Pennsylvania School Boards Association

TESTIMONY SUBMITTED TO
PENNSYLVANIA SENATE STATE GOVERNMENT COMMITTEE
SUBMITTED BY
EMILY J. LEADER, ACTING CHIEF COUNSEL
RE: SENATE BILL 444
MAY 13, 2013
STATE CAPITOL, HARRISBURG

Chairman Smucker, Chairman Smith, and members of the committee, I thank you for the opportunity to comment on Senate Bill 444 and to make some observations on Pennsylvania's Right-to-Know Law. It has been my pleasure over the past four and a half years to work closely with open-records officers and solicitors serving Pennsylvania's public school districts, Intermediate Units, Career and Technology Schools and even some Community Colleges. I have closely followed the work of Pennsylvania's Office of Open Records and reviewed the hundreds of Right-to-Know Law opinions issued by Courts of Common Pleas and Pennsylvania Appellate Courts. I think it is fair to say that the current law achieved much of what was intended in expanding the agencies subject to the Right-to-Know Law, placing the burden on agencies to show why requested information is not public, establishing definitions and exceptions to access to protect certain activities of government and creating the Office of Open Records to provide an administrative review of agency denials. Along the way, I think we would all agree, there have been some bumps in the road – although it is fair to say that there would be significant disagreement on what those "bumps" are.

In the past week, I sought input from Open-Record Officers and solicitors to ensure I had a current understanding of their experiences with the law. I include a summary of their responses with this testimony. It has long been obvious that advocates of transparency respond to concerns about some aspects of compliance with the Right-to-Know Law by suggesting that agencies want to operate in a cloud of secrecy. However, we suggest this is the wrong way to view these concerns. Indeed, the public interest to be balanced when thinking about the Right-to-Know Law is not between whether agencies operate transparently or in secret. The public interest to consider is the balance between what the General Assembly believes the public should be able to access regarding governmental activities and the degree to which all taxpayers should subsidize

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those who use the RTKL. In this regard, we applaud the effort in Senate Bill 444 to address commercial use of the law, use of the law to circumvent discovery rules for litigation and unduly burdensome requests. PSBA suggests, however, that the proposed amendments do not adequately resolve some problems experienced by agencies struggling to comply with extensive, complex, confusing or frequent requests by those who see no reason to consider the cost to all taxpayers connected to the manner in which they use the Right-to-Know Law.

For example, one district received a requests for several items, including all "correspondence dating from January 1, 2004, including without limitation letters, emails, memoranda, minutes and notes with respect to the construction of [two schools] among and between any of the following: employees, Board members and other representatives of the [School District]; employees and representatives of the Pennsylvania Department of Education ("PDE"); and third party consultants, agents, contractors, engineers, architects, construction managers and other professionals for either the [School District] or PDE." Responding to the request involved the production of approximately 30 boxes of documents and a hard drive with several gigabytes of data, as well as legal review of the documents to ensure compliance with the new law. Ultimately, after spending over $10,000 in legal fees and consultant costs to review and provide access to the documents, the requesters never came to inspect the documents that were produced. This is an example of a request that might be considered "unduly burdensome" under the proposed amendment to Section 506. However, in order to prove that a protective order is needed, the agency will likely have to expend the same time searching for and compiling records. Protective orders in litigation can be entered when the information sought is not sufficiently relevant to warrant the burden a party will experience in complying with a discovery request. Here, there is no such context for determining when an agency should be protected and when it should not.

Another district has received 147 requests from one requester, generally in groups of several requests at a time. Each request has multiple parts and the most recent request required 100 hours of review and copying time. This represents a typical experience in fulfilling this requester's requests. To make use of the proposed amendment, this district would have had to go to court for protective orders on as many as 21 occasions.

While it concerns districts that requesters are able to use the Right-to-Know Law for commercial purposes at the expense of taxpayers, it also is of concern that taxpayers have to pay for poorly worded requests that take many hours to fulfill when a more tailored request would have sufficed; for time expended on fulfilling requests when the Requester never picks up or comes to inspect the records; for time expended in responding to requests of individuals who are using the law to bog down district operations. Most requests take half an hour or less to fulfill and our members see this as part of their responsibility to their constituents.

