TESTIMONY BY
THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS

BEFORE THE
SENATE STATE GOVERNMENT COMMITTEE

ON

SB 444 *(PN 983)*

PRESENTED BY

LESTER HOUCK, PSATS PRESIDENT
SALISBURY TOWNSHIP, LANCASTER COUNTY

MAY 13, 2013

HARRISBURG, PA

Chairman Smucker and members of the Senate State Government Committee:

Good morning. My name is Lester Houck and I am the president of the Pennsylvania State Association of Township Supervisors and a township supervisor in Salisbury Township, Lancaster County. With me today is Elam M. Herr, assistant executive director for the Association. Thank you for the opportunity to appear before you today on behalf of the 1,455 townships in Pennsylvania represented by the Association.

Townships comprise 95 percent of the Commonwealth's land area and are home to nearly 5.4 million Pennsylvanians. These townships are very diverse, ranging from rural communities with fewer than 200 residents to more populated communities with populations approaching 70,000 residents. Thank you for the opportunity to testify today on an issue that is of great importance to local governments of all sizes across the state.

The Association continues to be strongly supportive of open government and worked to promote what we originally believed to be a fair and balanced Right-to-Know Act, Act 3 of 2008. However, since the act took effect in January 2009, the act has been interpreted by the Office of Open Records and the courts differently. In addition, the inability to recover the costs of compliance has proven to be a burdensome mandate for many of our communities, so much so that the need for reform has become a top priority for our organization.

Since its implementation, townships across the state have expressed concern with certain aspects of the law that they feel are burdensome. These concerns have generally covered two areas, 1) the inability to recover costs incurred by requesters which instead must be paid by the taxpayers and 2) privacy concerns over several types of sensitive information that are public under Act 3. **Senate Bill 444** *(PN 983)* would make significant strides to address these issues and we applaud Sen. Pileggi for introducing the legislation and this committee for hearing our comments today.

While we have considered data from around the state, I contacted all the townships and boroughs in Lancaster County to find out what their experiences with the Right-to-Know Law revealed. The number one complaint was that businesses and vendors are requesting copies of building permits and other documents for solicitation purposes. Nearly all the municipalities in Lancaster County receive the same type of request on a monthly basis from a variety of businesses. We don't know whether these entities plan to sell satellite dishes, yard services, pools, etc. And to be honest, that is not what concerns us. What does matter to us is that these municipalities can only charge for copying and mailing costs and not the staff time needed to fulfill these regularly occurring requests.

We hear the same complaint repeated from townships across the state. In fact, our members just adopted a resolution at our state conference in April specifically requesting

the ability to ask if a document will be used for resale, business solicitation, or financial gain and eliminate the current requirement that we respond to such requests.

It is a true public policy question of whether the commercial sector should be able to use data generated for a public purpose and at public expense to some commercial end. Under the current law, there are no limits on the use of government data that is considered to be a public record, nor are townships able to charge tiered fees when this information is acquired for commercial purposes. Many citizens are unhappy when they apply for permit only to discover that their application was acquired by a business under the RTKL and used for solicitation or marketing purposes.

With this said, we believe SB 444 would significantly improve on the current law by allowing agencies to require a requester to certify in writing whether a request is for a commercial purpose. The bill would authorize local agencies to assess search, review, and redaction fees, including staff time, for records requested for a commercial purpose, which would be narrowly defined and would exempt media and educational or scholarly requests. These charges would be limited to no more than the hourly wage of the lowest-paid employee capable of assembling the documents required for the request. We believe this would be a significant improvement over the current law and would reduce the costs our taxpayers must shoulder at no benefit to our community.

Residency. On a related note, the U.S. Supreme Court recently ruled that states may restrict public records access to residents of the state. In light of this unanimous decision and the increased burden placed on townships by commercial requesters, we ask that you consider defining "requester" as a resident or taxpayer of the Commonwealth. An exception could certainly be made for media inquiries or educational studies. Such a change could prevent our citizen's permit data from being sold to companies based in other states simply for solicitation or marketing purposes.

Tax and utility certifications. Recently, tax certification and settlement companies, as well as legal firms, have been requesting copies of real estate tax collector reports and lists of all tax payments made on a monthly basis, not just in Lancaster County, but across the state. Is this being done to avoid payment of tax certification fees to the tax collector or municipality? Settlement companies are required to research whether taxes have been paid on properties in settlement so that the taxes paid and owed can be equitably prorated between the buyer and seller. This same concept applies to sewer and water payments. In the past, these companies paid the municipality or authority a fee, generally $5 to $20, but now some of these companies are obtaining this information through a Right-to-Know Law request in order to save a few dollars. While this is reducing these companies bottom line, it is increasing the municipality's actual costs...all at the expense of the taxpayer.

