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Remarks on Pennsylvania's Right to Know Law and SB 444

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Senate State Government Committee

My name is Kim de Bourbon, and I am executive director of the Pennsylvania Freedom of Information Coalition, a nonprofit educational group that helps people understand and use the state's open records and open meetings laws. We support transparency at all levels of state and local government.

Our reason to exist is promoting good citizenship by helping people stay informed about what government agencies are doing. We present public information sessions across the state and provide information and resources on our website, pafoic.org.

Our most effective tool is our online Open Government Forum, where we answer questions anyone might have about the Right to Know Law and Sunshine Act. Since the website was launched in 2007, we have fielded more than 2,500 posts — most of them questions from regular citizens about how to obtain public records.

As you all know, the new Right to Know Law begins with a wonderful presumption that citizens have access to records held by state and local government, and since January 1, 2009, government transparency has been improved in many ways.

But browse through the posts on our forum, and you will gain special insight into what the average citizen faces when confronted with public officials who are reluctant or downright unwilling to provide those records.

One critical issue — which SB 444 must address, please — is the power agencies have assumed to simply ignore the law, since the Office of Open Records is not able to enforce its own rulings when granting access to records to people who have been denied.

"How can we get the State Assembly to make some changes to the RTK Act that would put teeth in the enforcement of Final Determinations?", one man recently asked. He stated that his city's open records officer "completely ignores these Finals. Makes no attempt to answer or reply and never turns these matters over to the Solicitor. They never appeal to the Court of Common Pleas."

And from another citizen:

"I requested a document under the RTKL and their Open Record Policy to the local township Board of Supervisors. A supervisor stopped by and asked me why I wanted the document. He left. But I never received a denial or anything in writing from them. He ignores my emails. They do not have an appointed official to deal with requests. What can I do?"

And from another:

"I'm writing concerning a 7½-month battle to obtain certain public records under the Right to Know Law, which is currently stalled because of the inability of the Office of Open Records to enforce its own determinations. At this point, the OOR has issued a final determination stating that all of the records I've requested are public and I am therefore entitled to them. However, the 30-day deadline set by the OOR determination for the agency to supply me these records has expired with no progress made toward fulfillment of my request."

As I am fond of saying when I speak to groups, the law is one thing, and the hearts and minds of public officials is another. Because as it exists, in a worse-case scenario, an agency may opt to do *nothing* in response to an OOR ruling that it must release records. The OOR is powerless to enforce its rulings, and no one else is going to step forward and make it happen.

It is left up to the requester — despite the law's presumption of access, despite the OOR's direction that the records must be released, despite the fact that the agency has not appealed the OOR's decision — to hire a lawyer and take the agency to court.

This is fundamentally wrong. Even when agencies fighting the release of records follow the law, the fact that they can appeal has in many ways eaten up the law's presumption of access. Agencies have learned they can bide their time until their opportunity to appeal, when many people will give up their pursuit of the

records because of the expense of going to court. It's a game that citizens cannot win.

People should not have to go to court and pay money out of their own pockets just to make the Right to Know Law work.

Simply put, there are too many agencies working too hard to restrict access to records and to make it more difficult for people to obtain them. Instead of finding ways to make it easier for people to obtain records — which surely should be the goal of this law — government officials are spending a lot of time and legal effort finding ways to deny them, despite the fundamental premise of access.

When the law was passed, agencies panicked at the provision requiring them to respond to records requests within five business days. The intent of that provision, of course, was to make sure citizens were served in a prompt way.

Quickly agencies learned, however, that they could simply make use of the liberal "30-day extension" provision, which allows them to delay — without any real oversight — the release of records for a month longer by simply claiming the need for "legal review," whether it was needed or not. Some agencies now as a matter of routine and policy withhold records until that 30th day.

A point we'd like to make: If all the time and money being spent to fight the release of records were spent on an easy-to-use statewide system for online access to routine records, much of the argument agencies make over staff time and the burden of fulfilling records requests could be dissipated.

But at this point, as changes to the law are being considered, we would like everyone to take a step back, take a deep breath, and give every aspect of this law a close look with this question in mind: Does this provision help, or does it hinder, the right of the public to know and understand what the government and its many agencies are doing?

