

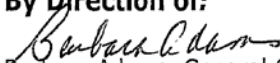
MANAGEMENT DIRECTIVE

Commonwealth of Pennsylvania Governor's Office

Subject:
Right-to-Know Law Compliance

Number:
205.36 Amended

Date:
March 18, 2010

By Direction of:

Barbara Adams, General Counsel

Contact Agency:
Governor's Office of General Counsel, Telephone 717-783-6563

This directive establishes policy, responsibilities, and procedures for agency compliance with the *Right-to-Know Law, 65 P.S. §§ 67.101-67.3104*. This amendment updates policy, responsibilities, and procedures. Marginal dots are excluded due to major changes.

- 1. PURPOSE.** To establish policy, responsibilities, and procedures for agency compliance with the *Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL)*, enacted on February 14, 2008, effective for records requests filed on or after January 1, 2009.
- 2. SCOPE.** This directive applies to any and all departments, boards, commissions, and councils (hereinafter referred to as "agency" or "agencies") under the Governor's jurisdiction.
- 3. OBJECTIVE.** To ensure that all agencies within the scope of this directive are uniformly complying in a timely and appropriate manner to records requests made under the RTKL. This directive does not apply to policies developed by individual agencies relating to release of records that are not required to be released pursuant to the RTKL.
- 4. DEFINITIONS.** When used in this directive, the terms defined in the RTKL shall have the meanings given to them in the RTKL. Other terms used in this directive shall have the following meanings:
 - a. Agency Open Records Officer (AORO).** The official or employee designated by the agency head to receive and respond to RTKL requests.
 - b. Agency Records Coordinator.** The employee appointed by the agency head to have agency-wide responsibility for managing and coordinating the agency's records management program. See *Manual 210.7, State Records Management Manual*.

- c. **Agency Web Site.** The agency's publicly accessible Web site where each agency publishes its RTKL policy and procedures.
- d. **Appeals Officer.** An attorney from the Office of Open Records (OOR) who decides an appeal following an agency's denial of a written RTKL request.
- e. **Business Day.** Any day other than a Saturday or Sunday, except those days when the offices of the agency are closed for all or part of a day:
 - (1) due to a state holiday;
 - (2) pursuant to *Management Directive 530.17, Partial and Full Day Closings of State Offices* and *Management Directive 505.7, Personnel Rules, Section 8.7*;
 - (3) due to a natural or other disaster;
 - (4) due to the request or direction of local, state, or federal law enforcement agencies or officials.
- f. **Deemed Denied.** The denial of a RTKL request by means other than a verbal or written response. A request is deemed denied if one of the following conditions occurs:
 - (1) The agency receiving a written RTKL request fails to make an interim or final response within the initial five business day period specified in the RTKL for response to RTKL requests; or
 - (2) The agency extends the five business day period, as permitted by the RTKL, but then fails to make a final response by the end of that extended period and any required prepayment has been made on time.
- g. **E-Mail Inbox.** The agency-designated electronic inbox that receives e-mail sent to an agency's e-mail address for RTKL requests.
- h. **Final Response.** A written response from an agency to a requester that grants, denies, or grants in part and denies in part, a RTKL request.
- i. **Interim Response.** A written response from an agency to a requester indicating that more than five business days will be required for a final response, due to specified circumstances.
- j. **Office of Open Records (OOR).** The Office of Open Records is established in the Department of Community and Economic Development (DCED), under the *Section 1310* of the RTKL.
- k. **Records Custodian.** Any person having custody, possession or control of a record.
- l. **Records Legal Liaison (RLL).** The agency attorney designated by the agency Chief Counsel to provide legal guidance to the AORO and Agency Records Coordinator on the agency's response to a RTKL request.

