

# Annual Report



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OFFICE OF OPEN RECORDS

2011



## A Message from Executive Director Terry Mutchler



In the third year of the landmark Right-to-Know Law, its impact continues to improve government accountability on every level. Success stories abound. Whether involving individuals, families, citizen groups, members of the media or public officials, these success stories illustrate the RTKL is regularly used by and impacts every segment of Pennsylvania citizenry.

However, success is not limited to cases of a requester obtaining records. Success stories include government agencies properly using the law to protect personal information and other exempted records from public distribution and potential abuse. Many government agencies across the Commonwealth have embraced the law and work with requesters in full compliance, even though it's clear we have a long road before we reach true transparency.

After three years, I can report that the courts remain center stage in shaping and interpreting the law, even as the Legislature prepares to make substantial amendments. The Supreme Court, the Commonwealth Court and the Courts of Common Pleas are all weighing in on a wide variety of open government issues from how much deference should be given to the OOR to whether the OOR can be sued for declaratory relief.



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## Executive Director Message cont.

The overwhelmingly interest in and use of the RTKL is exemplified by the increasing number of appeals filed with the OOR. Having decided over 4,000 appeals since 2009, the OOR has yet to peak in the number of appeals it handles annually. In 2011, requesters filed a record 1,772 appeals with the OOR, over a 30 percent increase from 2010. Additionally, the OOR's small staff has litigated or monitored over 200 cases in the appellate courts, conducted mediations, handled over 10,000 telephone or email inquiries, and responded to over 400 right-to-know requests directed to the OOR.

In November, 2011, the OOR received the largest number of inquiries related to one issue when it was inundated with questions regarding the scandal at the Pennsylvania State University, a state-related institution. Citizens, lawmakers, and media outlets from around the country suddenly wanted to know the relationship between Penn State and the Right-to-Know Law. While Penn State and the other state related institutions are not subject to the law, the OOR still, by law, had to process any appeals that were filed seeking records of Penn State increasing the OOR's workload to an even greater dimension than anticipated under this law.

The Legislature is properly considering including Penn State, Temple, Lincoln and Pittsburgh under the Right-to-Know Law. However, the addition of Penn State and other state-related institutions is projected to significantly increase the caseload of an already severely understaffed and underfunded OOR.



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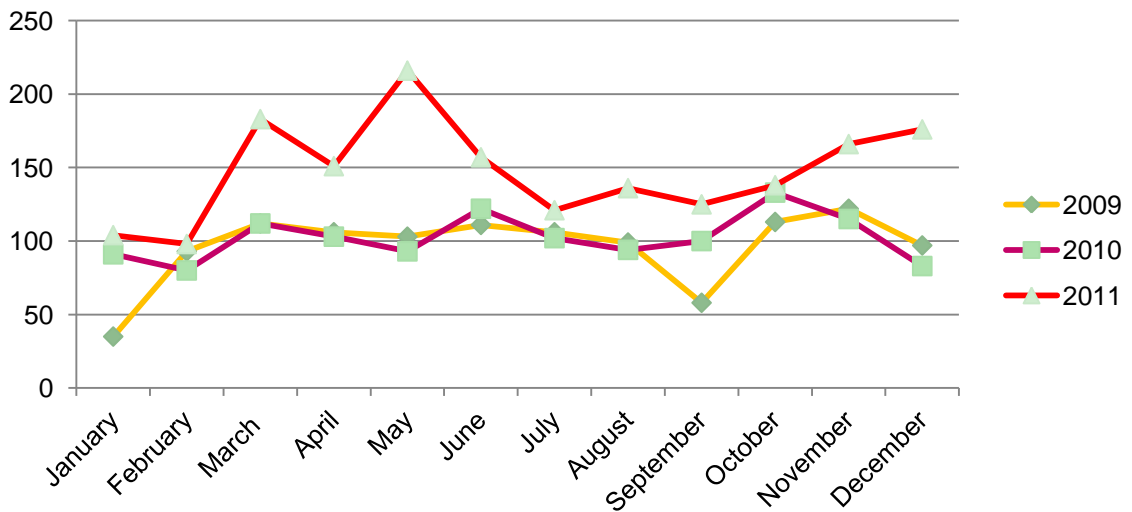
## Executive Director Message cont.

One of the most critical aspects of the work at the moment is to ensure that the OOR is properly funded and staffed to fulfill every statutory duty mandated to the OOR by the Legislature. The strongest Right-to-Know Law is meaningless without the necessary logistical support and financial enablement of the office charged with implementing and enforcing it. Trust fostered by transparency and government accountability is the underpinning of a strong democracy.

