

ORDINANCE NO. 16-2008

AN ORDINANCE OF THE BOROUGH OF KUTZTOWN, BERKS COUNTY, PENNSYLVANIA, REPEALING RESOLUTION NOS. 38-2007 AND 29-2002 AND ADOPTING CHAPTER 170 OF THE KUTZTOWN CODE WHICH SHALL PROVIDE RULES AND REGULATIONS FOR THE OBTAINING OF PUBLIC RECORDS FROM THE BOROUGH OF KUTZTOWN PURSUANT TO 65 P.S. § 67.101, *ET SEQ.* OTHERWISE KNOWN AS THE “RIGHT-TO-KNOW LAW.”

WHEREAS, the Commonwealth of Pennsylvania “Right-To-Know Law,” Act 3 of 2008, 65 P.S. § 67.101 to and including § 67.3104 as amended from time to time, applicable to the Borough of Kutztown, grants to any legal resident of the United States the right to request and inspect “public records,” as defined in said Act from the Borough of Kutztown; and

WHEREAS, the Right-To-Know Law requires that the Borough of Kutztown provide public records in accordance with the provisions of said law; and

WHEREAS, the open records law requires that the Borough of Kutztown adopt rules and regulations regarding the implementation of the Act.

NOW, THEREFORE, BE IT ENACTED AND ORDAINED by the Council of the Borough of Kutztown, County of Berks, Commonwealth of Pennsylvania, and it is hereby enacted and ordained by the authority of the same as follows:

SECTION 1. Short Title. This Ordinance shall be known as the “Right-To-Know Ordinance” of the Borough of Kutztown.

SECTION 2. Authority. The Right-To-Know Ordinance of the Borough of Kutztown is hereby adopted in accordance with and pursuant to 65 P.S. § 67.101, *et seq.*, otherwise known as the “Right-To-Know Law.”

SECTION 3. Section 170-1 through Section 170-8 of the Code of the Borough of Kutztown is hereby enacted to read as follows:

§ 170-1. Definition.

A. APPEALS OFFICER - the individual designated by the Pennsylvania Office of Open Records to hear appeals from the denial of public records request made to the Borough .

B. BOROUGH - the Borough of Kutztown, Pennsylvania

C. CONFIDENTIAL PROPRIETARY INFORMATION - Commercial or financial information received by an agency which is privileged or confidential and the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

D. FINANCIAL RECORDS

1. Any account, voucher or contract dealing with a receipt or disbursement of funds by the Borough or the Borough's acquisition, use or disposal of services, supplies, materials, equipment or property.
2. The salary or other payments or expenses paid to an officer or employee of the Borough, including the name and title of the officer or employee.
3. A financial audit report performed on behalf of the Borough, however, this term does not include the work papers underlying the audit.

E. HOMELAND SECURITY - governmental actions designed to prevent, detect, respond to and recover from acts of terrorism, major disasters and other emergencies, whether or natural or man made. The term includes activities relating to the following:

1. Emergency preparedness and response, including preparedness and response activities by volunteer medical, police, emergency management, hazardous materials and fire personnel;
2. Intelligence Activities;
3. Critical Infrastructure Protection;
4. Border Security;
5. Ground, aviation and maritime transportation security;
6. Biodefense;
7. Detection of nuclear and radiological materials; and
8. Research on next-generation securities technologies.

F. OFFICE OF OPEN RECORDS - the office established within the Department of Community and Economic Development for the State of Pennsylvania which is charged with the implementation and enforcement of the Right-To-Know Law.

G. PERSONAL FINANCIAL INFORMATION - an individual's personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account or pin numbers and other information relating to an individual's personal finances.

H. PRIVILEGE - information protected by the Attorney Work Product Doctrine, the Attorney-Client Privilege, the Doctor-Patient Privilege, the Speech and Debate Privilege or other privilege recognized by a court interpreting the laws of the Commonwealth of Pennsylvania.

I. PUBLIC RECORD - a record, including a financial record of the Borough that is not exempt under Section 170-6 of this Chapter or is not exempt from being disclosed under any other federal or state law or regulation or judicial order or decree or is not protected by a privilege.