PSBA urges this body to adopt the approach taken by many states, to permit agencies to charge reasonable fees for staff time expended in fulfilling requests and to provide recourse when requesters fail to pay for prior requests and seek to make new requests. We do support distinguishing commercial from noncommercial requests. Commercial requesters should have to pay for all time expended in fulfilling requests. Noncommercial requesters should only have to pay for time expended after the agency has spent a particular amount of time on a request or a group of related requests without charge. We propose adopting provisions similar to those enacted in Georgia in 2012[1], to include the following elements:

- Allow a reasonable charge for the search, retrieval, redaction, and production or copying costs for the production of records including the time expended to put electronic data onto media;
- Require agencies to use the most economical means reasonably calculated to identify and produce responsive, public records;
- That the charge for the search, retrieval, or redaction of records shall not exceed the prorated hourly salary of the lowest paid full-time employee who, **in the reasonable discretion of the custodian of the records**, has the necessary skill and training to perform the request;
- For noncommercial requests, provide that no charge shall be made for the first thirty minutes, but charge for all time for commercial requests;

[1] Ga Code Ann §50-18-71.

- Continue to permit charges for actual photocopy and other out of pocket costs including media used for electronic storage, making clear this might be less than the current $.25 per page currently permitted by the Office of Open Records;
- Require agencies to use the most economical means of duplication when providing copies;
- When a requester does not pay actually incurred, agreed upon costs which have been lawfully estimated and agreed to pursuant to the law, permit the agency to sue for them along in the same manner as authorized for collection of taxes, fees or assessments by an agency;
- Provide a mechanism for the requester to be notified of and agree to payment of estimated costs or to waive any estimate in writing and permit agency to defer search and retrieval until estimated costs are paid or agreed to;
- Permit agencies to defer fulfillment of new requests if lawfully incurred costs have not been paid for prior requests or the dispute regarding such costs is resolved;
- Place the burden of proving an administrative fee is reasonable is on the agency records custodian, since a fee could impair the public's right to access public records.

This approach to fees will maintain transparency while making sure that those who use the Right-to-Know Law do not place unreasonable burdens on agencies to the detriment of all taxpayers.

PSBA has a concern that the litigation exception as written is too easily circumvented in that a friend of a party to litigation can request the records at issue, thus subverting this new exception. We seek an amendment:

- Which exempts from disclosure records of agencies pertaining to litigation whether in courts or before administrative agencies or in arbitration of a dispute to which the agency is a party, if the complaint has been filed, or if the complaint has not been filed, if the agency shows that such litigation is reasonably likely to occur;
- Which no longer applies if the litigation has been concluded;
- Which requires a certification from the requester that the request does not pertain to litigation; but

- Which does not limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

With regard to requests for electronic records, PSBA opposes requiring agencies to provide electronic records to requesters in a format which can be manipulated. The information available under the Right-to-Know Law should be that of the agency, i.e., a "snapshot" of the record at the time of the request, showing the agency's work. The potential for misuse and misrepresentation of an agency's records is great and the ability to manipulate its data does not aid government transparency.

PSBA supports an amendment clarifying to whom written requests must be addressed and deletion of the provision in Section 703 which has been interpreted to require all written requests for information to be treated as Right-to-Know Law requests, regardless of who receives them. However, the term "administrative office" does not have a specific definition and could lead to further broad, unintended interpretations of this provision. We recommend that all written requests be required to be submitted on a form developed by the agency or the Office of Open Records or that it clearly be designated as a request made pursuant to the Right-to-Know Law. We would not oppose permitting requests to be addressed to either the agency Open-Records Officer or the head of the agency with the proviso that when addressed to the head of the agency it be promptly forwarded to the agency's Open-Records Officer.

As noted previously, this law has spawned much litigation. PSBA urges that Section 506(d) be deleted from the Right-to-Know Law as the requirement that agencies secure any records from contractors is untenable and places agencies in a position of having to sue vendors for records when they are uncooperative or face penalties under the Right-to-Know Law.

The predecisional deliberation exception should be entirely rewritten to capture within the exception itself exactly what kinds of records are always exempt as predecisional and what records transition to becoming public records when deliberated upon by a quorum of the agency. PSBA agrees that a vote need not take place at a meeting for deliberation on a matter to occur, but there is much more that is confusing about this entire exception than is clear.

