



# THE RIGHT TO KNOW OR THE RIGHT TO NO:

PUBLIC RECORDS LAWS AND  
INVESTIGATIVE JOURNALISM IN PHILADELPHIA

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## About MIC



The Media, Inequality & Change (MIC) Center is a collaboration between the University of Pennsylvania's Annenberg School and Rutgers University's School of Communication and Information. The Center explores the intersections between media, democracy, technology, policy, and social justice. MIC produces engaged research and analysis while collaborating with community leaders to help support activist initiatives and policy interventions. The Center's objective is to develop a local-to-national strategy that focuses on communication issues important to local communities and social movements in the region, while also addressing how these local issues intersect with national and international policy challenges.

## About the Center for Media at Risk



We are in uncharted waters. Political intimidation threatens media practitioners worldwide, and disinformation campaigns destabilize public trust. The Center for Media at Risk at the University of Pennsylvania's Annenberg School for Communication offers the chance to strategize in response to threatening political conditions. Knowing how media practitioners work under authoritarian regimes and circumstances of creeping authoritarianism can help free/defend/empower/protect/save the media.

## About the Authors

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## About the Report

The City of Philadelphia has a transparency problem impacting its newsrooms. Many studies have overlooked the ways in which Pennsylvania's Freedom of Information (FOI) laws constrain and empower local media practitioners. To fill in this major gap in scholarship, between October 2018 and January 2019, we conducted 17 interviews with Pennsylvania-based journalists in order to highlight their experiences with Pennsylvania's Right to Know (RTK) law. This report considers the results that their records requests have yielded and includes a comparative assessment of the RTK law as a mechanism of transparency and accountability. With special consideration to the difficulties that journalists face when they encounter resistance from open-records officers, we ask how journalists telling stories in and around Philadelphia can more effectively optimize the resource of public information in service of investigative reporting. We close by recommending a series of industry and policy reforms in order to ensure its future as a powerful investigative tool in Philadelphia's newsrooms. This research was co-funded by MIC and the Center for Media at Risk as part of a series on the future of journalism.

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# Executive Summary

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Since Pennsylvania passed its first Right-to-Know Law (RTKL) in 1957, news media professionals have noted a gulf between its purported objectives and its implementation. Though the law was “[d]esigned to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions,” its uses in practice have disappointed many members of the Philadelphia press.<sup>1</sup> Even with the enactment of an amended RTK law in 2009, practical and logistical issues have continued to stymie journalists seeking public records for investigating stories in the Philadelphia area. Consequently, with little or no prior training, news media professionals have had to learn to navigate an opaque and unpredictable bureaucratic system in which delays and denials are the only routine part of the process.

This exploratory study of the impacts and infrastructure of right to know (RTK) relies on semi-structured interviews to consider how local- and state-level bureaucracies have impacted the functioning of contemporary Philadelphia newsrooms. It outlines some of the primary strategies that journalists and editors alike use to compel government agencies to disclose information.

## Key Findings:

- When the bureaucratic process of records disclosure functions efficiently, RTK can serve as a powerful lever of transparency for journalists and their audiences in Philadelphia and beyond.
- RTK timelines are often protracted, straining journalists and their editors across the board. The severity varies based on the particular beat, with investigations into local crime and courts tending to be the most complicated.
- Facing a convoluted and sometimes even adversarial system, media practitioners may turn to informal requests, leakers, or off-the-record sources to obtain documents rather than filing traditional records requests.
- Patience does not necessarily produce records, and delays do not always lead to denials. The strategies involved are more complex, and the results are often unpredictable.
- The imprecision of the current RTK law, including its many exemptions, leaves ample room for interpretation and enables open-records officers in some agencies to overzealously withhold documents.
- The size and institutional capacity of media institutions makes a major difference in local journalists’ ability to employ RTK methods.
- The temporal, economic, and legal challenges that hinder effective uses of RTK are exacerbated in the case of freelance journalists engaging with the process.
- There is little to no formalized training for RTK methods or PA transparency laws state in journalism programs or in newsrooms. Ad-hoc trainings or one-off boot camps are much more common.

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<sup>1</sup> *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d*, 75 A.3d 453 (Pa. 2013).

# Methodology

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Between October 2018 and January 2019, the researchers conducted 17 interviews (in person and over the phone) with one media lawyer and 16 individuals who work or had worked at six Pennsylvania-based news organizations.<sup>2</sup> Interviewees were identified through word-of-mouth and snowball sampling. To gain firsthand experiences with the technical infrastructure underlying the local RTK system, the researchers also filed records requests with the Philadelphia Police Department and the Philadelphia Law Department.<sup>3</sup> Journalists with minimal experience with RTK were not included in this study.

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- 2 To ensure that interviewees felt comfortable discussing their relationships with editors and the status of ongoing records requests, they had the option of remaining anonymous. Although most opted out of using a pseudonym, those who did choose this option are identified by an asterisk the first time they are cited.
  - 3 An example of an acknowledgement letter sent to us after filing a records request is enclosed as Appendix I.

# Background

Significant revelations about the City of Philadelphia's incentives offered to Amazon, the renaming of public schools, citizen grievances against the Philadelphia Police Department, and sexual harassment in Philadelphia's City Hall are just a few of the findings that Philadelphia-based journalists have uncovered through the Pennsylvania RTK Law over the last decade.<sup>4</sup> Yet, while public records laws have vitally impacted the daily labor of investigative journalism, there has been very little research conducted into the practices reporters employ in their attempts to navigate these laws successfully. Furthermore, researchers who have probed this topic have primarily focused on applications of public records laws rather than the effects and challenges on the media practitioners who rely on them.<sup>5</sup> Many of these studies have a pattern of overlooking state-level laws and their substantive effects on shaping local news coverage;

they also tend to ignore the role power relations between journalists, editors, and RTK open-records officers can have in impacting local ecologies of transparency. To fill in the gaps in the existing scholarship, this project maps out the affordances and challenges of RTK-based journalism that news media practitioners in and around Philadelphia are experiencing.

Pennsylvania represents a unique case study in state transparency laws. Though the state first enacted a RTK law in 1957, a full decade before FOIA went into effect, the statute was very weak.<sup>6</sup> Both the 1957 version and the 2002 amendments operated under the presumption that government documents were not public records unless a requester could demonstrate otherwise. It was for this reason that legal scholars and activists alike declared Pennsylvania as having "one of the worst right to know laws in the United States."<sup>7</sup> Facing an uphill battle, requesters struggled to obtain information in ways that their counterparts in states such as Florida or Washington did not.<sup>8</sup>

To address these issues, in 2007, the Pennsylvania General Assembly took steps to make the a significant revision to the law.<sup>9</sup> Discussing the revisions in an Assembly session, State Senator Dominic Pileggi, one of

4 Jacob Adelman, "Details of Philadelphia's cash offer to Amazon in HQ2 pitch ordered to be shared," *Philadelphia Inquirer*, April 27, 2018, [https://www.inquirer.com/philly/business/real\\_estate/commercial/amazon-hq2-headquarters-pitch-philadelphia-release-payment-cash-details-20180427.html](https://www.inquirer.com/philly/business/real_estate/commercial/amazon-hq2-headquarters-pitch-philadelphia-release-payment-cash-details-20180427.html); Kathy Boccella and William Bender, "Billionaire Stephen Schwarzman had long list of demands in exchange for \$25M donation to Abington High," *Philadelphia Inquirer*, April 11, 2018, <http://www.philly.com/philly/education/stephen-schwarzman-25m-gift-abington-high-school-original-agreement-demands-20180411.html>; Ryan Briggs and Max Marin, "Infernal Affairs: Philadelphia Police identify officers named in hundreds of civilian complaints," *Philadelphia Weekly*, August 9, 2018, [http://www.philadelphiaweekly.com/news/infernal-affairs-philadelphia-police-identify-officers-named-in-hundreds-of-article\\_01dfa250-9bb5-11e8-88d5-3b5f52c93365.html](http://www.philadelphiaweekly.com/news/infernal-affairs-philadelphia-police-identify-officers-named-in-hundreds-of-article_01dfa250-9bb5-11e8-88d5-3b5f52c93365.html); Max Marin and Ryan Briggs, "Sexual harassment in Philadelphia City Hall: Unreported, unrecorded and unpunished," *Philadelphia Weekly*, Jun. 19, 2018, [http://www.philadelphiaweekly.com/news/sexual-harassment-in-philadelphia-city-hall-unreported-unrecorded-and-unpunished/article\\_20d3f9fc-736c-11e8-a7e5-4b32413323df.html](http://www.philadelphiaweekly.com/news/sexual-harassment-in-philadelphia-city-hall-unreported-unrecorded-and-unpunished/article_20d3f9fc-736c-11e8-a7e5-4b32413323df.html).

