

**TESTIMONY OF COMMON CAUSE/PENNSYLVANIA
ON SB-444
MODIFICATIONS TO THE OPEN RECORDS LAW**

**Senate State Government Committee
Harrisburg – May 13, 2013**

Good afternoon Chairman Smucker and distinguished members of the Senate State Government Committee. I am Barry Kauffman, Executive Director of Common Cause/PA. Common Cause/PA is a non-partisan, not-for-profit organization with over 5,000 members and affiliates who seek to make government more open, honest and accountable. We thank you for this opportunity to address SB-444's intentions to modify the Pennsylvania Open Records Law.

Pennsylvania has come a long way in its efforts to make state and local government transparent for citizen oversight. Common Cause/PA began a major push to overhaul Pennsylvania's deplorable Open Records law with Rep. Kevin Blaum in 1990 and continued those efforts until Sen. Dominic Pileggi pushed Act 3 to victory in 2008. Pennsylvania went from having one of the worst Open Records laws in the nation to now having what is considered a law containing many best practices. However, the work of fine tuning government integrity laws is never over.

Since Common Cause/PA has been a long-time advocate for Sunset laws and regular examination of government programs we welcome this effort to review, evaluate and improve this important government integrity statute now that it has been in place for over four years.

SB-444 includes valuable improvements, and some elements that are troubling. There also are additional modifications that should be included. Based on our experiences with assisting citizens, and our understanding of Office of Open Records and court decisions, we offer the following observations and recommendations.

Section 102. Definitions

“Commercial purpose.” Given the inclusion of new sections 707 and 1307 this is an important addition.

“Independent agency.” We commend you for adding the term “authority” to this definition. During the deliberations over Act 3, Common Cause/PA strongly urged the inclusion of authorities. Authorities exercise far-reaching governmental powers and administer vast sums of money. It should be clear that these entities are fully covered by the Open Records law.

Section 506. Requests.

(a)(3) This new section, dealing with “unduly burdensome” requests, needs to go back to the drawing board. The language in this section is far too nebulous and seems to permit extraordinary discretion by the agency. The term “unduly burdensome” needs to be carefully and narrowly defined or it will quickly become a loophole that could swallow this well-intended law. If it cannot be defined in a manner to prohibit agency abuse, this new provision should be jettisoned.

(d)(1) The amending language in SB-444 regarding records in the possession of agency contractors tightens up this provision in a positive manner.

Section 508. Inmate access.

This section also may need to go back for review and modification. Neither Act 3 or SB-444 defines the term “inmate”. They should; or in the alternative reference another statute that does properly define the term or the scope of persons to whom it is intended to be applied here. We wonder if this would prohibit an incarcerated person from getting access to documents that would help that person educate himself in a manner that would make him or her a more productive member of society upon release from prison. Would it prohibit an inmate from getting records that would allow the inmate to follow his or her children’s educational activities? Would it prohibit an inmate from gaining access to records about business or property functions to which he or she still has legitimate rights? This new provision requires more thought.

Section 702. Requests.

We question why the term “anonymous” would be deleted from the law. A verbal request that could be immediately fulfilled could be an “anonymous” request. This change would seem to require a record of all verbal as well as written requests.

Section 703. Written requests.

The proposed language of SB-444 appears to eliminate the requirement for “employees” of an agency to forward Open Records requests to the agency’s Open Records Officer. Instead it requires all requests to be sent directly to the Open Records Officer, or the agency’s administrative office which would then be obligated to forward the request to the Open Records Officer. We are happy to see the new requirement for requests to be forwarded “promptly” to the Open Records Officer, but it may be useful to simply require all agencies to establish protocols to ensure that *all* employees have responsibility for promptly forwarding such requests if they receive them.

Section 707. Production of certain records.

(d) Commercial requests. The intent of the new subsection (d) appears to be appropriate, but it may be difficult to effectively enforce. Since educational, non-commercial scientific institutions,

and the media are exempt from this certification, commercial entities may rather quickly find ways to access this information via legitimate third parties.

Section 708. Exceptions for public records.

(b)(10)(i)(A) Common Cause/PA had expressed concerns about this provision even while it was being debated in 2007 and 2008. Records regarding pre-decisional deliberations often contain important information about the range of options that were being considered in the development or execution of public policies. They contain information about the trade-offs considered. This often is important to understanding the evolution of a policy and to future reforms. The scope of this exemption needs to be narrowed, especially the exemption for "research" documents.

(b)(10)(ii) provides an important clarification by stating that a record becomes available to the public if it is presented to a quorum of the body regardless of whether a vote occurs on the underlying issue.

(b)(13) also caused Common Cause/PA concern during the original debates over Act 3. Safeguards need to be inserted to expose individuals who make "donations" to an agency but do so with an understanding that the donor, or a family member, business, or associate of the donor will receive some significant agency benefit, contract, or regulatory accommodation from that agency (or other agency).

(b)(17) is another exemption over which Common Cause/PA has great concern going back to the Act 3 debates. Our concerns have been elevated since the act has been implemented. Our concerns arise from the overly broad interpretations of the term "noncriminal investigation". This exception seems too often to morph into a much broader exception regarding basic research conducted by agencies. The language of exemption 17 needs to be tightened up to make it clear that basic agency research is NOT a noncriminal investigation. This exemption seems to be inappropriately applied far too often based on inquiries received at Common Cause/PA. A prominent example is *Raina Ripple v. PA Dept. of Conservation and Natural Resources*. In this decision Ms. Ripple was denied access to engineering studies regarding a dam failure at Ryerson Station State Park. Having access to these studies would have helped citizens keep an eye on agency responses and protect their communities. As I noted in my April 13, 2009 letter to the Office of Open Records "On several occasions Common Cause/PA testified before legislative committees on situations very similar to this one; and in many of the legislative negotiating sessions on bills over the past decade, this very concern was raised with virtually unanimous agreement that studies done for and by state and local governments in efforts to help understand problems confronting agencies and in efforts to develop government policy and produce government responses to those situations should and must be open to the public."