With regard to noncriminal investigative records, PSBA asks that the term, "safety inspection report made pursuant to Federal or State law" be further defined. Because exceptions are construed narrowly to maximize access to records, such terms must be clear to the agencies and requesters using the law and to the courts interpreting them.

PSBA urges this body to require an appeal of a denial to address the reasons raised by the agency for denying the record(s). We do not object to removing the language requiring that the requester explain why the record is a public, legislative or financial record. It is fundamentally unfair for the agency to have to guess which parts of its denial are at issue. PSBA anticipates that much will be made of the Office of Open Records's many dismissals of appeals for failing to include all required elements in an appeal. We believe that it was not necessary for the Office of Open Records to dismiss these appeals but that a process permitting requesters to cure the defect while preserving the date upon which they filed the appeal would have been permissible. Further, since requesters have the unilateral right to permit the Office of Open Records to extend the time it has to make a final determination, there was no downside to adopting a less draconian approach to insufficient appeals. PSBA suggests that hundreds of requesters were unnecessarily denied an Office of Open Records review because of its own internal policy.

While PSBA supports the right to have Office of Open Records conduct *in camera* reviews, it opposes its having authority to order them if an agency argues that the records are exempt from access as a matter of law. Further, Office of Open Records should have to explain its reason for seeking in camera review and that should be appealable when an agency declines to provide the unredacted records and the Office of Open Records orders it to disclose the records.

PSBA notes that when the current Right-to-Know Law was enacted, the law was amended to permit any legal resident of the United States to request records from agencies subject to the law. This was to comply with a Third Circuit Court of Appeals decision that found the Commerce Clause of the United States Constitution required state laws to permit interstate requests. On April 29, 2013, the United States Supreme Court ruled that state open records laws may limit

requests to citizens of a state, expressly rejecting the Third Circuit position[2]. Again, taking into account the interest of Pennsylvania's taxpayers, PSBA suggests that the Right-to-Know Law's definition of a requester should be amended to permit only Pennsylvania citizens to request records pursuant to the law.

As we go forward with this work, I am sure that many of the comments you have heard today will lead to further amendments and we stand ready to work with you in this important process. Thank you.

[2] *Mcburny v. Young,* 133 S. Court 1709 (2013).

Information Provided to PSBA by Open-Records Officers
and School Solicitors between May 6, 2013
And May 11, 2013

SUMMARY OF OPEN RECORDS OFFICERS' FEEDBACK:

1. Requests for records from our district has been relatively limited. The most recent request was from a gentleman requesting copies of tax information for all taxpayers in our district. He was notified that his request would be filled but that I would need extra time to complete the request as it needed to be redacted. I spent an entire day working on his request, notified him that it was ready but he would need to pay for the copies in advance as it was over $100. He decided he didn't want them because of the redactions. With school budgets being cut, I think people should have to pay for the time involved with some of these requests.

2. We are in the midst of a building renovation project with another project on its way. I have received two requests for certified payrolls. We are talking hundreds of pages that must be copied and then personal information redacted. This is extremely time consuming.

3. We have some requesters who make frequent and burdensome requests, always several at a time and always with multiple parts to each request. For example, one requester, since 2009, has submitted147 requests and related individuals and groups have submitted another 91on very similar but not identical topics. Generally, these come in groups of as many as seven requests at a time. Most recently, we received a request for all bills paid to a food service contractor. It took one staff member two solid weeks to review these and complete redactions and other staff members handled the copying. The district spent about 100 hours of clerical time responding to this request. This is a typical example in responding to this requester and the related individuals and groups. We need to be able to charge for staff time spent in searching for, redacting and copying records.

   School employees are particularly concerned about release of home addresses. As ORO, I am sometimes subjected to public criticism and even attacks on my character. I would prefer not to have my home address public.

4. We are in the midst of a renovation project. After four months of no complaints, we began to hear concerns that "construction dust and odors" are making students and staff "sick." A concerned parent submitted seven Right to Know requests in the past month for items such as resumes and salaries of employees who are involved in the project, the architect's contract, and other fairly reasonable and straight-forward requests – a nuisance, but not a problem. Unfortunately he feels that there is a cover-up so is searching high and low for something that doesn't exist. He recently filed a request to view copies of all construction progress meetings and daily logs created by our contracted construction management firm.

