meeting did not constitute a violation of the Sunshine Act since there is a "'substantial difference between discussion and deliberation'"). "Agency business" is the framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action.

In *Ackerman v. Upper Mt. Bethel Tp.*, *supra*, the court found that an *ad hoc* meeting on a proposed zoning amendment concerned "agency business." The Task Force to Address Residents' Concerns of the Solid Waste Disposal Facility, in *York Newspapers*, *supra*, did not engage in "deliberations" since it merely made nonbinding recommendations to the Township supervisors, and it was the supervisors who would then formulate policy in open meetings. In *League of Women Voters v. Pennsylvania*, 683 A.2d 685 (Pa. Commw. Ct. 1996), the Court held that "the mere preparation of a written report prior to the public meeting" does not qualify as "deliberations" for purposes of bringing a claim for violation of the Sunshine Act.

3. Electronic meetings.

a. Conference calls and video/Internet conferencing.

The participation of some members by speakerphone during agency deliberations does not violate the Act so long as the meeting itself is open to the public. *See Babac v. Pennsylvania Milk Mktg. Bd.*, 613 A.2d 551 (Pa. 1992). However, the Sunshine Act's requirement that votes be "publicly cast" precludes the use of paper ballots secretly exchanged among school board members until a decision is reached. *Public Opinion v. Chambersburg Area Sch. Dist.*, 654 A.2d 284 (Pa. Commw. Ct. 1995) (stating the requirement that a vote be "publicly cast" meant that the vote "must be one that informs the public of an elected official's position on a particular matter of business").

b. E-mail.

No cases, but non-public deliberations by e-mail would probably violate the Act unless the deliberations met an exemption. *See Babac*, *supra*. On the other hand, pre-deliberation communications or "discussions" probably would be lawful. Thus, a court would have to be convinced that "deliberations" — as opposed to mere "discussions" or "drafting" — actually occurred before it could find a violation.

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

A regular meeting is any agency meeting that is not a special or emergency meeting.

Under 65 Pa. Cons. Stat. § 703, a meeting is defined as: "Any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action." *Id.*

b. Notice.

(1). Time limit for giving notice.

An agency must give three days notice of its first regular meeting of the year, and notice of the schedule of its remaining regular meet-

ings in time to allow it to be published or circulated before the date of the meetings. 24-hours notice must be given for rescheduled regular meetings. 65 Pa. Cons. Stat. § 709.

(2). To whom notice is given.

The public, and interested parties.

There is no requirement that an agency provide individualized written notice to a person whose business with an agency will be conducted at a particular meeting. *See Sheetz, Inc. v. Phoenixville Borough Council*, 804 A.2d 113 (Pa. Commw. Ct. 2002).

(3). Where posted.

Notice requires:

Publication of place, date and time in a newspaper of general circulation that is either published in the appropriate political subdivision or has a local circulation equal to or greater than any newspaper published there. 65 Pa. Cons. Stat. § 703(l)(i). *See also Devich v. Borough of Braddock*, 602 A.2d 399 (Pa. Commw. Ct. 1992) (holding that the advertisement of a special meeting posted in the *Pittsburgh Press* satisfied the public notice requirements of the Act). In dicta, one court stated that governmental agencies are required to post notices of meetings in a section of the newspaper captioned "Legal Notices" which would provide notice to the public as well as other newspapers and organizations. *See Higgins v. Public School Employees' Retirement System*, 736 A.2d 745, 754 n.19 (Pa. Commw. Ct. 1999).

Prominently posting the place, date and time at the agency office. 65 Pa. Cons. Stat. § 703(l)(i). *See In Re: Condemnation by West Chester Area Sch. Dist.*, 50 Pa. D & C 4th 449 (Chester Cty. Ct. C.P. 2001) (holding that the agency failed to adduce evidence that there was any posting of the meeting).

Sending copies of the notice on request to any interested party that has furnished the agency with a stamped, self-addressed envelope. 65 Pa. Cons. Stat. § 709(c).

For a recessed or reconvened meeting, the agency need only take the second and third steps. 65 Pa. Cons. Stat. § 703.

(4). Public agenda items required.

There is no agenda requirement. *See East Rockhill Twp. v. Public Utility Comm'n*, 540 A.2d 600 (Pa. Commw. Ct. 1988). "The Act does not require that the notice to be published in a newspaper of general circulation contain a statement of the purpose of the meeting or a description of the business to be conducted at the meeting." *Devich v. Borough of Braddock*, 602 A.2d 399 (Pa. Commw. Ct. 1992).

(5). Other information required in notice.

None.

(6). Penalties and remedies for failure to give adequate notice.

Action taken in a meeting that does not comply with notice requirements may be declared void by a court. *See* 65 Pa. Cons. Stat. § 713; *see also See In Re: Condemnation by West Chester Area Sch. Dist.*, 50 Pa. D. & C. 4th 449 (Chester Cty. Ct. C.P. 2001); *Bensalem Tp. Sch. Dist. v. Gigliotti Corp.*, 415 A.2d 123 (Pa. Commw. Ct. 1980) (prior statute).

Pennsylvania courts have observed that "adequate notice to the public at large is an integral part of the public meeting concept; a meeting cannot be deemed to be public merely because its doors are open to the public if the public is not properly informed of its time and place." *Consumer Education and Protective Ass'n v. Nolan*, 368 A.2d 675 n.4 (Pa. 1977). Thus, courts will invalidate and void action taken at meetings lacking proper notice, rejecting arguments that even though notice was not properly given, the failure was harmless because the parties to the appeal actually attended or knew about the meeting. *See, e.g., In Re: Condemnation by West Chester Area Sch. Dist.*, 50 Pa. D. & C. 4th 449 (Chester Cty. C.C.P. 2001); *Eaton v. Zoning Hearing Board of the Borough of Wellsboro*, 471 A.2d 919 (Pa. Commw. Ct. 1984). That is because the notice requirement's purpose is to notify the public generally, not just the parties to a Sunshine Act appeal. *See In Re: Condemnation by West Chester Area Sch. Dist.*, 50 Pa. D. & C. 4th 449 (Chester Cty. Ct. C.P. 2001). "Of course, a 'public agency may cure the effect of a meeting defective as to notice by ratifying the action at a subsequent meeting properly had.'" *See In Re Condemnation by West Chester Area Sch. Dist.*, 50 Pa. D. & C. 4th 449 (Chester Cty. Ct. C.P. 2001) (quoting *Coder v. Commonwealth State Board of Chiropractic Examiners*, 471 A.2d 563 (Pa. Commw. Ct. 1984)).

c. Minutes.

(1). Information required.

Minutes are required and must contain the date, time and place of the meeting; the names of members present; the substance of all official actions and a record by individual member of roll call votes; and the names of all citizens who appeared officially and the subject(s) of their testimony. 65 Pa. Cons. Stat. § 706. Additionally, the Act requires that the votes of each member who actually votes on any "resolution rule, order, regulation, ordinance or the setting of official policy" be publicly cast and that, if a roll call vote is taken, it is recorded. 65 Pa. Cons. Stat. § 705. The requirement of written minutes is not satisfied by an audio tape recording of the meeting. *See Tapco, Inc. v. Township of Neville*, 695 A.2d 460, 463 (Pa. Commw. Ct. 1997).

(2). Are minutes public record?

Minutes are public records. *See* 65 Pa. Cons. Stat. § 66.1.

2. Special or emergency meetings.

a. Definition.

A special meeting is a "meeting scheduled by an agency after the agency's regular schedule of meetings has been established." An "emergency" meeting is a "meeting called for the purpose of dealing with a real or potential emergency involving a clear and present danger to life or property." 65 Pa. Cons. Stat. § 703. An emergency meeting requires a true emergency. *See, e.g., In re Petition of Board of Directors of Hazleton Area Sch. Dist.*, 527 A.2d 1091, 1093, n.3 (Pa. Commw. Ct. 1987) (stating that a school district's "adoption or failure to adopt a [redistricting] plan did not in any way pose a 'clear and present danger to life or property.'").

b. Notice requirements.

(1). Time limit for giving notice.

Twenty-four hours notice is required for a special meeting or a rescheduled regular or special meeting. 65 Pa. Cons. Stat. § 709. Where twenty-four hours notice is required, it is insufficient if notice is given in a newspaper that is published on the same day as the scheduled meeting; it must be done in a paper published "at least twenty four hours before the scheduled meeting." *See In Re Condemnation by West Chester Area Sch. Dist.*, 50 Pa. D. & C. 4th 449 (Chester Cty. Ct. C.P. 2001). Several courts have invalidated an action purported to be taken at a special meeting when the agency failed to provide the required notice. *See In Re Condemnation by West Chester Area Sch. Dist.*, 50 Pa. D. & C. 4th 449 (Chester Cty. Ct. C.P. 2001); *Martin v. Borough of Wilkinsburg*, 563 A.2d 958 (Pa. Commw. Ct. 1989).

No notice is required for an emergency meeting.

(2). To whom notice is given.

For special meetings, same as for regular meetings.

(3). Where posted.

For special meetings, same as for regular meetings.

(4). Public agenda items required.

For special meetings, same as for regular meetings.

(5). Other information required in notice.

For special meetings, same as for regular meetings. *See Devich v. Borough of Braddock*, 602 A.2d 399 (Pa. Commw. Ct. 1992) (stating that notice that a special meeting was to be held was sufficient; Borough was not required to specify that a hearing was to follow regarding whether to declare the seats of two council members vacant).

(6). Penalties and remedies for failure to give adequate notice.

Same as for regular meetings in the event of a violation.

c. Minutes.

(1). Information required.

Same as for regular meetings.

(2). Are minutes a public record?

Yes. Even those portions of the minutes of a private foundation which pertain to its governmental function constitute a public record under the new Act. *See East Stroudsburg Univ. Foundation v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. Ct. 2010).

3. Closed meetings or executive sessions.

a. Definition.

An executive session is a "meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting." 65 Pa. Cons. Stat. § 703. Discussions at which third parties are present are privileged only for the portions of the meetings at which such third parties are necessary. *Kravco Co. v. Valley Forge Ctr. Ass'n*, 1992 WL 157755 (E.D. Pa. July 1, 1992). For further discussion of execution sessions, *see* Section II.A. *Infra*.

b. Notice requirements.

(1). Time limit for giving notice.

The executive session may be held during an open meeting or at the conclusion of an open meeting, or it may be announced for a future time. 65 Pa. Cons. Stat. § 708(b).

(2). To whom notice is given.

The reason for holding an executive session must be announced at the open meeting occurring "immediately prior or subsequent to the executive session." 65 Pa. Cons. Stat. § 708(b). If the session is not announced for a specific future time, the Act requires that agency members receive 24 hours notice of the time, date and place of the meeting and the purpose of the executive session. *Id.*

(3). Where posted.

Beyond the announcement of the session and statement of its purpose, the Act does not require that a notice be "posted" or publicly list specific agenda items or other information.

(4). Public agenda items required.

None required.

(5). Other information required in notice.

The reasons given for holding an executive session "must be specific, indicating a real, discrete matter that is best addressed in private." *Reading Eagle Co. v. Council of the City of Reading*, 627 A.2d 305 (Pa. Commw. Ct. 1993). This level of specificity is necessary to allow the public "to determine from the reason given whether they are being properly excluded from the session." *Id.*

(6). Penalties and remedies for failure to give adequate notice.

In *Reading Eagle*, the Court entered a permanent injunction that required all subsequent announcements of executive sessions to be given with the necessary specificity. 627 A.2d at 308.

c. Minutes.