As always, my mission and duty is to ensure that this law is applied fairly and evenly and that the Pennsylvania model continues to excel as a national benchmark of transparency. Such an objective reiterates that Pennsylvania's government belongs to its citizens.



In 2011, the Office of Open Records (OOR) received a **record number of appeals**. Requesters filed 1,772 appeals with the OOR in 2011 compared with 1,228 appeals in 2010, and 1,159 appeals in 2009, its first year. In the first three years, the number of appeals filed with the OOR has steadily increased.





### The Impact of the Right-to-Know Law and the OOR

The OOR continues to be an irreplaceable resource for Pennsylvania taxpayers seeking access to government records. Additionally, the OOR assists agency personnel who consistently contact the OOR seeking guidance and training regarding the procedure and implementation of the Right-to-Know Law (RTKL).

Under the RTKL, the General Assembly has created a successful and efficient open records procedure that strengthens government accountability while also enabling citizens to protect their own personal rights.

The OOR's effective implementation of the General Assembly's intent for open government is represented in the following small sampling of positive outcomes and uses surrounding the RTKL:

- A requester obtained invoices showing a government agency hired outside lawyers instead of using agency lawyers. Some bills were for \$40,000 – \$50,000 per month.
- A RTK request revealed that former employees were still on an agency payroll even after they had left the agency.



## RTK Request Impact

- Public concern over possible misuse of funds by a school district youth football league's coach led to a request for bank records from the school district. The records prompted an investigation and the State Police filing theft-related charges against the coach.
- After a citizen suffered damage to his car via a city manhole, he filed a RTKL to obtain records showing the city incorrectly denied liability. Post request, the city agreed to cover the damage to the car.
- A county refused to provide pertinent financial records to auditors. Officials filed Right to Know requests and obtained the documents.
- A family used the RTKL to strengthen their claims regarding *sewage* backups in their basement. After they obtained the records, the sewer authority eventually paid the approximately \$13,000 in damage to their property.
- A newspaper obtained and reported on records showing how much a school district was spending in *legal fees* to defend a particular policy.



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## RTK Request Impact

- Following an appeal to the OOR, a requester obtained subpoenas to obtain credit card statements an agency claimed it could not obtain. The statements showed thousands of dollars in spending.
- Requesters across the Commonwealth have used the RTKL to obtain countless financial records that show how, why and when taxpayer funds are being spent.

To compile a more complete list of the types of records requested, users can track every appeal filed with the OOR and any subsequent court litigation on the OOR website: <https://openrecords.state.pa.us>,





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## Function of the OOR

Many still misunderstand the role and function of the OOR in the process of obtaining records under the RTKL.

A requester may submit a written request to an agency seeking records. An agency has five business days to respond to that request. If an agency denies the request or fails to respond within five business days, the requester can appeal to the OOR.

After assigning an appeals officer, the OOR permits both the requester and agency to submit arguments in support of their respective positions. After carefully weighing the evidence and legal arguments presented, the OOR issues a binding Final Determination within thirty calendar days.

In addition to handling over 4,000 appeals, the OOR's additional statutory duties include:

- Conducting annual and regional trainings on the RTKL
- Providing information regarding implementation of the RTKL
- Reviewing fees charged by agencies under the RTKL
- Issuing an Annual Report
- Maintaining a mediation program
- Maintaining a webpage