SB 444 does propose a couple of excellent improvements, not the least of which are making it clear that records must be released in specific computer formats if they exist that way, and removing the onerous provision requiring requesters to defend their right to records when submitting an appeal.

But there is very little else in these proposed amendments that bolsters the premise of openness for the average citizen, who — as the Office of Open Records has attested — are using the law far more than any other group. (A full 56 percent of appeals submitted to the OOR last year came from regular citizens — not reporters, not inmates, not companies.)

Our main concern with SB 444 as it exists is that most of the proposed changes seem to be reactions to agency complaints and concerns, with very few revisions that improve or clarify access for citizens.

Most of the new language in the bill serves to further restrict access to records by either creating new exceptions which will only exacerbate this issue for the average citizen or by making it all more complicated.

And we don't think an amended bill should give agencies and special interests a louder voice, just because the public don't have the collective resources to shout.

We respectfully ask you to remember that the premise of the law is to make government more transparent and its officials and agencies more accountable for their actions by providing access to records. Please take the time to give careful consideration to *all* parts of the Right to Know Law, and to listen to all sides, but to give extra consideration on behalf of citizens, for whom this law was written.

Also, there are some procedural consequences caused by the language of the law that the "framers" couldn't have anticipated but now, given the passage of years and the voluminous requests, we now see clearly. All of these concerns should be studied and addressed.

It is important to always keep the public's right to know in mind.

What needs to be fixed

— The law needs a new set of sharp teeth, and the OOR must be better funded and empowered. Agencies should face the imposition of costs and attorneys' fee when they withhold records without good reason or when they fail to provide records as directed by the OOR or other intermediate authority. The OOR should be able to assess fines or penalties against agencies that don't comply, or strict provisions regarding a range of permissible fines should be built into the statute.

The OOR must have enforcement power, and the law should specify that in-camera review is appropriate at the OOR level. Establishing the OOR's status as an independent agency in the language of the law is a good step.

— The non-criminal investigation exemption is too broad. Just about anything an agency looks into can be deemed an "investigation," and thus kept from the public eye. The proposed change to allow access to safety inspection reports is a good start, but this exception should be peeled back ever further.

— Criminal and non-criminal investigation exceptions: In all cases, unless another exception applies, once an investigation is closed, the records should become public. (As the law now stands, records of a 200-year-old murder investigation could be legally withheld.)

— Dates of birth and addresses of public employees are public records, vitally important as personal identifiers, and access to these records should be made clear.

— Make the "state-related" universities fully subject to the law. There is no reason not too.

— Make the Municipal Records Act fully enforceable regarding local municipal agencies. Good records management should be mandated, not just suggested.

— Agencies should be required to post the bulk of their public records online, making access easier and dramatically lessening the burden on agencies to fulfill requests. The law should also encourage the release of records in electronic format whenever possible, easing the burden on agency staff and cost to requesters.

Comments on some of the suggested changes in SB 444

— The government contractor provision is outrageous. Given the trend of privatizing more and more government functions, this change would severely undermine the public's ability to serve as a check on government and contractor abuses, and would provide yet another place where public records could be hidden. With more privatization, the public should have greater access to contractor records, not less. If private companies/nonprofits don't like this, they shouldn't contract with an agency to perform a government function.

— Fire companies and other volunteer groups that serve a public function should not be exempt from the law. Fire protection is surely a government function; if the traditional local fire company did not exist, local governments would have to form them. Local fire companies rely on public money — either through grants and fees or donations, bake sales and carnivals — and surely the public has a right to know how their money is spent, no matter how it is given.

— If the law must set a provision establishing a "commercial" class of requester, then the definition of "commercial purpose" must be narrow, and must exclude more than just the traditional news media. Any person or entity that requests records to inform the public about the government, or to speak out on a matter of public concern, should fall outside that definition, even if they "sell or resell any portion of the record" or expect to make a profit.

— The "unduly burdensome" provision is terribly problematic as drafted, with no explicit definition of what that means or what "good cause" entails. Surely there are simpler ways to address concerns about voluminous requests than to again force requesters to court and continue imbalance of power between agencies and citizens.

— The exemption for "predecisional deliberative" records needs to be defined and narrowed. Adding "contains or include" to this exemption would make this overly broad and ill-defined provision even more ridiculously broad. The public needs to be kept informed during the decision-making process, and not enough is being done to make sure that they are.

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