5 For examples of how long delays associated with FOI have historically constrained journalists, see David Cuillier, "Pressed for Time: U.S. Journalists' Use of Public Records During Economic Crisis," at 9, paper presented at the Global Conference on Transparency Research, Newark, N.J., May 18-20, 2011.

6 See Act of June 21, 1957, P.L. 390, formerly 65 P.S. §§66.1-66.9.

7 For example, see John L. Gedid, "Pennsylvania's 2008 Right to Know Law: Open Access at Last," 49 DUQ. L. REV. 459 (2011); Craig Staudenmeir, "Something Old, Something New," 10 PA. LAWYER 38, 40 (2008). See also the National Freedom of Information Coalition's description of Pennsylvania's FOIA Laws (<https://www.nfoic.org/coalitions/state-foi-resources/pennsylvania-foia-laws>).

8 Each state has its own freedom of information laws. In contrast to Pennsylvania, the public records laws of both Florida and Washington are known for placing strict limits on an agency's authority to deny a public records request. See Appendix III.

9 The 2002 amendments did not substantively change the Pennsylvanian RTKL. For further information on the differences between the 2002 and 2008 amendments, see Jolee Van Horn, "Agency's Email Privacy Trumps Disclosure of Public Records Under the Pennsylvania Right-to-Know Law: A Survey Analyzing the Holding of Easton Area School District v. Baxter and the Court's Battle with Identifying Emails," 22 Widener L.J. 435, 438 (2013).

the new bill's co-sponsors, argued, "Pennsylvania needs a stronger open records law because transparency builds trust in government. . . [A] strong open records law is the true foundation of government reform. By opening government records to public inspection, we give citizens the ability to thoroughly review governmental actions, which is their right."<sup>10</sup>

Signed into law by then-Governor Ed Rendell in February 2008 and enacted in January 2009, the new RTKL, also known as Act 3 of 2008, introduced several changes aimed at increasing government transparency and open access. It reversed the presumption of transparency, stating that government records are assumed to be public unless an agency can demonstrate otherwise. It also created an oversight agency called the Office of Open Records (OOR) to oversee the functions of Commonwealth (state-level) and local public records offices. Furthermore, it expanded the definition of what constitutes a record and clearly referred to digital and electronic files.<sup>11</sup>

Yet, even with the most recent iteration of the RTKL in place, the journalists we interviewed concurred that the process of disclosure remains convoluted and burdensome in Pennsylvania. One example of a controversial change to the 2008 version is the inclusion of 30 statutory exemptions. In his discussion of Pennsylvania's RTK law, legal scholar John L. Gedid noted, "Merely counting the number of exceptions does not tell the whole story. Many exceptions are general or unclear, so that it is likely that there will be litigation over

the extent and content of the exemptions."<sup>12</sup> Both the breadth of exemptions and the ambiguity around their applications grant open-records officers considerable leeway to withhold documents, and forces requesters into appeals processes and lawsuits to contest denials. In addition, the participants noted that several other exacerbating factors resulted in Pennsylvania continuing to lag behind most other states in efficient public records access. They suggested that further reforms to the law are necessary to optimize it for requesters.

To more fully understand how Philadelphia-area journalists are coping with the existing RTKL and how the law impacts the contemporary labor of fact-gathering, this project examines their strategies for procuring public records from government agencies. We identify the kinds of stories and media outlets that utilize public records, highlight the experiences of reporters who use RTK material for information about local- and state-level administrative failures, and consider the reception and impacts that their RTK-based reports have yielded. Based on these discussions, we then comparatively assess the viability of the RTK law as a mechanism of transparency and accountability, and the difficulties that journalists face when they encounter resistance from open-records officers or receive incomplete records. Throughout this analysis, we ask how journalists telling stories in and around Philadelphia can most effectively optimize the resource of public information in service of investigative reporting, tell compelling stories, and catalyze reforms and greater accountability.

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10 *Third Consideration and Final Passage of Right to Know Law: Hearing on SB 1 Before the General Assembly, 2007 Leg., 191st Sess. (Pa. 2007).*

11 Gedid, 466-467.

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12 Gedid, 474.

# Journalists' Views on the Right to Know Law

Pennsylvania's Right to Know law has been a source of information as well as frustration for investigative journalists in Philadelphia since the law's most recent iteration went into effect in 2009. Among the news media professionals interviewed for this paper, the consensus was that while the intent of the law was promising, its logistical limitations left much to be desired. Over the last decade, journalists have adjusted to the confines of the new law as the technological and economic shifts in the journalism industry have continued to upend the dynamics of the contemporary newsroom. Yet, even with the multifaceted challenges that retrieving public records has posed, participants agreed that obtaining such documents is often instrumental to breaking and reporting investigative stories.<sup>13</sup>

Mark Dent, a reporter who was formerly at Philadelphia-based news outlet *Billy Penn*, said, "It shows that democracy works and how our government works. We have these bureaucracies that nobody understands. But they require people [to keep documentation]. And through an open records request, someone who has the knowledge of how to do that, they can then share that knowledge with the audience and help it make sense." Incorporating these documents in news stories can help reaffirm that both government bodies and the news media are operating in the public interest.

The use of public records in journalism also offers valuable evidentiary primary-source material. Such documents can determine whether or not to pursue a story and provide leads for the future. As *Philadelphia Inquirer* reporter Claudia Vargas stated, "The key thing about these records is to be able to see for ourselves."

At the same time, *Philadelphia Inquirer* reporter Beth Scottsky\* noted that incorporating records "lends a story more authority. It's not just someone's opinion." The opportunities to report specific statistics, compare governmental data across years, or quote from internal documents can give investigative stories more heft and depth.

Although the current law has been in effect for more than ten years, journalists have not fully optimized the use of RTK, in part because many journalists move from other states and end up working for editors who are not acquainted with the nuances of specific agencies' processes. Individual agencies and departments have gained reputations for varying levels of compliance, and individual public records officers' interpretations of the law can be extremely subjective. According to freelance journalist Max Marin, "There's so much grey area in it. To me, it's one of the most fascinating laws for that reason. Sometimes, you'll just encounter a problem where there is no precedent to point to. You're just like, 'Well, no one's filed anything like this, so we'll just figure it out as we go.' . . . It's a brand-new game and we're all kind of winging it as we go along." Deciding whether to appeal a denial to the Office of Open Records and then up to the Common Pleas Court adds another layer of complexity.<sup>14</sup> The relative lack of established legal precedents based on appeals means that having a case reach the Common Pleas Court carries the high stakes of potentially setting case law for future requesters.<sup>15</sup>

13 A series of records requests has the potential to provide a national scoop, as evidenced, for example, by Brian Collister's acquisition of cell phone video taken by Sandra Bland before her death. See Justin Ray, "How one reporter got the Sandra Bland cell phone video," *Columbia Journalism Review*, May 8, 2019, [https://www.cjr.org/united\\_states\\_project/sandra-bland-video.php](https://www.cjr.org/united_states_project/sandra-bland-video.php).

14 See Appendix IV for an example of a rejection letter that one Philadelphia-based investigative reporter received from one agency, after filing a RTK request. It demonstrates the high level of legal literacy that local media practitioners must develop to counteract agencies' attempts to obfuscate government documents.