- m. Redaction.** The eradication of a portion of a record while retaining the remainder.
- n. RTKL.** *Act 2008-03 P. L. 6, 65 P.S. §§ 67.101-67.3104*, enacted on February 14, 2008, effective for record requests filed on or after January 1, 2009.
- o. RTKL Request.** A written or verbal request for a record that is submitted to the AORO, by position, by name or by mailing to the agency RTKL e-mail inbox and that indicates that it is being made pursuant to the RTKL.
- p. Sensitive Security Information.** Information exempt from disclosure pursuant to *Section 708 (b) (1), (2), (3) and (4)* of the RTKL; and information related to the expenditure of funds from the U.S. Department of Homeland Security, the U.S. Department of Defense or other federal or state funds expended for homeland security, national defense, law enforcement or other public safety activities, including public health preparedness; or information related to the expenditure of funds to ensure the security of public utilities, infrastructure or other essential public resources.
- q. Standard RTKL Form.** The RTKL request form published by the OOR, which all agencies must accept or the form made available by an agency for use in RTKL requests to that agency. See the OOR Web site at: <http://openrecords.pa.gov>.
- r. Written RTKL Request or Written Agency Response.** A written RTKL request or a written agency response is one that is made: on paper and submitted in person or by mail; by e-mail; by facsimile; or by any other electronic means that an agency may designate.

5. POLICY.

- a.** The RTKL repealed the *Act of June 21, 1957 (P. L. 390, No. 212)*, which was the previous "*Right-to-Know Law*," *65 P. S. §§ 66.1-66.9*. The current law (RTKL) is significantly different from the previous one in many respects, including: expanding the definition of a "public record"; shortening the time limits for agency response to written requests; placing the burden of proving that a record is exempt on the agency; specifically permitting requests by e-mail; establishing an Office of Open Records; and adding specific exemptions.
- b.** It is essential that all agencies under the Governor's jurisdiction respond to RTKL requests in a timely, efficient and legally appropriate manner in order to assure the ability of Pennsylvania residents to exercise their right of access to public records under the RTKL. Agency responses to RTKL requests should be uniform and consistent with direction from the Office of General Counsel regarding RTKL responses. The RTKL provides for the imposition of civil penalties against agencies and public officials who do not comply with the RTKL and are found to have acted in bad faith. In addition, if a requester prevails in an appeal to the Commonwealth Court, the RTKL permits the court in certain instances to award attorney fees to the requester, to be paid by the agency.

6. RESPONSIBILITIES.

a. Agency.

- (1) Establish appropriate procedures to ensure compliance with this directive.
- (2) Designate a management level employee of the agency to be the AORO and designate a Deputy AORO, if appropriate, to perform the duties of the AORO in the absence of, or as directed by, the AORO. For an agency with multiple RTKL offices, each RTKL office should have a designated Deputy AORO, who reports to the AORO.
- (3) Advise agency employees to promptly forward RTKL requests to the AORO.
- (4) Establish at least one RTKL office. If an agency establishes more than one RTKL office, the agency shall establish written policies governing the respective powers and responsibilities of one or more agency RTKL offices. Each agency shall staff and equip each RTKL office in such a manner as to assure the prompt and efficient handling of RTKL requests.
- (5) Post the following information at the agency and on the agency's Web site:
 - (a) Contact information for the AORO;
 - (b) The address to which RTKL requests should be mailed or delivered;
 - (c) The RTKL facsimile number and e-mail inbox address for submission of RTKL requests;
 - (d) The OOR RTKL Form and any agency form for submission of a RTKL request;
 - (e) Any policies, procedures and regulations of the agency relating to the RTKL;
 - (f) Applicable duplication fees established by the OOR posted on its Web site at <http://openrecords.pa.gov> and postage fees;
 - (g) Other fees established by the agency as permitted, including:
 - 1 Reasonable and Necessarily Incurred Costs. An agency may impose a reasonable fee for costs necessarily incurred in the production of the public records. However, no charge may be made for an agency or legal review of the record to determine whether the record is a public record that is subject to production.
 - 2 Certified Copies. An agency may assess a reasonable fee for providing certified copies in response to a request for certified copies.

3 Transcripts of administrative proceedings.

- a** Prior to adjudication becoming final, binding and non-appealable, transcripts shall be provided to the requester by the agency stenographer or a court reporter, in accordance with the published procedure of the agency or an applicable contract.
- b** Following an adjudication becoming final, binding and non-appealable, a transcript of an administrative proceeding shall be provided in accordance with the RTKL duplication fees set by the OOR.

