

**TESTIMONY OF THE**  
**PENNSYLVANIA FOUNDATIONS ASSOCIATION**  
**TO THE SENATE STATE GOVERNMENT COMMITTEE**  
**ON SENATE BILL 444**

**MAY 13, 2013**

On behalf of the Pennsylvania Foundations Association ("PAFA"). We would like to thank you for the opportunity to provide the Committee with the Association's insight on Senate Bill 444, which proposes to amend the Right to Know Law, 65 P.S. 67.101 et seq. ("RTKL").

The Pennsylvania Foundations Association is an association of the private, non-profit Foundations supporting the public universities that comprise the Pennsylvania State System of High Education ("PASSHE"). Members of our association previously addressed the Senate State Government Committee in April, 2011 to express our concerns regarding the interpretation of the RTKL and how the deviation from the stated intent of the law impacts the ability of its members to work on behalf the PASSHE universities to provide affordable education for all Pennsylvanians

The current language of the RTKL, and more specifically the interpretation by the Pennsylvania Courts, has adversely and disproportionately effected University Foundations more so than any other governmental contractor. Rather than promoting transparency in government, the current language and interpretation of the RTKL, as applied to private University Foundations, has negatively impacted the public's ability to secure low-cost higher education. This is an unintended and damaging consequence of the current law. The purpose of this testimony is to explain these unintended consequences and to provide recommendations on how to remedy the impact to the PAFA and other governmental contractors.

Some background information regarding the relationship between the PASSHE Universities and the Foundations is necessary to put into perspective the unique issues faced by University Foundations under the RTKL.

University Foundations were created to provide a private vehicle to solicit and manage donations from the private sector for the direct benefit of PASSHE Universities. Each Foundation is dedicated to a different PASSHE University and there is one Foundation generally dedicated to PASSHE as a whole.

Like all non-profit corporations, the Foundations have a specific purpose as outlined in their bylaws and articles of incorporation. For University Foundations, that purpose is to raise money for the benefit of Pennsylvania's public universities. While the corporate purpose and mission of the Foundations necessarily requires that the Foundations will work for the benefit of their designated public University, the Foundations remain private entities.

Each University Foundation is managed by an independent Board of Directors and some Foundations have additional managerial committees, such as audit committees and investment committees. The day to day management of the Foundation is typically handled by the Foundations' Chief Executive Officer and staff. The Foundations are represented by their own privately retained counsel and not by state-paid PASSHE attorneys.

The legal relationship between University Foundations and PASSHE Universities is defined as that of independent contractors pursuant to a written contractual agreement titled as a "Memorandum of Understanding." These Memorandum of Understanding are public documents and can be obtained by any party interested in the legal contract outlining the types of services the Foundation will provide to an individual University, much like any contract for the purchase of goods and services is a public document. The Memorandum of Understanding does not dictate how the Foundations operate; to the contrary, the Foundations manage and control their own day to day operations. Per the various Memorandums of Understanding, the University typically pays the Foundation a negotiated fee for its fundraising and other services. Likewise, the Memorandum of Understanding requires the Foundation to provide the University with annually audited financial statements, by an independent auditing firm selected by the Foundation.

The primary objective of University Foundations is fundraising and their charitable purpose is to benefit Pennsylvania's public universities. The Foundations solicit donations from the private sector and donors donate directly to the Foundations. All donors, however, have the option of donating directly to a PASSHE University if they choose.

Importantly, often public University money is invested and managed by the Foundations pursuant to the terms of a Fiduciary Agreement, and subject to rules and guidelines established by PASSHE. Other money is raised directly by the Foundations from the private sector and managed pursuant to the Foundation's investment guidelines, which allow for more diverse investments than those allowed by PASSHE. The Foundation's ability to engage in more diverse and aggressive investments is critical to sustaining endowed scholarships. There is a distinction between public money administered by the Foundations and private money solicited by the Foundations.

As a matter of policy, University Foundations do not typically share any donor information with the University. Documents that are generated and possessed by the Foundations include donor profile information, which includes relevant personal information of a donor (name, address, telephone number, e-mail address) and financial information (checking account numbers, savings account numbers, tax information), donor gift files, including mail and e-mail correspondence between the Foundation and the donor, donor gift agreements, donor pledge agreements, account summaries, documents showing pledge payments and receipts, and investment strategies and portfolios.

All Foundation donors have the option of designating their gift or pledge as "anonymous." From a donor's perspective, one of the most attractive features of a Foundation is

that a Foundation can afford the donor a greater degree of confidentiality in connection with their highly personal decision to make a charitable donation.

