

**WHEN IS A CONTRACTOR'S RECORD YOUR RECORD  
UNDER THE RIGHT TO KNOW LAW?**

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The Right to Know Law (RTKL) creates a presumption that all records in the possession of a local agency are public records unless they are subject to one of the enumerated exceptions. Section 506(d)(1) of the RTKL also provides that “a public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.” The courts and the Office of Open Records are still struggling with the extent of a local agency’s, and government contractor’s, obligation to produce documents within the contractor’s possession. Three recent decisions shed some light on this evolving issue.

In Allegheny County Department of Administrative Services v. A Second Chance, Inc., 13 A.3d 1025 (Pa. Cmmw. Ct. 2011), the Commonwealth Court dealt with a request for the Allegheny County's Department of Human Services to provide access under the RTKL to “payroll list[s]” of employees of three entities, including ASCI, with which the County has contracts. The letter specifically requested the following information: full name of each employee, job position/title, salary, hire date and birth date. The County provided payroll information that it had in its possession as to two contractors but responded that it did not have the requested information as to ASCI. On appeal, one of the issues related to the specific request for names, hire date and birth date of ASCI employees. The Commonwealth Court went through an analysis of the distinction between records in the possession of a local agency and those in the possession of an entity performing a governmental function on behalf of the agency and concluded that there is no presumption that a record in the possession of a third party is a public record. The focus is on whether the third party is performing a governmental function and then whether the record directly relates to the governmental function or is otherwise exempt from disclosure. In this case because the actual contract between the County and ASCI had not been made a part of the record, the Commonwealth Court remanded the case back to the trial court to determine whether the names, dates of birth and hire dates of ASCI employees were directly related to performing the governmental function. It is hard to imagine that the contract will support a conclusion that this specific information is directly related to the performance of the contract. This case helps establish that a local agency is not necessarily responsible for forcing a contractor to open up all of its business records for public disclosure merely because it had entered into a contract with the government.

In Office of the Budget v. Office of Open Records, 11 A.3d 618 (Pa. Cmmw. 2011), the Commonwealth Court recognized a distinction between government grants and government contracts and held that where a grantee received funds from the Commonwealth under a grant program but was not performing a governmental function, Section 506(d)(1) did not apply. In

addition, the Commonwealth Court rejected the part of the decision of the Office of Open Records that the Office of the Budget had an obligation to produce payroll records of a grantee where the conditions of the grant authorized the Office of the Budget to audit the records, even though it had not done so. The Office of Open Records had determined that the records were under the custody or control of the Office of the Budget, even though they were not in its possession. The Commonwealth Court refused to expand the RTKL to reach this conclusion.

Finally, in Giurintano v. Dept. of Gen. Services, 2011 WL 1566741 (Pa. Cmmw. Ct. 2011), a three-judge panel of the Commonwealth Court was unanimous in its determination that the Department of General Services is not required to turn over certain independent contractor agreements between an interpreter service called Language Services Associates (LSA) and LSA's subcontractor-interpreters. Under the facts of Giurintano, LSA contracts directly with the Department of General Services (DGS). In turn, LSA subcontracts with interpreters to complete its work for DGS, as well as to perform work under other contracts. Giurintano, an employee of the Harrisburg Law Firm McNeese Wallace & Nurick, submitted a RTKL request with DGS seeking disclosure of all independent contractor agreements between LSA and its interpreters. DGS initially denied the request; however Giurintano appealed to Office of Open Records, which directed DGS to disclose only the contracts for interpreters who performed work under LSA's contract with DGS. Any information identifying LSA's interpreters was to be redacted from these contracts because it constituted proprietary information. Giurintano appealed.

The court, citing Section 506(d)(1) of the RTKL, once again stated that records are only public if they directly relate to carrying out the government function, and upheld the limitation on disclosure to only those contracts with interpreters who actually performed services under the DGS contract. In addition, based upon some fairly unusual facts, the Court accepted LSA's argument that disclosing the identity of the subcontractor interpreters would cause great business and economic harm to LSA by "allowing competitors to gain the fruits of LSA's labor in identifying a vast network" of quality interpreters. Accordingly, the court held that the identities of the subcontractors are protected under the RTKL as both confidential proprietary information and trade secrets.