

Right-To-Know Law Policy Update in the Wake of Anonymous FOIA Buddy Record Requests

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If sunlight is said to be the best of disinfectants and electric lights the most efficient policeman, then what is said of the darkness of anonymity? Many agencies have been receiving Right-to-Know Law, 65 P.S. § 67.701, *et seq.* (“RTKL”) record requests created through “FOIA Buddy” that they suspect are anonymous. FOIA Buddy is an online service that lists its mission as “simplifying the process of requesting public records.” After numerous inquiries about anonymous requests, the Pennsylvania Office of Open Records (“OOR”) released a memo confirming that FOIA Buddy is operated by people who have a stated goal of efficiently promoting government transparency and accountability in a cost-effective manner for all involved and that the OOR found no indication that FOIA Buddy is part of a phishing, scraping, or scamming activity. The memo also stated that the OOR is unable to provide specific legal advice on responding to RTKL requests that are made by or through FOIA Buddy. However, the OOR recommends that agencies ensure their internal RTKL policies are clear and posted on the agency’s website and easily accessible. This has provided an opportunity for local agencies to dust off their RTKL policies, which likely have not been reviewed since the enactment of the new RTKL in 2008.

Section 702 of the RTKL provides that “Agencies may fulfill verbal, written or anonymous verbal or written requests under this act.” Therefore, agencies have discretion as to whether they will answer anonymous requests. For a request not to be anonymous, the request must have a valid requester with an ascertainable address. A “requester” is defined by the RTKL as “[a] person that is a legal resident of the United States.” Section 703 of the RTKL requires that all written requests under the RTKL “shall include the name and address to which the agency should address its response.” The use of an alias or fake name or the lack of inclusion of a verifiable address on the RTKL form constitutes an anonymous request.

While “Frank Curry” from FOIA Buddy sent agencies into a flurry of activity over the past few weeks, anonymous requests previously have been addressed by the OOR. In *Ryan v. Cumberland County*, OOR Dkt. No. AP 2024-0349 (Apr. 12, 2024), the OOR addressed a RTKL request from “Ryan” which included only an email address and a zip code. The OOR concluded that without an ascertainable address, the OOR could not confirm “Ryan” was a legal resident of the United States. In *John Doe v. Pennsylvania Dept. of Community and Economic Development*, OOR Dkt. No. AP 2024-0543 (Feb. 27, 2024), the Requester creatively submitted a sworn affidavit to prove he/she was in fact a legal resident of the United States but redacted the name and signature from that sworn affidavit. The redacted affidavit and request which only included the name “John Doe” and an email address was insufficient for the OOR to determine that the Requester was in fact a legal resident of the United States. In *Anonymous v. Downingtown Area School District*, OOR Dkt. No. AP 2023-2329 (Sept. 28, 2023), the OOR held that a request that only included the name “Anonymous” which was appealed by an email address “uwchlanauditing@gmail.com” was an anonymous request because the Pennsylvania Department of States does not list an entity registered as Uwchlan Auditing.

Although there have been numerous RTKL appeals of denied record requests by “Frank Curry,” the OOR denied the majority of those appeals as insufficient. Recently, the OOR finally had the opportunity to address anonymity concerns in *Frank Curry v. South Western School District*, OOR Dkt. No. AP 2024-1311 (Jun. 20, 2024). The School District had received ten RTKL requests from “Frank Curry” seeking records related to IT operations, contracts, staff, and budgets.

On appeal, the School District asserted sufficient evidence that “Frank Curry” is the equivalent of a “John Doe” and requests utilizing the “Frank Curry” name have opted into the anonymous request function of FOIA Buddy’s service. In fact, the Solicitor created a FOIA Buddy account to show that the name “Frank Curry” was assigned to his anonymous request. The School District had adopted a policy of fulfilling only RTKL requests made by a legal resident of the United States and its website notifies requesters that anonymous requests will not be fulfilled. Therefore, as an anonymous request, the School District was not required to respond to the request.