   We will be denying these requests based on various exceptions. If he appeals this denial, and it is overturned, I will need to print all of these documents (currently

stored electronically as .pdf documents created by the architect) read thru 18 months of bi-weekly and daily notes, redact any comments and notes that deal with safety, trade secret, etc., and prepare the records for his review. I estimate this would take 2-3 days of my time and I also assume that the multiple redactions will result in further accusations of a cover-up.

5. I support charging time spent responding to requests for commercial use. We have had requests for taxpayer property tax payment information from a company in New Jersey who does tax appeals on behalf of individuals. They have requested information and are sending solicitation to taxpayers as a result of receiving this information to get business and gain financial benefit by contacting these people to appeal their taxes and save the client money. I don't mind a taxpayer asking for some information so they individually can do some research, but this ends up as a mass mailing. Searching for older documents takes more time than more recent ones and lengthy redaction must be done by hand and should be charged by the hour if a lot is required. We do need an exception for pending litigation but it should not be limited to a party because others may ask for it. Such records should be exempt until litigation is closed. Regarding provision of records in electronic format, I would say the "computer file format or other format" and add the words "secured by protection password prior to delivery to avoid end use manipulation." The provision regarding records in possession of private contractors should be removed entirely. The agency should have a copy of the contract and that is what should be a public record. Requests should be made only to the address of record of the RTK Officer and appropriately addressed as noted on file with the RTK office. I believe the contents of appeals should remain the same.

6. The number of requests for information has decreased over past years. However, we do continue to receive requests for information that is never picked-up or paid for by the requestor. It is a waste of staff time and resources when this happens.

7. We went through the nightmare years with the new law and a very controversial issue but things have calmed down considerably so I don't have anything to report.

8. This school year, many requests took over two hours to fulfill, one took six hours and many are repetitive. In one instance, a Requester is convinced that the Superintendent's Commission is forged because got one copy from PDE and one from school district and is convinced signatures are different. This document includes Social Security number and home address and she wishes to have the ORO hold his hand over the exempt information while she examines the district's copy of it, even though she has been told by OOR that she has no right to inspect the version that includes exempt information.

9. With the upcoming Primary Elections, our District has had multiple requests by candidates (or their "representatives") and the media for the Delinquent Tax records provided to us by our elected Tax Collector. I personally feel we're being drawn into"mud-slinging" attempts thinly veiled as Open Records requests. The records that we have on file have been provided, however, I have told each requester that the information I have is a "snapshot in time" and that the most accurate information should be requested from our Municipal Tax Collector. Often higher level staff, not just clerical employees need to work on review of records and fees should reflect this. School District converts every document into PDF form so that manipulation of the data in not possible. We also hold fast to providing the document in the format in which we maintain it...we don't customize. The envelope, fax cover sheet or other cover page should be clearly marked Records/Document Request.

10. We have had 48 requests since our tracking began in 2009. Some have been a nuisance, but none have been extremely controversial. I think the nuisance situations for us were the requests made to most, if not all, school districts. The one request that I recall was the request for home addresses of teachers.

11. I maintain a "record" of all open record requests. The vast majority of the requests are in response to an RFP/bidding situation or are a union local checking on certified payrolls for various district construction products. Other than a few from the local Newspapers, we could only identify three from school district residents seeking what I would consider legitimate taxpayer oversight types of questions.

12. I have learned a great deal about the RTK law over the past year. We literally spent tens of thousands of dollars pulling, reviewing, categorizing, and producing emails over the course of multiple months. We had multiple appeals and many *in camera* reviews. The interesting story was the time when one OOR Appeals Officer ordered the release of all records prepared and a few days later, a different OOR Appeals Officer requested an *in camera* review of the same records. The OOR even ordered the full unredacted release of an email that contained an employee's bank account and routing number. Generally, these emails do not represent actions or decisions of the school board/school district. Ours is a small school district and administrators play multiple roles. If our board does anything controversial, the law is used to bog down the work of the entire district, often for records having nothing to do with the controversial action. This year, one requester's requests took four hours of his time, another took eleven hours and another sixteen. This was a parent who is upset about a special education case.

13. I spend about a half hour on each request, although we get regular requests from Signature Information Solutions regarding individual's payment of real estate taxes.