## Status of appeals as of 12/30/2011

1772 Appeals Filed

264 Granted

107 Partially granted

537 Dismissed

330 Denied

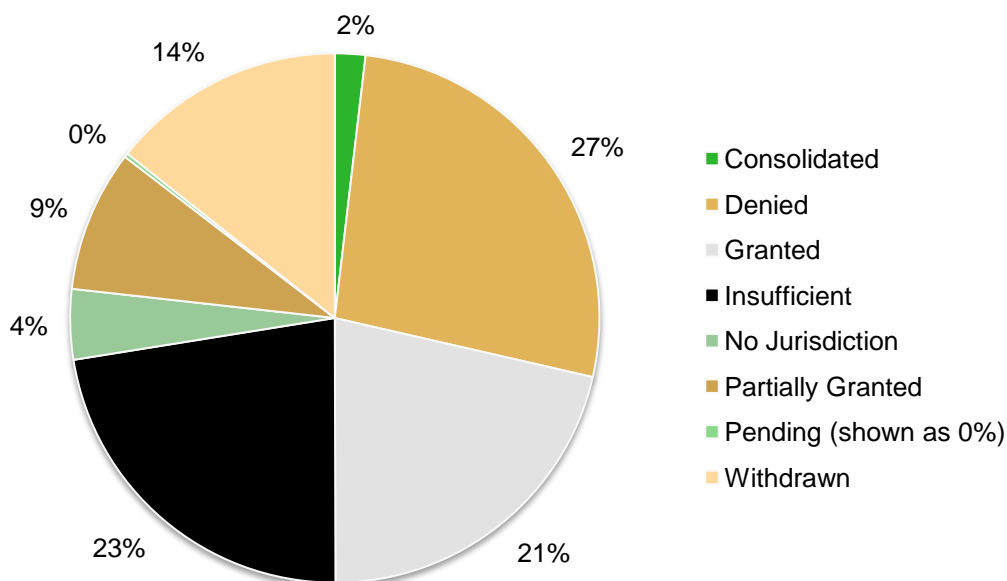
53 No Jurisdiction

177 Withdrawn

3 Pending

278 Insufficient

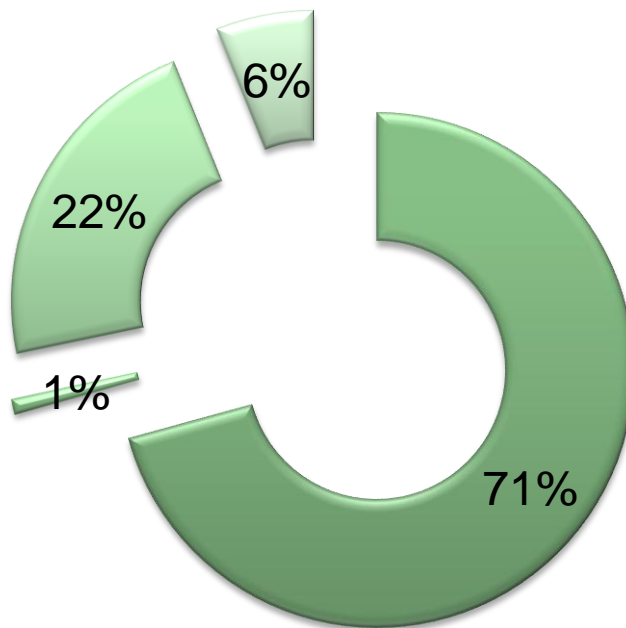
23 Consolidated





## Appeal Percentage by Requester Type

■ Citizen ■ Government Officials ■ Inmates ■ Media



• Inmates were included as Citizen Requesters until April 2011



**Breakdown of Appeals Involving  
Commonwealth and Local Agencies**

**501 involving State Agencies:**

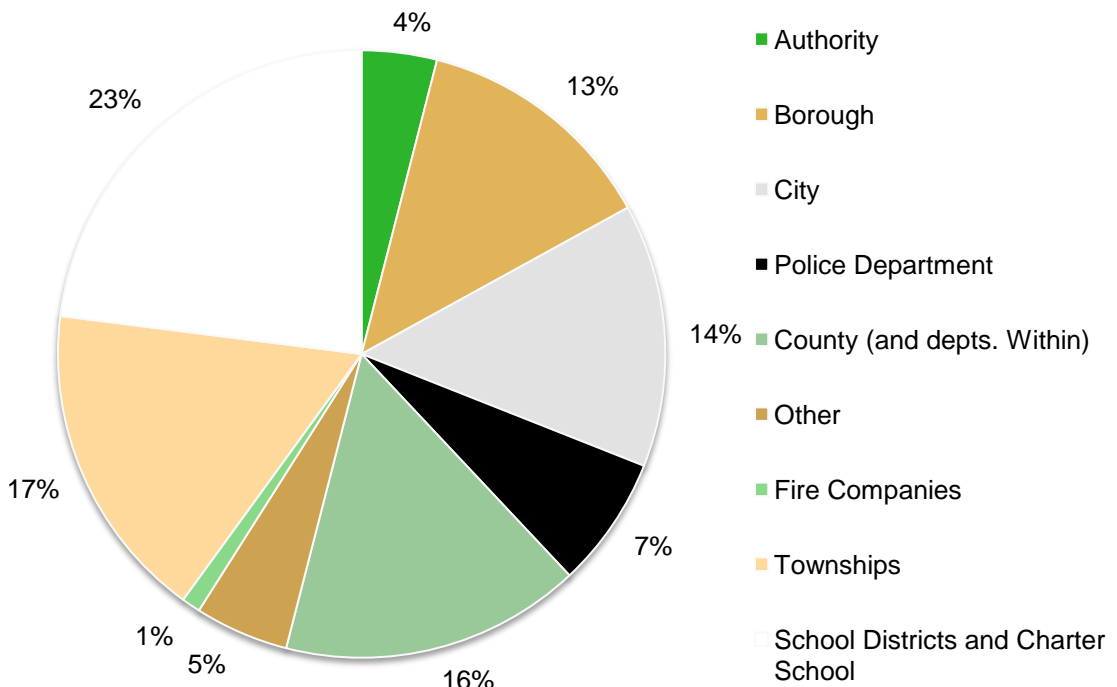
- 119 Granted or partially granted
- 40 Withdrawn
- 196 Dismissed
- 44 Insufficient
- 21 No Jurisdiction
- 72 Denied
- 8 Consolidated
- 1 Pending