15 Appendix V details the many stages of life that a records request can experience.



There is no consensus among journalists about how much RTK enhances their day-to-day investigative reporting. On one hand, as Vargas noted, the law is a means of formalizing a request and having legal recourse. She stated, "Despite the delays, it is still a good way to get information. Especially when it's hard to get directly from city officials. Sometimes, they'll fight." When she sought accident reports on Philadelphia garbage trucks, public records officers turned over datasets that didn't match and refused to conduct another search. In response, she told them she would file an RTK request to compel them to comply. Other interviewees criticized RTK as a tool that

officials could abuse. Daniel Denvir, a former journalist at the *Philadelphia City Paper*, said that officials sometimes asked journalists to file requests simply to draw out the process of disclosure. He said, "It feels like an abuse of open records, a perverse inversion of what the records law is supposed to be. It's supposed to be a lever to force reluctant bureaucracies to divulge information, not a bureaucratic distraction to keep them from operating a normal, relatively transparent communications office." Compliance with the RTK law is subjective, contingent, and dynamic. Depending on the circumstances, the right to know can instead become the right to say no.

## Uses and Impacts

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As a check on local and state governance, RTK provides many potential opportunities for reporting that can lead to awareness-raising and internal reforms on a wide range of issues. Our research shows that Philadelphia-area journalists are using RTK across expansively. Our participants have filed requests concerning City Hall, the Police Department, juvenile detention centers, education, sports, and, in the case of PennLive reporter Wallace McKelvey, “the sin beat—that’s alcohol, gambling, and marijuana.” For example, Philadelphia area reporters recently used RTK to reveal the incentives that the Commonwealth of Pennsylvania’s Department of Community & Economic Development offered to secure a second Amazon headquarters (HQ2) in Philadelphia. Reporters Max Marin and Jacob Adelman both filed requests to compel the department to divulge the secret deal. However, it was only after the Pittsburgh Post-Gazette appealed the state’s records denials to the Office of Open Records that the documents about the incentives became public. The release of these records, which included “up to \$4.6 billion in financial assistance” for the corporation, became the basis of many stories in Philadelphia news outlets. This inspired vigorous debate about the decision to secretly offer so many incentives to one of the world’s wealthiest companies.<sup>16</sup>

In 2016, Claudia Vargas developed another impactful set of stories based off records she obtained through RTK after the city comptroller issued a report on the Mayor’s Fund for Philadelphia that Vargas noticed was missing some of the non-profit’s expenditures. Amid allegations that the fund’s chairwoman had used its credit cards for personal expenses, she filed an RTK request for all the expense and credit card statements. “That took a really long time to get,” she noted. Officials “kept asking for

extensions, but we finally got those [records]. Some of them were electronic. Others I had to go in person to review. But we were able to put together a story that really raised questions about \$52,000 worth in questionable expenses.” Partly due to the Inquirer team’s investigative report, the attorney general announced criminal charges against the chairwoman who pled guilty in 2019 and was eventually sentenced for this misuse of funds. While not every story using RTK data has resulted in this type of concrete result, Vargas said that they often lead to “discussions among council members, whether it leads to legislation getting passed or not. It helps with the conversation at City Hall.”

In 2018, Max Marin used the RTK law to request a decade’s worth of files from the City of Philadelphia which revealed that “the city had a horrible track record of keeping records of, let alone having any sort of justice when it came to sexual offenders working in city government and people that were harassing their colleagues in a sexual manner.” He co-authored a *Philadelphia Weekly* article with Ryan Briggs entitled “Sexual harassment in Philadelphia City Hall: Unreported, unrecorded and unpunished,” which highlighted dysfunction at the Employee Relations Unit in the Philadelphia Mayor’s Office of Labor Relations. While the city had been working on reforming the policy, the administration expedited the process and cited the article as one justification. Like Vargas, Marin observed that other stories he published had less direct and immediate effects but did impact institutions like the police department and District Attorney’s office. Reflecting on his work to date, he noted, “I wouldn’t say that I’ve had a home run with it [so far], but I’ve definitely had some small victories that are enough to keep me going and want to get the bigger stories that have larger impacts using public records.”

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<sup>16</sup> See, for example, Jacob Adelman, “Details of Philadelphia’s cash offer to Amazon in HQ2 pitch ordered to be shared,” *Philadelphia Inquirer*, April 27, 2018, [www.philly.com/philly/business/real\\_estate/commercial/amazon-hq2-headquarters-pitch-philadelphia-release-payment-cash-details-20180427.html](http://www.philly.com/philly/business/real_estate/commercial/amazon-hq2-headquarters-pitch-philadelphia-release-payment-cash-details-20180427.html) and Claire Sasko, “Here’s What Philadelphia Offered Amazon in HQ2 Competition,” *Philadelphia Magazine*, Nov. 14, 2018, <https://www.phillymag.com/news/2018/11/14/philadelphia-amazon-hq2-proposal/>.

# Legal Strategies and Challenges

Across our interviews, there was agreement that the RTK process is unduly complicated and that Pennsylvania seems to deny the release of government records more often than other states, a hypothesis that findings from legal scholars have supported.<sup>17</sup> Under the current guidelines, Pennsylvania agencies are given five business days to respond in writing to: (1) grant the initial request, (2) deny the request, or (3) invoke a 30-calendar day extension. As the Pennsylvania Office of Open Records explained, “acceptable grounds for a 30-calendar day extension include: off-site location of records, staffing limitations, need for legal review or redaction, complex request, or the requester did not pay applicable fees as required or failed to follow agency policy.”

In practice, the elastic, unpredictable timelines and the amount of follow-up required burdens already over-extended journalists. Wallace McKelvey explained that state lawyers frequently test the patience of reporters. He said, “I don’t assume bad faith when I file a request and it’s not immediately honored, because sometimes there are legitimate reasons why a public records officer may not be able to get the file to me right away. But that said, it strains credulity that would always be the case, as it is in some agencies.” Nasim Compton\*, who covers the education beat for WHY, echoed these sentiments in his description of interacting with a Pennsylvania school district’s lawyer who habitually requested long extensions. Across beats, interviewees reported encountering a variety of stalling tactics. Beth Scottsky attempted to obtain records about juvenile detention facilities from the Pennsylvania State Department of Human Services and was initially told that there was no need to file a formal records request, because “it’ll make it complicated on both of our sides.” However, “it’s been four months [and] I don’t have my records, [so] I’m filing a RTK today. And now I’m behind schedule. So that was an eye-opening experience.” Having patience also does not necessarily lead to better results. Ryan Briggs discussed waiting a year for a record and then

taking the city to court for failing to fulfill his request in a timely manner. When the records were finally released, he realized that they were not useful for his reportage.

Some journalists intentionally try to avoid relying on the RTK law. Prior to filing a request, many of our participants engage in research into the viability of the request, consult with editors or other journalists about the best strategy, or explore more informal methods to simplify and expedite the process. As Wallace McKelvey observed, “The first recourse for me is always to find out if there’s someone . . . that I’ve been working with who’s willing to just give me the documents. Then I don’t have to worry about the Right to Know framework . . . Probably at least half the time that I’m trying to find records, the person I talk to just gives them to me.” Mark Dent concurred that it was worth reaching out to contacts first, because “a lot of times you’d be surprised at what people give you.” Circumventing the formal RTK process can be effective for experienced journalists who have developed relationships with public records officials.

Others suggested the importance of filing requests early and frequently to have multiple irons in the fire. For example, a reporter could file an anticipatory request as soon they begin an investigative story, or as exploratory measure to see whether a story is worth pursuing. Because disclosure is unpredictable, Jim Neff noted, “You may not have a story. They may not give [records] to you. They may say they don’t exist. But everybody on the team puts in records requests all the time.” As an example of routinizing the process, Neff also noted the late *Kansas City Star* reporter Mike McGraw who “would put in a records request every Friday. He would just put one in. He’d think of some record. He’d say, ‘I wonder what that is, you know?’ He didn’t even have a tip or anything. He just thought, ‘I’m going to ask for this.’” Another reason to pursue records early in the process is that the process of writing a story can be iterative: leads require additional requests, prolonging the story’s publication.

Journalists also invest time in considering how to best frame their requests—this can involve consulting with other journalists on staff at a media outlet; lawyers on staff; and on occasion, their own editors. Neff suggests segregating requests based on their viability

17 Drexler, S. P. (1994). Pennsylvania’s Right-to-Know Act: How It Is Used to Discourage, Delay and Deny Access to Public Documents and Why It Needs to Be Changed. *Duq. L. Rev.*, 33, 127.

and putting specific information into the language of the request, as well requesting emails separately because they frequently take longer than other forms of records. Moreover, he suggested noting precisely which documents and which keywords an open-records officer should use in their search in order to yield more accurate results. *Philadelphia Inquirer* journalist Bob Porter\* also recommended informing the public records official of the intended use of the records in cases where the story is not likely to be controversial. Based on his experiences, he believed that being upfront about the purpose can make agencies more forthcoming and expeditious.

