WRITTEN TESTIMONY OF TERRY MUTCHLER, ESQUIRE
EXECUTIVE DIRECTOR OF THE OFFICE OF OPEN RECORDS
SENATE STATE GOVERNMENT COMMITTEE
CONSIDERATION OF SENATE BILL 444
ROOM 8E-B, EAST WING
MONDAY, MAY 13, 2013

INTRODUCTION

Chairman Smucker and Members of the Committee.

Thank you for the opportunity to testify before you today on this important ground breaking law and to address the impact the proposed amendments would have on the citizens and agencies within the Commonwealth.

My name is Terry Mutchler. Since 2008, I have been the Executive Director of the Office of Open Records ("Office" or "OOR"). The Office is an independent quasi-judicial tribunal charged with implementing and enforcing the Right to Know Law ("RTKL" or "the Law"), which became effective in 2009.

The Law and Office were founded on the timeless principle that transparency and accountability are essential to good government. Transparency is the cornerstone of democracy and accountability the bedrock of a free society. Without either, government is left with little motivation to serve its citizens.

I would be remiss if I did not begin with the highest praise for Senator Dominic Pileggi. Senator Pileggi is an open-government visionary and his foresight has catapulted Pennsylvania to the top-tier in states committed to ensuring transparency in government. The Legislature also deserves credit for the courage to pass such bold legislation, which has improved the government in both reality and perception.

The Legislature wrote a law that was designed for ease of citizen access to the records they own. Broad access with minimal hurdles is a principle that should remain in this law. An effective open records law balances the fundamental rights of the citizens with government's legitimate need for confidentiality. Knowing this, the General Assembly with the invaluable foresight of the bill's author, Senate Majority Leader Dominic Pileggi, crafted a strong Right to Know Law that will benefit Pennsylvanians for decades to come.

The success of this law is best measured by the results: citizens have been able to review hundreds of thousands of records of their government since this new law took effect. The public's overwhelming support of the law and their continuous use of the law have remained constant. The number of appeals filed with the OOR has increased nearly 100% since opening in 2009.

Once ranked 47th among the other states, Pennsylvania has asserted itself as a **leading voice for transparency ranking as high as 5th in some studies.** Public officials from across the country now look to Pennsylvania for counsel on establishing similar laws and entities to that of the Office of Open Records. Even Congress has looked to the Pennsylvania Model in creating for the first time a federal ombudsman to address issues related to the federal Freedom of Information Act. They adopted many of our recommendations for creating that office within the National Archives.

The Pennsylvania Supreme Court has also taken this law to a new level with its interpretation of provisions related to government contracts with third-parties. Pennsylvania now boasts the highest level of transparency as it relates to government contracts with third parties. The Supreme Court's interpretation of these sections positions Pennsylvania as having one of the strongest laws in the United States related to third-party contracts.

The Pennsylvania Legislature should be proud of its work in establishing this law. This type of transparency allows citizens to monitor how and why their government spends their money in what are increasingly difficult economic times.

As with all new laws, the RTKL does need improvement. A strong law can be made stronger and a good law better. It's important for proponents and opponents to remember that the RTKL requires minor surgery, not a transplant. SB444 addresses many practical and procedural concerns faced by the OOR, agencies, and requesters across the Commonwealth.

Senator Pileggi's office was very receptive to our input and many of the proposed changes to the law reflect our position. We are grateful for his leadership. **That said, the OOR does have concerns about some of the proposed changes.** These practical concerns, linked by a common thread, can be summarized in three broad areas.

- Procedural
- Substantive
- Enforcement

The common thread linking these three areas is the funding and staffing necessary to carry out the law. Quite frankly, without additional support, the OOR cannot continue to successfully implement the law as written. The great ground that the Legislature has gained will be lost unless this financial component is kept at the forefront of any changes to this law.

Any staffing and budget increases have been exceeded by the ever increasing workload and significant increases in operating costs. In the past year, the OOR with a staff of twelve people has:

- Issued 2,188 Final Determinations
- Answered thousands of inquiries from public and agencies
- Trained hundreds of agency employees on RTKL procedure and exemptions
- Litigated and/or monitored hundreds of appellate court matters from the Common Pleas level to the PA Supreme Court

- Responded to nearly 800 RTKL requests directed to the OOR

To provide the Committee with a workload comparison, the Connecticut Freedom of Information Commission is similar to the OOR in its duties and responsibilities. That Commission has about 800 cases a year and 22 staff members. While the OOR is not seeking to triple its staff or budget, additional funding and staffing is required for the OOR to successfully implement the law.

PROCEDURAL AND SUBSTANTIVE

- ***Section 506(a)(3) Unduly Burdensome Requests***

The OOR is well aware that a small minority of requesters use the RTKL as a weapon to harass and annoy agencies instead of as a tool to scrutinize and improve government. In addition, companies, businesses, and their employees regularly use the RTKL for the sole intent of corporate or personal financial gain. Such uses not only contradict the intended purpose of the law, but waste limited government resources. There is no question that these abuses must be addressed.