**1271 involving Local Agencies:**

- 252 Granted or partially granted
- 137 Withdrawn
- 341 Dismissed
- 234 Insufficient
- 32 No Jurisdiction
- 258 Denied
- 15 Consolidated
- 2 Pending



# Appeals Involving Local Agencies





**Most Appeals Filed with the OOR:**

Philadelphia Federation of Teachers	82
Shawn Makanvand (Citizen)	24
Simon Campbell (Stop Teacher Strikes)	24
Charles Hoyer (Inmate)	22

**Most Appeals Filed Involving Commonwealth Agencies**

Dept. of Corrections	170
Dept. of Environmental Protection	44
State Police	36
Dept. of State	31
Dept. of Labor & Industry	19
Dept. of Transportation	18
Dept. of Public Welfare	17

**Most Appeals Filed Involving Local Agencies**

*City of Philadelphia	107
*City of Johnstown	32
*Allegheny County	21
SEPTA	18

\* Includes all departments and agencies within



In addition to the 1,772 Final Determinations and thousands of e-mail and telephone inquiries, the OOR continues to monitor and/or litigate hundreds of appeals of Final Determinations in appellate courts across the state.

In 2011, local agencies and requesters filed approximately 67 appeals to Courts of Common Pleas. An additional 61 appeals were filed with the Commonwealth Court either appealing Court of Common Pleas decisions or OOR Final Determinations involving state agencies.

For the first time, cases involving substantive issues in the RTKL made their way to the Pennsylvania Supreme Court. Nine appeals were filed with the Pennsylvania Supreme Court in 2011.

Currently, there are approximately 17 matters pending before the Supreme Court and another 49 before the Commonwealth Court. At the same time, approximately 134 appeals are pending in various Courts of Common Pleas.

- ❖ These numbers are based on appeals where the OOR was given notice. While the RTKL requires the OOR to be noticed on any appeal of its Final Determinations, the OOR does not always receive the required notice.



In 2011, the Commonwealth Court issued more ground breaking decisions covering a wide range of significant open records issues:

In *Sherry v. Radnor Twp. School District*, 20 A.3d 515 (Pa. Commw. Ct. 2011), the Commonwealth Court approved the OOR's use of testimonial affidavits noting the strict time limitations faced by the OOR.

In *Department of Corrections v. OOR*, 18 A.3d 429 (Pa. Commw. Ct. 2011), the Commonwealth Court held that when a requester appeals an agency's denial of a request for records, the appeal must specify any defects in the agency's stated reason for denial. If the requester does not say why they believe the agency incorrectly denied the appeal, the appeal must be dismissed. Following this ruling, the OOR has been forced to dismiss hundreds of appeals.

The Commonwealth Court and Courts of Common Pleas have consistently held that an agency cannot raise new arguments and/or exemptions on appeal. An agency is limited to the arguments and exemptions it raised in the denial of the request for records. While the Commonwealth Court has not issued a decision regarding deemed denials, it has strongly implied that an agency is barred from raising any arguments or exemptions on appeal when the agency failed to respond to the request (a deemed denial).





In 2011, the Commonwealth Court addressed the difficult issue of e-mails.

*In Re Silberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011), the Court held that documents and electronic communications of an individual public office holder maintained on a personal computer are not records of an agency and are instead records of an individual not authorized to act alone. Unless the emails and other documents in are produced with the authority of an agency, or were later ratified, adopted or confirmed by the agency the records cannot be deemed “public records” within the meaning of the RTKL.

