

Staying Ahead

with Saul Ewing

February 2008

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Finally! Pennsylvania's New Right-to-Know Law

By Joel R. Burcat and Peter J. Yoon

On Valentine's Day, Governor Rendell signed into law the long-awaited Right-to-Know Law, Act 3 of 2008. The new open-records legislation was finally passed by Pennsylvania's legislature and signed into law after a year of debate. Portions of Act 3 will take effect immediately (the establishment of a new Office of Open Records), while other portions will take effect on July 1, 2008 (those pertaining to state-related institutions and state contract information) and the remainder on January 1, 2009.

Act 3 is a complete revision of the previous law. Pennsylvania's previous Right-to-Know law was widely condemned as one of the worst laws in the nation with regard to providing the public with access to government documents. Now, after months of revisions, studies and debates, Pennsylvania's new open records law makes numerous changes to the law and should enable wider access to public records.

Most important in the new law is the shift in burden of proof, from the public to the government, to show that state or local government records are either public or exempt from disclosure. This is a substantial change from the previous law, which had a very narrow definition of what documents were considered public and gave the government great leeway to deny access to documents. Also significant, the new law creates the Office of Open Records, with its own independent director and staff to handle disputes and appeals. The new law will impose civil penalties should an agency improperly deny access to a public record or fail to comply with a court order to provide access to a public record.

Starting with the presumption that "Public Records" are to be available for inspection by members of the public, the new law establishes **30 categories** of documents that are exempt from disclosure. The burden will be on a Commonwealth or local agency (defined to include all agencies of Pennsylvania government, the legislature and judiciary, political subdivisions, public schools, local agencies, authorities boards and commissions, state-related universities and others), however, to show that the record is not a "public" record or that it is exempt from disclosure. Among the 30 categories of exempt documents are:

- Records relating to law enforcement that, if disclosed, would be reasonably likely to jeopardize or threaten public safety;
- Personal identification information;
- Certain agency employee records;

- Records that reflect internal, pre-decisional deliberations of an agency relating to budgets, legislation, policy or “course of action”;
- Trade secrets or confidential proprietary information;
- The strategy to be used by an agency to develop a legislative proposal or regulation;
- Notes and work papers prepared by a public official or agency employee used by that person;
- Certain records relating to a criminal investigation;
- Certain records relating to a non-criminal investigation; and
- Records identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public.

During the remainder of 2008, state and local governments will take steps to develop policies and pass regulations to implement this new law. We have seen in the past that some governmental agencies, such as the Pennsylvania Department of Environmental Protection, take affirmative steps in issuing a detailed policy on public access to information, and we expect that either PA DEP or the General Counsel will issue policies implementing the new law.

Members of the regulated community should begin anticipating whether documents they are submitting to government agencies — that previously had been considered “non-public” documents — will now be considered public records. Documents that are believed to be confidential under Act 3 should be marked as such to assist agency personnel in restricting access to those records. If there is concern that the submission of certain documents will subject those documents to public scrutiny, plans should be made now to prevent disclosure of sensitive information. Shortly, we will issue a more detailed article detailing the key components of the Right-to-Know Law as it affects businesses and the regulated community.

For more information, go to: www.EnviroLawyers.com

This Bulletin was written by Joel R. Burcat, Chair of Saul Ewing’s Environmental Department and Peter J. Yoon, an Associate in Saul Ewing’s Environmental Department. If you have questions or wish to discuss the contents of this Bulletin, please feel free to contact Joel at 717.257.7506 or jburcat@saul.com or Peter at 215.972.8389 or pyoon@saul.com. This publication has been prepared by the Environmental Department for information purposes only.

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