(1). Information required.

By its terms, the Act only requires that minutes be kept of "all open meetings." 65 Pa. Cons. Stat. § 706. There are various statutory provisions that require specific agencies and public bodies to keep minutes of all their proceedings and allow public inspection. *See*, *e.g.*, 32 Pa. Stat. § § 815.101, 820.1 (Delaware and Susquehanna River Basin Commissions); 53 Pa. Stat. § § 14759, 25057, 53807 (Board of Adjustment); 53 Pa. Stat. § 55631 (Township Civil Service Commission); 62 Pa. Stat. § 1725 (Board of Claims).These provisions would arguably cover "executive sessions," although their existence with respect to specific agencies is hit-or-miss.

(2). Are minutes a public record?

Only minutes of open meetings are public records.

d. Requirement to meet in public before closing meeting.

The Sunshine Act is ambiguous about whether agencies must meet publicly before closing a meeting and going into an executive session. *See* 65 Pa. Cons. Stat. § 708(b). Presumably, when an executive session is announced for a specific future time, no prior public meeting is required. However, although the purpose of an executive session may be announced after the session, § 708 may arguably be read to require some prior public announcement that an executive session will be held. No cases address this issue.

e. Requirement to state statutory authority for closing meetings before closure.

There would appear to be no requirement to explicitly state the legal source for the agency's authority to go into executive session. However, the announcement of the reason for the session, particularly if given with the requisite specificity, should state the exemption to the Act that the agency relied on before continuing in closed session.

f. Tape recording requirements.

There is no requirement that executive sessions be tape recorded.

F. Recording/broadcast of meetings.

1. Sound recordings allowed.

The Act gives the public the right to use "recording devices" to record the proceedings. Meetings of the General Assembly are excepted; the House and Senate may adopt their own rules regarding broadcasting or recording. 65 Pa. Cons. Stat. § 711. Any agency may adopt reasonable rules for the maintenance of order at its meetings, although the rules may not preclude recording. *Hain v. Board of Directors of Reading Sch. Dist.*, 641 A.2d 661, 663-64 (Pa. Commw. Ct. 1996). In *Harman v. Wetzel*, 766 F. Supp. 271 (E.D. Pa. 1991), the court determined that any citizen who attends a zoning hearing may record it, and any citizen who makes a statement at the hearing should expect it to be recorded.

2. Photographic recordings allowed.

Recording devices include video cameras. *Hain v. Board of Sch. Directors of Reading Sch. Dist.*, 641 A.2d 661, 664 (Pa. Commw. Ct. 1994).

Audio broadcast of meeting allowed. The use of a microphone and speaker system to broadcast an agency's proceedings to a separate facility where the public was provided with overflow seating arrangements does not violate the Act. *See Sovich v. Shaugnessy*, 705 A.2d 942, 946 (Pa. Commw. Ct. 1998) (stating that *Babac* interpreted the Sunshine Act to require only the public's ability to "observe" the open meeting). However, one lower court went so far as to hold that the Act requires meetings to be entirely "open" in the sense that the public is entitled not only to be present and observe the proceedings but also to

hear them. *See Landscape Products, Inc., v. Zoning Hearing Board of East Allen Twp.*, No. 1999-C-3703, Court of Common Pleas, Northampton County, at 6 (Nov. 23, 1999) ("We conclude that the right of the public to witness deliberation and decisionmaking includes more than the right to be present and watch what is happening.") (unreported case available on the Internet at http://www.law.com/pa.html).

G. Are there sanctions for noncompliance?

Yes. The Act provides three "sanctions": (1) the court in its discretion may invalidate the official action taken at the meeting; (2) the participants in the meeting may be fined $100; and (3) attorney's fees shall be awarded if the agency's actions in violation of the Act were willful or with wanton disregard (if the challenge to the meeting is frivolous, the agency shall be awarded attorney's fees and costs). 65 Pa. Stat. § § 713-714.1.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

a. General or specific.

The Act contains three general exceptions to the open meeting requirement: executive sessions, conferences, and certain working sessions. *See* 65 Pa. Cons. Stat. § 707.

b. Mandatory or discretionary closure.

These are discretionary exceptions; the Act allows, but does not require, agencies to hold these sessions privately. 65 Pa. Cons. Stat. § 708(c).

2. Description of each exemption.

a. Executive sessions.

Executive sessions can be held for any of the following six purposes:

1. to discuss personnel matters. *See Mirror Printing Co., Inc., v. Altoona Area School Board*, 609 A.2d 917 (Pa. Commw. Ct. 1992) (stating the importance of maintaining confidentiality regarding a disciplinary matter because it could be potentially "harmful to a person's reputation or personal security."); *see also Bianco v. Robinson Twp.*, 556 A.2d 993 (Pa. Commw. Ct. 1989) (stating that an agency may hold a closed executive session for employment and promotion matters, but any official action must be taken at an open meeting or may be announced for a future time).

2. to hold sessions relating to collective bargaining or labor negotiations. In *Lawrence Cty. v. Brenner*, 582 A.2d 79 (Pa. Commw. Ct. 1990), *appeal denied*, 593 A.2d 426 (Pa. 1991), the court broadly construed this exemption to the open meeting requirement by holding that a decision to close a nursing home was related to a labor negotiation with the home's staff being undertaken in an executive session. *See also Saint Clair Area Sch. Dist. v. Saint Clair Educ. Ass'n*, 552 A.2d 1133 (Pa. Commw. Ct. 1988), *aff'd*, 579 A.2d 879 (Pa. 1990) (stating that the Sunshine Act is not meant to require that labor contract negotiations be held in public).

3. to consider the purchase or lease of real property up to the time an option to purchase or lease is obtained or up to the time an agreement to purchase or lease is obtained.

4. to consult with an attorney or professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed. *See Keenheel v. Commonwealth*, 579 A.2d 1358 (Pa. Commw. Ct. 1990) (holding that although it was appropriate for the Pennsylvania Securities Commission to discuss a settlement offer in executive session, it should have returned to open meeting for the actual vote).

5. to discuss agency business that is otherwise privileged or protected by law, including matters related to investigations of possible legal violations and quasi-judicial deliberations. *See, e.g., Riverwalk Casino, L.P. v. Pennsylvania Gaming Control Board*, 926 A.2d 926 (Pa. 2007) (Pennsylvania Gaming Control Board's private meetings regarding applications for slot machine licenses were quasi-judicial deliberations exempt from the Act's requirements); *Kennedy v. Upper Milford Twp. Zoning Hrg. Bd.*, 834 A.2d 1104 (Pa. 2003) (zoning hearing board, which the court defined as a quasi-judicial agency, was permitted to take a recess to conduct deliberations in private); *see also In re Blystone*, 600 A.2d 672 (Pa. Commw. Ct. 1991), *appeal denied*, 626 A.2d 1159 (Pa. 1993) (where district attorney was investigating charges against the police chief, and the decision to demote the chief was made at a public meeting, it was not required that the charges be voted on and adopted at a public meeting).

6. for certain educational agencies, to discuss academic admissions or standing. Final votes by school boards on matters such as appointments to the board or the setting of the school superintendent's salary must be taken in public. *See Cumberland Publishers v. Carlisle A.B.S.D.*, 646 A.2d 69 (Pa. Commw. Ct. 1994) (holding that so long as final vote on person to fill school board vacancy was taken in public, Board could discuss candidates' qualifications in executive session); *The Morning Call, Inc. v. Board of Sch. Directors of Southern Lehigh Sch. Dist.*, 642 A.2d 619 (Pa. Commw. Ct. 1994) (stating that votes to narrow the field of candidates for superintendent position from five to three, and then from three to one could be taken in executive session, so long as final vote on appointment was taken in public).

Official action on any of the above discussions must be taken in public. 65 Pa. Cons. Stat. § 708. *See, e.g.*, 35 Pa. Stat. § 449.7 (allowing only executive sessions of the Health Care Cost Containment Council, during which no action will be taken, to be closed to the public).

For discussion of the notice and minute requirements for execution sessions, *see* Section I.E.2 *supra*.

b. Conferences.

"An agency is authorized to participate in a conference which need not be open to the public. Deliberation of agency business may not occur at a conference." Conferences are defined as any "training program or seminar, or any session arranged by State or Federal agencies for local agencies, organized and conducted for the sole purpose of providing information to agency members on matters directly related to their official responsibilities." The scope of this exception is unclear. In *Times Leader v. Dallas Sch. Dist.*, 49 D. & C. 3d 329 (Luzerne Cty. Ct. C.P. 1988). The court ruled that a proposed meeting between a consultant and a school board for the purpose of reviewing a report was not a "conference."

c. Working sessions.

Boards of auditors may conduct closed sessions to examine or discuss accounts or records, so long as official action is conducted publicly. No cases further explain this exception.

d. Administrative action.

"Administrative action" is "the execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency." For example, the revision of expense guidelines in accordance with a prior resolution constituted ministerial action which did not violate the Sunshine Act. *See Common Cause/Pennsylvania v. Itkin*, 635 A.2d 1119 (Pa. Commw. Ct. 1993). The term "administrative action" does not include, however, the deliberation of agency business.

B. Any other statutory requirements for closed or open meetings.

There exist, throughout the Pennsylvania Code, occasional provisions requiring that the meetings of particular public bodies be open.

See, *e.g.*, 53 Pa. Stat. § 12527 (stating that council meetings of first class cities must be open); 53 Pa. Stat. § 36005 (requiring that council meetings of third-class cities be open). If, as is likely, the courts adhere to their practice under the prior Sunshine Act, these statutes will be read *in pari materia* with the Act, and will be subject to its exceptions. *See Mellin v. City of Allentown*, 430 A.2d 1048 (Pa. Commw. Ct. 1981).

C. Court mandated opening, closing.

No cases.

III. MEETING CATEGORIES -- OPEN OR CLOSED.

Note: The Act bases access on the type of agency action undertaken, not on the particular agency or the subject matter of the action. Hence, specific meeting categories are not particularly helpful.

A. Adjudications by administrative bodies.

The Act expressly allows these to be held in executive session, at least where they would otherwise result in disclosure of information privileged or otherwise protected by law. 65 Pa. Cons. Stat. § 708(a)(5). The Act is ambiguous about whether all adjudications may be held in executive session. Governmental units, including the Commonwealth, take the position that all adjudications may be closed. *See*, *e.g.*, 4 Pa. Code § 1.50(d) (policy statement of Commonwealth Counsel regarding "privileged, confidential, investigatory and quasijudicial matters"). However, § 708(a)(5) may be read to permit closure only of that portion of an adjudication or a quasi-judicial proceeding that involves privileged or legally protected information. This latter reading may be more consistent with the Act's legislative policy statement. *See* 65 Pa. Cons. Stat. § 702. A Task Force established to investigate complaints regarding an incinerator could properly meet in executive session since public attendance would chill the Task Force's investigatory abilities. *York Newspapers*, *supra*. Furthermore, the taking of witness testimony, pursuant to agency's investigatory function, may be conducted in private. *See Taylor v. Borough Council Emmaus Borough*, 721 A.2d 388 (Pa. Commw. Ct. 1998).

1. Deliberations closed, but not fact-finding.

In *Kennedy v. Upper Milford Twp. Zoning Hrg. Bd.*, 834 A.2d 1104 (Pa. 2003), the court ruled that a quasi-judicial agency, a zoning hearing board, may conduct deliberations in private. Although not part of the decision, in *Kennedy*, the zoning hearing board heard testimony in public prior to the deliberations.