4 Enhanced Electronic Access. With the approval of the OOR, an agency may establish user fees if the agency offers enhanced electronic access to records in addition to making the records accessible for inspection and duplication by a requester.

- b. Agency Open Records Officer.** Working with the Agency Records Coordinator and RLL, receive RTKL requests submitted to the agency; direct RTKL requests to other appropriate persons, including parties with whom the agency has contracted to perform a governmental function; track the agency's progress in responding to RTKL requests; redirect a RTKL request to another agency when appropriate and be responsible for the issuance of interim and final responses to RTKL requests. Responses to RTKL requests by the AORO shall constitute an action of the agency.
- c. Chief Counsel.** Designate a RLL to provide legal guidance to the AORO and Agency Records Coordinator on the agency's response to a RTKL request.
- d. Office of General Counsel (OGC).** Provide direction to agency Chief Counsel, AOROs and RLLs on RTKL matters. Any agency wishing to submit a request for an advisory opinion to the OOR must have that request approved in advance by OGC.
- e. Office of Open Records.** The responsibilities of the OOR are set forth in the RTKL and include:
 - (1)** Hearing appeals of denials or deemed denials of a RTKL request by commonwealth agencies.
 - (2)** Developing a RTKL request form to be accepted by all commonwealth agencies. See the OOR Web site at: <http://openrecords.pa.gov>.
 - (3)** Setting fees for duplication, printing and other costs for commonwealth agencies responding to requests, and conducting biannual reviews of the fees being charged.
 - (4)** Providing information relating to the implementation and enforcement of the RTKL.

- (5) Issuing advisory opinions to agencies and requesters.

NOTE: Any agency wishing to submit a request for an advisory opinion to the OOR must have that request approved in advance by OGC.

- (6) Providing training courses to agencies and employees regarding the RTKL and the commonwealth's *Sunshine Act*.
- (7) Establishing a mediation program.
- (8) Maintaining an internet Web site that includes information relating to fees, advisory opinions, and decisions rendered, and the contact information for all AOROs.
- (9) Reporting annually to the General Assembly and the Governor on the activities of the office.

f. **Records Legal Liaison.** Work with the AORO on responses to RTKL requests; review all interim and final responses; and coordinate with OGC, as appropriate.

7. PROCEDURES.

a. RTKL Requests.

- (1) **Verbal and Anonymous RTKL Requests.** Agencies may fulfill verbal requests made under the RTKL, including anonymous requests, but the requester cannot appeal a denial unless the request is a written RTKL request.
- (2) **Submittal of a Written RTKL Request.** An agency shall accept written RTKL requests submitted in person, by mail, facsimile, e-mail, or to the extent provided by agency rules, any other electronic means. However, electronic requests must be addressed to the agency's published facsimile number, e-mailed to the agency's e-mail inbox for RTKL purposes or to the AORO. Written requests must be addressed to the AORO, by name, RTKL e-mail address or by position title. Each agency shall advise its employees to promptly forward RTKL requests to the AORO.

NOTE: If an agency elects to have more than one RTKL office and/or AORO, the agency shall include in its written policies and public notices a statement and explanation of which types of RTKL requests are to be directed to which RTKL office and to which AORO. If an agency establishes more than one RTKL office and/or AORO, the agency shall have the discretion to establish written policies to regulate the types of RTKL requests that may be submitted to them. In the absence of such policies, a RTKL request may be submitted to any AORO of the agency, if addressed to the AORO by name, by RTKL e-mail address or by position title.