14. I am in one of the most affluent communities in the Commonwealth and we have a variety of citizens who use the RTK process as a tool for attempting to prove their points at our expense. Many of the RTK requests are demanding in nature and pose questions rather than requests for information – in effect – expecting and demanding that it is their right to have this and that District staff must do the work for them in proving the point they are trying to make. Although we are very careful to point out that the RTK law requires that we are only required to provide existing records and information, it is still very time consuming to weed through the often vague requests and separate out what is information we are required to provide and what requires analysis beyond the scope of the law.

    I have one gentleman who has filed over 20 RTK requests in the last 6 months. Most of the requests have been financial in nature. His requests are often very vague, demanding and rude and once he gets my response he will often appear at a public meeting of the Board and, with no frame of reference, begin a litany of accusations that he can't get the information he wants that that we are hiding information. He alone has become a very time consuming factor and with all of the demands on my time this has become extremely burdensome. In this case it borders on abuse. I do appreciate the fact that those who drafted the legislation had the foresight to structure the appeal process in such a way that the appeal must be made to the state OOR rather than the local school board. This takes the local politics of out it which is definitely a plus. However, the law has enabled abusive people individuals and organizations to make life extremely complicated and miserable for those of us in the trenches trying to get a job done.

    I suppose if I had my choice in what needs to be improved – is that the law be changed to limit the number of requests and any individual or organization can make at one time or over a period of time. I have had as many as four requests at once from individuals. This is also very time consuming to address.

15. My district has received only about a half dozen requests, ranging from local taxpayer asking about extracurricular spending to leading state newspapers inquiring about salary information. We do convert electronic records to .pdf for ease of transmission and to avoid manipulation of data. I would appreciate if the law required use of forms for requests.

16. We received three Right-to-Know requests this year that were granted but they were obviously meant to promote the private interests of others and not specific to the education of our children or function of our school district. The law was used to obtain mailing lists for special interest groups; not for what tax dollars should be used. (NOTE: two of these did not fit the definition of a commercial use request.)

17. Our two biggest issues with the RTKL are as follows:

    1) Data Miners on Tax payment records. We should be allowed to collect our actual costs plus a 3% admin fee, as well as any legal fees. This usually comes from out of state firms.
    2) Political Advocacy groups. Looking for employee information (i.e. Names, addresses, phone numbers, district e-mail addresses and union membership). We should be allowed to collect our actual cost plus 3% admin fee and legal fees. Districts are not allowed to politically advocate therefore those that use district advocate their political agendas should pay for the privilege to do so.

18. As the RTK officer for our district, I have personally handled every one of the 72 RTK requests we have received in the past 4+ years. Of those 72 requests, only 11 or 15% have come from individuals living in our school district and over half of them (6) are from one gentleman. I believe the RTK law was not directed at our school district. We do not hide things. We do believe transparency is proper public policy. I would however, suggest the following changes to this law:

    1. We should not be required to provide documentation to vendors that may provide them with competitive advantages in doing business. I do not believe this was the intent of the RTK Law.
    2. We should not be required to provide the lists of names and addresses of employees to anyone as privacy issues and identity theft are concerns. From the requests we have received, it would appear that they want to send something to them. This is just what we all need - more junk mail. I do not believe this was the intent of the RTK Law.
    3. Law offices should not be allowed to request documents that they would normally need to obtain through the "Discovery" process, just to save them time, money and effort. I do not believe this was the intent of the RTK Law.
    4. The proposed revision relating to records possessed by contractors still looks too difficult to administer - especially with RTK time lines. This whole section needs to be reworked. There is no guarantee that we can get the records from the contractor. Thus we waste time and energy trying to do so. By the way - many of our contractors are NOT public entities and they do not fall under RTK laws. As such - they have not been trained and do not understand its workings. Get rid of this requirement all together.

19. Since the information that I provided for you in November 2011(specifically, that a request for information on 8/10/10 which required a substantial time for processing did not come to fruition due to no response from the requester), there have been no significant problems with any RTK requests, requesters have remained committed to their request, and we have not experienced payment default for records provided which incurred a cost. Responses requiring a 30-day extension were not contested, and there was no dissention in regard to the

responses or records we provided. In 2012, we received ten requests, taking 6.5 hours to fulfill and we collected fees of $103.00.

Although not especially problematic, I would like to note that beginning in 2008 through October 2012, we received a monthly request for tax collectors' reports from the City and all townships and boroughs in our school district. Compilation/copying of these reports is very time consuming; however, the entity requesting this information always paid the processing fees. We have not lately received a similar request from this entity.