2. Only certain adjudications closed, i.e. under certain statutes.

There are no such statutes in Pennsylvania.

B. Budget sessions.

Open if agency business or official action is involved unless one of the Act's exceptions applies.

C. Business and industry relations.

Open if agency business or official action is involved unless one of the Act's exceptions applies.

D. Federal programs.

Open if agency business or official action is involved unless one of the Act's exceptions applies.

E. Financial data of public bodies.

Open if agency business or official action is involved unless one of the Act's exceptions applies.

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

The Act provides that such information may be kept confidential if protected by a privilege or other legal measure. 65 Pa. Cons. Stat. § 708.

G. Gifts, trusts and honorary degrees.

Open.

H. Grand jury testimony by public employees.

Closed. *See* Pa. R. Crim. P. 209; *see also* 42 Pa. Cons. Stat. § 4549. Grand jury sessions are not meetings under the Act.

I. Licensing examinations.

Closed; not meetings under the Act.

J. Litigation; pending litigation or other attorney-client privileges.

Any agency may hold an executive session "to consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed." 65 Pa. Cons. Stat. § 708(a)(4). The Pennsylvania Public Utility Commission has adopted regulations mandating that all decisions to settle a potential lawsuit be made in open meetings. *Regulation Regarding Resolution of Informal Investigations*, 1989 Pa. PUC LEXIS 28 (March 30, 1989). The agency must state a sufficiently specific reason for closing the meeting, "indicating a real, discrete matter that is best addressed in private." *Reading Eagle Co. v. Council*, 627 A.2d 305 (Pa. Commw. Ct. 1993) (noting that for an agency to state "litigation" as its reason for holding a closed session tells nothing and is, therefore, meaningless). Accordingly, the agency must announce "the general nature of the complaint" when a matter is to be discussed in a closed executive session. *Id.*

K. Negotiations and collective bargaining of public employees.

An express subject for executive session. 65 Pa. Cons. Stat. § 708(a)(2). *See* II.A.2.a *supra*.

1. Any sessions regarding collective bargaining.

An agency can hold a closed meeting pursuant to the executive session exemption for the purpose of negotiating or arbitrating a collective bargaining agreement. *See Lawrence Cty.*, *supra.*

2. Only those between the public employees and the public body.

Not limited by statute.

L. Parole board meetings, or meetings involving parole board decisions.

Probably open.

M. Patients; discussions on individual patients.

Probably closed. *See* 50 Pa. Stat. § 8005 (patients' personal information is kept confidential). In addition, a hospital board may not be considered an "agency" under the Act.

N. Personnel matters.

Generally, a subject for executive session. *See Morning Call, Inc. v. Council of the Borough of East Stroudsburg*, 6 Pa. D. & C. 4th 321 (Monroe Cty. Ct. C.P. 1989). *See* II.A.2.a *supra*.

1. Interviews for public employment.

Probably closed.

2. Disciplinary matters, performance or ethics of public employees.

Closed, so long as the ultimate result is voted on in a public meeting. In *Mirror Printing Co., Inc. v. Altoona Area Sch. Bd.*, 609 A.2d 917 (Pa. Commw. Ct. 1992), for example, the school board was not required to disclose the subject matter of a disciplinary agreement involving a teacher when the agreement was reached in an executive session but was voted on in a public meeting.

3. Dismissal; considering dismissal of public employees.

Closed, so long as the final result is voted on in public. However, in *Philadelphia Newspapers, Inc. v. Ambler Borough Council*, No. 87-0725 (Mont. Cty. Ct. C.P., May 26, 1987), an unreported case, a judge held that a hearing on a council member's absences from a counsel meeting did not involve a "personnel matter" and must be open to the public. A water treatment expert serving as a consultant to a governmental sewer authority is not an "employee or public officer" and thus the Sewer Authority could not meet in executive session to discuss his termination. *Easton Area Joint Sewer Authority v. The Morning Call, Inc.*, 581 A.2d 684 (Pa. Commw. Ct. 1990).

O. Real estate negotiations.

A subject for executive session until an option or sales agreement is obtained. 65 Pa. Cons. Stat. § 708(a)(3). *See* II.A.2.a *supra*.

P. Security, national and/or state, of buildings, personnel or other.

Open; nothing in the Act allows closure, if agency business or official action is involved.

Q. Students; discussions on individual students.

Discussion of individual students is generally closed; boards of state-owned or related colleges must meet in executive session to discuss academic standing or admission. 65 Pa. Cons. Stat. § 708(a)(6). Executive sessions may also be held to avoid disclosure of information privileged or protected by law; this might also include discussions of individual students, particularly when grades or disciplinary proceedings are involved.

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

A. When to challenge.

Legal challenges under the Act must be filed within 30 days of a closed meeting or within 30 days of discovery of an action that occurred at a closed meeting at which the Act was violated. In the latter case, there is a one-year outside time limit. 65 Pa. Cons. Stat. § 713. *See, e.g., Day v. Civil Service Comm'n of the Borough of Carlisle*, 931 A.2d 646 (Pa. 2007) (Sunshine Act challenge brought eight months after closed meeting was untimely); *Lawrence Cty. v. Brenner*, 582 A.2d 79 (Pa. Commw. Ct. 1990), *appeal denied*, 593 A.2d 426 (Pa. 1991) (stating that since there was no evidence to support the allegation that legal challenge was initiated more than 30 days after discovery, the court must conclude the action was timely); *Bradford Educ. Assn. v. Bradford Area Sch. Dist.*, 572 A.2d 1314 (Pa. Commw. Ct. 1990) (finding that the 30-day limitations began to run when the person claiming a violation of the Sunshine Act read an editorial alleging such a violation).

1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

There is no provision in the statute for expedited consideration of a Sunshine Act suit. Such considerations can be obtained by request, or by seeking a temporary restraining order or preliminary injunction.

2. When barred from attending.

There is no provision in the statute for expedited consideration of a Sunshine Act suit. Such considerations can be obtained by request, or by seeking a temporary restraining order or preliminary injunction.

3. To set aside decision.

Yes.

4. For ruling on future meetings.

Yes. Declaratory relief.

5. Other.

Curing violation. Some courts have held that an agency may "cure" a prior violation of the Act by allowing public comment or voting in public at a subsequent meeting. *See e.g., Ass'n of Comm. Org. for Reform Now v. SEPTA*, 789 A.2d 811 (Pa. Commw. Ct. 2002); *League of Women Voters of Pennsylvania v. Commonwealth*, 683 A.2d 685 (Pa. Commw. Ct. 1996).

B. How to start.

1. Where to ask for ruling.

a. Administrative forum.

(1). Agency procedure for challenge.

Not applicable. There is no requirement that administrative remedies be exhausted, or that a formal or informal protest or request be lodged with the particular agency. Such a request would be helpful, however, in developing a record for a court challenge.

(2). Commission or independent agency.

Not applicable.

b. State attorney general.

Not applicable.

c. Court.

In cases involving state agencies, the Commonwealth Court has original jurisdiction of legal challenges. *See Property Owners v. Department of Community Affairs*, 552 A.2d 769 (Pa. Commw. Ct. 1989) (deciding that the Department of Community Affairs did not have jurisdiction to determine whether the Sunshine Act had been violated). In all other cases, the various Courts of Common Pleas have original jurisdiction. *See, e.g., Patriot-News Co. v. Empowerment Team of the Harrisburg Sch. Dist.*, 763 A.2d 539 (Pa. Commw. Ct. 2000) (appeals of decisions of local school districts properly in local court of common pleas); *see also O'Hare v. County of Northhampton*, 782 A.2d 7 (Pa. Cwmlth. 2001) (Sunshine Act vests the Courts of Common Pleas with original jurisdiction over matters arising under the Act).

The action may be brought by "any person" where the agency whose act is complained of is located, or where the unwarranted closure occurred. There is no requirement that administrative remedies be exhausted, or that a formal or informal protest or request for openness be made to the agency before court proceedings are begun.

2. Applicable time limits.

Legal challenges under the Act must be filed within 30 days of a closed meeting or within 30 days of discovery of an action that occurred at a closed meeting at which the Act was violated. *See, e.g., Thomas v. Township of Cherry*, 722 A.2d 1150 (Pa. Commw. Ct. 1999) (stating that the court would address the other violations alleged in the complaint despite acknowledgement that the complaint was untimely filed pursuant to the thirty-day "timeliness" requirement of the Act). In the latter case, there is a one-year outside time limit. 65 Pa. Cons. Stat. § 713.

3. Contents of request for ruling.

There is no requirement that a formal or informal protest or request for openness be made to the agency before court proceedings are begun.

4. How long should you wait for a response?

There is no requirement that administrative remedies be exhausted before court proceedings are begun.

5. Are subsequent or concurrent measures (formal or informal) available?

No.

C. Court review of administrative decision.

1. Who may sue?

Suit may be brought by "any person." 65 Pa. Cons. Stat. § 715. This language was probably intended to allow suit on a showing of "tax-

payer" or "citizen" interest; however, the language is broad enough to allow suits by persons who are neither citizens nor taxpayers of Pennsylvania. Traditional standing principles do not apply to the Sunshine Act; thus, proof of an injury or special interest is not required. *Press-Enterprise, Inc. v. Benton Area Sch. Dist.*, 604 A.2d 1221 (Pa. Commw. Ct. 1992) (holding that a publisher of a newspaper has standing to bring an action against a school district for alleged violation of the Sunshine Act "because of the media's unique role and interest in observing government activity in our democracy."). Additionally, "person" includes a corporation. *Id.*

2. Will the court give priority to the pleading?

Nothing in the Act requires the court to give expedited consideration to a Sunshine Act challenge. In emergency situations, a litigant would proceed by seeking a temporary restraining order or preliminary injunction.

3. Pro se possibility, advisability.

Pro se suits are permissible under the Act, although its structure is sufficiently complicated to make such suits unadvisable.

4. What issues will the court address?

a. Open the meeting.

The Act's framework for obtaining relief is directed primarily towards after the fact challenges to alleged violations. *See* 65 Pa. Cons. Stat. § 713. However, nothing in the Act would appear to bar a judicial challenge to a meeting in progress, although the practical impediments to mounting such a challenge in time to open the proceeding would be considerable in most cases.

b. Invalidate the decision.

The court may invalidate action taken at any meeting that violates any requirement of the Act, including the notice provisions. It may grant declaratory or injunctive relief with respect to particular practices. It may temporarily enjoin challenged action while it considers the merits of the challenge. However, a court is not required to invalidate action taken where there has been a violation of the Sunshine Act. *Ackerman v. Upper Mt. Bethel Tp.*, 567 A.2d 1116 (Pa. Commw. Ct. 1989). Pennsylvania courts have held that a violation of the Act may be "cured" by deliberations and/or official action that occurs at a later meeting open to the public. *Id.; see also Ass'n of Community Organizations for Reform Now v. SEPTA*, 789 A.2d 811 (Pa. Commw. Ct. 2002) (holding that "any alleged violation of the Sunshine Act was cured by th[e] subsequent public meeting, at which [SEPTA's] official action was taken"); *Lawrence Cty. v. Brenner*, 582 A.2d 79 (Pa. Commw. Ct. 1990) (stating that a violation of the Act may be cured by a subsequent ratification of the action at a public meeting); *Doverspike v. Black*, 535 A.2d 1217 (Pa. Commw. Ct. 1988) (rejecting the argument that a contract entered into by County Commissioners violated the former Sunshine Act when the contract was voted on at a public meeting after the date the contract was signed); *Bianco v. Robinson Tp.*, 556 A.2d 993 (Pa. Commw. Ct. 1989) (holding that any complaint that decisions made at an executive session violated the Sunshine Act was rendered moot when a public meeting was later held to ratify the actions taken at the executive session).