SB 444 would work to address this issue by specifically exempting utility payment records of individuals from disclosure, while requiring the local agency to issue a clearance certificate to document payment of these charges and authorizing the local agency to charge a reasonable fee for this service. Likewise, the legislation would exempt

tax payment records in the possession of a tax collector from disclosure under the law, while requiring the tax collector to provide a clearance certificate that taxes have been paid.

While we support this language, we suggest a clarification. In our experience, the companies requesting tax payment records are specifically asking the municipality for this information, not the tax collector. Under the Local Tax Collection Law, the tax collector is required to provide a monthly report of taxes collected to each taxing district, which includes detailed information on payments received that month, names, and property information. Since the taxing districts have this report, this is what is being requested. Our suggestion would be to consider extending the proposed exemption of the tax payment records of the tax collector to the required monthly reports *from* the elected tax collector that are in the possession of the municipality.

Burdensome requests. Reports of truly burdensome requests are growing. In some cases, including Lancaster County, municipalities are enforcing ordinances *(which, in many cases, are state mandated, such as sewer or the Uniform Construction Code)*, and issue citations for enforcement actions. Those individuals who receive citations often become revengeful and request several years of permits issued or all files related to the issue. While we certainly respect the publics' right-to-know, it is difficult to deal with these requests, particularly when they are requesting copies of the citations and certified letters that the township staff already sent to that individual, such as copies of citations and enforcement letters. This is simply abuse of the Right-to-Know Law.

Examples include attorneys representing developers who file extensive requests, including all communications concerning a particular development. In one case, a landowner had a fence that exceeded the height limit in the zoning ordinance and the municipality enforced the provision. The landowner then filed a request seeking copies of all complaints concerning fences. While this information is exempt under the current law, the municipality still had to respond. And this is a very common occurrence throughout the state.

Another example included a recent request by a police association which appears to be unhappy with its municipal government. The request asked for certified copies of the following: the most recent eleven budgets; all economic models and forecasts to generate the budgets for the past ten years, all audited financial statements for the past ten years; copies of documents used to show the tax rate for the past eleven years; lists of all properties receiving tax abatements or exemptions in the municipality and the end date of the abatement or exemption; the number of employees by department for the past 11 years; lists of all real estate holdings of the municipality; and copies of all salary data of certain employees and elected officials for the past 20 years.

These examples are, unfortunately, not unusual. We support language in SB 444 that would allow an agency to petition a court of competent jurisdiction for a protective order from a request or related group of requests that are determined to be unduly

burdensome, upon a showing of good cause. The agency could request that the provision of the records be prohibited or limit the requested records that could be released.

Recent media reports have attacked this provision as unreasonable and ripe for abuse. We must strongly disagree. Townships are seeing the Right-to-Know Law used as a hammer to harass the municipality or a neighbor. Some of these requesters submit voluminous, weekly requests simply to cause problems because of a gripe with the neighbor or township. Perhaps the individual was forced to comply with an ordinance or connect to sewer, was very unhappy about it, and decided to cause problems for everyone he or she considers to be at fault. This can and does happen under existing law, unfortunately with growing regularity.

The proposed provision would simply authorize a municipality to pursue this remedy. Keep in mind, filing a petition with the courts is certainly not a free or inexpensive venture. Instead, it involves times and effort, including legal fees and court costs. As such, it is unlikely to be used unless the request is so egregious that the payment of attorneys' fees and court costs is less expensive than compliance with the request. And given the current court decisions on this law, no court is going to give an agency a free pass on a request just because they don't *want* to comply.

Similarly, there are those in Lancaster County and elsewhere that are submitting requests that look like discovery when in litigation with a municipality or simply to go on a fishing expedition. These are expensive requests to fulfill due to the amount of research required and in many cases, our staff is simply doing the legal team's work for them at a great cost break. As such, we can support language in the bill that would allow an agency to deny requests to a party to litigation that is related to the pending litigation or which was previously made in discovery. This provision would not impose on anyone's rights, but simply aim to prevent continued abuse of the system at the expense of our taxpayers.

If possible, we also request the committee consider expanding this language to prohibit the use of the Right-to-Know Law to conduct discovery. There is a legal process for this type of activity and the RTKL should not be used as an inexpensive method of circumventing these rules.