We do not believe documents should be provided in a format that can be manipulated but should only be shared as read only/.pdf if electronic.

I will reiterate, as stated in my letter to you in November 2011, that providing access to public records is a long standing practice in our school district. In establishing a more legalistic approach, the RTKL has created unnecessary constraints, is more costly in time and effort, and often diverts attention from the general business and concerns of operating a school district. Negative experiences with the RTKL have centered primarily on time factors and costs which include legal review of requests in order to remain compliant with the RTKL. Our district has experienced no apparent positive benefits from this legislation.

20. School employees are concerned about release of home addresses. They are concerned about their personal safety and feel that providing their home addresses, along with the fact they work for the school district, will give criminals knowledge of the hours they can break into their homes.

I support a fee for requests for commercial purposes. For noncommercial requests, we should be able to charge fees for anything over an hour or two spent on the request. Thirty minutes is too short because even the easiest requests take thirty minutes to handle. We spend a substantial amount of time redacting legal invoices (91 hours on one request). I think it is fine to charge the rate of the lowest paid employee.

I am concerned about the right to go to court on the grounds requests are overly burdensome because this can cut two ways in that our school district has needed to use the Right-to-Know law at least once in a manner the responding charter school might have considered burdensome because we needed oversight over the school's operations. My solution to the problem of overly burdensome requests would be to possibly limit how many records can be requested on one request, how many RTK requests a person may have awaiting action from an agency at any one time, and to provide additional time to respond to lengthy requests. The initial 5 days and the 30 day extension does not always provide enough time for the lengthy requests.

I have found that the exemptions currently included in the law were sufficient to meet our needs regarding the release or withholding of records pertaining to matters under litigation.

We call all security measures we take in schools to protect students and staff "safety measures." I would be against releasing school safety inspection reports if they deal with school safety and safety measures we have in place to protect students. It would be best to carefully define what a "safety inspection report" is so that it is not read too broadly.

SUMMARY OF SOLICITORS' FEEDBACK

1. Over the past three or four years we have made hundreds (probably thousands) of copies under Right to Know. We break even on copying expanses but the manpower costs are huge. And we consistently see hostile parties adopt what looks like an "I'll show those so and so's" and bombard us for copies of records they will never look at. Another manpower cost is me sitting down with our RTK officer and combing through requests to see what we have to produce and what we don't. And the culture seems to have changed with school boards. Over the years there have been courtesies when it came to providing records to school board members. Now we are confronted with hostile board members who advocate their cause by bombarding our front office with RTK requests. We fairly recently had a board member (who had the support of some other board members) disrupt the functioning of the school district with his RTK antics.

2. I am actually dealing with a RTKL request from a Plaintiff's firm wherein the information requested is exactly the same information a AAA arbitration panel decided was not relevant or discoverable. The request came from the law firm on behalf of its client but asked for the records to be sent to it instead of the client. It was a blatant way to get around the issues that had been litigated and lost. Since, this is active litigation I am not using the names of those involved.

   I have had lawyers do this in special education cases and PAHRC/EEOC cases as well. It creates a very unfair advantage to non-public litigants to burden the public body and to circumvent discovery rulings.

3. One thing that I think needs to be addressed is the interested party language. I just got my first appeal with the direction to contact all potential interested parties and inform them of the appeal. I also am in the process of handling a request that sought potentially confidential proprietary information, and had to coordinate the redaction with the third party. In light of the Commonwealth Court's comments about their concern that an interested party isn't informed of the request until the appeal, or is never informed when a request is granted, this should be addressed in the amendment. The local agency should be permitted to step away and let the

other party handle the request, appeal, etc. Also, I am a bit concerned with a requirement in an appeal that we identify the records that are being withheld. Many times, we don't even get to the search due to a request being insufficiently specific or being clearly exempt. That could somewhat be mitigated by search fees, but it will be a big waste of time to search and compile records that we know are not going to be accessible. For the School District of Pittsburgh in 2012, I spent a total of 80.5 hours handling the 5 day, final responses, and any appeals (I don't think we had many in 2012). I have no way to account for all of the search time or database query time spent by the school district.