Receiving full or partial denials and incomplete records is a standard part of the RTK process, and journalists must evaluate whether further pursuit is worth the effort. Ryan Briggs' decision to appeal is based on whether he agrees with the logic behind the denial, as well on the perceived viability of the appeal. For instance, when an officer denied a request on the basis of an ongoing investigation exemption, Briggs assessed that there was little chance of appealing that decision. However, he noted a more common response is a denial based on "insufficient specificity...the catch-all term when the city doesn't feel like fulfilling your request or is actively trying to frustrate your request. And that tends to be something that I'd pursue through the appeals process or try to negotiate out through an open records officer because that is a much weaker denial." The nuance of such distinctions suggests that knowing how and when to appeal is as significant a skill as knowing how to file an initial request.

The RTK landscape is rendered more complex as precedents are continually being set that can affect future requests. It seems the ground can shift under journalists' feet in real time, and setting negative legal precedent affects decision-making. Bob Porter stated, "I don't mind appealing at the Office of Open Records level. . . . Losing at that level doesn't really hurt you that much. But if then they appeal it to, say, the Common Pleas Court, if you lose at that level, you've now established

that that [method of denial is legally sound]." Securing appropriate legal counsel is another challenge, even for larger, better-funded enterprises like the *Inquirer* that have in-house counsel, because in-house counsel does not normally have the expertise or experience with RTK. Jim Neff, editor at *The Inquirer* noted that when expertise is needed, he ends up guiding most of his reporters through their RTK requests himself by drawing on his knowledge as an editor. Melissa Melewsky, media counsel for the Pennsylvania Newspaper Publishers Association has also emerged as another useful resource. Dana DiFilippo stated, "You can call her and she'll do everything from answer basic questions to help you word your right-to-know request. That was a lifesaver for me because I wasn't getting that kind of . . . support from the paper."

While states such as New York, New Jersey, and Washington make it easier for requesters to recover the costs of attorney fees and penalties against agencies acting in bad faith, those legal protections are weaker in Pennsylvania. Pennsylvania law permits appeals courts to make overruled agencies pay requesters' attorney fees, but the statute says courts "may award" rather than "shall award," and in 2018, for example, courts only imposed sanctions in two instances.<sup>18</sup> The RTKL therefore creates an asymmetry in power between records requesters and RTK officials. Melewsky, who often sees this imbalance play out in her conversations with journalists with limited resources, noted, "Agencies often have a team of lawyers to act in RTKL cases; the public (and most media organizations) obviously don't, and the miniscule number of fee impositions over the last decade of RTKL litigation illustrates the need for change." Tellingly, most of the interviewed journalists had never filed an appeal. Although some professional journalism organizations

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18 According to Melewsky, the Court of Common Pleas in Berks County sanctioned the city of Reading for approximately \$12,000 in legal fees, and the Commonwealth Court imposed a \$1,500 fine plus attorney fees of \$120,000 against the State Department of Corrections, the largest penalty in Right to Know Law history. Both of these payouts went to records requesters who were not media practitioners.

provide financial support to reporters who take agencies to court over records, only one of our interviewees had received such funding.<sup>19</sup>

Even when journalists have access to legal representation, the appeals process remains labyrinthine. There are over thirty paragraphs of exemptions in the updated 2008 law, many of which are unclear or overly broad.<sup>20</sup> In “Trump Wages War Against the Media While Pennsylvania State Agencies Wage A Behind the Scenes Cold War,” Frederick Frank and Zachary Gordon itemize all of the exemptions embedded in the RTK Law:

The exemptions include: any document where the release of the document could jeopardize personal and public safety; records containing individual identifiable health information; records containing certain personal identification information; certain

records related to employee discipline or labor relations; records of drafts of bills, resolutions, and regulations along with other records of predecisional deliberations; records containing trade secrets; records of a government employee that are solely for personal use; certain academic records; records pertaining to criminal and non-criminal investigations; 911 recording records; certain coroner and autopsy records; certain real estate appraisals; certain library, archeological, and endangered species records; records of bids to perform services for an agency prior to the award of the contract; certain agency communications regarding insurance; and information identifying an individual that applies for or receives social services.<sup>21</sup>

The exemptions carve out entire areas of governance that local journalists cannot examine through the lens of records requests. Unsurprisingly, many of our interviewees recommended reducing the bloated amount of exemptions granted under the law, including those granted to specific institutions. Especially frustrating to journalists is the exemption pertaining to investigations, even when the investigation had already been closed. Bob Porter explained, “That’s one area that there is a lot of pain in. You’re trying to ask for things and they’ll just say, ‘Well, it’s an investigation. We can’t give it to you.’ That is a little absurd. It’s taking it too far, because clearly, in most of the states, this wouldn’t be an issue.” The deliberate broadness of such exemptions invites public records officers to offer overly strict interpretations that are then the basis for further interpretations by appeals courts.

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19 The Society of Professional Journalists (SPJ) awarded Austin Nolen, the managing editor of the *Philly Declaration*, a Philadelphia-based alternative news site, \$947 from its Legal Defense Fund. That sum was intended to cover an expense the Declaration incurred while seeking a contract between the City of Philadelphia and the federal Immigration and Customs Enforcement (ICE) that would give ICE access to the City’s online criminal arraignment e-filing system. In its justification for covering the publication’s legal fees, the SPJ noted, “There are undoubtedly similar situations in cities across the country so this sets helpful precedent for public disclosure of such arrangements.” For further details, see “Legal Defense Fund – LDF in Action,” *Society of Professional Journalists*, 2005-2018, <https://www.spj.org/ldf-a.asp>.

20 Pennsylvania’s New Right to Know Law, Act 3 of 2008, 65 P.S. § 67.708(b)(1)-(30), 12-16.

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21 Frederick N. Frank & Zachary N. Gordon, “Trump Wages War Against the Media While Pennsylvania State Agencies Wage A Behind the Scenes Cold War,” 27 *Widener Commonwealth L. Rev.* 7, 10–11 (2018).

# Economic Challenges

Although the current version of the law stipulates that costs should be “reasonable,” the Office of Open Records sets the fees for Commonwealth and local agencies, while letting each judicial agency and each legislative agency set their own fees. It also states that the costs for records duplication should be comparable to the rates of local businesses, which accounts for regions in Pennsylvania having price differences.<sup>22</sup> In its most recent update of a fee schedule in October 2018, the OOR posted the maximum costs an agency could charge for different media formats.<sup>23</sup> However, when it comes to practices such as converting paper files to digital files, the law states, “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.”<sup>24</sup> Such flexibility on the part of agencies simultaneously produces a lack of clarity for requesters, and can cause the costs to exceed their expectations. Furthermore, in the case of large archives, the vague metric of “reasonable” may ultimately be insupportable as the costs of disclosure prove prohibitive.

At a moment when many news outlets are responding to economic losses by downsizing personnel and cost-cutting, even well-funded publications may not be able or willing to pay the exorbitant costs of document

retrieval. With the overwhelming size of some archives, it is always uncertain if the costs will be worth the information the records contain. Considering his work at the *Inquirer*, Bob Porter said, “Ultimately, I have to weigh the value of the data. How much is it? Is it going to be worth for us to get it? I have to keep the price low in most cases. But if it’s a huge dataset [like] 10 years of court records . . . then maybe we’ll pay \$600. But I have to get approval.” Financially insecure independent outlets, alt-weeklies, and freelancers are even less equipped to assume these costs and an agency’s steep bill can prevent investigations from progressing.

The ‘reasonable cost’ standard may also be flexible over time, used as a possible deterrent, or even influenced by political agendas. In Porter’s case, the relatively cheap cost of acquiring a dataset enabled the investigative team’s story. However, he believed that officials were not “happy with the story that we published, so the price miraculously went up [the next time].” Max Marin encountered a related issue when he requested every contract that a local housing authority had signed with a third-party private vendor. The response he received was that the department had 600 contracts of about 300 pages each, all of which were not digitized. Although about 250 pages of these records were boilerplate contract language that Marin did not need, the department insisted on including them because they legally could. As a result, he said, “We came out with this incredible number of pages, which would have cost \$16,000 to reproduce. And they send this to you with the most stone-faced language you can imagine, as if this is anything you’re going to proceed with... This is how they stonewall you in the process.”