The Foundations accept both restricted and unrestricted gifts. A restricted gift is dedicated to a specific fund. For instance, a donor can make a donation to the John Doe Biology Scholarship Fund for the exclusive use and benefit of a student pursuing a degree in the sciences. This scholarship would be awarded by the Foundation and not by the University. In contrast, the Foundation has discretion to use unrestricted gifts. In that regard, unrestricted gifts can be used for a multitude of needs including the Foundation's general operating fund, which would pay, among other things, the salary of Foundation personnel, Foundation support needs, and legal fees.

Apart from the foregoing, because the Foundations are private businesses, they also maintain their own business records which reflect the daily operations of the Foundation. These business records include board of director's meeting minutes, executive committee meeting minutes, tax records, internal policies and procedures and correspondence with vendors directly hired by the Foundation.

Because the Foundations are private, they can offer the following attractive options to donors, which ultimately benefit the University:

- Foundations can invest beyond the low risk, low return strategies often maintained by the State, thereby increasing the opportunity for greater investment return, and consequently, the revenue available to the primary institution;
- Foundations are not subject to regulations governing the sale or purchase of real property by the State and can perform these and other business transactions in a competitive and expeditious manner;
- Donors often feel more comfortable making a donation to a foundation governed by individuals with extensive legal, business and financial management skills.

With this background in mind, the Foundations are primarily concerned with Section 506(d)(1) of the RTKL and the Court's interpretation of this section - the provision relating to the disclosure obligations of private, government contractors. But for this section of the RTKL, the Foundations would not have any disclosure obligations under the law.

Previously, the Foundations expressed some concern with Section 708 (b)(13) and (c), which provided that donor identity could not be redacted from financial records. This issue has been addressed in Senate Bill 444, and we thank Senator Pileggi for recognizing the importance of protecting the confidentiality of donor information. The Foundations want to ensure that these protections extend to records of the Foundation, if such records are subject to disclosure, and we have provided draft language to that effect.

The Foundations, however, remain concerned with the amended provisions of the law relating to the disclosure obligations of third party government contractors, such as the Foundations, under Section 506.

Under the currently enacted version of Section 506, Pennsylvania courts have expansively interpreted this section as allowing access to an unlimited number of Foundation documents. Indeed, the courts have ruled that everything from internal business documents, such as board of directors' meeting minutes, to donor files, are open to disclosure.

By way of example, East Stroudsburg University Foundation, a member of PAFA, was involved in a landmark case under Section 506 of the RTKL, and was ultimately ordered by the Commonwealth Court to disclose thousands of pages from donor files, in addition to the minutes of its board of directors' meetings. East Stroudsburg University Foundation expended tens of thousands of dollars opposing, and ultimately responding to this RTK request. To be sure, East Stroudsburg University Foundation's response was not funded by "State dollars;" it came from its private, general operating fund; monies that would have otherwise inured to the benefit of ESU students in accordance with the corporate and charitable mission of the Foundation.

While we agree that Senate Bill 444 attempts to address the confusing, and overbroad language of Section 506 by setting forth a more simple approach, the members of PAFA remain concerned that the language of Senate Bill 444 may actually be broader and more inclusive than the prior language, and we do not believe that it was the intent of the Legislature to expand, already expansive language relating to the disclosure obligations of private entities.

The amended language provides that any contract between an agency and third party is subject to disclosure and any public records of the agency relating to the contract are subject to disclosure.

The proposed language in Senate Bill 444 eliminates the limiting language that third party records must "directly relate" to the contract for performance of a "governmental function," which in itself was confusing and given broad scope by the courts.

The scope of the phrase "public records of the agency relating to the contract" is concerning and may result in unintended consequences. The language "of the agency" has already been interpreted by the Pennsylvania Supreme Court in the context of 506(d)(1) and the Court determined that if a contractor is in possession of public records directly relating to its governmental contract with the agency, those records are "of the agency." An example can highlight the Foundation's concern.

A Foundation will have a contract with a University whereby it will be paid a service fee for fundraising, which may be a nominal amount of the Foundation's overall operating budget, and the Foundation will raise funds from the private sector, for the ultimate use and benefit of a PASSHE University. The Foundation will cultivate donors, develop relationships, and once the donation is received, will manage and invest the donation pursuant to the Foundation's internal policies, with guidance from an investment committee or other managerial arm of the Foundation, and sometimes the donor provides input. Some of the unrestricted

revenue from a gift is used to pay routine foundation expenses, including staff salaries, and payment to third-party vendors. In this process, a substantial amount of paper is produced, most of which has absolutely nothing to do with the University. The question then becomes, are all of the documents generated as part of fundraising, the Foundation's corporate mission, "relating to the contract" between the University and Foundation?

