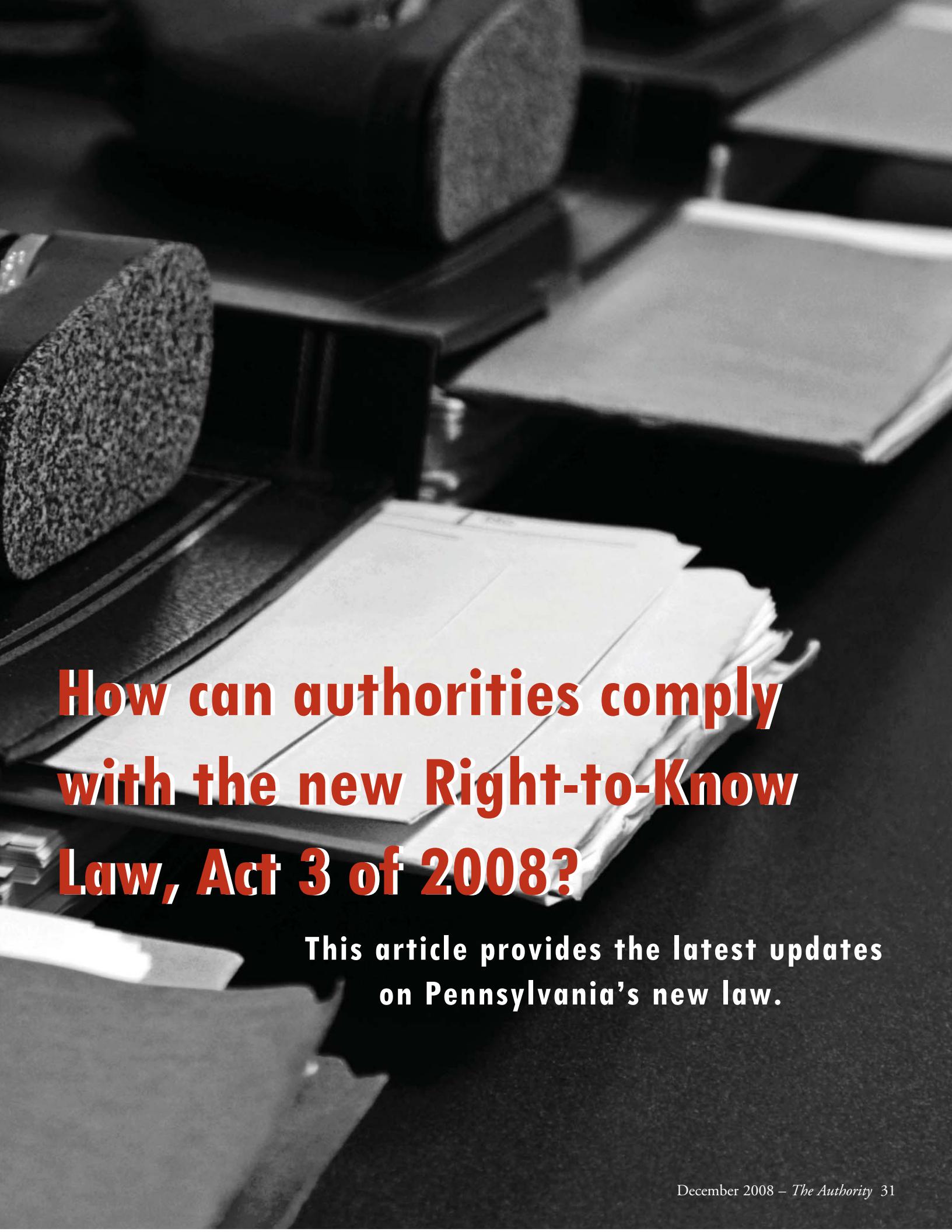




New Open Records Law:

The Essentials of Authority Compliance

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How can authorities comply with the new Right-to-Know Law, Act 3 of 2008?

**This article provides the latest updates
on Pennsylvania's new law.**

During PMAA's annual conference this past September, attendees were advised to begin the process of formally appointing an Open Records Officer and preparing the required forms and policies so that they may be adopted at authority board meetings prior to January 1, 2009, when the Act becomes effective. Authorities are well advised to consider following the new rules for requests that are received even prior to January 1, 2009, since the Act will be applicable to pre-existing records and if a request is denied before that time under the old Act, it can simply be resubmitted under the new Act.