- (3) Contents of a Written RTKL Request.** A written RTKL request must include the name and the address to which the agency should address its response; identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested; include an indication that the request is being made pursuant to the RTKL; and be addressed to the AORO, by name, by RTKL e-mail address or by position title.
- (4) Reason for a RTKL Request.** A written RTKL request need not include any explanation of the requester's reason for making the request or the intended use of the records unless otherwise required by law. However, an agency may ask the requester to disclose that reason, in relation to the calculation of fees under *Section 1307(b)(4)(ii)* of the RTKL, which contains fee provisions that relate to the intended use of the records; but the reason or the failure to provide a reason is not a basis for denial of a RTKL request.
- (5) Forms.** An agency must post the RTKL request form developed by the OOR on its Web site and must accept requests made on that form. An agency may also create or adopt its own forms for use by requesters in preparing written RTKL requests and such forms must be posted on its Web site. There is no requirement that a RTKL request be made on a specified form.

b. Processing of RTKL Requests.

- (1)** Upon receiving a written RTKL request at the appropriate RTKL office, the AORO at that office must ensure completion of the following:

 - (a)** Record receipt of an electronic request (e-mail or facsimile) or date-stamp non-electronic written requests.
 - (b)** Assign a tracking number to the RTKL request.
 - (c)** Record the RTKL request in the system used by the agency for tracking RTKL requests and their final disposition.
 - (d)** Compute the day on which the five business day period will expire and note the same on the written request.
 - (e)** Keep an electronic or paper copy of the written RTKL request, including all documents submitted with it and the envelope (if any) in which it came.
 - (f)** Create a file for the retention of the original RTKL request, a copy of the response provided, a record of verbal or written communications with the requester and a copy of other communications.
- (2)** Calculating the five business day period:

 - (a)** The five business day period does not begin to run until a RTKL request is received by the AORO.

- (b) Each agency shall, in its written policies, specify the regular business hours of its RTKL office(s). Any RTKL request received by a RTKL office after the close of those regular business hours shall be deemed to have been received by that office on the following business day.
 - (c) For purposes of determining the end of the five business day period, the day that a RTKL request is received (or deemed to be received) is not counted. The first day of the five business day period is the agency's next business day.
- (3) Because of the strict time limits for an agency response to a RTKL request, an AORO shall promptly process each request and complete intake procedures.

c. Initial Review by the AORO.

- (1) Upon receiving a RTKL request, the AORO shall promptly review it and consult with the RLL. The purpose of this review is to make a good faith effort to determine whether: the record requested is a public record; the agency has possession, custody or control of the requested record; and the agency will require more than five business days to respond. The initial review by the AORO and the RLL shall determine the following:
- (a) Whether the RTKL request must be granted, in whole or in part, without further consideration. For example, if the initial review determines that the requested records are public records, are in the possession and control of the agency, and are immediately accessible, no further analysis is necessary.
 - (b) Whether a basis exists for rejecting the RTKL request, in whole or in part, without further consideration. Such bases include the following:
 - 1 The records sought by the requester are not identified with sufficient specificity.
 - 2 The requester is not a legal U.S. resident.
 - 3 The requested record does not exist.
 - 4 While the agency possesses the requested document, it is not a "record" pursuant to the RTKL. The requested information must have a clear nexus to the agency's activities or transactions to be a "record" as defined by the RTKL. If the requested information does not document a transaction or activity of an agency or it was not created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency, it is not a record.
 - 5 The agency does not possess the document and does not have an affirmative obligation to obtain the document from a third party.