If so, this arguably has the effect of making the Foundations, and any charitable entity that benefits the government, de facto public entities and, we do not understand the intent of Section 506 is to open wide the doors of every private contractor that happens to contract with the government. Would we require Staples office products to share all of its internal business documents because it sold pencils to a covered agency...if not, why should the Foundation be treated any differently just because its corporate mission is to support an agency that is specifically covered under the RTKL.

The overriding purpose of the RTKL is, and has always been, to promote transparency in the use of taxpayer dollars and promoting access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions. In the case of PASSHE and the private University Foundations, this is occurring because all of the legal agreements between the two, as well as any agreements for services, are public documents. It is submitted that as drafted, §506(d)(1) casts a net over private entities that will reach much more than their receipt of public funds by a State agency and their performance of government contracts.

PAFA suggests that the overbreadth of §506(d)(1) can be remedied by limiting the disclosure obligations of University Foundations to those documents relating to the contract by delineating specific types of documents that would allow for transparency of the use of public funds, without making every government contractor a governmental entity under the RTKL. We have attached PAFA's proposed language for consideration by the Committee.

If the law is not changed, the Foundations are concerned that the Foundations will be stripped of their private, independent, status and donors will be reluctant to donate to the Foundations, which will negatively impact PASSHE Universities. Some areas of concern include the following:

- Chilling of donations. Many donors prefer to make a gift to a private rather than a state entity. The Foundations assure that a donor's gift will be invested profitably, distributed for the intended purpose, and not become confused with state appropriation or other funds. Currently, because of the Court's interpretation of the RTKL, University Foundations are the equivalent of state agencies under the law, if the law is not changed donors may be reluctant to donate to the Foundations if they are essentially an arm of the State;
- Foundations can serve to safeguard the privacy of donors who may not want the details of their personal financial information to become a matter of public record. Indeed, donors do not want aspects of their personal

finances or personal interests to be disclosed, which could possibly happen despite the expanded donor identity exemption as stated in Senate Bill 444.

On a final note, the members of PAFA want to make a point of clarification. During our previous testimony in April 2011, we suggested that one way to limit the intrusion into the private sector would be to specifically limit the disclosure obligations of University Foundations so that they more closely align with the disclosure obligations of "Stated-related Institutions" such as Temple University, Penn State, University of Pittsburgh and Lincoln.

We understand that these entities may now be included as agencies under the RTKL and we want to let the Committee know that we feel there are other ways to safe-guard private donor and business information of the Foundations, and we recognize that our prior testimony on this point no longer aligns with our present goal.

It is my hope that the foregoing information sheds some light on the important role that private University Foundations play in this State and how the expansive language and interpretation of the RTKL can negatively impact the Foundations. The Foundations are not in any manner trying to stifle the public's access to public information; rather, the Foundations only wish to protect the integrity of their operations and preserve the interests of these important private vehicles that ultimately support the public good.

Thank you for your time and attention today.

Please do not hesitate to contact me if I can provide any additional information on this matter or on the Pennsylvania Foundations Association:

Christian Steber  
[Christian.Steber@qscinc.com](mailto:Christian.Steber@qscinc.com)  
570-466-0550 (cell)

# PROPOSED AMENDMENTS TO SENATE BILL 444

[Amending 65 P.S. §§ 67.101 et seq.]

## **I. AMENDMENT TO 65 P.S. § 67.506(d)(1)**

(1) The following records that are not in the possession of an agency shall be public under this act:

(i) 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]~~ contract between an agency and a person, business or organization.

(ii) Correspondence between the agency, person, business or organization pertaining to the contract under subparagraph (i);

(iii) Invoices, payment vouchers, and receipts, and any additional reporting requirements contained in the terms of the contract under subparagraph (i).

## **II. AMENDMENT TO 65 P.S. §67.708(b)**

§ 67.708. Exceptions for public records

(b) EXCEPTIONS.-- Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

(13) Records that would disclose the identity of, ~~<or the personal financial information relating to,>~~ an individual who lawfully makes a donation to <or for the benefit of> 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 agency, including lists of potential donors compiled by an agency to pursue donations.

(c) The exceptions set forth in subsection (b) shall not apply to financial records, except an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), ~~<(11)>~~ ~~<(13)>~~ (16) or (17). An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.