22 Pennsylvania’s New Right to Know Law, 20.

23 “Official RTKL Fee Schedule,” Office of Open Records, updated 2018, <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm>.

24 Pennsylvania’s New Right to Know Law, 21.

## Comparison to Other States

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Participants who had worked in other states rated Pennsylvania's RTK law as comparatively inferior and overly complicated, exacerbating the temporal, legal, and economic challenges that journalists employing RTK methods already face.

Claudia Vargas noted that public records laws in New Jersey were better because you "can get a contract or payroll record immediately. You just ask whoever the public information officer is and then get a contract, no questions asked. [For them], that's [clearly] a public record . . . Whereas here in Philadelphia, I waited two months to get a copy of one contract once." Bob Porter also noted that his managing editor, who had moved from Seattle, had assumed that the *Inquirer's* investigative team had acquired its collection of tapes, videos, photographs, and internal affairs documents through this method. While obtaining these kinds of materials through public records requests was standard practice for journalists in Seattle, the resistance to efficiently releasing such records in Philadelphia made it necessary for the team to rely on other sources. Mark Dent, who has covered stories in both Pennsylvania and Texas, noted that Pennsylvania law exempts some seemingly public institutions. When

he attempted to use RTK to uncover information about the Jerry Sandusky scandal at Penn State, Dent found that the school was categorized as a "state-related institution," placing it beyond the reach of RTK, which would not happen in Texas. He said, "Every university that gets any kind of major funding from the state, you can get open records requests from and it's led to some really good stories." Jim Neff, who had the most extensive experience in other states, criticized the attitude of resistance in Pennsylvania, partially attributing it to the personnel making the disclosure decisions. Compared to his time working in Seattle, Cleveland, and Austin, he said that the culture of transparency in Philadelphia is noticeably worse and noted that, "Unlike any other place I've worked, they have lawyers do the records request instead of well-trained clerks, staffers, paralegal types. . . They don't lean into disclosure. They lean against. In my experience, they fight you every step of the way. They provide their turndowns much like they're making a legal case." Perhaps stemming from this different attitudinal approach, several journalists noted that officers routinely took the maximum time legally allowed to acknowledge requests, and used the maximum time or requested extensions to fulfill it. These obstructions occurred less frequently in other states where they had worked.

## Recommendations & Conclusions

As many local and state-level news outlets face continued economic uncertainty, such as cuts to newsroom staffs, increased demands on employees, condensed timelines, shrinking profits, loss of advertising, the rise of clickbait, and increased competition upending the industry, it is becoming even more difficult for journalists to employ unpredictable and labor-intensive methods to tell in-depth stories. Furthermore, economic pressures on the contemporary newsroom manifest differently. Smaller and more independent outlets are usually more precarious and have even fewer resources to support RTK methods. The same is true for freelancers, many of whom lack organizational infrastructure and may have to absorb the costs of requests themselves. The current version of RTK remains overly convoluted, burdensome, and unpredictable for many journalists, which limits both its regular use and the kinds of stories that could emerge as a result. Even organizations committed to helping media practitioners navigate the RTK law, such as the Pennsylvania NewsMedia Association and the Pennsylvania Freedom of Information Coalition, are stretched especially thin.<sup>25</sup> Until news media professionals, legislators, open-records officers, and news consumers more fully address the complex dimensions of RTK issues, the investigative stories that RTK methods support and who gets to tell them will continue to be circumscribed and diminish the potential of substantive public knowledge.

<sup>25</sup> At the time of writing, the Executive Director of the Pennsylvania Freedom of Information Coalition, which provides trainings to Right-to-Know requesters, had the following message posted on its website: “The Pennsylvania Freedom of Information Coalition is struggling financially. This is a shame because we are the only group in the state dedicated to ensuring that all people have full access to Pennsylvania state and local government records and proceedings. The PaFOIC represents ‘We the People’ – not industry or a special interest group, but all of the human beings who live, work, pay taxes, volunteer, send our kids to school, fish and hunt, and need and use the services that government provides. For now, we are ratcheting back our services as we reassess our prospects. We certainly don’t think the only measure of a good idea is whether people will pay for it; that is, however, our biggest constraint right now” (<http://pafoic.org>).

To ensure that the law does live up to the rhetoric of transparency and accountability that accompanied its passage, a series of industry reforms need to occur:

- Many reporters scramble to find the time to file requests and strategize appeals on their own. Editors can help newsrooms adapt and encourage the use of RTKL, but they cannot succeed in this without basic stewardship, such as understanding the temporal, economic, and legal obstacles that tend to stall reporters. Editors should therefore undergo training in the specificities of Pennsylvania’s RTKL and file some of their own requests.
- In this same vein, local editors should consider collaborating with journalists to establish specific beat-specific strategies, including how to navigate the exemptions to disclosure and how to account for agency norms.
- More experienced journalists should receive institutional and financial support in organizing workshops on how to optimize RTK requests (many already share details informally in one-to-one conversations that are not recorded in any public forum). These workshops could even be beat-specific and could encourage significant knowledge sharing between reporters at different media outlets.
- Ensuring that future journalists are able to draft requests and handle appeals is no easy feat, but journalism schools could help their graduates immeasurably by offering more training that goes beyond FOIA and focuses on state-specific RTK laws and even city-specific norms. Many reporters are not staying in one single area for the duration of their careers and having fluency in more than one state’s RTKL would ease their journey.
- Local news organizations should consider hiring in-house counsel that can assist reporters with the filing of RTK requests, so that they have on-site access to a legal expert before reaching the appeal phase. This would be a financial commitment and would also signal to local journalists that their investigations matter.
- Local agencies in Philadelphia should be required to have online reading rooms, which would share archives of the most frequently requested documents.



- News organizations in Philadelphia should encourage the wider internal sharing of documents, as well as successful and unsuccessful templates, to facilitate the requests of journalists. Digitizing these documents and keeping them in electronic databases would further facilitate more efficient journalistic labor. Here too, editors can play a pivotal role in advocating for the needs of their journalists.
- Many of our freelance interviewees voiced frustration at not having the time to file requests of their own. Local organizations can help by offering grants to support the vital RTK work done by freelancers as well as journalists at smaller and independent outlets.
- According to a 2018 Pennsylvania Legislative Budget and Finance Committee report on the costs of administering the RTK law, a survey of 1,100 state and local open records officers revealed that more than a third of all requests in 2016 came from commercial requesters.<sup>26</sup> One possible reform is increasing the fee placed upon commercial requestors: legislation has been introduced to this effect but not passed.<sup>27</sup> This change might ultimately discourage commercial requesters from overwhelming Pennsylvania agencies, but it is by no means guaranteed to be an ex-ante transparency solution that would equally serve the investigative needs of journalists across different beats.
- Reporters also need to do a better job at keeping records of their own records requests. Many did not see value in documenting their failures to obtain government documents, and in fact, sharing this knowledge of which agencies refused to share documents and which types of verbiage resulted in a “no documents” response could benefit local media-makers at other outlets.
- Media outlets cannot save the day alone. It would be enormously beneficial for an academic institution or local non-profit to step in and create a digital archive wherein journalists could share RTK templates and records themselves after a story had gone to press. In this space, they could also submit anonymized information about their own experiences communicating with RTK officials at specific local and state agencies.

Ultimately only a combination of industry and policy reforms will ensure that local journalists are able to wield RTK to their advantage in the decade to come, and so, the need for scholars to continue to examine transparency issues at the sub-federal level remains paramount. Ensuring the future of transparency in Philadelphia also requires looking beyond it. There’s a real need to conduct comparative research on trends and norms of RTK use by media practitioners in other Pennsylvanian cities, including but not limited to Pittsburgh and Harrisburg. Our interviewees consistently stressed that to do their jobs, to share information of public interest with their readers, they need the City of Philadelphia to make transparency more of a priority. RTK provides them a critical window into the core of local government, its policies, and its practices; if the law is not understood and used by journalists, it cannot be protected or explained by them, and critical stories cannot be told.