*In Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011) the Court clarified its *Silberstein* ruling holding that where emails are exchanged by a quorum of supervisors, it constitutes a transaction of agency business, unlike *Silberstein*, where the emails of a single supervisor were sought.

However, the Court recently issued *Easton Area School District v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012) seemingly overruling *Silberstein* holding that an “individual acting in his or her official capacity, nonetheless, constitutes agency activity when discussing agency business.”



In *Edinboro University of Pennsylvania v. Felix Folletti*, No. 1900 CD 2010, 2011 Pa. Commw. Unpub. LEXIS 561 (Pa. Commw. Ct. 2011), the Commonwealth Court held that certain requested contracts were public records. Edinboro University stated that it did not have the contracts but the University Foundation, a separate entity, did. The Court subsequently ordered Edinboro University to obtain copies of the contracts from the Edinboro University Foundation. Despite the Court's holding and order, the Foundation refused to give the public records to the University for public release. After the Court entered an order prohibiting contact between the University and Foundation, the Foundation relented and gave the public records to the University for public release.

In 2011, the OOR saw an increase in the number of cases remanded to the OOR for hearings. In at least one case, the agency released the records after the court remanded the case to the OOR. As the OOR has testified to the General Assembly, if the OOR continues to face budget cuts, it will be logistically impossible for the OOR to comply with these orders.

On September 13, 2011, the OOR argued for the first time before the Pennsylvania Supreme Court. Justice Seamus McCaffery acknowledged that Executive Director Terry Mutchler was the first woman to argue before the Supreme Court of Pennsylvania in Philadelphia's Old City Hall.



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## Training

In addition to answering telephone and e-mail inquiries, the OOR continues to provide statutorily mandated regional trainings across the state to local municipalities, public employees and organizations. As in 2010, the amount of trainings was again severely limited by staff and budget constraints. In the last three years, the OOR has conducted over 700 trainings. These trainings are vital to assisting requesters and especially agencies comply with the law in an efficient and cost-effective manner.

As mandated by Law, the OOR held its Annual Training in September at the State Museum located in Harrisburg. This training briefly addressed the Sunshine Law and provided an update on the issues that agencies are encountering including procedural issues, hot topic issues, and recent Court opinions.



The OOR maintains and operates an informal mediation program designed to promote access to records outside of formal appeals. The goal of informal mediation is to resolve disputes between an agency and a requester without undergoing a formal hearing process and to avoid litigation once the administrative procedures for appeals by the OOR have been exhausted.

Mediation allows an agency to better understand a request so that a requester can receive the records he or she actually seeks. Mediation reduces the burden of production that a voluminous request places on an agency, as well as reduces potential financial costs to the requester.

In 2011, the OOR conducted seven mediations. Of these mediations, two were successful.

- ❑ In *Brennan v. Pennsylvania Office of Administration*, OOR Dkt. AP 2011-0707, the Request sought information regarding the Commonwealth's use of portable radios.
- ❑ In *Groff v. Bristol Borough School District*, OOR Dkt. AP 2011-1185, the request sought the job descriptions for certain employees of the District. With guidance from the OOR through the mediation process, the parties reached amicable resolutions.
- ❑ Consequently, satisfied requesters withdrew both appeals.



## Office of Open Records Staff Bios

**Terry Mutchler**, Executive Director, was appointed to a six-year term as Executive Director in April, 2008. Prior to accepting this position, Ms. Mutchler served as Illinois' first Public Access Counselor to enforce the state's sunshine laws and also served as a senior advisor and speech writer for the Attorney General.

She previously worked at a national law firm in its media law group and appellate practice group in Chicago. She is a former law clerk for a retired Chief Justice of the Illinois Supreme Court, and also clerked for the Executive Office of the President during the Clinton Administration focusing on privacy issues.

Before becoming an attorney, Ms. Mutchler was an investigative journalist for The Associated Press in Pennsylvania, New Jersey, Alaska, and Illinois. She later served as a senior advisor and speech writer for the late Illinois Senate Minority Whip.

Ms. Mutchler received her *juris doctor* from the John Marshall School of Law in Chicago. She was selected as a Bohnett Summer Fellow at the Kennedy School of Government, Harvard University.



## Office of Open Records Staff Bios (cont.)

**Nathanael Byerly**, Deputy Director, was previously OOR Chief Counsel and the Open Records Officer for the OOR. He has also served as an Appeals Officer. Prior to joining the OOR, he was a Special Assistant United States Attorney in the Harrisburg Branch of the U.S. Attorney's Office for the Middle District of Pennsylvania.