The Court holds great discretion in deciding whether to invalidate a decision made at a closed meeting. *Bradford Educ. Ass'n v. School Dist.*, 572 A.2d 1314 (Pa. Commw. Ct. 1992) (noting that the trial court has broad discretion to refuse to construe the Act strictly); *Keenheel v. Commonwealth*, 579 A.2d 1358 (Pa. Commw. Ct. 1990) (noting that although the Pennsylvania Securities Commission should have voted on litigation settlement offer in open meeting, the court did not invalidate the Commission's approval since petitioner did not claim injury because of that violation); *In re Hazelton Area Sch. Dist.*, 527 A.2d 1091 (Pa. Commw. Ct. 1987), (where the court excused a school district's failure to comply with the Act's notice provisions because the violation was technical, occurred under unusual conditions of time pressure, and because no prejudice resulted.)

Discharge responsible officials. An alleged failure to comply with the requirements of this Act was not found to justify discharging the officials from office. *Muncy Creek Tp. Citizens Committee v. Shipman*, 573 A.2d 662 (Pa. Commw. Ct. 1990).

Order payment of damages. At least one court has declared that damages are not available if a violation of the Sunshine Act has occurred. *Association of City Management and Professional Employees v. Civil Service Comm'n*, 19 Phila. 588 (1989).

c. Order future meetings open.

The court may order future compliance with the Act's provisions as relief. *See Reading Eagle Co. v. Council of the City of Reading*, 627 A.2d 305 (Pa. Commw. Ct. 1993) (affirming trial court's grant of permanent injunction against City Council, requiring it to announce specific reasons for going into executive session at future meetings); *Patriot-News Co. v. Empowerment Team of the Harrisburg Sch. Dist.*, 763 A.2d 539 (Pa. Commw. Ct. 2000) (upholding trial court's entry of a preliminary injunction requiring meetings to be open to the public). This same reasoning would support a petition for relief that included a prospective order to keep meetings open.

5. Pleading format.

The manner in which a "legal challenge" is to be initiated is not defined in the Sunshine Act, and it is not clear from the text how specific the grounds for the challenge must be. Thus, the manner in which a legal challenge is initiated, whether by complaint, writ of summons, agreement, "or other traditionally recognized means" is not significant. *Tom Mistick & Sons, Inc. v. City of Pittsburgh*, 567 A.2d 1107 (Pa. Commw. Ct. 1989), *appeal denied*, 589 A.2d 695 (Pa. 1990). Appeals under the Right to Know Act may be instructive. When an appeal is brought in the Commonwealth Court, as opposed to the Court of Common Pleas, the proper pleading is a petition for review pursuant to Pa. R.A.P. 1501, *et seq*. *See Ristau v. Casey*, 647 A.2d 642 (Pa. Commw. Ct. 1994). When an appeal is taken to a Court of Common Pleas, counsel should consult the local court rules for guidance.

6. Time limit for filing suit.

Legal challenges under the Act must be filed within 30 days of a closed meeting or within 30 days of discovery of an action that occurred at a closed meeting at which the Act was violated. In the latter case, there is a one-year outside time limit. 65 Pa. Cons. Stat. § 713.

7. What court.

In cases involving state agencies, the Commonwealth Court has original jurisdiction of legal challenges. *See Property Owners v. Department of Community Affairs*, 552 A.2d 769 (Pa. Commw. Ct. 1989) (deciding that the Department of Community Affairs did not have jurisdiction to determine whether the Sunshine Act had been violated). In all other cases, the various Courts of Common Pleas have original jurisdiction. *See, e.g., Patriot-News Co. v. Empowerment Team of the Harrisburg Sch. Dist.*, 763 A.2d 539 (Pa. Commw. Ct. 2000) (appeals of decisions of local school districts properly in local court of common pleas).

Pennsylvania courts have rejected arguments that certain proceedings were held pursuant to another statute and divest the courts of common pleas of jurisdiction to hear Sunshine Act appeals. *See, e.g., Hare v. County of Northampton*, 782 A.2d 7 (Pa. Commw. Ct. 2001) (holding that court of common pleas, not the Department of Community and Economic Development, had jurisdiction to hear Sunshine Act appeal claiming violations occurring during proceedings approving a bond ordinance).

8. Judicial remedies available.

See Section IV.C.4 *supra*.

The party bringing the action against an agency for alleged violation

of the Act bears the burden of proof. *See George Clay Steam Fire Eng. v. PHRC*, 639 A.2d 893, 903 (Pa. Commw. Ct. 1994) (holding that the company, and not the commission, had the burden of providing sufficient evidence to prove the alleged violation of the Act). *See also Public Advocate v. Gas Comm'n*, 637 A.2d 676, 680, (Pa. Commw. Ct. 1994), *reversed on other grounds*, 674 A.2d 1056 (Pa. 1996) (holding that "the burden of proof was on the challenger . . . to prove that official non-public deliberations took place before the public meeting."). *See, e.g.*, *Conners v. West Greene School Dist.*, 569 A.2d 978 (Pa. Commw. Ct. 1989) (stating that a newspaper article reporting that School Board members "apparently" discussed the cutting of particular programs was insufficient proof to bring a claim for violation of the Act).

9. Availability of court costs and attorneys' fees.

The Act specifically requires the court to impose reasonable attorneys' fees and costs of litigation on an agency that "willfully or with wanton disregard violated a provision of this chapter, in whole or part." The Act also requires the court to award reasonable attorneys' fees and costs of litigation for legal challenges "of a frivolous nature" or "brought with no substantial justification." 65 Pa. Cons. Stat. § 714.1.

10. Fines.

65 Pa. Cons. Stat. § 714 provides that any "member of any agency who participates in a meeting with the intent and purpose by that member of violating this act commits a summary offense and shall, upon conviction, be sentenced to pay a fine not exceeding $100 plus costs of prosecution."

11. Other penalties.

Not applicable.

D. Appealing initial court decisions.

1. Appeal routes.

Decisions of the Common Pleas Court may be appealed to the Commonwealth Court, 42 Pa. Cons. Stat. § 762, within 30 days of the entry of the order appealed from. Pa. R.A.P. 903(a). However, a claim that there was a violation of the Sunshine Act may not be raised on appeal if it had not been raised before the Common Pleas Court. *Perin v. Board of Supervisors*, 563 A.2d 576 (Pa. Commw. Ct. 1989). Further review by the Supreme Court is discretionary. 42 Pa. Cons. Stat. § 724(a); Pa. R.A.P. 1113. When original jurisdiction is in the Commonwealth Court, there is a right of appeal to the Supreme Court. 42 Pa. Cons. Stat § 723(a).

2. Time limits for filing appeals.

The notice of appeal must be filed within 30 days of the entry of the order appealed from. Pa. R.A.P. 903(a).

3. Contact of interested amici.

Anyone "interested" in the questions involved in any appeal may file a brief *amicus curiae* without leave; oral argument by an *amicus* is permitted rarely and only at the court's direction. Pa. R.A.P. 531.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

V. ASSERTING A RIGHT TO COMMENT.

A. Is there a right to participate in public meetings?

There should be a "reasonable opportunity" for all those who have standing "to comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action." 65 Pa. Cons. Stat. § 710.1(a). The board or council has "the option to accept all public comment at the beginning of the meeting." If the board or council determines that there is "not sufficient time" for all such comment, it "may defer the comment period to the next regular meeting or to a special meeting occurring in advance of the next regular meeting."

B. Must a commenter give notice of intentions to comment?

No cases.

C. Can a public body limit comment?

If it finds that there is "not sufficient time," it may defer such comment. One court suggested that comment should be limited to "current business" and not the over-broad standard of "matters of concern" that "may" come before an agency. *See Baravordeh v. Borough Council of Prospect Park*, 706 A.2d 362 (Pa. Commw. Ct. 1998).

D. How can a participant assert rights to comment?

No cases.

E. Are there sanctions for unapproved comment?

No cases.

Statute

RIGHT TO KNOW ACT

65 Pa.Stat. § 66.1 et seq.

Providing for access to public information, for a designated open-records officer in each Commonwealth agency, local agency, judicial agency and legislative agency, for procedure, for appeal of agency determination, for judicial review and for the Office of Open Records; imposing penalties; providing for reporting by State-related institutions; requiring the posting of certain State contract information on the Internet; and making related repeals.

TABLE OF CONTENTS

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

CHAPTER 1

PRELIMINARY PROVISIONS

Section 101. Short title.

This act shall be known and may be cited as the Right-to-Know Law.

Section 102. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Administrative proceeding." A proceeding by an agency the outcome of which is required to be based on a record or documentation prescribed by law or in which a statute or regulation is particularized in application to individuals. The term includes an appeal. "Agency." A Commonwealth agency, a local agency, a judicial agency or a legislative agency. "Aggregated data." A tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories.

"Appeals officer." As follows:

(1) For a Commonwealth agency or a local agency, the appeals officer designated under section 503(a).

(2) For a judicial agency, the individual designated under section 503(b).

(3)For a legislative agency, the individual designated under section 503(c).

(4) For the Attorney General, State Treasurer, Auditor General and local agencies in possession of criminal investigative records, the individual designated under section 503(d).

"Commonwealth agency." 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.

"Confidential proprietary information." Commercial or financial information received by an agency:

(1) which is privileged or confidential; and

(2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

"Financial record." Includes: any of the following:

(1) Any account, voucher or contract dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.

(2) 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.

(3) Results of a financial audit.

(3) A financial audit report. The term does not include work papers underlying an audit.

"Homeland security." Governmental actions designed to prevent, detect, respond to and recover from acts of terrorism, major disasters and other emergencies, whether natural or manmade. The term includes activities relating to the following:

(1) emergency preparedness and response, including preparedness and response activities by volunteer medical, police, emergency management, hazardous materials and fire personnel;

(2) intelligence activities;

(3) critical infrastructure protection;

(4) border security;

(5) ground, aviation and maritime transportation security;

(6) biodefense;

(7) detection of nuclear and radiological materials; and

(8) research on next-generation securities technologies.

"Independent agency." Any board, commission or other agency or officer of the Commonwealth, that is not subject to the policy supervision and control of the Governor. The term does not include a legislative or judicial agency.

"Judicial agency." A court of the Commonwealth or any other entity or office of the unified judicial system.

"Legislative agency." 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 of Research Liaison.

(15) The Legislative Audit Advisory Commission.

"Legislative record." Any of the following relating to a legislative agency or a standing committee, subcommittee or conference committee of a legislative agency:

(1) A financial record.

(2) A bill or resolution that has been introduced and amendments offered thereto in committee or in legislative session, including resolutions to adopt or amend the rules of a chamber.

(3) Fiscal notes.

(4) A co-sponsorship memorandum.

(5) The journal of a chamber.

(6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.

(7) The transcript of a public hearing when available.

(8) Executive nomination calendars.

(9) The rules of a chamber.

(10) A record of all recorded votes taken in a legislative session.

(11) Any administrative staff manuals or written policies.

(12) An audit report prepared pursuant to the act of June 30, 1970 (P.L.442, No.151) entitled, "An act implementing the provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission."

