

March 10, 2008

Dear Client:

As part of our commitment to provide you with a legal resource that can offer cogent day-to-day advice and clear strategies for a secure future, we offer our pledge to also be your partner in information. We recognize the need for you to be immediately responsive to the changing requirements of the law, government regulations, and community needs. As such, our office will prepare *Action Papers* in response to the ever-changing laws and regulations affecting public education. Receipt of an Action Paper is an indication that your School District may want to consider changing a practice or policy. It also may indicate that your District is required by law to initiate or discontinue a practice or policy.

### **Pennsylvania Enacts New Open Records Law**

When Governor Edward G. Rendell signed Senate Bill 1 into law on February 14, 2008, he set the stage for a dramatic paradigm shift. Under the current Open Records Law, 65 P.S. §66.1 *et seq.*, the party seeking access to documents has the burden of showing the record sought has the characteristics of a public record. This new version of the Open Records Law, also known as "Senate Bill 1" or "Act 3 of 2008," considers records presumptively open, and places the burden on the agency to show that the requested record is either not a public record or falls into one of approximately 30 exceptions.

The new law is set to become effective for all requests for records made after December 31, 2008. Even though January 1, 2009 may seem to be the distant future, the Open Records Law imposes several requirements on not only school districts, but on agencies across the commonwealth which will require structural and personnel decisions so as to be ready for implementation at the start of 2009.

## What is an Open Record?

Under the new law, a record is defined as: information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes written documents as well as electronically stored or imaged documents. Virtually every document provided to the board for deliberation is considered open unless it is specifically exempted by the Open Records Law, is exempt from being disclosed under any other Federal or State law (such as FERPA or HIPPA), or is protected by privilege. For example, documents that are sent between the district and its legal counsel related to litigation, negotiations, or strategy are considered protected by the attorney/client privilege.

Some of the exemptions most relevant to school districts include:

- A record which would result in the loss of Federal or State funds by an agency or would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual;
- A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, resource, infrastructure, facility or information storage system including: computer hardware, software, system networks or computer security. Also, building plans or infrastructure that expose or create vulnerability through disclosure of critical systems.
- A record containing all or part of a person's Social Security number; driver's license number; personal financial information; phone number(s); personal e-mail addresses; spouse's name; marital status, beneficiary or dependent information.
- Letters of reference or recommendation, performance ratings or reviews, employment applications of an individual who is not hired, written criticisms of an employee, grievance material (including documents related to discrimination or sexual harassment), information regarding discipline, demotion or discharge contained in a personnel file, or an academic transcript.
- A record pertaining to strategy or negotiations relating to labor relations or collective bargaining and any related arbitration proceedings. (The final executed contract and any arbitration awards, however, are open records).
- Records which reflect the internal pre-decisional deliberations of an agency.
- Notes and working papers that do not have an official purpose
- Academic transcripts, examination questions, scoring keys or answers to an examination.
- Minutes or notes from an executive session.
- Purchase proposals and bid offers prior to the award of contract.

## Open-Records Officer - Local Agency Level

An oft repeated complaint by those requesting documents is they do not know where to begin or whom to ask. The Open Records Law addresses this by requiring all agencies to designate an official or an employee to act as the open-records officer. The open-records officer will receive requests submitted to the agency under the act, direct requests to other appropriate persons within the agency or *to appropriate persons in another agency*;<sup>1</sup> track the agency's progress in responding to requests and issue interim and final responses under the act. The open-records officer is required to respond to written requests within **five business days** from the date the request is received. If the agency fails to send the response within five business days of receipt of the written request for access, the written request shall be deemed denied. The open-records officer is also required to maintain an electronic or paper copy of the request until the request has been fulfilled. If the request is denied, the written request is maintained for 30 days unless an appeal is filed.

The open-records officer will evaluate the request, determine if the document(s) requested is a record under the act, or if it fits into one of the approximately 30 exemptions granted by the law, fits under a privilege such as attorney/client privilege or attorney work product, or if another relevant Federal or State statute or regulation forbids the record's disclosure. A record which contains information which is both exempt and non-exempt may still be subject to disclosure with the exempt information redacted. It is important to note that a local agency may not deny a requester access to a record based on the intended use of the record by the requester unless otherwise provided by law.

As noted above, the agency has **five business days** to respond to a request. The time to produce the record may be extended up to **thirty days** if one or more of seven mitigating circumstances exist. The extension may be granted if the request requires redaction of a record, the request requires retrieval from a remote location; a timely response is not possible due to bona fide and specified staffing limitations; legal review is necessary; the requester has not complied with the agency's policies regarding access to records; the requester refuses to pay applicable fees or the extent or nature of the request precludes a response within the required time period. If the open records officer determines one of the above circumstances applies, he or she must still give notice within five days that the request is being reviewed, the reason for the review, and a reasonable date that a response is expected. Any response in excess of 30 days following the five days is considered a denial of access unless the requester has agreed in writing to a longer extension.