Or imagine a situation in which a township is anticipating approving zoning variances and permits to a major housing developer. First, however, they conduct studies and research (paid with taxpayer dollars) to explore impacts on ground water, pollution, traffic congestion, trash collection services, and significantly increased numbers of students at local schools. While the local officials were anticipating approving the variances and permits, the studies suggest they probably should not. Under the guise of the research being a noncriminal investigation, citizens

fighting the development could be inappropriately denied access to essential information which could help support their efforts to protect their community from over-development.

Exemption 17 needs to be refined to make it clear that research and studies are not noncriminal investigations.

Section 1101. Filing of appeal.

We applaud your modifications to sections (a)(1)(i) and (a)(1)(ii). People making Open Records requests often are doing so on their own time as civic-minded citizens. By extending the deadline for filing appeals to 20 days it gives them the time they need to do the necessary research, file the essential paperwork, and possibly find and meet with an attorney. Likewise, by simply requiring citizens to provide only a copy of the original request, agency denial, and list of records denied, instead of also addressing the grounds the agency stated for its denial, helps to eliminate bias and unnecessary paperwork from the appeal process.

Section 1307. Fee limitations.

(h) Prepayment.

We challenge the need to reduce to \$50 (from \$100) the threshold for which prepayment of documents would be required.

Omissions, oversights, and additional recommendations.

While SB-444 is proceeding through the legislative process, we encourage you to take advantage of the opportunity to pursue additional important improvements to the Open Records law.

- Chapter 15

We note with some bewilderment the failure of SB-444 to address the problems caused by Chapter 15 of Act 3 dealing with State-Related Institutions – especially in light of the public uproar over the Jerry Sandusky scandal at Penn State University. When Act 3 was winding its way through the legislative labyrinth, Common Cause/PA opposed the sweeping exemptions provided to the state-related institutions of Temple University, the University of Pittsburgh, Penn State University and Lincoln University. In the wake of the Sandusky scandal at Penn State we now know, according to media reports, these exemptions may have helped cover up the scandal and endanger more young boys. The special terms contained in Chapter 15 for these institutions were inappropriate then and are inappropriate now. Chapter 15 should be repealed and these institutions should be treated in the same manner as all other state agencies.

- Section 1305. Civil Penalty.

(a) Denial of access.

This section establishes a penalty of up to \$1,500 for an agency that denies a record in bad faith. This may be a disincentive for improper actions by a tiny agency or small township, but it may just be the cost of doing business for a large entity like PennDOT or the City of Philadelphia.

With such a miniscule penalty, a large agency may just decide to attempt to wait out providing documents until they are no longer useful, or until the requester can no longer afford to keep pursuing the appeal process. An attempt should be made to scale the penalty to an agency's resources to make it meaningful.

- Timeline for producing documents when requestor prevails in appeal.

A specific deadline needs to be added to the Act to protect a requestor who prevails in an appeal. When a requestor wins an appeal the agency should be required to turn over the documents to the requestor immediately. Under no circumstances should the agency be permitted to go beyond five days in providing the documents to the requestor.

- Expedited processing.

If a record is needed by a citizen to effectively participate in a government meeting or proceeding procedures should provide for expedited processing. Exemption (10)(ii) appears to provide such access to documents that have been provided to a quorum of the agency decision-makers. However, citizens generally don't have lobbyists to seek out essential documents they need to present their cases and protect their interests. Nor do local media have the ability to follow all government activities and report on them in a timely manner. Often citizens learn of pending government actions shortly before they are to be deliberated or voted. Therefore, special procedures may be needed to provide timely access to essential documents about impending agency actions.

- Legislative records.

Act 3 places legislative records into a special protected status with a lesser degree of presumption of openness. The time has come to grant the same level of access to legislative records as is afforded to records of all other agencies. If there are needs for exemptions for special records that deserve privacy, such as general constituent correspondence, narrow exemptions can be carved out for those records.

- Records retention.

While Section 507 of the Act specifically indicates that it does not affect records retention schedules, Common Cause/PA wants to register its concern that critical records, such as public officials' statements of financial interests, were recently destroyed by the State Archives. While it may properly be the subject of other legislation, we strongly urge you to protect vital historical records that may be useful for researchers and investigators. If it is not already being done, many of these records should be required to be protected in perpetuity by digitizing them. By saving them in digital form, the record is protected for future use and it will require very little storage space.

- Funding the Office of Open Records.

The Office of Open Records provides a vital public service, protecting citizens' access to critical documents, and helping citizens hold their government accountable for its actions. While it has developed a stellar reputation, it is operating under a crushing work load and appears to be seriously understaffed. In this year's budget negotiations we urge you to increase the Office of Open Records budget so that it can more effectively serve Pennsylvania's citizens and provide its services in an even more timely manner.

Thank you again for offering us the opportunity to present our comments and suggestions. We commend Sen. Pileggi and you for this effort to make Pennsylvania's government more transparent.

I would be happy to attempt to address any questions you may have.