J. RECORD - information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the Borough . The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

K. REQUESTOR - a person that is a legal resident of the United States and requests a record pursuant to this Chapter or the Pennsylvania Right-To-Know Law.

L. RESPONSE - access to a Pennsylvania record or the Borough's written notice to a requestor granting, denying or partially granting and partially denying access to a record.

M. RIGHT-TO-KNOW OFFICER - the person designated by the Borough to receive public records requests submitted to the Borough and otherwise complies with the Pennsylvania Right-To-Know Law on behalf of the Borough .

N. SOCIAL SERVICES - cash assistance and other welfare benefits, medical, mental and other healthcare services, drug and alcohol treatment, adoption services, vocational services and training, occupational training, education services, counseling services, workers' compensation services and unemployment compensation services, foster care services, services for the

elderly, services for individuals with disabilities and services for victims of crimes and domestic assault.

O. **TERRORIST ACT** - a violent or life threatening act that violates the criminal laws of the United States or any state that appears to be intended to:

1. Intimidate or coerce a civilian population.
2. Influence the policy of a government.
3. Affect the conduct of a government of mass destruction, assassination or kidnapping.

P. **TRADE SECRET** - information, including the formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

1. Derives independent economic value, actual or potential, but not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

§ 170-2. Appointment of a Right-To-Know Officer. The Borough hereby appoints the Borough Secretary as the Right-To-Know officer for the Borough .

§ 170-3 Duties of the Right-To-Know Officer.

A. The Right-To-Know Officer shall receive requests submitted to the Borough .

B. The Right-To-Know Officer shall direct requests to the appropriate persons within the Borough or to the appropriate person from amongst the Borough 's contractors, legal advisors and other such related personnel.

C. Track the Borough 's progress in responding to requests, including the following:

1. Put the date of receipt on a written request received by the Borough .
2. Compute the day on which the five-day period for responding to the request will expire and make a notation of that date on the written request.
3. Maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been fulfilled. If the request is denied, the written request shall be maintained for thirty days or, if an appeal is filed, until a final determination is issued under Section 1101(b) of the Pennsylvania Right-To-Know Law.

§ 170-4. Request for Public Records.

A. A requestor desiring to obtain or view public records in the possession or believed to be in the possession of the Borough shall make a request to the Borough on the Right-To-Know request form in the format attached hereto as Exhibit “A” or as provided by the Office of Open Records.

B. All request for public records shall be made to the Right-To-Know officer for the Borough .

C. All requests should identify or describe the public records being sought with sufficient specificity to enable the Borough to ascertain which public records are being requested and shall include the name and address to which the Borough should address its response.

D. A written request need not include any explanation of the requestor’s reason for requesting a public record or its intended use of the public record, unless otherwise required by law.

§ 170-5. Response to Public Records Request.

A. Borough has five business days from receipt of a written request to either grant or deny the request.

B. In response to a request for a public record, the Borough shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the Borough does not currently compile, maintain, format or organize the record.

C. Failure to act within the five day time period shall equate to a deemed denial of the request.

D. Extension of Time.

1. An agency may take up to an additional thirty calendar days after the five business days to respond to a request for public records if the Right-To-Know officer sends written notice to the requestor within the five business days that the agency needs additional time to process the request as noted herein.

E. Situation Necessitating Extension of Time.

1. Redaction of non-public information is required.
2. The records must be retrieved from a remote location.
3. Timely response cannot be accomplished within the time required due to bonafide and specified staffing limitations.
4. Legal review is necessary.
5. The requestor has not complied with the Borough's policies regarding access.
6. The requestor refuses to pay applicable fees.
7. The extent and nature of the request precludes a response within the time period.

In the event the Borough has not responded to a request for which it has received an extension of time within the thirty day time period, a deemed denial of the request shall take place on the 31st day.

F. Extension of Time Beyond the Thirty Day Time Period. A requestor may agree to a period in excess of thirty days for the processing of the request but is not required to do so. If such an agreement is reached between the requestor and the Borough, the request shall be deemed denied the day following the date agreed upon for production if the response has not been provided by that date.

G. Denial of a Request. A denial of a request for a public record shall set forth:

1. A description of the record requested.
2. The specific reasons for denial, including citation of legal authority, if applicable.