## Acknowledgments

The authors would like to thank the Media, Inequality, and Change Center and the Center for Media at Risk for recognizing the value of this work and co-sponsoring our study. We would also not have been able to conduct our research without the generous participation and insights of our interviewees, whose hopes for an improved, more efficient RTK system and greater government transparency propelled our inquiries. Thanks as well to Briar Smith and Emily Plowman for guiding us in the introductory stages of our work and to Professors Victor Pickard and Barbie Zelizer for their generous feedback, critical mentorship, and encouragement throughout the research process. We are indebted to our interviewees, who took the time to reflect on their own records requests and share their visions for a more transparent future.

26 “Costs to Implement the Right to Know Law,” 2018 Legislative Budget and Finance Committee report, February 2018, <http://lbfc.legis.state.pa.us/Resources/Documents/Reports/610.pdf>.

27 In June 2019, State Senator John P. Blake (D., Lackawanna) introduced two bills with the aim of amending sections of the Right-to-Know Law; it is the fourth consecutive legislative session that he has tried to get legislation on this topic passed. See Claudia Vargas, “We asked dozens of Pa. officials for their texts and emails. One thing we learned? Gov. Wolf deletes his texts,” *Philadelphia Inquirer*, June 26, 2019, <https://www.inquirer.com/news/pennsylvania-open-records-emails-texts-wolf-kenney-mcblain-fetterman-20190626.html>.

# Appendix I:

## Sample RTK Acknowledgment Letter from the City of Philadelphia

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THE CITY OF PHILADELPHIA

Dear Muira McCammon,

Thank you for your correspondence. This is an automatic response to let you know that the City will process your request and respond further within 5 business days of its receipt by an Open Records Officer. Please note that requests received after 5PM are deemed received the next business day. If you do not receive an email within 5 business days, please contact the City immediately as occasionally a requester's spam blocking service interferes with the delivery of our emails and we are not aware of the issue. Did you know that the City already releases a lot of information and open data online? You might be able to find the answer to your inquiry right now!

Here are some common types of requests we receive and where to find this information online right now: Search for a property's L&I related permits, licenses, violations, and appeals with the L&I property history tool.

Search for a property's Real Estate Tax Balance with the Revenue Department's tax real estate lookup tool. Find all of the City of Philadelphia's open data sets, including City employee salary data, on Open Data Philly, the Philadelphia region's open data portal.

Search information about professional service contracts online at eContract Philly.

Search information about procurement contracts online with PHL Contracts.

Search City legislation and related hearings online with Legistar.

Obtain financial disclosure forms from the Department of Records.

If you are seeking a police incident report, you can obtain the proper form from the Department of Records. Please note that police incident reports cost \$25.00. The City of Philadelphia is often confused with other entities, such as the ones below. If you want to submit a request to one of these entities, please click the links below to be directed to their Open Records Policies:

Philadelphia Parking Authority

School District of Philadelphia

City of Philadelphia District Attorney's Office

Philadelphia Redevelopment Authority

First Judicial District (Philadelphia Court of Common Pleas)

If one of these sources has solved your inquiry, please let us know! Otherwise, thank you for your patience, and we will be in touch soon. Sincerely, The City of Philadelphia Please Note: To help make sure that future emails from us don't end up in your spam or junk folder, please add this email address to your safe sender list.

# Appendix II:

## Sample RTK Rejection Letter

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**DISTRICT ATTORNEY'S OFFICE**  
 THREE SOUTH PENN SQUARE  
 PHILADELPHIA, PENNSYLVANIA 19107-3499  
 215-686-8000

*Rejection*

October 8, 2018

*Via E-Mail*

William Bender  
 benderw@phillynews.com

**Re: Final Response to Your Right to Know Law Request**

Dear Mr. Bender:

This letter is in response to your Right-to-Know-Law (RTKL) requests, which were received by the Open Records Officer of the Philadelphia District Attorney's Office (DAO) on August 29, 2018. You requested:

1. Results of Richard Glazer's review of Michael Giampietro's hiring and any records or reports generated by that review.
2. All DAO communications – including but not limited to incoming and outgoing emails, text messages, voicemails and memos – regarding the hiring of Michael Giampietro.
3. All DAO communications – including but not limited to incoming and outgoing emails, text messages, voicemails and memos – regarding the Allen Robinson trial, Dorothy Johnson-Speight, Harrod E. Clay Jr., Giovanni Campbell or Guy Sciolla, including communications sent or received by Larry Krasner, Arun Prabhakaran, Jody Dodd, Movita Johnson-Harrell, Mark Burgmann, Michael Giampietro and Benjamin Waxman.
4. All DAO communications – including but not limited to incoming and outgoing emails, text messages, voicemails and memos – regarding the office's responses to questions from the Inquirer and Daily about the Allen Robinson case.

On September 5, pursuant to Section 902 of the RTKL, the DAO invoked an extension of time until October 8, 2018, to respond. This constitutes the DAO's final response to your request.

### 1. Request under Item 1

Your request under Item 1 is denied. Mr. Glazer serves as a legal advisor to the District Attorney concerning conflicts-of-interest law and ethics law more generally. Any records generated by his legal review of the hiring of Mr. Giampietro would be privileged and exempt non-public records.

First, such records would be privileged under the various attorney-confidentiality doctrines: attorney-client privilege, the work-product doctrine, and the attorney-confidentiality rule. The attorney-client privilege protects attorney-client communications made for the purpose of the legal representation. *See, e.g., Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011) (“[I]n Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.”). Similarly, the work-product doctrine offers broad protection for legal reports created by an attorney in the course of their representation. *See, e.g., Heavens v. Pennsylvania Dep’t of Envtl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. 2013) (“The work-product doctrine offers broad protection to the mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation.”). And, Rule 1.6 of the Rules of Professional Conduct states that “[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent . . . .” It “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” *Id.* cmt. 3.

Second, such records would be privileged under the deliberative-process privilege, which broadly protects any record that “reflects or shows the deliberative process in which an agency engages during its decision-making.” *Carey v. Pennsylvania Dep’t of Corr.*, 61 A.3d 367, 379 (Pa. Commw. 2013).

Finally, such records would be exempt under several of the expressly enumerated exemptions of Section 708(b), including 708(b)(7) (“recommendation pertaining to . . . qualifications of an identifiable [agency employee]”); *id.* (b)(10)(i)(A) (exempting records that reveal “internal, predecisional deliberations of an agency, its members, employees . . . relating to a . . . course of action or any research, memos or other documents used in the predecisional deliberations”); *id.* (b)(17)(ii) (non-criminal investigative reports); and *id.* (b)(17)(vi)(A) (“[r]eveal the institution, progress or result of an agency investigation”).

Accordingly, the requested records are exempt privileged and non-public records. *See Bagwell v. Pennsylvania Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. 2014) (“An agency lacks the discretion to provide access to a privileged record.” (citing 65 P.S. § 67.506(c)); 65 P.S. § 67.102 (defining “public record” as record not protected by privilege and not exempt under section 708).

### 2. Request under Item 2

Your request under Item 2 is granted subject to redaction of personal identifier information. *See id.* 65 P.S. § 67.708(b)(6)(i)(A)-(C) (“personal identification information”). I have located one responsive record, which is Mr. Giampietro’s offer letter (attached as Ex. A).