On appeal, the “Frank Curry” asked the OOR to make a finding of bad faith against the School District. Under the RTKL, a finding of bad faith may be appropriate where an agency refuses to comply with its statutory duties. The OOR concluded that the School District had not acted in bad faith in ignoring the request because the RTKL requests were anonymous requests which the School District was not required to respond to under the RTKL and because the School District promptly notified “Frank Curry” of the anonymity issue in its timely denial letter.

In the wake of agency concern over anonymous requests, the OOR recommends that agencies ensure their internal RTKL policies are clear, especially regarding what requests will be accepted or denied. Agencies should review and revise RTKL policies to state that anonymous RTKL requests will not be accepted by the agency. If a request is received from “Frank Curry” utilizing the “foiabuddy.com” email address and the agency has a clear and accessible internal RTKL policy stating that anonymous requests will not be accepted, the agency may ignore the request as anonymous.

In light of this new anonymous service, agencies should review their old RTKL policies or consider the adoption of a policy for agencies that do not currently have one. Agencies are not required to promulgate regulations and/or policies under the RTKL, but they may do so in accordance with Section 504 of the RTKL. Notably, Section 504(b) of the RTKL requires that any such regulations or policies must be posted at the agency’s physical location and on the agency’s website if it maintains one. The OOR has published a sample Agency RTKL Policy on its website which may be a good starting place for agencies adopting or revising their current policies. It is important to remember that the RTKL prohibits the adoption of regulations or policies that include the following: (i) a limitation on the number of records that may be requested or made available for inspection or duplication and/or (ii) a requirement to disclose the purpose or motive in requesting access to records. When revamping its RTKL policy, an agency should consider the following:

1. Agency Contact Information

With the constant ebb and flow of staffing at agencies, the policy must remain up to date as far as the title of the agency employee who is tasked with being the Open Records Officer (“ORO”). Agencies may also consider designating an Alternate Open Records Officer (“AORO”) in the event that the ORO is unavailable such as during a vacation. An agency’s policy should include the contact information for the ORO and AORO (if applicable).

2. ORO Responsibilities

The policy may also list the responsibility of the ORO and/or AORO in receiving, processing, and responding to RTKL requests.

3. Record Request Information

An agency’s policy can dictate the method of submission of RTKL requests and all agencies must accept RTKL requests on the OOR’s standard form. However, if an agency’s policy dictates the use of a form, agencies do not have to honor record requests outlined in an email or letter. Similar to anonymous requests, the agency can state that it will not acknowledge verbal or repeat RTKL requests. The policy may also include the agency’s hours of daily operation and a notice that requests received outside those hours of operation will be considered received by the agency as of the next business day.

4. Fee Waiver

The policy can dictate whether an agency will waive all fees under a certain dollar amount.

5. Posted Public Records

Where a record is available on an agency's website, Section 704 of the RTKL allows the agency to point requesters to the website rather than providing copies of the record. The RTKL policy can designate what records will be posted to the website.

6. Record Retention Policy

An agency's policy may include a reference to the agency's record retention policy to put requesters on notice of what records are no longer available, which may help reduce RTKL requests.

Even if an agency does not have a RTKL policy, pursuant to Section 504(b) of the RTKL, it must post the following information at its physical office and on its website: (i) ORO contact information, (ii) OOR contact information for appeals, and (iii) a form which may be used to file a RTKL request. This information may be incorporated into the RTKL policy to satisfy this requirement. While not required, a RTKL policy posted to the agency's website and physical offices can help show an agency was not acting in bad faith in not responding to a verbal or anonymous request. RTKL policies can also be a helpful reminder to agency staff of an agency's internal review and procedure related to processing RTKL requests which can often be complex. Our office continually monitors the OOR's guidance on RTKL policies and the processing of anonymous requests. A government agency should be operating in the sunlight and can do so through clear RTKL policies that prevent records requesters from operating in the darkness.

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