However, while §506(a)(3) attempts to solve the problem, the OOR is very concerned about the practical impact. Under Section 506(a)(3), once an agency deems a request or related group of requests to be unduly burdensome, it is permitted to bypass the OOR completely and try to obtain an order from the appropriate jurisdictional court determining what records are to be released. In its simplest explanation this will revert the current law to the Old Law. I cannot stress enough how a number of agencies already attempt to game the system. Agencies routinely complain that a request is unduly burdensome when it is one request for a handful of records. Nothing in the provision prevents an agency from regularly labeling requests "unduly burdensome" and skipping the OOR to litigate before a local Court of Common Pleas or the Commonwealth Court.

Real time application of this section poses problems as demonstrated by a recent case decided by OOR. In that case, a thirteen-year-old requester sought records from a school district. The school district denied the request in part as disruptive stating that her request was related to other requests seeking the same records. The requester replied that her request was independent of any made by a previous requester. If this section were applied, the school district would have had the procedural option of pursuing an unduly burdensome action in court against the thirteen-year-old requester bypassing the OOR. Instead under the current law, the requester appealed to the OOR who determined that she was not a disruptive requester and that the school district was required to release the records.

As a related matter, the section is silent regarding the RTKL appeal process should the court side with the requester. Additionally, the section does not address the impact of such a proceeding on an appeal to the OOR should the court rule for the agency or what appeals rights either party has within the courts.

Another unintended result is the potential influx of more RTKL cases on an already stretched court system.

- ***Commercial Purposes***

As a direct result of its understaffing, the OOR is very cognizant of the practical impact the RTKL has on the day to day operations of government agencies, both large and small. Agencies across the Commonwealth have adapted to responding to numerous requests, some voluminous, with limited economic and staff resources under tight time deadlines. Because the purpose of the Law is government accountability and not personal or corporate financial profit, the OOR supports preventing the use of the RTKL for commercial purposes and gain. However, from a practical standpoint this section creates an additional step for gaining access to records; submission of a certification of intended use. The section is silent as to how this affects timeframes with either the request or appeal process or how failure or neglect to check a box or provide certification affects the agency's response. Additionally, § 1308 precludes agencies from making a policy that allows the agency to ask the purpose for the records requested.

- ***Criminal Records of a Local Agency***

The OOR supports the addition of the campus police departments of state-owned or state-related agencies as local agencies. However, their proposed addition highlights a glaring procedural flaw within the RTKL which has become increasingly problematic. Section 503(d) precludes the OOR from hearing appeals regarding the criminal investigative records of a local agency. The appeals officer appointed by the district attorney of the county in which the agency is located has jurisdiction to hear those appeals. Most importantly, the appointed appeals officer has the sole jurisdiction to determine if the records are even a criminal investigative record.

This raises both procedural and government efficiency issues. From a procedural standpoint, the OOR receives many appeals regarding criminal investigative records referred to them by district attorney's offices who are unaware of their obligations under the law. Due to strict timeframes under the RTKL, requesters' rights to appeal are usually forfeited in these circumstances.

Another pitfall, is where a local agency denies a request because the records may be criminal investigative. Agencies rarely look to the DA for a determination of whether the records are in fact criminal investigative. Upon denial, agencies tell the requester to appeal to the OOR when the appeal should go to the DA. At that point, the OOR must dismiss the appeal for lack of jurisdiction and instruct the requester to appeal to the DA. Again, in many instances the time has passed for the requester to timely appeal.

Finally, there are cases where both criminal investigative and non-criminal investigative records are requested. Since agencies rarely look to the DA for a determination of whether the records are in fact criminal investigative, the OOR is left trying to determine

whether it has jurisdiction and what if any of the records might be non-criminal on their face so as to give the OOR jurisdiction.

The OOR recommends that like criminal records held by the Pennsylvania State Police, the criminal records of local agencies be subject to OOR jurisdiction under the RTKL. Like the Pennsylvania State Police, local agencies would be given opportunity to raise appropriate exemptions under the RTKL or other criminal record statutes that might preclude release of such records. Such a result resolves the procedural conundrum faced by requesters and the OOR while also protecting local law enforcement agencies from the unwarranted release of sensitive records and information. Additionally, it consolidates sixty-seven open records officers into one central office promoting government efficiency and economy.

- ***Section 506(d)***

The OOR opposes the change as written to 506(d). Section 506(d) remains the crowning achievement of the RTKL and has advanced Pennsylvania to new heights in government transparency and was supported outright by the Commonwealth Court in its seminal case, E. Stroudsburg Univ. Found. v. Office of Open Records, 995 A.2d 496 (Pa. Commw. Ct. 2010) and the Supreme Court in SWB Yankees LLC v. Wintermantel, 45 A.3d 1029, 1042 (Pa. 2012). To alter this section would limit access, be a step backward, and erase very good open-government ground.

- ***Section 508 Inmates***

The OOR supports § 508(a). The OOR is concerned about § Section 508(b) as it gives the OOR jurisdiction over non-public records without creating clear guidance as to what appeal rights are related to the records in 508(b). (e.g. educational, tax, disciplinary records).