### 3. Request under Item 3

Your request under Item 3 is denied.<sup>1</sup> This request concerns correspondence related to the DAO's criminal investigation and prosecution in *Commonwealth v. Robinson*. All such records are exempt criminal investigative records. The RTKL contains an exemption for any records "relating to or resulting in a criminal investigation," 65 P.S. § 67.708(b)(16). *See, e.g., Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Commw. 2014) ("[I]f a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii)."). That exemption remains during and after any investigation is completed. *See Coley v. Philadelphia Dist. Attorney's Office*, 77 A.3d 694, 697 (Pa. Commw. 2013) ("[C]riminal investigative records are still exempt from disclosure under the Right-to-Know Law after the investigation is completed[.]"); *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479 (Pa. Commw. 2010) (en banc) (holding that criminal-investigative-record exemption of RTKL exempts records of "whether certain investigative tasks have been carried out or whether certain information was discovered"). The requested records would also fall under the expressly enumerated exemptions of 708(b)(16), including 708(b)(16)(i) ("[c]omplaints of potential criminal conduct"), *id.* (b)(16)(ii) ("correspondence"), and *id.* (b)(16)(vi)(A) ("[r]eveal the institution, progress or result of a criminal investigation"). Such records would also "include[] information made confidential by law" under a variety of legal privileges and statute. *Id.* (b)(16)(iv) ("[a] record that includes information made confidential by law or court order"); *see* Pa. R.P.C. 1.6 ("A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent . . ."); *Commonwealth v. Vartan*, 733 A.2d 1258, 1265 (Pa. 1999) ("[T]he Court recognizes the existence of a deliberative process privilege that protects confidential deliberations of law, or policymaking that reflect opinions, recommendations or advice."); *Gillard*, 15 A.3d at 59 (explaining attorney-client privilege). Moreover, such records would constitute confidential "investigative information" under the Criminal History Record Information Act (CHRIA), 18 Pa.C.S. §§ 9101-9106. *See id.* § 9102 (defining "investigative information" as "[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing"). Such information is exempt from disclosure under CHRIA and therefore the RTKL. *See id.* §

<sup>1</sup> Your request as broadly written is insufficiently specific to satisfy the RTKL's specificity criteria. Section 703 requires that requests "identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." 65 P.S. § 67.703. In accordance with those criteria, your request is being read to request "incoming and outgoing emails, text messages, voicemails and memos – regarding the Allen Robinson trial, Dorothy Johnson-Speight, Harrod E. Clay Jr., Giovanni Campbell or Guy Sciolla, [] sent or received by Larry Krasner, Arun Prabhakaran, Jody Dodd, Movita Johnson-Harrell, Mark Burgmann, Michael Giampietro and Benjamin Waxman." *See, e.g., Pennsylvania Office of Inspector Gen. v. Brown*, 152 A.3d 369, 374 (Pa. Commw. 2016) (finding request insufficiently specific because it "did not identify the [agency] transaction or activity"); *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. 2010) ("The portion of the request seeking *any and all records, files or communications* is insufficiently specific . . . . However, the request for 'manual(s)' relating to vehicle stops, searches and seizures is specific . . ." (emphasis added)). The request is also being read to exclude any personal records. *See Pennsylvania Office of Atty. Gen. v. Philadelphia Inquirer*, 127 A.3d 57, 64 (Pa. Commw. 2015) (en banc) (holding that personal email of public employees are not "public" or "records" even if government email used).

9106(c)(4) (“Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency . . .”); *Coley*, 77 A.3d at 697 (explaining that records barred from disclosure by CHRIA are “by definition” not public records under RTKL (citing 65 P.S. § 67.102)).

Second, any correspondence between employees of the DAO regarding the Allen Robinson trial would in addition constitute privileged and exempt records under the attorney-client privilege, the work-product doctrine, the attorney-confidentiality rule, deliberative-process privilege, the pre-decisional deliberations exemption, and the non-criminal-investigation exemption. See *Gillard*, 15 A.3d at 59 (attorney-client privilege); *Heavens*, 65 A.3d at 1077 (work product); Pa. R.P.C. 1.6 (attorney confidentiality); *Vartan*, 733 A.2d at 1265 (deliberative-process privilege); 65 P.S. § 67.708(b)(10)(i)(A) (exempting records that reveal “internal, predecisional deliberations of an agency, its members, employees”); *id.* (b)(17) (“[c]omplaints submitted to an agency,” “[r]eveal the institution, progress or result of an agency investigation,” “investigative correspondence,” and “unwarranted invasion of privacy”). Any such records may also contain exempt personal identification information, including phone numbers and email addresses. See 65 P.S. § 67.708(b)(6)(i)(A)-(C).

Third, any correspondence between DAO employees and members of the public regarding the Allen Robinson trial would in addition constitute exempt non-public records under Section 708(b)(17), which exempts records of “[c]omplaints submitted to an agency,” records that “[r]eveal the institution, progress or result of an agency investigation,” “investigative correspondence,” and records the release of which would constitute an “unwarranted invasion of privacy.”

Accordingly, the requested records are exempt privileged and non-public records. See *Bagwell*, 103 A.3d at 420; 65 P.S. § 67.506(c); *id.* § 67.102.

#### 4. Request under Item 4

Your request under Item 4 is denied.<sup>2</sup> This request seeks records of internal discussions between DAO employees about how to respond to reporter questions about the Allen Robinson case. Such records would be privileged and exempt under the attorney-client privilege, the work-product doctrine, the attorney-confidentiality rule, deliberative-process privilege, the pre-decisional deliberations exemption, and the non-criminal-investigation exemption. See *Gillard*, 15 A.3d at 59 (attorney-client privilege); *Heavens*, 65 A.3d at 1077 (work product); Pa. R.P.C.

<sup>2</sup> Your request as broadly written is insufficiently specific to satisfy the RTKL’s specificity criteria. Section 703 requires that requests “identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. In accordance with those criteria, your request is being read to request “incoming and outgoing emails, text messages, voicemails and memos regarding the office’s responses to questions from the Inquirer and Daily about the Allen Robinson case.” See, e.g., *Brown*, 152 A.3d at 374; *Pennsylvania State Police v. Office of Open Records*, 995 A.2d at 517. The request is also being read to exclude personal records. See *Pennsylvania Office of Atty. Gen. v. Philadelphia Inquirer*, 127 A.3d at 64.

1.6 (attorney confidentiality); *Carey*, 61 A.3d at 379 (deliberative-process privilege); 65 P.S. § 67.708(b)(10)(i)(A) (exempting records that reveal “internal, predecisional deliberations of an agency, its members, employees”); *id.* (b)(17) (“[r]eveal the institution, progress or result of an agency investigation,” “investigative correspondence,” and “unwarranted invasion of privacy”); *see also, e.g., Comm. on Oversight & Gov’t Reform, U.S. House of Rep. v. Lynch*, 156 F.Supp.3d 101, 111-12 (D.D.C. 2016) (explaining that deliberative-process privilege covers records about how to respond to press inquiries regarding law-enforcement matter); *Judicial Watch v. DHS*, 736 F.Supp.2d 202, 208 (D.D.C. 2010) (privilege covers documents “generated as part of a continuous process of . . . how to respond to on-going inquiries from the press”). Any such records may also contain exempt personal identification information, including phone numbers and email addresses. *See* 65 P.S. § 67.708(b)(6)(i)(A)-(C).

Accordingly, the requested records are exempt privileged and non-public records. *See Bagwell*, 103 A.3d at 420; 65 P.S. § 67.506(c); *id.* § 67.102.

#### 5. Appeal Advisement

This letter constitutes the response of the DAO to your RTKL request.

Should you wish to contest this decision as to Item 3, any appeal must be filed with the District Attorney’s Office Appeals Officer, Brad Paraszczak, Three South Penn Square, Philadelphia, PA 19107, no later than 15 business days from the date of this letter.

Should you wish to contest this decision as to Items 1, 2, or 4, any appeal must be filed with the Pennsylvania Office of Open Records, Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17101-2234, no later than 15 business days from the date of this letter.

Please feel free to contact me if you have further questions.

