

No. 2002-100

AN ACT

HB 2100

Amending the act of June 21, 1957 (P.L.390, No.212), entitled "An act requiring certain records of the Commonwealth and its political subdivisions and of certain authorities and other agencies performing essential governmental functions, to be open for examination and inspection by citizens of the Commonwealth of Pennsylvania; authorizing such citizens under certain conditions to make extracts, copies, photographs or photostats of such records; and providing for appeals to the courts of common pleas," further providing for definitions, for examination and inspection and for extracts, copies or photostats; providing for denial of access to public records, for redaction, for response to requests for access and for final agency determinations; further providing for appeal from denial of right; and providing for court costs and attorney fees, for penalty and for immunity.

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

Section 1. Section 1 of the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law, amended June 17, 1971 (P.L.160, No.9), is amended to read:

[Section 1. In this act the following terms shall have the following meanings:]

Section 1. 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:

[(1)] "Agency." Any *office*, department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, the Pennsylvania Turnpike Commission, *the State System of Higher Education* or any State or municipal authority or similar organization created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function.

"Commonwealth agency." *An agency which is a Commonwealth agency as that term is defined under 62 Pa.C.S. § 103 (relating to definitions).*

"Non-Commonwealth agency." *An agency which is not a Commonwealth agency.*

[(2)] "Public [Record] record." Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, That the term "public records" shall not mean any report, communication or other paper, the publication of

which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those reports filed by agencies pertaining to safety and health in industrial plants; it shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, excepting therefrom however the record of any conviction for any criminal act.

"Record." Any document maintained by an agency, in any form, whether public or not.

"Requester." A person who is a resident of the Commonwealth and requests a record pursuant to this act.

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

Section 2. Section 2 of the act is amended to read:

[Section 2. Every public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania.]

Section 2. Procedure for access to public records.

(a) General rule.—Unless otherwise provided by law, a public record shall be accessible for inspection and duplication by a requester in accordance with this act. A public record shall be provided to a requester in the medium requested if the public record exists in that medium; otherwise, it shall be provided in the medium in which it exists. Public records shall be available for access during the regular business hours of an agency. Nothing in this act shall provide for access to a record which is not a public record.

(b) Requests.—Agencies may fulfill verbal requests for access to records and anonymous requests for access to records. In the event that the requester wishes to pursue the relief and remedies provided for in this act, the requester must initiate such relief with a written request.

(c) Written requests.—A written request for access to records may be submitted in person, by mail, by facsimile or, to the extent provided by agency rules, any other electronic means. A written request shall be addressed to the agency head or other person designated in the rules established by the agency. 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.

(d) Electronic access.—*In addition to the requirements of subsection (a), an agency may make its public records available through any publicly accessible electronic means. If access to a public record is routinely available by an agency only by electronic means, the agency shall provide access to inspect the public record at an office of the agency.*

(e) Creation of a public record.—*When responding to a request for access, an agency shall not be required to create a public record which does not currently exist or to compile, maintain, format or organize a public record in a manner in which the agency does not currently compile, maintain, format or organize the public record.*

(f) Conversion of an electronic record to paper.—*If a public record is only maintained electronically or in other nonpaper media, an agency shall, upon request, duplicate the public record on paper when responding to a request for access in accordance with this act.*

(g) Retention of records.—*Nothing in this act is intended to modify, rescind or supersede any record retention and disposition schedule established pursuant to law.*

Section 3. Section 3 of the act is repealed.

Section 4. The act is amended by adding sections to read:

Section 3.1. Access to public records.

An agency may not deny a requester access to a public record due to the intended use of the public record by the requester.

Section 3.2. Redaction.

If an agency determines that a public 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 and cannot be separated, the agency shall redact from the public 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 public 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 section 3.3.

Section 3.3. Commonwealth agency's response to written requests for access.