(13) Final or annual reports required by law to be submitted to the General Assembly.

(14) Legislative Budget and Finance Committee reports.

(15) Daily Legislative Session Calendars and marked calendars.

(16) A record communicating to an agency the official appointment of a legislative appointee.

(17) A record communicating to the appointing authority the resignation of a legislative appointee.

(18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.

(19) The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

"Local agency." Any of the following:

(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.

"Office of Open Records." The Office of Open Records established in section 1310.

"Personal financial information." An individual's personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account or PIN numbers and other information relating to an individual's personal finances.

"Privilege." The attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.

"Public record." 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.

"Record." 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.

"Requester." A person that is a legal resident of the United States and requests a record pursuant to this act. The term includes an agency.

"Response." Access to a record or an agency's written notice to a requester granting, denying or partially granting and partially denying access to a record.

"Social services." Cash assistance and other welfare benefits, medical, mental and other health care services, drug and alcohol treatment, adoption services, vocational and services and training, occupational training, education services, counseling services, workers' compensation services and unemployment compensation services, foster care services, services for the elderly, services for individuals with disabilities and services for victims of crimes and domestic violence.

"State-affiliated entity." A Commonwealth authority or Commonwealth entity. The term includes the Pennsylvania Higher Education Assistance Agency and any entity established thereby, the Pennsylvania Gaming Control Board, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement Board, the State System of Higher Education, a community college, the Pennsylvania Turnpike Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Interscholastic Athletic Association and the Pennsylvania Educational Facilities Authority. The term does not include a State-related institution.

"State-related institution." Includes:

(1) Temple University.

(2) The University of Pittsburgh.

(3) The Pennsylvania State University.

(4) Lincoln University.

"Terrorist act." A violent or life-threatening act that violates the criminal laws of the United States or any state and appears to be intended to:

(1) intimidate or coerce a civilian population;

(2) influence the policy of a government; or

(3) affect the conduct of a government by mass destruction, assassination or kidnapping.

"Trade secret." Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

(1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

CHAPTER 3

REQUIREMENTS AND PROHIBITIONS

Section 301. Commonwealth agencies. (a) Requirement.—A Commonwealth agency shall provide public records in accordance with this act. (b) Prohibition.—A Commonwealth agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.

Section 302. Local agencies. (a) Requirement.—A local agency shall provide public records in accordance with this act. (b) Prohibition.—A local agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.

Section 303. Legislative agencies. (a) Requirement.—A legislative agency shall provide legislative records in accordance with this act. (b) Prohibition.—A legislative agency may not deny a requester access to a legislative record due to the intended use of the legislative record by the requester.

Section 304. Judicial agencies. (a) Requirement.—A judicial agency shall provide financial records in accordance with this act or any rule or order of court providing equal or greater access to the records. (b) Prohibition.—A judicial agency may not deny a requester access to a financial record due to the intended use of the financial record by the requester.

Section 305. Presumption. (a) 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:

(1) the record is exempt under section 708;

(2) the record is protected by a privilege; or

(3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. (b) Legislative records and financial records. A legislative record in the possession of a legislative agency and a financial record in the possession of a judicial agency shall be presumed to be available in accordance with this act. The presumption shall not apply if:

(1) the record is exempt under section 708;

(2) the record is protected by a privilege; or

(3) the record is exempt from disclosure under any other Federal or State law, regulation or judicial order or decree.

Section 306. Nature of document. Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.

CHAPTER 5

ACCESS

Section 501. Scope of chapter. This chapter applies to all agencies.

Section 502. Open-records officer. (a) Establishment.— (1) An agency shall designate an official or employee to act as the open-records officer.

(2) For a legislative agency other than the Senate or the House of Representatives, the open-records officer designated by the Legislative Reference Bureau shall serve as the open-records officer. Notwithstanding paragraph (1), a political party caucus of a legislative agency may appoint an open-records officer under this section.

(b) Functions.—

(1) The open-records officer shall receive requests submitted to the agency under this act, direct requests to other appropriate persons within the agency or to appropriate persons in another agency, track the agency's progress in responding to requests and issue interim and final responses under this act.

(2) Upon receiving a request for a public record, legislative record or financial record, the open-records officer shall do all of the following: (i) Note the date of receipt on the written request. (ii) Compute the day on which the five-day period under section 901 will expire and make a notation of that date on the written request. (iii) Maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been fulfilled. If the request is denied, the written request shall be maintained for 30 days or, if an appeal is filed, until a final determination is issued under section 1101(b) or the appeal is deemed denied. (iv) Create a file for the retention of the original request, a copy of the response, a record of written communications with the requester and a copy of other communications. his subparagraph shall only apply to Commonwealth agencies.

Section 503. Appeals officer. (a) Commonwealth agencies and local agencies.—Except as provided in subsection (d), the Office of Open Records established under section 1310 shall designate an appeals officer under section 1101(a)(2) for all:

(1) Commonwealth agencies; and

(2) local agencies.

(b) Judicial agencies.—A judicial agency shall designate an appeals officer to hear appeals under Chapter 11.

(c) Legislative agencies.— (1) Except as set forth in paragraph (2), the Legislative Reference Bureau shall designate an appeals officer to hear appeals under Chapter 11 for all legislative agencies. (2) Each of the following shall designate an appeals officer to hear appeals under Chapter 11: (i) The Senate. (ii) The House of Representatives.

(d) Law enforcement records and Statewide officials.— (1) The Attorney General, State Treasurer and Auditor General shall each designate an appeals officer to hear appeals under Chapter 11.

(2) The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 relating to access to criminal investigative records in possession of a local agency of that county. The appeals officer designated by the district attorney shall determine if the record requested is a criminal investigative record.

Section 504. Regulations and policies.

(a) Authority.—An agency may promulgate regulations and policies necessary for the agency to implement this act. The Office of Open Records may promulgate regulations relating to appeals involving a Commonwealth agency or local agency.

(b) Posting.—The following information shall be posted at each agency and, if the agency maintains an Internet website, on the agency's Internet website:

(1) Contact information for the open-records officer.

(2) Contact information for the Office of Open Records or other applicable appeals officer.

(3) A form which may be used to file a request.

(4) Regulations, policies and procedures of the agency relating to this act.

Section 505. Uniform form.

(a) Commonwealth and local agencies.—The Office of Open Records shall develop a uniform form which shall be accepted by all Commonwealth and local agencies in addition to any form used by the agency to file a request under this act. The uniform form shall be published in the Pennsylvania Bulletin and on the Office of Open Record's Internet website.

(b) Judicial agencies.—A judicial agency or the Administrative Office of Pennsylvania Courts may develop a form to request financial records or may accept a form developed by the Office of Open Records.

(c) Legislative agencies.—A legislative agency may develop a form to request legislative records or may accept the form developed by the Office of Open Records.

Section 506. Requests. (a) Disruptive requests.—

(1) An agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.

(2) A denial under this subsection shall not restrict the ability to request a different record.

(b) Disaster or potential damage.—

(1) An agency may deny a requester access: (i) when timely access is not possible due to fire, flood or other disaster; or (ii) to historical, ancient or rare documents, records, archives and manuscripts when access may, in the professional judgment of the curator or custodian of records, cause physical damage or irreparable harm to the record.

(2) To the extent possible, the contents of a record under this subsection shall be made accessible to a requester even when the record is physically unavailable.

(c) Agency discretion.—An agency may exercise its discretion to make any otherwise exempt record accessible for inspection and copying under this chapter, if all of the following apply:

(1) Disclosure of the record is not prohibited under any of the following: (i) Federal or State law or regulation. (ii) Judicial order or decree.

(2) The record is not protected by a privilege.

(3) The agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.

(d) Agency possession.—

(1) A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

(2) Nothing in this act shall be construed to require access to any other record of the party in possession of the public record.

(3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee established under section 1307(b) and upon collection shall remit the fee to the party in possession of the record if the party duplicated the record.

Section 507. Retention of records. Nothing in this act shall be construed to modify, rescind or supersede any record retention policy or disposition schedule of an agency established pursuant to law, regulation, policy or other directive.

CHAPTER 7

PROCEDURE

Section 701. Access. (a) General rule.—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. A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists. Public records, legislative records or financial records shall be available for access during the regular business hours of an agency. (b) Construction.—Nothing in this act shall be construed to require access to any computer either of an agency or individual employee of an agency.

Section 702. Requests. Agencies may fulfill verbal, written or anonymous verbal or written requests for access to records under this act. 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.

Section 703. Written requests. 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, 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.

Section 704. Electronic access. (a) General rule.—In addition to the requirements of section 701, an agency may make its records available through any publicly accessible electronic means. (b) Response.—

(1) In addition to the requirements of section 701, an agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means or that the agency will provide access to inspect the record electronically.

(2) If the requester is unwilling or unable to access the record electronically, the requester may, within 30 days following receipt of the agency notification, submit a written request to the agency to have the record converted to paper. The agency shall provide access to the record in printed form within five days of the receipt of the written request for conversion to paper.

Section 705. Creation of record. When responding to a request for access, an agency shall not be required to create a record which does not currently 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.

Section 706. Redaction. If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9.

Section 707. Production of certain records.

(a) General rule.—If, in response to a request, an agency produces a record that is not a public record, legislative record or financial record, the agency shall notify any third party that provided the record to the agency, the person that is the subject of the record and the requester.

(b) Requests for trade secrets.—An agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information. Notification shall be provided within five business days of receipt of the request for the record. The third party shall have five business days from receipt of notification from the agency to provide input on the release of the record. The agency shall deny the request for the record or release the record within ten business days of the provision of notice to the third party and shall notify the third party of the decision.

(c) Transcripts.—

(1) Prior to an adjudication becoming final, binding and nonappealable, a transcript of an administrative proceeding shall be provided to a requester by the agency stenographer or a court reporter, in accordance with agency procedure or an applicable contract.

(2) Following an adjudication becoming final, binding and nonappealable, a transcript of an administrative proceeding shall be provided to a requester in accordance with the duplication rates established in section 1307(b).

Section 708. Exceptions for public records. (a) Burden of proof.—

(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

(2) The burden of proving that a legislative record is exempt from public access shall be on the legislative agency receiving a request by a preponderance of the evidence.

(3) The burden of proving that a financial record of a judicial agency is exempt from public access shall be on the judicial agency receiving a request by a preponderance of the evidence.

(b) Exceptions.—Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

(1) A record the disclosure of which: (i) would result in the loss of Federal or State funds by an agency or the Commonwealth; or (ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or –the personal security of an individual.

(2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.

(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.

(4) A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.

(5) A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

(6)(i) The following personal identification information: (A) A record containing all or part of a person's Social Security number; driver's license number; personal financial information; home, cellular or personal telephone numbers; personal e-mail addresses; employee number or other confidential personal identification number. (B) A spouse's name; marital status, beneficiary or dependent information. (C) The home address of a law enforcement officer or judge. (ii) Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee. (iii) An agency may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.

(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.

(8)(i) A record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings. This subparagraph shall not apply to a final or executed contract or agreement between the parties in a collective bargaining procedure. (ii) In the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion. This subparagraph shall not apply to the final award or order of the arbitrator in a dispute or grievance procedure.

(9) The draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.

(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. (ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act — and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record. (iii) This paragraph shall not apply to a written or Internet application or other document that has been submitted to request Commonwealth funds. (iv) This paragraph shall not apply to the results of public opinion surveys, polls, focus groups, marketing research or similar effort designed to measure public opinion.