4. One district received a requests for several items, including all "correspondence dating from January 1, 2004, including without limitation letters, emails, memoranda, minutes and notes with respect to the construction of [two schools] among and between any of the following: employees, Board members and other representatives of the [School District]; employees and representatives of the Pennsylvania Department of Education ("PDE"); and third party consultants, agents, contractors, engineers, architects, construction managers and other professionals for either the [School District] or PDE." Responding to the request involved the production of approximately 30 boxes of documents and a hard drive with several gigabytes of data, as well as legal review of the documents to ensure compliance with the new law. Ultimately, after spending over $10,000 in legal fees and consultant costs to review and provide access to the documents, the requesters never came to inspect the documents that were produced.

   In another case, an individual requested 14 different categories of documents covering a 6 year period. After hours of administrative time and effort and over $7,000 in legal fees for review, responsive documents were provided. The district was then sued in federal court and required to produce the almost the exact same documents.

   In another case, a request sought all correspondence, contracts and payment records related to a particular construction project over a 36 month period. Because of the generic nature of the search terms, the production required a document by document review of nearly 18,000 emails.

   In another case, an individual made serial requests (5 in a 2 month period) for various records apparently stemming from his friendship with an attorney who represented an adverse party to the district in a litigation matter. The requests included, by way of example: itemized legal bills related to a particular case, itemized bills for all legal services performed over the past 12 months, copies of any complaints, briefs and motions filed by all of the lawyers in such cases, copies of legal decisions by a hearing officer and/or judge may have been rendered in each case, copies of any settlements that may have been filed to dismiss litigation. While the district denied many of the requests, ultimately a

substantial number of documents had to be redacted and made available to the requester.

In each case, while the districts could have expended resources trying to fight the requests, they faced the possibility of having to pay to litigate the matters, then having to pay to produce and review the records, along with the prospect, albeit recently corrected by the Pennsylvania Supreme Court, of having any exception not raised deemed waived by OOR. While the law requires that the request be sufficiently specific, it does not require that the request not be unduly burdensome.

5. As special counsel for several districts, we are encountering RTK requests that endeavor to secure discovery for litigation purposes, in advance of filing the claim and without adherence to discovery rules. The RTK response to broad, discovery-style requests is more burdensome than the discovery would be! First, there is no limitation as to relevance. Secondly, there is no option to open files for examination by the RTK requester – the documents have to be copied and produced. Thirdly, there is no judicial oversight to limit unreasonable requests.

Here are the options we've used or that we'd suggest could be considered:

1. Permit the governmental entity to treat the RTK request being filed by or on behalf of a potential litigant as a discovery request under the Rules of Civil Procedure, with disputes resolvable by petition to the courts of common pleas (or Commonwealth Court in the case of state agencies) – applicable whether the underlying dispute were in court or in arbitration;
2. Require a certification that the documents obtained were not intended for use in litigation; or
3. Prohibit the use of RTK documents in any claim against the governmental entity the jurisdiction for which would be in arbitration or a judicial forum

6. I offer comments on two areas:

First, in regard to the exceptions concerning water and sewer clearances and tax payment records, a long-standing practice for most closings require the buyer's attorney to be satisfied that there are no outstanding municipal claims and that the taxes have been paid. Typically, the municipalities have a designated officer to do the water and sewer certifications and the elected tax collectors do the taxes. There are usually small fees charged for this. Although I have not seen it happen, here, I suspect that somewhere it must be happening that requests are made under the Right-to-Know Law to the municipality, itself, rather than the water/sewer and/or tax collector, as a means to avoid paying the typical fee for these certifications.

Therefore, although it may seem that no exception is necessary, I suggest this is a good idea to maintain what has been the practice "forever."

Second, in regard to fees related in responding to the requests, I offer the following thoughts. And, these may be based upon the type of retainer agreement which the attorney has with his municipality or school district. My typical retainer is a yearly rate which covers certain things, but does not cover the time required for specific research items for which I must render an opinion. Doing research and rendering opinion is precisely what happens for most Right-to-Know Law requests. Therefore, I offer the observation that it costs municipalities and school districts "extra" solicitor fee every time there is a Right-to-Know Law request, because it is referred to the solicitor for research and response, and this is not a cost which gets passed on to the requestor, it becomes another burden upon the taxing body, and hence, the taxpayer. Frankly, I have no suggestion for a remedy, but it appeared to me that this is an issue that has not really been given any thought in this whole process.