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<sup>1</sup> While there are obviously no regulations yet to guide the open-records officers, it would appear by the language of the statute that if a request is made to a district's open-records officer that is more appropriate for a borough or township open-records officer, the district's open-records officer is to direct the request, not the requester to the appropriate person.

## **Required Postings**

In addition to designating an open-records officer, the agencies must post the following information at each agency and if the agency maintains an Internet website, this information must be posted on the website as well. The mandated postings include:

- 1) Contact information for the open-records officer,
- 2) Contact information for the Office of Open Records,
- 3) A form which may be used to file a request,
- 4) Regulations, policies and procedures of the agency relating to the Open Records Law.

The Commonwealth's Office of Open Records, a new state entity discussed later, will be publishing a standard, state-wide request form which all local agencies will be required to accept, but the law also permits each local agency to develop a form custom designed for your use.

## **Office of Open Records – Commonwealth Level**

Perhaps one of the most visible results of the new Open Records Law will be the "Office of Open Records" within the Department of Community and Economic Development. This office will provide information relating to the implementation and enforcement of the act, issue advisory opinions to agencies and requesters, and provide training on the Open Records Law as well as the "Sunshine Act" (65 Pa.C.S. Ch. 7). Additionally, the Office of Open Records will assign appeals officers to review appeals of decisions by Commonwealth Agencies or local agencies, establish an informal mediation program to resolve disputes under this act, establish an Internet website, conduct a biannual review of fees charged under the act, and report annually to the Governor and General Assembly.

Three sections of the Open Records Law take effect immediately: the short title, the definitions, and the establishment of the Office of Open Records in the Department of Community and Economic Development. At this time, there have been no predictions as to how soon this office will be operational or begin to promulgate rules. We will, of course, monitor the progress at the commonwealth level and advise districts of opportunities for training or of recommended action steps.

## **Recommendations**

As you can tell, the changes imposed by the new Open Records Law are relatively complex and quite different from the way districts handled such requests in the past. As districts have approximately 10 months in which to implement the law, we are recommending districts begin taking action in incremental steps sooner rather than later. Some of the steps necessary to fully implement the requirements of the Open Records Law will naturally have to wait until the Office of Open Records is established and begins to

promulgate rules and procedures. Other decisions can be made independent of the Office of Open Records.

The most logical decision to begin with is the selection of the district's open-records officer. By nominating the open-records officer early in the process, the individual selected can take part in training sessions which will be offered by the Office of Open Records and become the district's in-house expert. Additionally, the open-records officer will be an integral part of tailoring the district's specific policies and procedures.

As you begin the discussion, please consider the following.

- 1) The open-records officer should be someone who is at the district consistently because the district will be required to respond within five-business days of the request. Therefore, part-time employees or members of the board are not ideal candidates.
- 2) The open-records officer should be someone who has access to confidential information. In some cases, requests may be made for records which contain information that is only partially exempt from disclosure. The open-records officer is responsible for redacting the information which is not subject to disclosure and providing the remaining information.
- 3) The open-records officer should be able to exercise independent judgment. It may not be feasible to require the open-records officer to obtain permission from the Superintendent, and definitely not advisable to require board-action on every request.

Districts are not required to add, nor do we recommend adding, a full-time position to serve as the open-records officer. It is also not advisable to add the open-records officer to any bargaining unit so as to avoid potential conflicts. Confidential secretaries, full-time board secretaries, full-time public-relations directors, or business managers are the most logical candidates to be open-records officers. Districts should consider the fiscal impact in any upcoming budget discussions.

In addition to naming the open-records officer, districts should begin considering digitizing frequently requested types of information. The Open Records Law provides that it is perfectly acceptable for an open-records officer to respond to a request by informing the requester that the material is available through publicly accessible electronic means or that the agency will provide access to inspect the record electronically. (The requester then has 30 days to submit a written request that the record be converted to paper.)

For obvious reasons, all documents posted should be in a read-only format such as Adobe's Portable Document Format (.pdf). Remember, the district is only *required* to post contact information for the open-records officer, contact information for the Office of Open

Records, a form which may be used to file a request, and the district's regulations, policies and procedures relating to the Open Records Law on its Internet site. Our recommendation to post additional information is to expedite responses to requests made pursuant to the Open Records Law.

### **Conclusion**

As with any major transition, the new Open Records Law may appear daunting at first. Remember, however, that you have a proven partner for changing times such as these. Our firm is committed to assisting you in implementing the requirements imposed by the new Open Records Law, and will continue to provide updates as they become available. Starting with the appointment of the open-records officer and the gradual addition of information to the district's website will help ease the transition so that on January 1, 2009, the public has no doubt as to how or where to obtain public records. As always, if you have any questions or concerns, please do not hesitate to contact our office.

Best regards,

ANDREWS & PRICE