(11) A record that constitutes or reveals a trade secret or confidential proprietary information.

(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

(13) Records that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

(14) Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.

(15) Examination questions, scoring keys or answers to — an examination, including questions, keys and answers on tests in primary and secondary schools and institutions of higher education. (15) (i) academic transcripts — (ii) examinations, examination questions, scoring keys or answers to examinations. This subparagraph shall include licensing and other examinations relating to the qualifications of an individual and to examinations given in primary and secondary schools and institutions of higher education.

(16) A record of an agency relating to or resulting in a criminal investigation, including: (i) Complaints of potential criminal conduct other than a private criminal complaint. (ii) Investigative materials, notes, correspondence, videos and reports. (iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised. (iv) A record that includes information made confidential by law or court order. (v) Victim information, including any information that would jeopardize the safety of the victim. (vi) A record that, if disclosed, would do any of the following: (A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges. (B) Deprive a person of the right to a fair trial or an impartial adjudication. (C) Impair the ability to locate a defendant or codefendant. (D) Hinder an agency's ability to secure an arrest, prosecution or conviction. (E) Endanger the life or physical safety of an individual. This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).

(17) A record of an agency relating to a noncriminal investigation, including: (i) Complaints submitted to an agency. (ii) Investigative materials, notes, correspondence and reports. (iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L.1559, No.169), known as the Whistleblower Law. (iv) A record that includes information made confidential by law. (v) Work papers underlying an audit. (vi) A record that, if disclosed, would do any of the following: (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court. (B) Deprive a person of the right to an impartial adjudication. (C) Constitute an unwarranted invasion of privacy. (D) Hinder an agency's ability to secure an administrative or civil sanction. (E) Endanger the life or physical safety of an individual.

(18) (i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings. (ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the — agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.

(19) DNA and RNA records.

(20) An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.

(21)(i) Draft minutes of any meeting of an agency until the next regularly scheduled meeting of the agency. (ii) Minutes of an executive session and any record of discussions held in executive session.

(22)(i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following: (A) The leasing, acquiring or disposing of real property or an interest in real property. (B) The purchase of public supplies or equipment included in the real estate transaction. (C) Construction projects. (ii) This paragraph shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.

(23) Library and archive circulation and order records of an identifiable individual or groups of individuals.

(24) Library archived and museum materials, or valuable or rare book collections or documents contributed by gift, grant, bequest or devise, to the extent of any limitations imposed by the donor as a condition of the contribution.

(25) A record identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public.

(26) 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 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).

(27) A record or information relating to a communication between an agency and its insurance carrier, administrative service organization or risk management office. This paragraph shall not apply to a contract with an insurance carrier, administrative service organization or risk management office or to financial records relating to the provision of insurance.

(28) A record or information: (i) identifying an individual who applies for or receives social services; or (ii) relating to the following: (A) the type of social services received by an individual; (B) an individual's application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or (C) eligibility to receive social services, including the individual's income, assets, physical or mental health, age, disability, family circumstances or record of abuse.

(29) Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbyist disclosure).

(30) A record identifying the name, home address or date—of birth of a child 17 years of age or younger. (c) Financial records.—The exceptions set forth in subsection (b) shall not apply to financial records, except for — financial records that an agency may redact that portion of a – financial record protected under subsection (b)(1), (2), (3), (4) or (5) or personal financial information. An agency shall—redact that portion of a financial record which would disclose information protected under subsection (b)(6). An agency shall (4), (5), (6), (16) OR (17). An agency shall not disclose the — identity of an individual performing an undercover or covert law enforcement activity. or other nonfinancial information — protected under subsection (b)(16) or (17). (d) Aggregated data.—The exceptions set forth in subsection (b) shall not apply to aggregated data maintained or received by an agency, except for data protected under subsection (b)(1), (2), (3), (4) or (5). (E) Construction.—In determining whether a record is exempt — from access under this section, an agency shall consider and apply each exemption separately.

CHAPTER 9

AGENCY RESPONSE

Section 901. General rule. 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.

Section 902. Extension of time.

(a) Determination.—Upon receipt of a written request for access, the open-records officer for an agency shall determine if one of the following applies:

(1) the request for access requires redaction of a record in accordance with section 706;

(2) the request for access requires the retrieval of a record stored in a remote location;

(3) a timely response to the request for access cannot be accomplished due to bona fide and specified staffing limitations;

(4) a legal review is necessary to determine whether the record is a record subject to access under this act;

(5) the requester has not complied with the agency's policies regarding access to records;

(6) the requester refuses to pay applicable fees authorized by this act; or

(7) the extent or nature of the request precludes a response within the required time period.

(b) Notice.—

(1) Upon a determination that one of the factors listed in subsection (a) applies, the open-records officer shall send written notice to the requester within five business days of receipt of the request for access under subsection (a).

(2) The notice shall include a statement notifying the requester that the request for access is being reviewed, the reason for the review, a reasonable date that a response is expected to be provided and an estimate of applicable fees owed when the record becomes available. If the date that a response is expected to be provided is in excess of 30 days, following the five business days allowed for in section 901, the request for access shall be deemed denied unless the requester has agreed in writing to an extension to the date specified in the notice.

(3) If the requester agrees to the extension, the request shall be deemed denied on the day following the date specified in the notice if the agency has not provided a response by that date.

Section 903. Denial. If an agency's response is a denial of a written request for access, whether in whole or in part, the denial shall be issued in writing and shall include:

(1) A description of the record requested.

(2) The specific reasons for the denial, including a citation of supporting legal authority.

(3) The typed or printed name, title, business address, business telephone number and signature of the open-records officer on whose authority the denial is issued.

(4) Date of the response.

(5) The procedure to appeal the denial of access under this act.

Section 904. Certified copies. If an agency's response grants a request for access, the agency shall, upon request, provide the requester with a certified copy of the record if the requester pays the applicable fees under section 1307.

Section 905. Record discard. If an agency response to a requester states that copies of the requested records are available for delivery at the office of an agency and the requester fails to retrieve the records within 60 days of the agency's response, the agency may dispose of any copies which have not been retrieved and retain any fees paid to date.

CHAPTER 11

APPEAL OF AGENCY DETERMINATION

Section 1101. Filing of appeal. (a) Authorization.—

(1) If a written request for access to a record is denied or deemed denied, the requester may file an appeal with the Office of Open Records or judicial, legislative or other appeals officer designated under section 503(d) within 15 business days of the mailing date of the agency's response or within 15 business days of a deemed denial. The appeal shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request.

(2) Except as provided in section 503(d), in the case of an appeal of a decision by a Commonwealth agency or local agency, the Office of Open Records shall assign an appeals officer to review the denial.

(b) Determination.—

(1) Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).

(2) If the appeals officer fails to issue a final determination within 30 days, the appeal is deemed denied.

(3) Prior to issuing a final determination, a hearing may be conducted. The determination by the appeals officer shall be a final order. The appeals officer shall provide a written explanation of the reason for the decision to the requester and the agency.

(c) Direct interest.—

(1) A person other than the agency or requester with a direct interest in the record subject to an appeal under this section may, within 15 days following receipt of actual knowledge of the appeal but no later than the date the appeals officer issues an order, file a written request to provide information or to appear before the appeals officer or to file information in support of the requester's or agency's position.

(2) The appeals officer may grant a request under paragraph (1) if: (i) no hearing has been held; (ii) the appeals officer has not yet issued its order; and (iii) the appeals officer believes the information will be probative.

(3) Copies of the written request shall be sent to the agency and the requester.

Section 1102. Appeals officers. (a) Duties.—An appeals officer designated under section 503 shall do all of the following:

(1) Set a schedule for the requester and the open-records officer to submit documents in support of their positions.

(2) Review all information filed relating to the request. The appeals officer may hold a hearing. A decision to hold or not to hold a hearing is not appealable. The appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. The appeals officer may limit the nature and extent of evidence found to be cumulative.

(3) Consult with agency counsel as appropriate.

(4) Issue a final determination on behalf of the Office of Open Records or other agency.

(b) Procedures.—The Office of Open Records, a judicial agency, a legislative agency, the Attorney General, Auditor General, State Treasurer or district attorney may adopt procedures relating to appeals under this chapter.

(1) If an appeal is resolved without a hearing, 1 Pa. Code Pt. II (relating to general rules of administrative practice and procedure) does not apply except to the extent that the agency has adopted these chapters in its regulations or rules under this subsection.

(2) If a hearing is held, 1 Pa. Code Pt. II shall apply unless the agency has adopted regulations, policies or procedures to the contrary under this subsection.

(3) In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute.

CHAPTER 13

JUDICIAL REVIEW

Section 1301. Commonwealth agencies, legislative agencies and judicial agencies. (a) General rule.—Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a Commonwealth agency, a legislative agency or a judicial agency issued under section 1101(b) or

the date a request for access is deemed denied, a requester or the agency may file a petition for review or other document as might be required by rule of court with the Commonwealth Court. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision. (b) Stay.—A petition for review under this section shall stay the release of documents until a decision under subsection (a) is issued.

Section 1302. Local agencies. (a) General rule.—Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b) or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision. (b) Stay.—A petition for review under this section shall stay the release of documents until a decision under subsection (a) is issued.

Section 1303. Notice and records. (a) Notice.—An agency, the requester and the Office of Open Records or designated appeals officer shall be served notice of actions commenced in accordance with section 1301 or 1302 and shall have an opportunity to respond in accordance with applicable court rules. (b) Record on appeal.—The 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.

Section 1304. Court costs and attorney fees. (a) Reversal of agency determination. — If a court reverses the final determination of the appeals officer or grants access to a record after a request for access was deemed denied, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester if the court finds either of the following:

(1) the agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or

(2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law. (b) Sanctions for frivolous requests or appeals. —The court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to an agency or the requester if the court finds that the legal challenge under this chapter was frivolous. (c) Other sanctions.—Nothing in this act shall prohibit a court from imposing penalties and costs in accordance with applicable rules of court.

Section 1305. Civil penalty. (a) Denial of access.—A court may impose a civil penalty of not more than $1,500 if an agency denied access to a public record in bad faith. (b) Failure to comply with court order. — An agency or public official who does not promptly comply with a court order under this act is subject to a civil penalty of not more than $500 per day until the public records are provided.

Section 1306. Immunity. (a) General rule. — Except as provided in sections 1304 and 1305 and other statutes governing the release of records, no agency, public official or public employee shall be liable for civil penalties resulting from compliance or failure to comply with this act. (b) Schedules. — No agency, public official or public employee shall be liable for civil or criminal damages or penalties under this act for complying with any written public record retention and disposition schedule.

Section 1307. Fee limitations.

(a) Postage. — Fees for postage may not exceed the actual cost of mailing.

(b) Duplication. —

(1) Fees for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication shall be established: (i) by the Office of Open Records, for Commonwealth agencies and local agencies; (ii) by each judicial agency; and (iii) by each legislative agency.

(2) The fees must be reasonable and based on prevailing fees for comparable duplication services provided by local business entities.

(3) Fees for local agencies may reflect regional price differences.

(4) The following apply to complex and extensive data sets, including geographic information systems or integrated property assessment lists. (i) Fees for copying may be based on the reasonable market value of the same or closely related data sets. (ii) Subparagraph (i) shall not apply to: (A) a request by an individual employed by or — connected with a newspaper or magazine of general circulation, weekly newspaper publication, press — association or radio or television station, for the purpose of obtaining information for publication or broadcast; or (B) a request by a nonprofit organization for the conduct of educational research. (iii) Information obtained under subparagraph (ii) shall be subject to paragraphs (1), (2) and (3). (iv) Information obtained under this paragraph shall — not be sold or otherwise provided to another person for commercial purposes.