- 6 The AORO has been advised by agency counsel that the requested record is not a public record under the RTKL.
- (c) Whether the record requested is maintained by another agency. In that case, the RTKL request should be directed to the AORO of that agency, although no rights accrue to the requester until such time as a RTKL request is made by the requester to the other agency.
- (2) In conducting this initial review, the AORO may contact the requester in order to obtain clarification or additional information. However, such contact or request for clarification, alone, does not alter the time limits for response under the RTKL. If, as a part of any such contact, the AORO concludes that the requester has changed or rescinded the RTKL request, the AORO shall seek the requester's verbal or written confirmation and shall record and retain in the file any confirmation that is given. A copy of any writing to or from the requester shall become a part of the file. If contact is verbal (in person or by telephone) the AORO shall immediately document the conversation and include that documentation as a part of the file. If the result of the communication with the requester is a more specific explanation of the original RTKL request or a reduction of that RTKL request, the modification shall not be considered a new RTKL request. If, however, the communication with the requester results in a RTKL request for different or additional records, it shall be treated as a new RTKL request as to those records.
- (3) If, after the AORO completes this initial review, the RTKL request is not rejected in whole, the AORO shall make appropriate inquiry of potential records custodians. Each potential records custodian contacted by the AORO shall promptly review records under the custodian's control and advise the AORO as to any records that are responsive to the request that they may have and identify any other potential record custodians who may have such records. If a records custodian has a concern about whether the requester should receive access to or copies of a record, such records custodian shall promptly notify the AORO. Upon receiving such notice, the AORO shall take such steps as the AORO deems appropriate, including review by the RLL, or other agency attorney(s), as designated by the agency Chief Counsel. The agency or the AORO may establish such procedures as are deemed desirable to effectively record actions taken, to apprise agency officials of RTKL requests and issues related thereto and to assure timely and accurate responses.
- (4) The AORO also shall review the request in order to determine whether the estimated fees required to fulfill the RTKL request exceed \$100, pursuant to *Section 1307* of the RTKL. If they do, the AORO shall present the requester with a demand for prepayment. The demand for prepayment may specify a reasonable period of time, such as 15 business days from the mailing date of the interim response, within which the requester must make such prepayment. An agency may require that such prepayment be made by certified check or that an ordinary check must clear before being considered as received by the agency. If the requester fails to make prepayment within the specified time and does not appeal, the agency is not required to produce the records requested and may deem the request withdrawn.

d. Interim Response.

- (1) An agency must provide a final response to a RTKL request within five business days unless one or more specific conditions are satisfied and the AORO gives the requester written notice that additional time will be required. That notice is referred to as an "interim response". The requester's written agreement is required if an extension for a final response will be over 30 days. Otherwise, the RTKL request is deemed denied. The RLL shall review the interim response before it is sent out by the AORO and agencies should refer to the sample letters and templates provided by OGC in constructing their responses.
- (2) The AORO may send an interim response if any of the following apply:
 - (a) The RTKL request requires redaction of a public record.
 - (b) The RTKL request requires retrieval of a record stored at a remote location.
 - (c) A response within the five business day period cannot be accomplished due to bona fide staffing limitations, which limitations must be specified in the interim response.
 - (d) A legal review is necessary to determine whether the record requested is subject to access under the RTKL.
 - (e) The requester has not complied with the agency's policies regarding access to public records.
 - (f) The requester is required to prepay fees that are estimated to exceed \$100. When such prepayment is required, the time period for the agency final response shall restart as of when the payment has been received. If the payment is not received by the date indicated by the agency for payment and the requester does not appeal, the request shall be deemed withdrawn.
 - (g) The extent or nature of the request precludes a response within the required time period.
- (3) An interim response must meet the following criteria:
 - (a) It must be sent to the requester on or before the last day of the five business day period.
 - (b) It must include a statement notifying the requester of the reason for a delay in providing the final response.
 - (c) It must state a reasonable date that the final response is expected to be provided. If the date is more than 30 calendar days from the end of the five business day period, and the agency does not provide a response within 30 calendar days, the RTKL request will be deemed denied unless the requester agrees in writing to a longer extension and the response is made within that time.

e. Final Response.