3. The printed name, title, business address and telephone number and signature of the Right-To-Know officer who issued the denial.

4. The date of the denial.

5. The procedure to appeal the denial.

§ 170-6. Documents Exempt from Production.

A. The burden of proving that a record of the Borough is exempt from public access shall be on the Borough and shall be proven by a preponderance of the evidence.

B. However, documents meeting any one of the following criteria are exempt from production to requestors pursuant to the Right-To-Know Law:

1. A record, the disclosure of which:

a. would result in the loss of Federal or State funds by the Borough.

b. would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

2. A record maintained by the Borough in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.

3. A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

a. documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

b. lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National Infrastructure Protections, which are deemed critical due to their nature and which result from risk analysis; threat assessments; consequences assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and

c. building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

4. A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.

5. A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

6. The following personal identification information:

a. A record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.

b. A spouse's name, marital status or beneficiary or dependent information.

c. The home address of a law enforcement officer or judge.

d. Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related

contract or agreement and length of service of a public official or a Borough employee.

e. The Borough may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.

7. The following records relating to a Borough employee:

a. A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual, unless it was prepared in relation to the appointment of an individual to fill a vacancy in an elected office or an appointed office requiring Senate confirmation.

b. A performance rating or review.

c. The result of a civil service or similar test administered by the Borough shall not be disclosed if restricted by a collective bargaining agreement. Only test scores of individuals who obtained a passing score on a test administered by the Borough may be disclosed.

d. The employment application of an individual who is not hired by the Borough .

e. Workplace support services program information.

f. Written criticisms of an employee.

g. Grievance material, including documents related to discrimination or sexual harassment.

h. Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of the Borough that results in demotion or discharge.

i. An academic transcript.

8. A record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings. This subparagraph shall not apply to a final or executed

contract or agreement between the parties in a collective bargaining procedure.

a. In the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion. This subparagraph shall not apply to the final award or order of the arbitrator in a dispute or grievance procedure.

9. The draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for the Borough.

10. A record that reflects:

a. The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

b. The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

i. This paragraph shall not apply to a written or Internet application or other document that has been submitted to request Commonwealth funds.

ii. This paragraph shall not apply to the results of public opinion surveys, polls, focus groups, marketing research or similar effort designed to measure public opinion.

11. A record that constitutes or reveals a trade secret or confidential proprietary information.

12. Notes and working papers prepared by or for a public official or Borough employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

13. Records that would disclose the identify of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the Borough, including lists of potential donors compiled by the Borough to pursue donations, donor profile information or personal identifying information relating to a donor.

14. Academic transcripts.

15. Examinations, examination questions, scoring keys or answers to examinations. This subparagraph shall include licensing and other examinations relating to the qualifications of an individual and to examination given in primary and secondary schools and institutions of higher education.

16. A record of the Borough relating to or resulting in a criminal investigation, including:

a. Complaints of potential criminal conduct other than a private criminal complaint.

b. Investigative materials, notes, correspondence, videos and reports.

c. A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.

d. A record that includes information made confidential by law or court order.

e. Victim information, including any information that would jeopardize the safety of the victim.

f. A record that, if disclosed, would do any of the following:

i. Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

ii. Deprive a person of the right to a fair trial or an impartial adjudication.

iii. Impair the ability to locate a defendant or codefendant.

iv. Hinder the Borough or a law enforcement agency's ability to secure an arrest, prosecution or conviction.

v. Endanger the life or physical safety of an individual.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).

17. A record of the Borough relating to a noncriminal investigation, including:

a. Complaints submitted to the Borough.

b. Investigative materials, notes, correspondence and reports.

c. A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169), [FN1] known as the Whistleblower Law.

d. A record that includes information made confidential by law.

e. Work papers underlying an audit.

f. A record that, if disclosed, would do any of the following:

i. Reveal the institution, progress or result of a Borough investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certificate or similar authorization issued by the Borough or an executed settlement agreement unless the agreement is determined to be confidential by a court.

- ii. Deprive a person of the right to an impartial adjudication.
- iii. Constitute an unwarranted invasion of privacy.
- iv. Hinder the Borough's ability to secure an administrative or civil sanction.
- v. Endanger the life or physical safety of an individual.

18. Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings. This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the Borough or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.

19. DNA and RNA records.

20. An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.

21. Draft minutes of any meeting of the Borough until the next regularly scheduled meeting of the Borough. Minutes of an executive session and any record of discussions held in executive session.

22. The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by the Borough relative to the following:

- a. The leasing, acquiring or disposing of real property or an interest in real property.
- b. The purchase of public supplies or equipment included in the real estate transaction.
- c. Construction projects.

This paragraph shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.

23. Library and archive circulation and order records of an identifiable individual or groups of individuals.

24. Library archived and museum materials, or valuable or rare book collections or documents contributed by gift, grant, bequest or devise, to the extent of any limitations imposed by the donor as a condition of the contribution.

25. A record identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public.

26. A proposal pertaining to Borough procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

27. A record or information relating to a communication between the Borough and its insurance carrier, administrative service organization or risk management office. This paragraph shall not apply to a contract with an insurance carrier, administrative service organization or risk management office or to financial records relating to the provision of insurance.

28. A record or information:

a. identifying an individual who applies for or receives social services; or

b. relating to the following:

i. the type of social services received by an individual;

ii. an individual's application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict

benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or

iii. eligibility to receive social services, including the individual's income, assets, physical or mental health, age, disability, family circumstances or record of abuse.

29. Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch.13A (relating to lobbying disclosure).

30. A record identifying the name, home address or date of birth of a child 17 years of age or younger.

31. The Borough shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.

§ 170-7 Fees.

A. Postage - The Borough may charge the actual cost of postage incurred as a result of mailing the response to the Requester.

B. Duplication - the Borough may charge a fee for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication fees as established by the Office of Open Records.

C. The Borough shall charge a fee of \$1.00 per page for certification of a document, if certification of the document is requested by the requestor and said fee shall be amended from time to time by resolution of the Borough .

D. Conversion of Paper - a record is only maintained electronically or in other non-paper media, duplication fees shall be limited to the lesser of the fee for duplication on paper or the fee for duplication in the original media, unless the requestor specifically requests for the record to be duplicated in the more expensive medium.

E. Prepayment - if the estimate of the fees to be charged to a requestor in connection with a request exceeds the amount of One Hundred

Dollars (\$100.00), the Borough may require prepayment of the fees prior to granting a request for said information.

§ 170-8 Appeal Procedure.

A. If a written request for access to a record is denied or deemed denied, the requestor may file an appeal with the Office of Open Records to the Appeals Officer designated by the Office of Open Records for the taking of same within fifteen (15) business days of the mailing date of the Borough's denial or within fifteen (15) days of a deemed denial.

B. Any appeals to the Office of Open Records or the appeals officer designated by the Office of Open Records to hear appeals from determinations of the Borough shall state the grounds upon which the requestor asserts that the public is a public record, legislative record or financial record and shall address any grounds stated by the Borough for delaying or denying the request.

C. All appeals to the Office of Open records should be made to:
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, Plaza Level
Harrisburg, PA 17120-0225.

SECTION 4. Repealer. All existing ordinances and resolutions or parts of ordinances and resolutions and provisions of the Code of the Borough of Kutztown are hereby repealed to the extent necessary to give this chapter full force and effect.

SECTION 5. Severability. The provisions of this Chapter are severable and if any section, sentence, clause or provision hereof shall be held illegal, invalid or unconstitutional by any court of competent jurisdiction, such decision of the court shall not affect or invalidate the remaining sections, sentences, clauses or provisions of this Chapter. It is hereby declared to be the intent of the governing body of the Borough that this Chapter would have been adopted if such illegal, invalid or unconstitutional section, sentence, clause or provision had not been included herein.

SECTION 6. Effective Date. This Ordinance shall become effective on January 1, 2009.

ENACTED AND ORDAINED as an Ordinance of the Borough of Kutztown this 16th day of December, 2008 in lawful session duly assembled.

BOROUGH OF KUTZTOWN

By: _____

Malcolm Eidle, President of Borough Council

Attest: _____
Bonnie Bray, Secretary of the Borough

Approved as an Ordinance this 16th day of December, 2008.

Sandra Green, Mayor