(c) Certification. — An agency may impose reasonable fees for official certification of copies if the certification is at the behest of the requester and for the purpose of legally verifying the public record.

(d) Conversion to paper.—If a record is only maintained electronically or in other nonpaper media, duplication fees shall be limited to the lesser of the fee for duplication on paper or the fee for duplication in the original media as provided by subsection (b) unless the requester specifically requests for the record to be duplicated in the more expensive medium.

(e) Enhanced electronic access.—If an agency offers enhanced electronic access to records in addition to making the records accessible for inspection and duplication by a requester as required by this act, the agency may establish user fees specifically for the provision of the enhanced electronic access, but only to the extent that the enhanced electronic access is in addition to making the records accessible for inspection and duplication by a requester as required by this act. The user fees for enhanced electronic access may be a flat rate, a subscription fee for a period of time, a per-transaction fee, a fee based on the cumulative time of system access or any other reasonable method and any combination thereof. The user fees for enhanced electronic access must be reasonable, must be approved by the Office of Open Records and may not be established with the intent or effect of excluding persons from access to records or duplicates thereof or of creating profit for the agency.

(f) Waiver of fees.—An agency may waive the fees for duplication of a record, including, but not limited to, when:

(1) the requester duplicates the record; or

(2) the agency deems it is in the public interest to do so.

(g) Limitations. —Except as otherwise provided by statute, no other fees may be imposed unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable. No fee may be imposed for an agency's review of a record to determine whether the record is a public record, legislative record or financial record subject to access in accordance with this act.

(h) Prepayment.—Prior to granting a request for access in accordance with this act, an agency may require a requester to prepay an estimate of the fees authorized under this section if the fees required to fulfill the request are expected to exceed $100.

Section 1308. Prohibition. A policy or regulation adopted under this act may not include any of the following:

(1) A limitation on the number of records which may be requested or made available for inspection or duplication.

(2) A requirement to disclose the purpose or motive in requesting access to records.

Section 1309. Practice and procedure. The provisions of 2 Pa.C.S. (relating to administrative law and procedure) shall not apply to this act unless specifically adopted by regulation or policy.

Section 1310. Office of Open Records.

(a) Establishment.—There is established in the Department of Community and Economic Development an Office of Open Records. The office shall do all of the following:

(1) Provide information relating to the implementation and enforcement of this act.

(2) Issue advisory opinions to agencies and requesters.

(3) Provide annual training courses to agencies, public officials and public employees on this act and 65 Pa.C.S. Ch. 7 (relating to open meetings).

(4) Provide annual, regional training courses to local agencies, public officials and public employees.

(5) Assign appeals officers to review appeals of decisions by Commonwealth agencies or local agencies, except as provided in section 503(d), filed under sec-

tion 1101 and issue orders and opinions. The office shall employ or contract with attorneys to serve as appeals officers to review appeals and, if necessary, to hold hearings on a regional basis under this act. Each appeals officer must comply with all of the following: (i) Complete a training course provided by the Office of Open Records prior to acting as an appeals officer. (ii) If a hearing is necessary, hold hearings regionally as necessary to ensure access to the remedies provided by this act. (iii) Comply with the procedures under section 1102(b).

(6) Establish an informal mediation program to resolve disputes under this act.

(7) Establish an Internet website with information relating to this act, including information on fees, advisory opinions and decisions and the name and address of all open records officers in this Commonwealth.

(8) Conduct a biannual review of fees charged under this act.

(9) Annually report on its activities and findings to the Governor and the General Assembly. The report shall be posted and maintained on the Internet website established under paragraph (7). (b) Executive director. — Within 90 days of the effective date of this section, the Governor shall appoint an executive director of the office who shall serve for a term of six years. Compensation shall be set by the Executive Board established under section 204 of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929. The executive director may serve no more than two terms. (c) Limitation.. — The executive director shall not seek election nor accept appointment to any political office during his tenure as executive director and for one year thereafter. (d) Staffing. —The executive director shall appoint attorneys to act as appeals officers and additional clerical, technical and professional staff as may be appropriate and may contract for additional services as necessary for the performance of the executive director's duties. The compensation of attorneys and other staff shall be set by the Executive 26 Board. The appointment of attorneys shall not be subject to the act of October 15, 1980 (P.L.950, No.164), known as the Commonwealth Attorneys Act. (e) Duties. — The executive director shall ensure that the duties of the Office of Open Records are carried out and shall monitor cases appealed to the Office of Open Records. (f) Appropriation. — The appropriation for the office shall be in a separate line item and shall be under the jurisdiction of the executive director.

CHAPTER 15

STATE-RELATED INSTITUTIONS

Section 1501. Definition. As used in this chapter, "State-related institution" means any of the following:

(1) Temple University.

(2) The University of Pittsburgh.

(3) The Pennsylvania State University.

(4) Lincoln University.

Section 1502. Reporting. No later than May 30 of each year, a State-related institution shall file with the Governor's Office, the General Assembly, the Auditor General and the State Library the information set forth in section 1503.

Section 1503. Contents of report. The report required under section 1502 shall include the following:

(1) Except as provided in paragraph (4), all information required by Form 990 or an equivalent form, of the United States Department of the Treasury, Internal Revenue Service, entitled the Return of Organization Exempt From Income Tax, regardless of whether the State-related institution is required to file the form by the Federal Government.

(2) The salaries of all officers and directors of the State-related institution.

(3) The highest 25 salaries paid to employees of the institution that are not included under paragraph (2).

(4) The report shall not include information relating to individual donors.

Section 1504. Copies and posting. A State-related institution shall maintain, for at least seven years, a copy of the report in the institution's library and shall provide free access to the report on the institution's Internet website.

CHAPTER 17

STATE CONTRACT INFORMATION

Section 1701. Submission and retention of contracts. (a) General rule. — Whenever any Commonwealth agency, legislative agency or judicial agency shall enter into any contract involving any property, real, personal or mixed of any kind or description or any contract for personal services where the consideration involved in the contract is $5,000 or more, a copy of the contract shall be filed with the Treasury Department within ten days after the contract is fully executed on behalf of the Commonwealth agency, legislative agency or judicial agency or otherwise becomes an obligation of the Commonwealth agency, legislative agency or judicial agency. The provisions of this chapter shall not apply to contracts for services protected by a privilege. The provisions of this chapter shall not apply to a purchase order evidencing fulfillment of an existing obligation contract but shall apply to a purchase order—evidencing new obligations. The following shall apply:

(1) Each Commonwealth agency, legislative agency and judicial agency shall submit contracts in a form and structure mutually agreed upon by the Commonwealth agency, legislative agency or judicial agency and the State Treasurer.

(2) The Treasury Department may require each Commonwealth agency, legislative agency or judicial agency to provide a summary with each contract, which shall include the following: (i) Date of execution. (ii) Amount of the contract. (iii) Beginning date of the contract. (iv) End date of the contract, if applicable. (v) Name of the agency entering into the contract. (vi) The name of all parties executing the contract. (vii) Subject matter of the contract. Each agency shall create and maintain the data under this paragraph in an ASCII-delimited text file, spreadsheet file or other file provided by Treasury Department regulation. (b) Retention. — Every contract filed pursuant to subsection (a) shall remain on file with the Treasury Department for a period of not less than four years after the end date of the contract. (c) Accuracy.—Each Commonwealth agency, legislative agency and judicial agency is responsible for verifying the accuracy and completeness of the information that it submits to the State Treasurer. The contract provided to the Treasury Department pursuant to this chapter shall be redacted in accordance with applicable provisions of this act by the agency filing the contract to the Treasury Department. (d) Applicability.—The provisions of this act shall not apply to copies of contracts submitted to the Treasury Department, the Office of Auditor General or other agency for purposes of audits and warrants for disbursements under section 307, 401, 402 or 403 of the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code.

Section 1702. Public availability of contracts. (a) General rule.—The Treasury Department shall make each contract filed pursuant to section 1701 available for public inspection either by posting a copy of the contract on the Treasury Department's publicly accessible Internet website or by posting a contract summary on the department's publicly accessible Internet website. (b) Posting.—The Treasury Department shall post the information received pursuant to this chapter in a manner that allows the public to search contracts or contract summaries by the categories enumerated in section 1701(a)(2). (c) Request to review or receive copy of contract.—The Treasury Department shall maintain a page on its publicly accessible Internet website that includes instructions on how to review a contract on the Internet website. (d) Paper copy.—A paper copy of a contract may be requested from the agency that executed the contract in accordance with this act.

CHAPTER 31

MISCELLANEOUS PROVISIONS

Section 3101. Applicability. This act applies as follows:—

(1) This act shall apply to requests for information made after December 31, 2008.

(2) Chapter 15 shall apply to fiscal years beginning after June 30, 2008.

(3) Chapter 17 shall apply to contracts entered into or renewed after June 30, 2008.

Section 3101.1. Relation to other law or judicial actions. If the provisions of this act regarding access to public records conflict with any Federal or State law, judicial order or decree, the provisions of this act shall not apply. This act shall apply to requests for information made after — December 31, 2008.

Section 3101.2. Severability. All provisions of this act are severable.

Section 3102. Repeals. Repeals are as follows:

(1) The General Assembly declares as follows: (i) The repeal under paragraph (2)(i) is necessary to effectuate Chapter 17. (ii) The repeals under paragraph (2)(ii) and (iii) are necessary to effectuate this act.

(2) The following acts and parts of acts are repealed: (i) Section 1104 of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929. (ii) The act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law. (iii) 62 Pa.C.S. § 106.

Section 3103. References. A reference in a statute, regulation or judicial order or—decree notwithstanding 1 PA.C.S. § 1937(B), a reference in a—statute or regulation to the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law, shall be deemed a reference to this act.

Section 3104. Effective date. This act shall take effect as follows:

(1) The following provisions shall take effect immediately: (i) Sections 101, 102 and 1310. (ii) This section.

(2) The remainder of this act shall take effect January —

(2) Chapters 15 and 17 and Sections 3102(1)(I) and—3102(2)(I) shall take effect July 1, 2008.

(3) The remainder of this act shall take effect January 1, 2009.

SUNSHINE ACT

§ 701 Short title of chapter

This chapter shall be known and may be cited as the Sunshine Act.

§ 702 Legislative findings and declaration

(a) Findings. — The General Assembly finds that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society.

(b) Declarations. — The General Assembly hereby declares it to be the public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this chapter.

§ 703. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Administrative action." The execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency. The term does not, however, include the deliberation of agency business.

"Agency." The body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of all the following: the General Assembly, the executive branch of the government of this Commonwealth, including the Governor's Cabinet when meeting on official policymaking business, any board, council, authority or commission of the Commonwealth or of any political subdivision of the Commonwealth or any State, municipal, township or school authority, school board, school governing body, commission, the boards of trustees of all State-aided colleges and universities, the councils of trustees of all State-owned colleges and universities, the boards of trustees of all State-related universities and all community colleges or similar organizations created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function and through the joint action of its members exercises governmental authority and takes official action. The term shall include the governing board of any nonprofit corporation which by a mutually binding legal written agreement with a community college or State-aided, State-owned or State-related institution of higher education is granted legally enforceable supervisory and advisory powers regarding the degree programs of the institution of higher education. The term does not include a caucus or a meeting of an ethics committee created under rules of the Senate or House of Representatives.