- ***Section 703***

The OOR supports amending this section. However, the section as proposed still leaves procedural uncertainty. "Administrative office" is not defined. Some agencies, particularly Commonwealth, have many offices that carry out administrative tasks. For example, the Department of Labor & Industry operates regional offices, disability determination branch offices, workforce innovation offices, etc. This language would permit a right-to-know request to be submitted to any office, and to any type of employee.

Requests are required to be forwarded to the Open Records Officer "promptly." The Commonwealth Court has held under the current language, which is unchanged in the amendments, that the clock for a response begins to run when the Open Records Officer of the agency receives it. The amendment does not define the word "promptly" leaving an agency under no time deadline to forward a request and requesters with uncertainty as to when the response and/or appeal is due.

- ***Section 708(b)(10) and (17)***

The OOR is neutral on what types of records should and should not be exempt and what entities should and should not be spent. Such a decision lies within the purview of the Legislature. That said, the OOR's underlying philosophy is that where tax dollars are used, it is imperative that the citizens have the right to monitor, track, and observe how and why that money is spent.

- ***Section 1101***

The OOR supports the proposed changes to § 1101.

From a practical standpoint, the OOR is concerned that Section (a)(1)(ii)(a) requiring that the appeal be filed within twenty business days of the postmark date could cause difficulty for the OOR in determining if an appeal is timely. Where an agency emails and/or faxes a response to a request, the date and time of the response is evident. However, many requesters who file appeals involving responses mailed first class do not think preserving the envelope in which the response is mailed is required or even important. Without a postmarked envelope, it is unclear how the OOR would determine timeliness of the appeal under this section as written.

- ***Section 1102***

The OOR supports the express language regarding legislating its existing authority to conduct in camera review. The OOR strongly recommends that the decision to conduct such a review remain un appealable. Otherwise, the OOR will expend valuable resources litigating appeals of its *in camera* orders; further wasting government resources and time and undercut the Legislature's stated intent of access and ease.

- ***Section 1310***

In the past five years, the OOR continually has fought to ensure that its decisions remain free of the hand of any Administration. Adding the word independent, for the OOR, is the crown jewel of this legislation and the OOR is grateful for the trust that the Legislature has displayed in this addition. In order to make this workable and meaningful, we ask that the Legislature make clear that the OOR will be on the same footing and situated as the Small Business Advocate, receiving support, as directed from the OOR, for DCED to continue providing computer and technology support, human resources support, and issuance of payroll support.

While we initially expressed no concerns regarding this section, upon further reflection, the OOR is concerned about the practical impact of the broad language precluding it from commenting on any issued related to pending cases. Due to the high volume, the OOR has any number of the same issues constantly pending before it any given time. At a minimum, the language potentially prevents the OOR from training on certain issues, speaking to lawmakers about cases in their districts, and will directly conflict with its

statutory duty of training public officials and the public on the law. The OOR DOES NOT SPEAK ABOUT PENDING CASES before it. However, when we issue a decision we often speak about it and this language would potentially preclude that.

- ***Personal Financial Information***

The OOR is concerned with changes to the definition of "personal financial information." This revision conflicts with other statutory law making such information public, such as statutorily-public property assessment records filed "by" an agency. The definition of "personal financial information" would potentially exempt all tax forms even those currently public such as certain property tax records. The broader definition seems to be aimed at the exemption of W-2s and 1099s. Because under Section 3101.1, the RTKL does not control in event of a conflict with other statutory law, this amendment will likely be ineffective for its intended purpose. The OOR proposes that the definition specifically name and list the forms intended to be exempt to the extent possible.

ENFORCEMENT

This is the most critical issue for citizens that have arisen since the inception of the law. Without enforcement, the Right to Know Law becomes a meaningless exercise and in the plainest language, without addressing this component of the law means that the Office of Open Records risks become a failed government experiment.

The OOR consistently receives complaints from citizens that certain agencies are not complying with OOR Determinations and the citizens repeatedly ask the OOR to step in and enforce our Final Determination. In other words, when we review a case and determine the records are public, some agencies have chosen to run the clock – and simply wait until the citizens' right to seek judicial relief expires without complying with the Order.

This puts the requestor back in the position of the Old Law – where the only recourse was to go to Court.

The RTKL as written does not provide the OOR with enforcement power. There is much confusion on this point and it can best be clarified in this way.

The Office could file a motion in Court to *seek enforcement* of an OOR Final Determination but we do not have – nor should we have – the power of a court to levy fines or force compliance. The courts have addressed this in varying ways some granting petitions for enforcement while others dismiss saying they don't have jurisdiction. The Legislature needs to address this and correct it to ensure that citizens have meaningful access to the records of their government.

CONCLUSION

Because of the General Assembly's work and adoption of this law, citizens across the Commonwealth are getting access to records that would have never seen the light of day under the Old Law. A stronger and more transparent Commonwealth is emerging. With a few minor changes to the current law, the General Assembly can expect an even stronger Commonwealth as the OOR works with requester and agencies to provide citizens with the transparent and accountable government to which they are entitled. A properly equipped independent office implementing a balanced approach to this law instills trust not only in the process and procedure of the law, but also between the requesters and agencies that regularly use that process. Such trust results in a more accountable, effective, and efficient government.