As senior adviser to the Executive Director, he is actively involved in speech writing, testifying before the Legislature, managing administration and monitoring the budget of the OOR.

Mr. Byerly has also worked in private practice for the Law Offices of Craig A. Diehl and Knauer & Associates, LLC. He is a graduate of the University of Dayton School of Law.

**Dena Lefkowitz**, Chief Counsel, joined the OOR in 2008. The one-time General Counsel to the Chester Upland School District and Assistant General Counsel to the School District of Philadelphia has also been a civil litigator for firms in Media, Bala Cynwyd, Norristown and Philadelphia. She is a graduate of Temple School of Law.



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## Office of Open Records Staff Bios (cont.)

**J. Chadwick Schnee**, Assistant Chief Counsel, joined the OOR in 2009 as an Appeals Officer. Mr. Schnee is a former associate with the Pittsburgh-based Campbell, Durrant, Beatty, Palombo & Miller, P.C. He graduated from the University of Pittsburgh School of Law.

**Charles Rees Brown**, Senior Attorney, joined the OOR in May, 2011. Mr. Brown is a graduate of Penn State University and Widener University School of Law. Prior to joining the OOR, he served in the Governor's Office of General Counsel representing the Department of Community and Economic Development.

**Audrey Buglione**, Staff Attorney joined the OOR in 2009 as an Appeals Officer. Prior to joining the OOR, Ms. Buglione started her own law firm. She was also a former associate with McNees, Wallace & Nurick, in Harrisburg. Ms. Buglione is a *magna cum laude* graduate of the Widener University School of Law.

**Kyle Applegate**, Staff Attorney, joined the OOR in the Spring of 2011 as an Appeals Officer. Before joining the OOR, Mr. Applegate was a law clerk for the Franklin County Court of Common Pleas. Mr. Applegate is a *magna cum laude* graduate of Widener University School of Law.



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## Office of Open Records Staff Bios (cont.)

**Benjamin Lorah**, Staff Attorney, joined the OOR as an Appeals Officer in November of 2011. Prior to joining the OOR in 2011, Mr. Lorah served as an attorney for the Pennsylvania Board of Finance and Revenue for nearly 5 years. Mr. Lorah is a graduate of The Pennsylvania State University Dickinson School of Law.

After valuable service to the OOR, especially in its early days, Senior Attorney and Appeals Officer **Lucinda Glinn** accepted a position with the Pennsylvania Commonwealth Court in mid -2011. Due to budget constraints, the OOR was unable to fill her vacant position.





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**Media**

Since its creation, the OOR has received considerable attention as people across the United States track the ongoing advancement of what has been called the “Pennsylvania Model.”

Since the first Final Determination in February 2009, national, state and local news organizations have editorialized and discussed the OOR’s Final Determinations both challenging and praising them. Open government issues, including OOR Final Determinations, have been consistently appeared in *The New York Times*, *The Wall Street Journal*, *Philadelphia Inquirer*, *Pittsburgh Post-Gazette*, *Philadelphia Daily News*, *Pittsburgh Tribune-Review*, *The Morning Call*, *The Patriot-News*, *Delaware County Daily Times*, *York Daily Record*, *The Herald*, *The Sentinel*, *Scranton Times*, *Erie Times-News*, *Pocono Record*, *Reading Eagle*, *Intelligencer Journal*, *Beaver County Times*, *The Times Leader*, *Pottsville Republican*, *The Daily News* and *Ellwood City Ledger* and many others.

This interest in the RTKL was never stronger than in November, 2011. Both media and public inquiries to the OOR exploded with the revelation of allegations surrounding Jerry Sandusky and Penn State University. In addition to appearing on *Anderson Cooper 360* and *Dr. Drew*, the Executive Director conducted dozens of interviews explaining the OOR’s jurisdiction and how the RTKL applied to obtaining records related to the allegations and the ensuing questions those allegations raised.



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## Right-to-Know Requests

Like all Commonwealth agencies, the OOR is subject to the RTKL. The OOR regularly receives and responds to right to know requests. In 2011, the OOR received 429 requests.

The OOR has granted access to the following records

- *Emails*
- *Names and titles of OOR staff*
- *OOR staff salaries*
- *Home address of the Executive Director*
- *Copy of the Pennsylvania Constitution*
- *Appeal information contained in certain docketed appeals*
- *Names of requesters filing most appeals with the OOR*