"Agency business." The framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action.

"Caucus." A gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action in the General Assembly.

"Conference." Any training program or seminar, or any session arranged by State or Federal agencies for local agencies, organized and conducted for the sole purpose of providing information to agency members on matters directly related to their official responsibilities.

"Deliberation." The discussion of agency business held for the purpose of making a decision.

"Emergency meeting." A meeting called for the purpose of dealing with a real or potential emergency involving a clear and present danger to life or property.

"Executive session." A meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting.

"Litigation." Any pending, proposed or current action or matter subject to appeal before a court of law or administrative adjudicative body, the decision of which may be appealed to a court of law.

"Meeting." Any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action.

"Official action."

(1) Recommendations made by an agency pursuant to statute, ordinance or executive order.

(2) The establishment of policy by an agency.

(3) The decisions on agency business made by an agency.

(4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

"Political subdivision." Any county, city, borough, incorporated town, township, school district, intermediate unit, vocational school district or county institution district.

"Public notice."

(1) For a meeting:

(i) Publication of notice of the place, date and time of a meeting in a newspaper of general circulation, as defined by 45 Pa.C.S. § § 101 (relating to definitions), which is published and circulated in the political subdivision where the meeting will be held, or in a newspaper of general circulation which has a bona fide paid circulation in the political subdivision equal to or greater than any newspaper published in the political subdivision.

(ii) Posting a notice of the place, date and time of a meeting prominently at the principal office of the agency holding the meeting or at the public building in which the meeting is to be held.

(iii) Giving notice to parties under section 709(c) (relating to public notice).

(2) For a recessed or reconvened meeting:

(i) Posting a notice of the place, date and time of the meeting prominently at the principal office of the agency holding the meeting or at the public building in which the meeting is to be held.

(ii) Giving notice to parties under section 709(c).

"Special meeting." A meeting scheduled by an agency after the agency's regular schedule of meetings has been established.

§ 704. Open meetings

Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered).

§ 705. Recording of votes

In all meetings of agencies, the vote of each member who actually votes on any resolution, rule, order, regulation, ordinance or the setting of official policy must be publicly cast and, in the case of roll call votes, recorded.

§ 706. Minutes of meetings, public records and recording of meetings

Written minutes shall be kept of all open meetings of agencies. The minutes shall include:

(1) The date, time and place of the meeting.

(2) The names of members present.

(3) The substance of all official actions and a record by individual member of the roll call votes taken.

(4) The names of all citizens who appeared officially and the subject of their testimony.

§ 707. Exceptions to open meetings

(a) Executive session. — An agency may hold an executive session under section 708 (relating to executive sessions).

(b) Conference. — An agency is authorized to participate in a conference which need not be open to the public. Deliberation of agency business may not occur at a conference.

(c) Certain working sessions. — Boards of auditors may conduct working sessions not open to the public for the purpose of examining, analyzing, discussing and deliberating the various accounts and records with respect to which such boards are responsible, so long as official action of a board with respect to such records and accounts is taken at a meeting open to the public and subject to the provisions of this chapter.

§ 708. Executive sessions

(a) Purpose. — An agency may hold an executive session for one or more of the following reasons:

(1) To discuss any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the agency, or former public officer or employee, provided, however, that the individual employees or appointees whose rights could be adversely affected may request, in writing, that the matter or matters be discussed at an open meeting. The agency's decision to discuss such matters in executive session shall not serve to adversely affect the due process rights granted by law, including those granted by Title 2 (relating to administrative law and procedure). The provisions of this paragraph shall not apply to any meeting involving the appointment or selection of any person to fill a vacancy in any elected office.

(2) To hold information, strategy and negotiation sessions related to the negotiation or arbitration of a collective bargaining agreement or, in the absence of a collective bargaining unit, related to labor relations and arbitration.

(3) To consider the purchase or lease of real property up to the time an option to purchase or lease the real property is obtained or up to the time an agreement to purchase or lease such property is obtained if the agreement is obtained directly without an option.

(4) To consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed.

(5) To review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law and quasi-judicial deliberations.

(6) For duly constituted committees of a board or council of trustees of a State-owned, State-aided or State-related college or university or community college or of the Board of Governors of the State System of Higher Education to discuss matters of academic admission or standings.

(b) Procedure. — The executive session may be held during an open meeting or at the conclusion of an open meeting or may be announced for a future time. The reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session. If the executive session is not announced for a future specific time, members of the agency shall be notified 24 hours in advance of the time of the convening of the meeting specifying the date, time, location and purpose of the executive session.

(c) Limitation. — Official action on discussions held pursuant to subsection (a) shall be taken at an open meeting. Nothing in this section or section 707 (relating to exceptions to open meetings) shall be construed to require that any meeting be closed to the public, nor shall any executive session be used as a subterfuge to defeat the purposes of section 704 (relating to open meetings).

§ 709. Public notice

(a) Meetings. — An agency shall give public notice of its first regular meeting of each calendar or fiscal year not less than three days in advance of the meeting and shall give public notice of the schedule of its remaining regular meetings. An agency shall give public notice of each special meeting or each rescheduled regular or special meeting at least 24 hours in advance of the time of the convening of the meeting specified in the notice. Public notice is not required in the case of an emergency meeting or a conference. Professional licensing boards within the Bureau of Professional and Occupational Affairs of the Department of State of the Commonwealth shall include in the public notice each matter involving a proposal to revoke, suspend or restrict a license.

(b) Notice. — With respect to any provision of this chapter that requires public notice to be given by a certain date, the agency, to satisfy its legal obligation, must give the notice in time to allow it to be published or circulated within the political subdivision where the principal office of the agency is located or the meeting will occur before the date of the specified meeting.

(c) Copies. — In addition to the public notice required by this section, the agency holding a meeting shall supply, upon request, copies of the public notice thereof to any newspaper of general circulation in the political subdivision in which the meeting will be held, to any radio or television station which regularly broadcasts into the political subdivision and to any interested parties if the newspaper, station or party provides the agency with a stamped, self-addressed envelope prior to the meeting.

(d) Meetings of General Assembly in Capitol Complex. — Notwithstanding any provision of this section to the contrary, in case of sessions of the General Assembly, all meetings of legislative committees held within the Capitol Complex where bills are considered, including conference committees, all legislative hearings held within the Capitol Complex where testimony is taken and all meetings of legislative commissions held within the Capitol Complex, the requirement for public notice thereof shall be complied with if, not later than the preceding day:

(1) The supervisor of the newsroom of the State Capitol Building in Harrisburg is supplied for distribution to the members of the Pennsylvania Legislative Correspondents Association with a minimum of 30 copies of the notice of the date, time and place of each session, meeting or hearing.

(2) There is a posting of the copy of the notice at public places within the Main Capitol Building designated by the Secretary of the Senate and the Chief Clerk of the House of Representatives.

(e) Announcement. — Notwithstanding any provision of this chapter to the contrary, committees may be called into session in accordance with the provisions of the Rules of the Senate or the House of Representatives and an announcement by the presiding officer of the Senate or the House of Representatives. The announcement shall be made in open session of the Senate or the House of Representatives.

§ 710. Rules and regulations for conduct of meetings

Nothing in this chapter shall prohibit the agency from adopting by official action the rules and regulations necessary for the conduct of its meetings and the maintenance of order. The rules and regulations shall not be made to violate the intent of this chapter.

§ 710.1. Public participation

(a) General rule. — Except as provided in subsection (d), the board or council of a political subdivision or of an authority created by a political subdivision shall provide a reasonable opportunity at each advertised regular meeting and advertised special meeting for residents of the political subdivision or of the authority created by a political subdivision or for taxpayers of the political subdivision or of the authority created by a political subdivision or for both to comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action. The board or council has the option to accept all public comment at the beginning of the meeting. If the board or council determines that there is not sufficient time at

a meeting for residents of the political subdivision or of the authority created by a political subdivision or for taxpayers of the political subdivision or of the authority created by a political subdivision or for both to comment, the board or council may defer the comment period to the next regular meeting or to a special meeting occurring in advance of the next regular meeting.

(b) Limitation on judicial relief. — If a board or council of a political subdivision or an authority created by a political subdivision has complied with the provisions of subsection (a), the judicial relief under section 713 (relating to business transacted at unauthorized meeting void) shall not be available on a specific action solely on the basis of lack of comment on that action.

(c) Objection. — Any person has the right to raise an objection at any time to a perceived violation of this chapter at any meeting of a board or council of a political subdivision or an authority created by a political subdivision.

(d) Exception. — The board or council of a political subdivision or of an authority created by a political subdivision which had, before January 1, 1993, established a practice or policy of holding special meetings solely for the purpose of public comment in advance of advertised regular meetings shall be exempt from the provisions of subsection (a).

§ 711. Use of equipment during meetings

(a) Recording devices. — Except as provided in subsection (b), a person attending a meeting of an agency shall have the right to use recording devices to record all the proceedings. Nothing in this section shall prohibit the agency from adopting and enforcing reasonable rules for their use under section 710 (relating to rules and regulations for conduct of meetings).

(b) Rules of the Senate and House of Representatives. — The Senate and House of Representatives may adopt rules governing the recording or broadcast of their sessions and meetings and hearings of committees.

§ 712. General Assembly meetings covered

Notwithstanding any other provision, for the purpose of this chapter, meetings of the General Assembly which are covered are as follows: all meetings of committees where bills are considered, all hearings where testimony is taken and all sessions of the Senate and the House of Representatives. Not included in the intent of this chapter are caucuses or meetings of any ethics committee created pursuant to the Rules of the Senate or the House of Representatives.

§ 713. Business transacted at unauthorized meeting void

A legal challenge under this chapter shall be filed within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open at which this chapter was violated, provided that, in the case of a meeting which was not open, no legal challenge may be commenced more than one year from the date of said meeting. The court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached. Should the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official action taken at the meeting shall be invalid. Should the court determine that the meeting met the requirements of this chapter, all official action taken at the meeting shall be fully effective.

§ 714. Penalty

Any member of any agency who participates in a meeting with the intent and purpose by that member of violating this chapter commits a summary offense and shall, upon conviction, be sentenced to pay a fine not exceeding $100 plus costs of prosecution.

§ 714.1. Attorney fees

If the court determines that an agency willfully or with wanton disregard violated a provision of this chapter, in whole or in part, the court shall award the prevailing party reasonable attorney fees and costs of litigation or an appropriate portion of the fees and costs. If the court finds that the legal challenge was of a frivolous nature or was brought with no substantial justification, the court shall award the prevailing party reasonable attorney fees and costs of litigation or an appropriate portion of the fees and costs.

§ 715. Jurisdiction and venue of judicial proceedings

The Commonwealth Court shall have original jurisdiction of actions involving State agencies and the courts of common pleas shall have original jurisdiction of actions involving other agencies to render declaratory judgments or to enforce this chapter by injunction or other remedy deemed appropriate by the court. The action may be brought by any person where the agency whose act is complained of is located or where the act complained of occurred.

§ 716. Confidentiality

All acts and parts of acts are repealed insofar as they are inconsistent with this chapter, excepting those statutes which specifically provide for the confidentiality of information. Those deliberations or official actions which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matter related to the investigation of possible or certain violations of the law and quasi-judicial deliberations, shall not fall within the scope of this chapter.</body></html>