- (1) The AORO has the duty to prepare and send written final responses, with appropriate assistance from the RLL, who shall review the final response before it is sent. Agencies should refer to the sample letters and templates provided by OGC in constructing their responses.
 - (2) The final response shall grant, deny, or partially grant or deny the request.
 - (3) A request may be granted by providing a requester with access to inspect a record electronically or as otherwise maintained by the agency, either: by providing access in the offices of the agency, if agreed to by the requester; by sending a copy to the requester, upon payment for duplication, mailing and/or other permissible fees; or by notifying the requester that the record is available through publicly accessible electronic means. In the latter case, if the requester writes to the agency within 30 days stating that the requester is unable or unwilling to access the information electronically, the agency shall provide the records in paper format, upon payment of all applicable fees.
 - (4) If a written RTKL request is denied in whole or in part, a final written response must be issued, which must include the following:
 - (a) A description of the record requested.
 - (b) The specific reasons for the denial, including a citation of supporting legal authority. If the denial is the result of a determination that the record requested is not a public record, the specific reasons for the agency's determination that the record is not a public record shall be included.
 - (c) The typed or printed name, title, business address, business telephone number and signature of the AORO on whose authority the denial is issued.
 - (d) Date of response.
 - (e) The procedure to appeal the denial of access under the RTKL.
 - (5) An agency may send written responses to requesters by United States mail, by hand (in person or by delivery service), by facsimile or by e-mail.
 - (6) **Deemed Denials.** The failure of an agency to make a timely written final response is a deemed denial under the RTKL.
- f. Redaction.** If only portions of a public record are subject to public access under the RTKL, the agency shall not deny access to the record based upon the fact that portions are not subject to public access. Rather, the agency shall redact the portions that are not subject to public access under the RTKL, produce the portions that are subject to public access and state the basis for redaction.

g. Agency Discretion. An agency may provide a requester access to a record that is exempt from public disclosure under the RTKL if all of the following apply: disclosure is not prohibited by federal or state law or regulation or court order; the record is not protected by privilege; and the agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access. This determination must be made by the agency head, and not the AORO or the RLL. If the agency head determines that a non-public record should be provided in response to a RTKL request, the agency shall notify any third party that provided the information, the person that is the subject of the record and the requester.

h. Duplication of and Physical Access to Public Records.

(1) Unless otherwise provided by law, the public records of an agency shall be available for access during the regular business hours of the agency and shall be available for access and duplication in accordance with the RTKL. In the case of a public record that is available only through electronic means, the agency may either provide paper copies of the record or provide access (under supervision, as deemed appropriate, to prevent access to information that is not a public record of the agency) at a computer or computer terminal located in a public records access room. However, the RTKL does not require an agency to provide access to any computer either of an agency or individual employee of an agency. In making any records electronically available, agencies shall exercise care not to disclose information protected by the RTKL.

(2) **Public Records Access Room.** An agency may, in its discretion, establish one or more public records access rooms, as it deems appropriate, in order to provide a specific, established site for public access to certain public records of an agency. While the RTKL does not require an agency to provide access to any computer either of an agency or individual employee of an agency, an agency may place one or more computers or computer terminals in its public access room, in order to provide access to electronic records. An agency that establishes a public records access room has the discretion to establish policies governing the use of that room including, but not limited to, the hours of access, restrictions or prohibitions on the removal of records, the ability of a requester to bring duplication or other equipment into the room, and limitations on use of computers and computer terminals (including limiting to use under supervision to prevent access to information which is not a public record of the agency). If an agency has more than one public records access room, the agency has the discretion to establish different policies for each such room. If an agency elects not to establish such a room, the agency's AORO shall determine on an *ad hoc* basis the building and room where records will be made available to a requester and the hours of availability.

(3) Each agency has the discretion to establish its own policies regarding how records are duplicated. For example, an agency may make its duplication equipment available to a requester but require that the requester operate the equipment or the agency may assign its own staff to make the duplications requested by the requester.

- (4) A public record must be provided to a requester in the medium requested if the record exists in that medium. Otherwise, the public record must be provided in the medium in which it exists. If a public record only exists in one medium, the agency is not required to convert it to another medium, except that if the public record is only available in an electronic form, the agency must print it out on paper, if the requester so requests.
- (5) An agency is not required to create a public record that does not already exist, nor is an agency required to compile, maintain, format, or organize a public record in a manner in which the agency does not currently do so.

i. Requests for Certain Records.

(1) Trade Secrets or Confidential Proprietary Information. Trade secrets and confidential proprietary information are covered by exemptions from production under the RTKL. In addition, special notification rules apply to information that included a written statement, when first provided to the commonwealth, that the information was a trade secret or confidential proprietary information. When an AORO receives a request for such records, the following steps shall be followed:

(a) Before the last day of the five business day period, the AORO shall:

- 1** send an interim response to the requester stating that extra time will be required in order to conduct a legal review as to whether the requested records are protected from disclosure under the exemption for trade secrets and confidential proprietary information.
- 2** notify the third party that a RTKL request has been made, and that the third party has five business days to provide input to the agency.