Sincerely,

*/s/ Douglas Weck*

Douglas Weck  
 Open Records Officer  
 PHILADELPHIA DISTRICT ATTORNEY’S OFFICE  
 Three South Penn Square  
 Philadelphia, PA 19107-3499  
 (215) 686-5736  
 douglas.weck@phila.gov

# Appendix III:

## Listing of State Freedom of Information Acts and Similar Statutes

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[Excerpted from 132 Am. Jurisprudence Proof of Facts 3d 1 (November 2018 Update)]

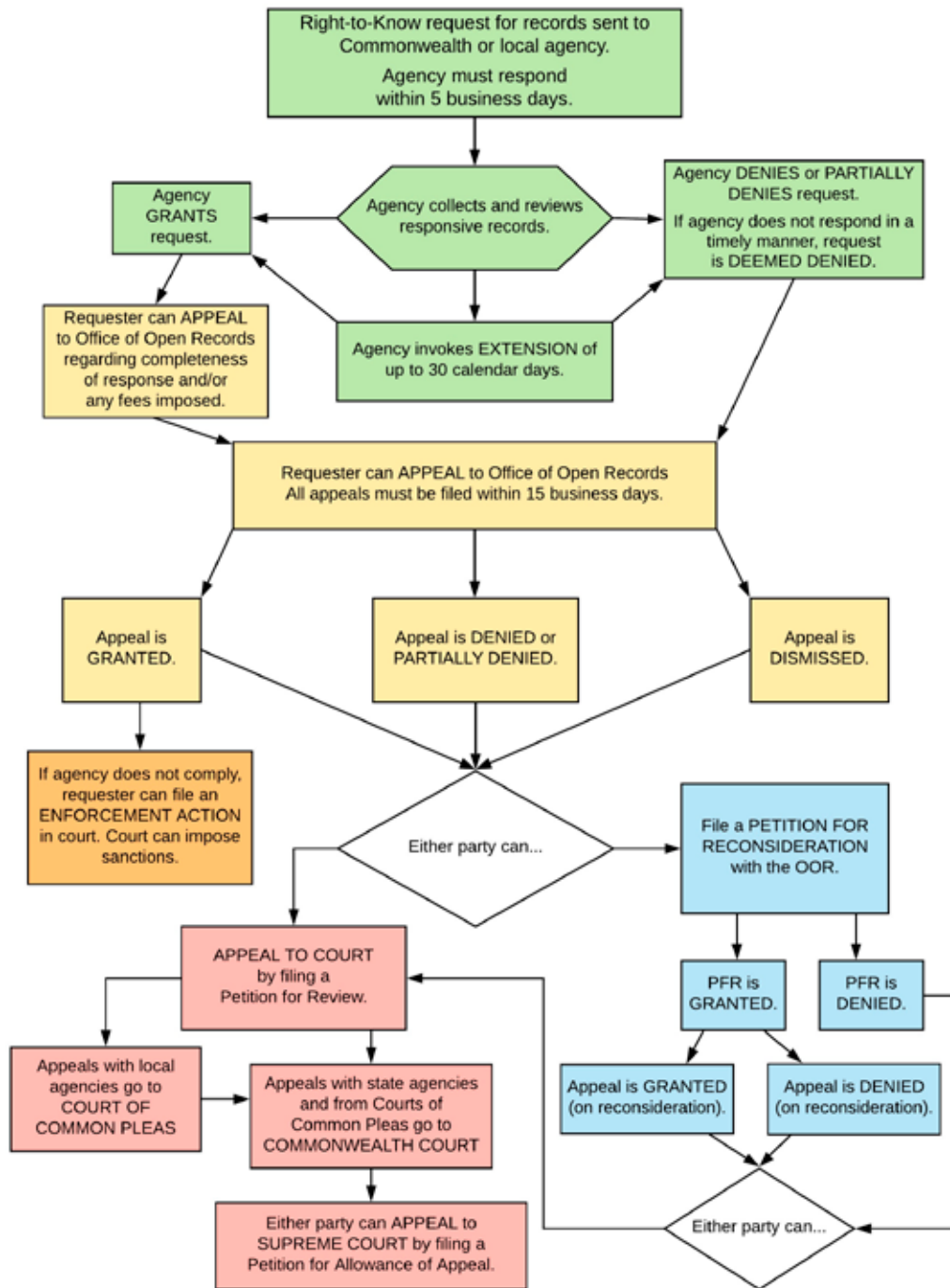
The following is a listing of all State Freedom of Information Acts.

- **Alabama:** Ala. Code §§ 36-12-40 et seq.
- **Alaska:** Alaska Stat. §§ 40.25.100 et seq.
- **Arizona:** Ariz. Rev. Stat. Ann. §§ 39-121 to 39-124
- **Arkansas:** Ark. Code Ann. §§ 25-19-106 et seq.
- **California:** Cal. Gov. Code §§ 6250 to 6270
- **Colorado:** Colo. Rev. Stat. Ann. §§ 24-72-201 et seq.
- **Connecticut:** Conn. Gen. Stat. §§ 1-200 et seq.
- **Delaware:** Del. Code Ann. tit. 29, §§ 10001 et seq.
- **District of Columbia:** DC ST §§ 2-531 to 2-540
- **Florida:** Fla. Stat. Ann. §§ 119.01 to 119.165
- **Georgia:** Ga. Code Ann. §§ 50-18-70 to 50-18-76
- **Hawaii:** Haw. Rev. Stat. §§ 92F-1 et seq.
- **Idaho:** Idaho Code §§ 9-338 to 9-347
- **Illinois:** 5 Ill. Comp. Stat. Ann. §§ 140/1 to 140/11.5
- **Indiana:** Ind. Code Ann. §§ 5-14-3-1 to 5-14-3-10
- **Iowa:** Iowa Code Ann. §§ 22.1 to 22.14
- **Kansas:** Kan. Stat. Ann §§ 45-215 to 45-250
- **Kentucky:** Ky. Rev. Stat. Ann. §§ 61.870 to 61.884
- **Louisiana:** La. Rev. Stat. Ann. § 44:31
- **Maine:** Me. Rev. Stat. Ann. § 400 to 434
- **Maryland:** Md. Code, State Government §§ 10-611 to 10-630
- **Massachusetts:** Mass. Gen. Laws Ann. ch. 4, § 7; ch. 66, § 10
- **Michigan:** Mich. Comp. Laws Ann. §§ 15.231 to 15.256
- **Minnesota:** Minn. Stat. Ann. § 13.03
- **Mississippi:** Miss. Code Ann. §§ 25-61-1 et seq.
- **Missouri:** Mo. Ann. Stat. §§ 109.180 to 109.190
- **Montana:** Mont. Code Ann. §§ 2-6-101 to 2-6-111
- **Nebraska:** Neb. Rev. Stat. § 84-712
- **Nevada:** Nev. Rev. Stat. Ann. §§ 239.005 to 239.040
- **New Hampshire:** N.H. Rev. Stat. § 91-A:1 et seq.
- **New Jersey:** N.J. Stat. Ann. §§ 47:1A-1 et seq.
- **New Mexico:** N.M. Stat. Ann. §§ 14-2-1 et seq.
- **New York:** N.Y. Pub. Off. Law § 84 et seq.
- **North Carolina:** N.C. Gen. Stat. §§ 132-1 to 132-10
- **North Dakota:** N.D. Cent. Code §§ 44-04-18 to 44-04-18.8
- **Ohio:** Ohio Rev. Code Ann. §§ 149.43 to 149.45
- **Oklahoma:** Okla. Stat. Ann. tit. 51, §§ 24A.1 to 24A.18
- **Oregon:** Or. Rev. Stat. Ann. §§ 192.410 to 192.505
- **Pennsylvania:** 65 Pa. Cons. Stat. Ann. §§ 67.101 to 67.3104
- **Rhode Island:** R.I. Gen. Laws §§ 38-2-1 to 38-2-14
- **South Carolina:** S.C. Code Ann. §§ 30-4-10 to 30-4-165
- **South Dakota:** S.D. Codified Laws Ann. §§ 1-27-1 to 1-27-19
- **Tennessee:** Tenn. Code Ann. §§ 10-7-503 et seq.
- **Texas:** Texas Government Code §§ 552.001 to 552.353
- **Utah:** Utah Code Ann. §§ 63G-2-101 to 63G-2-901
- **Vermont:** Vt. Stat. Ann. tit. 1, §§ 316 to 320
- **Virginia:** Va. Code § 2.2-3704 to 2.2-3704.1
- **Washington:** Wash. Rev. Code Ann. §§ 42.56.001 to 42.56.904
- **West Virginia:** W. Va. Code § 29B-1-1
- **Wisconsin:** Wis. Stat. Ann. §§ 19.31 to 19.39
- **Wyoming:** Wyo. Stat. Ann. §§ 16-4-201 to 16-4-205



# Appendix IV: Explanatory Diagram Tracing the Life of a Records Request

## Pennsylvania's Right-to-Know Law: Request through Appeal



(Created by the Office of Open Records, original diagram available at [https://www.openrecords.pa.gov/Documents/RTKL/RTKL\\_Flowchart.jpg](https://www.openrecords.pa.gov/Documents/RTKL/RTKL_Flowchart.jpg))