The New Presumption and Exceptions

Section 701 of the Act provides that unless otherwise provided by law, a public record or financial record shall be accessible for inspection and duplication. This is a fundamental change that flips the old rule on its head and means that a record is now presumed to be a public record, meaning open and available to the public, unless it is:

- Exempt under § 708;
- Protected by a privilege;
- Exempt from disclosure under any other federal or state law, regulation or court order.

Section 708 of the Act lists the exceptions to the rule that every record is a public record. The burden of proof is on an authority to prove that the record is exempt from public access under one of those exceptions. For authorities, some of the critical exemptions to be aware of include:

- Security & Safety, § 708(b)(3). Records which create a likelihood of endangering the safety or the physical security of authority buildings, resources, infrastructure, facilities or information storage systems, including documents relating to computer hardware, source files and software system networks, building plans or infrastructure records that disclose the location, configuration or security of critical water, waste water, sewage and other utility systems.

Computer & Networks, § 708(b)(4). Records regarding computer hardware, software and networks, including administrative or technical records, which would be likely to jeopardize computer security.

- Employee Records, § 708(b)(5). Records relating to employees' medical history or status, including worker's compensation, unemployment compensation information.
- Personal Information, § 708(b)(6). Records containing a person's social security number, driver's license number, personal financial information, home, cell or personal telephone numbers, personal e-mail addresses, employee numbers or other confidential personal identification numbers. The question of whether an employee's home address must be supplied was discussed at length, with the advice given that existing case law may provide the basis for an argument that such information is privileged, although not listed as an exception in the Act.

- Employee Personnel Records, § 708(b)(7). This section exempts certain personnel records including letters of reference, a performance rating and review, the results of civil service or other tests if restricted by a collective bargaining agreement. Only test scores of individuals who obtain the passing score may be disclosed. Employment applications of persons who are not hired, written criticisms of an employee, grievance material and information regarding discipline, demotion or discharge contained in a personnel file, are all exempt from disclosure.
- Labor Relations, § 708(b)(8). This section exempts records relating to labor relations, collective bargaining and arbitration proceedings.
- Drafts of Resolutions, Regulations, Policies and Directives, § 708(b)(9). Draft documents falling in this category are exempt. Authorities wishing to protect such drafts from disclosure should assure that the documents are conspicuously labeled "draft" at the time they are prepared and distributed.



Pre-decisional Deliberations, § 708 (b)(10). Records reflecting pre-decisional deliberations relating to a proposed budget, policy or course of action and any documents used in pre-decisional deliberations are exempt. Authorities are advised to mark memos and other documents used in a pre-decisional deliberation as "pre-decisional deliberation document" in order to preserve this protection.

An exception, however, to the pre-decisional deliberation exception should be noted by authorities. Pre-decision deliberation documents included in a meeting packet provided to board members at a public meeting, and not falling within one of the other stated exemptions, may not fall within the pre-decisional deliberation exemption. Authorities should be warned to expect requests to see all materials included in document packets used by board members at a public meeting.

- Strategy Memos, § 708(b)(10.B). Documents reflecting the strategy to be used to develop or achieve the adoption



of a budget, legislative proposal or regulation are exempt, whether pre-decisional or not. Again, to preserve this exemption, stamp the document as "Strategy Memo."

- Non-Criminal Investigations, § 708(b)(17). Records relating to a non-criminal investigation, including a complaint submitted to the authority, the authority's investigative materials, notes, correspondence and reports and any record that might reveal the institution progress or result of an authority investigation.

- Executive Session Discussions, § 708(b)(21). Minutes of an executive session or any record of discussions held in executive session.

- Bid Documents Prior to Award, § 708(b)(26). Bid proposals are exempt only prior to the award of the contract and prior to the opening and rejection of all bids. Authorities should note that this is a significant difference from the present practice since currently only the winning proposal is a public record. Authorities may well expect requests

from disappointed bidders and others for the proposals submitted by all bidders. Certain financial information contained in a bid proposal is exempt even after award of the bid.

New Open Record Procedures

Authorities must appoint an Open Records Officer, adopt an Open Records Policy and post the Policy at the authority office and on the authority website if there is one. Authorities must also adopt and post the forms that will be used for persons to file a request and to document how the request is answered. Authorities should pay particular attention to using a proper form for denial of requests as the denial must be in writing and must include the description of the record requested, the specific reasons for denial, including the citation of supporting legal authority, the name and contact information of the Open Records Officer, the date of the denial and the procedure to appeal the denial. (See § 903 of the Act).