(a) General rule.—*Upon receipt of a written request for access to a record, a Commonwealth agency shall make a good faith effort to determine if the record requested is a public record and to respond as promptly as possible under the circumstances existing at the time of the request but shall not exceed ten business days from the date the written request is received by the Commonwealth agency head or other person designated by the Commonwealth agency for receiving such requests. If the Commonwealth agency fails to send the response within ten business*

days of receipt of the written request for access, the written request for access shall be deemed denied.

(b) Exception.—Upon receipt of a written request for access, if a Commonwealth agency determines that one of the following applies:

- (1) the request for access requires redaction of a public record in accordance with section 3.2;*
- (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 public record subject to access under this act;*
- (5) the requester has not complied with the Commonwealth agency's policies regarding access to public records; or*
- (6) the requester refuses to pay applicable fees authorized by section 7 of this act,*

the Commonwealth agency shall send written notice to the requester within ten business days of the Commonwealth agency's receipt of the request for access. The notice shall include a statement notifying the requester that the request for access is being reviewed, the reason for the review and a reasonable date that a response is expected to be provided. If the date that a response is expected to be provided is in excess of 30 days, following the ten business days allowed for in subsection (a), the request for access shall be deemed denied.

(c) Denial.—If a Commonwealth agency's response is a denial of a written request for access, whether in whole or in part, a written response shall be issued and include:

- (1) A description of the record requested.*
- (2) 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.*
- (3) The typed or printed name, title, business address, business telephone number and signature of the public official or public employee on whose authority the denial is issued.*
- (4) Date of the response.*
- (5) The procedure to appeal the denial of access under this act.*

(d) Certified copies.—If a Commonwealth agency's response grants a request for access, the Commonwealth agency shall, upon request, provide the requester with a certified copy of the public record if the requester pays the applicable fees pursuant to section 7.

Section 3.4. Non-Commonwealth agency's response to written requests for access.

(a) General rule.—Upon receipt of a written request for access to a record, a non-Commonwealth agency shall make a good faith effort to determine if the record requested is a public record and to respond as promptly as possible under the circumstances existing at the time of the request but shall not exceed five business days from the date the written request is received by the non-Commonwealth agency head or other person designated in the rules established by the non-Commonwealth agency for receiving such requests. If the non-Commonwealth 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.

(b) Exception.—Upon receipt of a written request for access, if a non-Commonwealth agency determines that one of the following applies:

- (1) the request for access requires redaction of a public record in accordance with section 3.2;*
- (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 accompanied due to bona fide and specified staffing limitations;*
- (4) a legal review is necessary to determine whether the record is a public record subject to access under this act;*
- (5) the requester has not complied with the non-Commonwealth agency's policies regarding access to public records; or*
- (6) the requester refuses to pay applicable fees authorized by section 7,*

the non-Commonwealth agency shall send written notice to the requester within five business days of the non-Commonwealth agency's receipt of the request notifying the requester that the request for access is being reviewed, the reason for the review and a reasonable date that a response is expected to be provided. If the date that a response is expected to be provided is in excess of 30 days, following the five business days allowed in subsection (a), the request for access shall be deemed denied.

(c) Denial.—If a non-Commonwealth agency's response is a denial of a written request for access, whether in whole or in part, a written response shall be issued and include:

- (1) A description of the record requested.*
- (2) 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.*
- (3) The typed or printed name, title, business address, business telephone number and signature of the public official or public employee on whose authority the denial is issued.*
- (4) Date of the response.*

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

(d) Certified copies.—If a non-Commonwealth agency's response grants a request for access, the non-Commonwealth agency shall, upon request, provide the requester with a certified copy of the public record if the requester pays the applicable fees pursuant to section 7.

Section 3.5. Final agency determination.

(a) Filing of exceptions.—If a written request for access is denied or deemed denied, the requester may file exceptions with the head of the agency denying the request for access within 15 business days of the mailing date of the agency's response or within 15 days of a deemed denial. The exceptions shall state grounds upon which the requester asserts that the record is a public record and shall address any grounds stated by the agency for delaying or denying the request.