(b) After ten business days have passed from the time notice was sent to the third party, the AORO shall deny the request unless the third party has consented to the record being produced.

(2) Sensitive Security Information. When an AORO receives a RTKL request for a record that may contain sensitive security information, the following steps shall be followed:

- (a)** Before the last day of the five business day period, the AORO shall send an interim response to the requester stating that extra time will be required in order to conduct a legal review as to whether the requested records are protected from disclosure under the applicable security exemption.
- (b)** The AORO shall immediately forward the request to the RLL, who will alert the OGC RTKL Coordinator for such requests.
- (c)** The AORO shall collect all records responsive to the request and forward them to the OGC designate for review prior to the final agency response.

- (3) Requests for Messages in Electronic Storage.** E-mail, voicemail and text messages all involve recorded information in electronic storage. The AORO should follow the same steps to determine whether the requested messages are public records as with any other requested information.
- (a)** If the content of the message is related to the business of the agency, the message is a record. If the requested information does not document a transaction or activity of an agency or it was not created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency, it is not a record. Under the commonwealth's records management policy, a non-record is to be deleted or disposed of immediately and a transitory record is to be disposed of once its short-term administrative value is completed.
- (b)** If the record requested is in electronic form, the determination of whether it is a public record must be made on a case-by-case basis. The AORO shall not assume the fact that an e-mail has a confidentiality or privilege disclaimer at the bottom means that it is exempt under the RTKL.
- j. Appeal Process.** Appeals of a commonwealth agency denial for access to a document will go first to the OOR, after which they may be appealed to Commonwealth Court.
- (1)** When a request is denied or deemed denied, whether in whole or in part, the requester may file an appeal with the OOR within 15 business days of the mailing date of the agency response or of the deemed denial.
- (2)** The appeal shall state the grounds for the requester's assertion that the record requested is a public record and shall address any grounds stated by the agency for delaying or denying the request.
- (3)** A person other than the agency or the requester with a direct interest in the record subject to an appeal has 15 days following actual knowledge of the appeal, but no later than the date the Appeals Officer issues an order, to file a written request to provide information or to appear before the Appeals Officer in support of the requester's or the agency's position in the appeal. The Appeals Officer may, but need not, grant the request.
- (4)** The RLL or other attorney assigned by agency Chief Counsel shall represent the AORO on appeal.
- (a)** The RLL or other attorney assigned by agency Chief Counsel is responsible for promptly compiling the record on appeal and transmitting the record to the OOR.
- (b)** Under the RTKL, one of the duties of the Appeals Officer is to "consult with agency counsel as appropriate". To avoid any due process issues, the RLL should not participate in any off-the-record or *ex parte* discussions with the Appeals Officer.

- (c) The RLL or other attorney assigned by agency Chief Counsel shall make a determination, independent from the determination of the Appeals Officer, as to whether any person other than agency personnel should be advised of the appeal and offered the opportunity to provide information or to appear at a hearing on behalf of the agency, if one is conducted.
- (5) The Appeals Officer may, but is not required to, hold a hearing on the appeal.
- (6) The Appeals Officer shall make a final determination regarding the agency's response within 30 calendar days of the receipt of the appeal, unless the requester agrees to an extension of time. If a final determination is not made within 30 calendar days, or within the extension of time agreed upon by the requester, the appeal is deemed denied.

k. Judicial Review

- (1) The requester or an agency may file a petition for review with Commonwealth Court within 30 days of the mailing date of the final determination of the Appeals Officer or within 30 days of the date the request for access was denied or deemed denied.
- (2) A petition for review filed with the Commonwealth Court will stay the release of the records until a decision is rendered.

This directive replaces, in its entirety, *Management Directive 205.36* dated November 20, 2008.