Requesters should pay reasonable fees for processing requests. Our members have consistently told us that they should be able to charge reasonable fees for the cost of labor necessary to search, gather, and prepare public records in response to written requests. While many requests require a minimum amount of staff time, the current law specifically prohibits local agencies from placing any type of limit on the number of records requested *(Section 1308)*. As a result, some residents and businesses are requesting enormous quantities of records, which can take significant amounts of time to assemble, keeping employees from performing their primary functions and requiring taxpayers to subsidize these labor costs. While SB 444 would make several changes that would help relieve this burden on the commercial request front, we also suggest that the committee examine more general authorization for the recovery of staff time, particularly

in those instances when more than a set minimum amount of time, such as 15 minutes or half an hour, is required in order to compile requested items.

Currently, fees are prohibited for staff time to research and locate the requested documents. If large prints are requested and the municipality does not have the capability to make these copies, they must go to an outside entity for these copies. While the municipality can recover the cost of the copies, they cannot cover the travel time or costs for the employee to obtain the documents and then to make copies. And, keep in mind, it is not uncommon for requesters to refuse to pay to receive these documents once they are informed that their documents are ready, but they must first pay a copying fee, thus making the municipality's efforts in compliance with the law completely unrecoverable. And depending on the extent of the request, the staff time can be a significant loss to the township as extra hours or overtime may be required. In addition, there is no reimbursement authorized for solicitor and engineer research, verification, or location of requested documents, which the township has no choice but to force on the taxpayers.

We suggest going further with the improvements to this provision, by requiring a good faith deposit before a local government spends the staff time and the paper and ink to compile the requested copies, just to prevent the requester from changing their mind and refusing to pay the bill.

Another suggestion would be to allow those municipalities that proactively make documents available on their websites for all to view to respond to a request by referring to the location of the document on that municipality's website. These documents would be available free of charge and would eliminate the need for the township employee to print the document and for the requester to pay for the document. We believe this is a reasonable alternative to providing copies of all documents.

On page 10 of the bill, a clarification would be made to prevent a local government from being required to transcribe a proceeding solely for the purposes of responding to a request under the act. This is a welcome clarification.

Finally, the bill would authorize agencies to require prepayment if requests exceeded $50, reduced from the current $100. Under the current OOR fee schedule, a request must exceed 400 pages for one-sided black and white copies in order to qualify for prepayment. This amendment would cut this amount in half and allow for better recovery of costs. We support this improvement and ask that you consider our previous suggestions for cost recovery.

Appeals process. The appeals process to the Office of Open Records has created challenges as denial letters have evolved from routine form letters to more complex legal documents requiring the routine assistance of counsel at taxpayer expense. The appeals process created the benefit of a rapid set of legal guidance regarding the appeals process and the treatment of the exemptions by the Office of Open Records, however, the sheer volume of appeals made finding and understanding the final determinations of the OOR a challenge for local government officials.

As a whole, the majority of local governments strive to meet the requirements of the law. In those cases where a problem may exist, it is often the difference in the treatment of certain records under prior versus current law that has led to some level of confusion as local governments, the OOR, and the courts interpret Act 3.

Identity theft and fraud concerns under the RTKL. There are real concerns with disclosing local government financial account numbers due to the potential for fraudulent use of this information. SB 444 would address this issue and exempt banking account and routing numbers, credit card numbers, and passwords from disclosure. We believe that this change will protect taxpayer funds while keeping the substance and content of financial documents in the open.

Personal financial information *(definition in Section 102 and Section 708(b)(6))* needs to be protected. We believe that a local government's financial information is, and should be, open to public scrutiny. This includes the salaries paid to employees, benefits provided to employees, and any reimbursable expenses. However, once we pay our employee's salaries, these funds become the employee's property and, at this point, employee payroll deductions and taxes should be shielded from public view. We believe that the addition of "forms required to be filed by a taxpayer with a Federal or Commonwealth taxing authority" in Senate Bill 444 would protect employee's personal tax information from disclosure, including W-2s and 1099s. While the courts have ruled that this information is protected, we applaud this change as an important clarification.

While tax forms that must be filed for the local earned income tax are currently protected by Act 50 of 1998, we suggest that the committee consider adding "local" to the list of taxing authorities for clarification.

In addition, we respectfully request that consideration be given to protecting the home addresses of public employees, as well as our employee's personal information, such as age, gender, race, date of birth, and signature. For safety and to prevent identity theft, public employees should be entitled to privacy for their personal information.

The legislation would also exempt volunteer emergency responders from the Right-to-Know Law unless they contract with a municipality to provide service to a particular municipality. If the entity is providing good Samaritan services to the township without taxpayer dollar, why is there a need for this private entity to comply with this law? However, if the emergency responder is receiving public dollars, than their financial information should be open.

Thank you for your consideration of the concerns of township government concerning the RTKL. We look forward to a continued working relationship with you on this important issue as you move towards updating this law.