(b) Determination.—Unless the requester agrees otherwise, the agency head or his designee shall make a final determination regarding the exceptions within 30 days of the mailing date of the exceptions. Prior to issuing the final determination regarding the exceptions, the agency head or his designee may conduct a hearing. The determination shall be the final order of the agency. If the agency head or his designee determines that the agency correctly denied the request for access, the agency head or his designee shall provide a written explanation to the requester of the reason for the denial.

Section 5. Section 4 of the act is amended to read:

[Section 4. Any citizen of the Commonwealth of Pennsylvania denied any right granted to him by section 2 or section 3 of this act, may appeal from such denial. If such court determines that such denial was not for just and proper cause under the terms of this act, it may enter such order for disclosure as it may deem proper.]

Section 4. Judicial appeal.

(a) Commonwealth agency.—Within 30 days of the mailing date of a final determination of a Commonwealth agency affirming the denial of access, a requester may file a petition for review or other document as might be required by rule of court with the Commonwealth Court.

(b) Other agency.—Within 30 days of a denial by a non-Commonwealth agency under section 3.4(c) or of the mailing date of a final determination of a non-Commonwealth agency affirming the denial of access, a requester may file a petition for review or other document as might be required by rule of court with the court of common pleas for the county where the non-Commonwealth agency's office or facility is located or bring an action in the local magisterial district. A requester is entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached.

(c) Notice.—*An agency shall be served notice of actions commenced in accordance with subsection (a) or (b) and shall have an opportunity to respond in accordance with applicable court rules.*

(d) Record on appeal.—*The record before a court shall consist of the request, the agency's response, the requester's exceptions, if applicable, the hearing transcript, if any, and the agency's final determination, if applicable.*

Section 6. The act is amended by adding sections to read:

Section 4.1. Court costs and attorney fees.

(a) Reversal of agency determination.—*If a court reverses an agency's final determination, 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 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 law.*

(b) Sanctions for frivolous requests or appeals.—*If a court affirms an agency's final determination, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to the agency if the court finds that the legal challenge to the agency's final determination 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 5. Penalties.

(a) Summary offense.—*An agency or public official who violates this act with the intent and purpose of violating this act commits a summary offense subject to prosecution by the Attorney General or the appropriate district attorney and shall, upon conviction, be sentenced to pay a fine of not more than \$300 plus costs of prosecution.*

(b) Civil penalty.—*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 \$300 per day until the public records are provided.*

Section 6. Immunity.

(a) General rule.—*Except as provided in sections 4.1 and 5 and other statutes governing the release of records, no agency, public official or public employee shall be liable for civil or criminal damages or 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 7. Fee limitations.

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

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

(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 public 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 native media as provided by subsection (b) unless the requester specifically requests for the public record to be duplicated in the more expensive medium.

(e) Enhanced electronic access.—If an agency offers enhanced electronic access to public records in addition to making the public 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 public 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 and may not be established with the intent or effect of excluding persons from access to public 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 public record, including, but not limited to, when:

- (1) the requester duplicates the public 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 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 8. Implementation.

(a) Requirement.—*An agency shall establish written policies and may promulgate regulations necessary to implement this act.*

(b) Content.—*The written policies shall include the name of the office to which requests for access shall be addressed and a list of applicable fees.*

(c) Prohibition.—*A policy or regulation may not include any of the following:*

(1) *A limitation on the number of public 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 which are public records.*

(d) Posting.—*The policies shall be conspicuously posted at the agency and may be made available by electronic means.*

Section 9. Practice and procedure.

The provisions of 2 Pa.C.S. (relating to administrative law and procedure) shall not apply to this act.

Section 7. If an agency receives a request for a record that is subject to a confidentiality agreement executed before the effective date of this act, the law in effect at the time the agreement was executed, including judicial interpretation of the law, shall govern access to the record, even if the record is a public record, unless all parties to the confidentiality agreement agree in writing to be governed by this act.

Section 8. This act shall take effect in 180 days.

APPROVED—The 29th day of June, A.D. 2002.

MARK S. SCHWEIKER