INFORMAL MEDIATION

Preliminary Statement

The Right-To-Know Law (“RTKL”) requires in section 1310(a)(6) that the Office of Open Records (“OOR”) shall “establish an informal mediation program to resolve disputes under this act.” 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 Office of Open Records have been exhausted. Using the mediation program established by OOR will not prejudice a requester’s ability to appeal an agency denial should the mediation not resolve the dispute.

The key to successful resolution of an open records dispute is to conduct informal mediation prior to an agency issuing a denial of records. The Office of Open Records encourages in the strongest possible terms that agencies and requesters resolve an open records dispute before a denial is issued by an agency to avoid the appeals process at both the administrative and the judicial levels. Parties are also strongly encouraged to discuss alternative resolutions even after a denial is issued, but prior to submitting an appeal. A requester and an agency may agree on their own informal mediation process, or may use the mediation program that will be used by the Office of Open Records as outlined below. Additionally, to promote uniformity within the Commonwealth, the Legislature and the Judiciary are encouraged to use the Informal Mediation Program established by the Office of Open Records.

When an appeal is commenced, the Office of Open Records in most instances can resolve an appeal based on documents and information supplied to our Office from both the requester, who was denied information, and from the agency that denied the records. In some instances, a formal hearing will also be used to resolve disputes. The process is outlined in the Appeals Process – Interim Guidelines.

Prior to issuing a Final Determination, however, the Office of Open Records will offer an informal mediation program. Either a requester or an agency may opt for
informal mediation at the onset of the administrative review period, which starts the day that a timely appeal of a denial is filed to the appropriate Appeals Officer designated in Section 503 of the RTKL. This informal mediation program will be available as an option to requesters or agencies provided they agree to the terms outlined in this Informal Mediation Program, and agree to an extension of time to permit an Appeals Officer a total of thirty (30) calendar days to issue a Final Determination in the event mediation does not resolve the dispute(s).

Nationally, no formal mediation model exists specifically for disputes involving government records. The “Openness Promotes Effectiveness in our National Government Act of 2007,” provides that an ombudsman will establish a mediation program to resolve disputes among federal government agencies. No mediation framework has been established because the Office remains unfunded. At the state level, a public access counselor, Attorneys General office or Commission often conducts mediation in an effort to avoid costly litigation over release of government records. Those agencies employ mediation as a tool to resolve disputes because they lack other authority to issue binding decisions. In Pennsylvania, the Office of Open Records does have authority to issue binding Final Determinations when a local or Commonwealth Agency denies records. Pursuant to Section 1101(b), the Final Determination of a designated Appeals Officer is a binding final order and an agency must comply, or opt for judicial review.

INFORMAL MEDIATION PROCESS

Mediation is a fair and efficient tool to resolve conflict. Usually, mediation can be invoked at any time during a dispute. However, because the RTK law contains strict statutory deadlines for invoking an appeal and for a Final Determination to be issued by the Office of Open Records, mediation by the Office of Open Records will be available only when a formal appeal is commenced with our Office.

To participate in the OOR Mediation Program, all parties must agree to mediate a dispute and submit an Informal Mediation Request Form to the OOR requesting mediation, showing the written consent of both parties to participate in mediation in good faith and on the terms outlined below.

Once a formal appeal of an agency denial is filed to the appropriate Appeals Officer designated pursuant to Section 503, either the requester or an agency may request to participate in the mediation program overseen by the OOR. The Informal Mediation Request Form shall be submitted to the appropriate Appeals Officer advising the Appeals Officer that mediation shall be conducted within a specified number of days, agreed to by both parties and OOR, and requester is granting an extension to issue a Final Determination for the duration of the mediation.
Informal Mediation Program

1. Parties must agree in writing to participate in informal mediation in good faith. The Informal Mediation Request Form to enter informal mediation is available at our website.

2. Parties must agree in writing to a date, time and location for at least one mediation session.

3. Mediation is not open to the public, and all discussions, negotiations and materials reviewed which are not part of the record submitted on appeal are confidential.

4. Parties cannot agree among themselves to keep confidential the resolution of the mediation. However, parties should be advised that the resolution of the dispute is a public record as defined in the law.

5. At the commencement of the informal mediation, the Appeals Officer/Mediator shall do the following:

   a. Inform the parties that the mediation is confidential.
   b. Inform the parties that they cannot agree among themselves to keep confidential the resolution of the open records dispute, which resolution is itself a public record.
   c. Inform the parties that if resolution is reached, the appealing party must withdraw the appeal in writing.
   d. Inform the parties that if mediation is not successful, the Appeals Officer will issue a Final Determination within 30 calendar days calculated from the last day of the mediation process.
   e. State the purpose of mediation and provide goals desired to be reached during the mediation.
   f. Review for parties the documents submitted to the Office of Open Records for the appeal, which must include:
      i. the Complainant’s full name, address, telephone and fax number; and
      ii. A concise statement of relevant facts including, but not limited to:
           i. The name, title, address, telephone and fax numbers, if known, of the agency and any agency official alleged to have denied the Complainant a right conferred by the RTKL;
           ii. A description of the records requested;
           iii. The date of the Right to Know request;
           iv. The date of any response or the date the response was deemed denied;
           v. A statement of the grounds upon which the requester asserts that the record is a public record;
vi. A statement addressing any grounds stated by the agency for delaying or denying the request, including any unusual circumstances or emergency situations that may have contributed to the delay;

vii. A copy of any pertinent correspondence or other documents; and

viii. A statement that all material provided by the agency has been submitted with the appeal.

g. Permit each party to state their view of the dispute and their position.

h. Outline various options related to resolution of the dispute.

i. Permit each party to propose a resolution to the dispute.

j. If the open records dispute is resolved, the Mediator shall reduce the resolution, which is a public record, to writing for signature by both parties.

k. If resolution is reached, the appealing party must withdraw its pending appeal.

l. If resolution is reached and the appeal is withdrawn, the Appeals Officer shall not issue a Final Determination but will issue a statement indicating the resolution reached via mediation.

m. If no resolution is reached via mediation, the parties will be advised that the applicable Appeals Officer shall issue its Final Determination within 30 calendar days calculated from the last day of the mediation process.