An authority must provide records in the medium requested, if the record exists in that medium. If a record does not exist in the medium requested, then the record must be provided in the medium in which it exists. For example, a requester seeks an electronic copy of a proposal submitted by a prospective bidder on an authority's materials contract. The authority retains proposals only in paper form; therefore, only a paper copy of the proposal needs to be provided.

Authorities with websites are urged to use their websites wisely to expedite the provision of records. Under § 701 of the Act, an agency may respond to a records request by notifying the requester that the record is available through its own or another publicly accessible website. However, the requester may, within 30 days following receipt of such a notification, submit a written request to the agency to have the record converted to paper and the agency must do so.

An authority must respond to an Open Records request within five business days from the date of receipt of the response by the Open Records Officer. Remember that in computing this deadline, days are counted beginning on the day after receipt of the request, meaning that the Open Records Officer will always have at least seven calendar days. Failure to respond within the time limit is deemed a denial of the request. If circumstances do not permit a response within five days, the Open Records Officer should send a written notice to the requester within five business days indicating that the request is being reviewed, the reason for the review, a reasonable date by which to expect a response and an estimate of applicable fees that will be owed when the record is available.

A denial of a request for a record may be appealed by the requester to the state Office of Open Records within 15 business days from the mailing date of the denial letter. (Act, § 1101. The appeal must state the grounds for appeal and must address any reason given by the authority for denying or delaying the request. The appeals officer is to make a final determination on the appeal which is mailed within 30 days of the receipt of the appeal. A hearing may be conducted but is not required. Any party may appeal the hearing officer's decision to the Court of Common Pleas in the county where the agency is located. Filing of such an appeal will stay the release of the documents, pending decision.

What copying charges may be imposed to satisfy the records request? This information can be found on the website. Authorities should follow the fee set by the Office of Open Records. Authorities may not impose a fee for the cost of the authority's review of a record to determine if the record is subject to access. Wherever fees are estimated to be greater than \$100.00, the authority may require the requester to prepay the fee.

continued on page 51

continued from page 33.

Much valuable information regarding the Open Records Act is available at the Office of Open Records website, <http://openrecords.state.pa.us>. Sample uniform request forms are available at that website.

PMAA is assisting its member authorities by making available a sample Open Records Policy. Authorities are urged to review the policy with their solicitor and to adopt an appropriate policy before January 1, 2009.

The presentation at PMAA's Conference elicited many questions regarding the new Act that are unique to authorities. In closing, we will present several of these questions and our suggested answers.

Authorities' Open Records Questions

Our authority has a SCADA system which produces printouts regarding various equipment, controls and operations. Are SCADA system printouts a public record?

Answer: Authorities understandably want to limit disclosure into the location and details of internal operations and equipment. Since SCADA printouts and similar information could be used to disrupt authority processes, an authority may seek to deny access under the exception for safety of buildings, infrastructure, facility or information storage systems at § 708(b)(3) and also the exception regarding computer hardware, software and networks at § 708(b)(4).

An authority receives a written customer complaint regarding water quality and has its staff look into the situation. Is the complaint letter a public record?

Answer: § 708(b)(17) exempts records of an agency relating to a noncriminal investigation including complaints submitted to the agency. If the authority

**The website for Pennsylvania's Office of Open Records is:
<http://openrecords.state.pa.us>**



has conducted an investigation into the complaint, the letter of complaint and the investigative materials and reports may be exempt under this section.

When the authority publicly bids a contract, must it provide upon request a list of prospective bidders who have picked up bid specification packets, prior to the bid being awarded?

Answer: Such a list would appear to be a "record" under the Act since it documents a transaction or activity of the authority that was created in connection with authority business. There is no specific exemption under § 708 that would appear to apply, leading to the conclusion that such a list would be a public record. However, if the authority has not maintained such a list, it does not need to create a list in order to provide one to the requester.

Our authority has a GPS system that records the location of authority vehicles during the day. Is a record of such location a public record?

Answer: Such records might reasonably be regarded as jeopardizing the safety or security of authority operations, especially where the tracking information would provide schedule and location data regarding employee visits in connection with inspections, servicing or security of authority facilities, thus coming under the exception at § 708(b)(3) regarding the safety of buildings and infrastructure may apply.

The information presented in this article was featured at PMAA's 66th Annual Conference & Trade Show. Charles Means can be reached in the Pittsburgh office of Goehring Rutter & Boehm (412) 281-0587; or email: cmeans@grblaw.com.