Good Morning. I would like to thank the Chair and the Committee for the opportunity to testify today. My name is David Strassburger of the Pittsburgh law firm of Strassburger McKenna Gutnick & Gefsky. I regularly represent media organizations and other clients in Western Pennsylvania who request information under the Right to Know Law.

A number of the changes proposed by SB 444 reflect sound public policy, good sense and careful study, including making the Office of Open Records an independent agency, clarifying the obligation of agencies to provide documents in the format requested, and revisions that remove procedural obstacles to access. While I endorse these changes contained in the bill, what motivated me to speak here today is my opposition to the proposed amendments to section 506 of the Right to Know Law.

SB444 would make three changes to section 506. The first change would add subparagraph (a)(3). According to the proposal, if a request or related group of requests would be unduly burdensome, the agency may petition a court for a protective order, which the court could issue upon a showing of good cause.

The proposal makes an unfortunate choice as a matter of substance and procedure. On the substance, the principle worth protecting is the public's right to information, whether the information exists in one record or 1,000 records, or is sought in one request or piecemeal requests. Administrative burden should never be a reason to shield from public view information

that would otherwise be made available under the Law's presumption of access.

Procedurally, what makes a request burdensome? Two things, really. Not enough time to respond, and too much expense needed to respond. But the Law already addresses these concerns. Section 902(a)(3) states that the open records officer may respond by stating that a timely response is not possible due to staffing limitations, and under section 902(b)(2), may propose a date beyond the 35th day that a response would otherwise be forthcoming. The requester at that point has the option to agree to the extension, or reject it and argue on appeal that the request for extension was unjustified.

SB 444 also addresses the issue of money. Under the proposed amendment, commercial requests would require the payment of additional fees, and those fees would increase for large commercial requests.

Allowing an agency to go to court and circumvent the administrative process is not in the public interest. One of the significant purposes of the new Law was to create a more uniform, administrative procedure so cases could be decided faster and, if necessary, get to court faster. Allowing an agency to circumvent the existing machinery for unduly burdensome requests would bring the process to a screeching halt. The petition and answer process contemplated by proposed subparagraph (a)(3) would take months, if not years, to be decided, and presumably the court would only decide the question of undue burden. If the petition were denied, the

agency would then have to decide the request on the merits, and then the normal appeals process would be followed. In other words, the proposal creates a detour that slows the process down to decide a single issue that the open records officer may already decide under existing law.

The second proposed change to section 506 is new subparagraph (a)(4), which states that an agency may deny requests to a party to litigation which are related to pending litigation or which were previously made in litigation discovery. The purpose of the amendment is to prevent a party from making an end run around the litigation process and obtaining something through the Right to Know Law that the party should have requested under the Rules of Civil Procedure, or perhaps under the Rules of Criminal Procedure for criminal cases.

To be sure, no one wants litigants to play fast and loose with the judicial system, but this amendment actually does more harm than good. This amendment says that a litigant's exclusive avenue for requesting information may be the lawsuit. Lawsuits, however, are about evidence, not information. In a lawsuit, information is subject to discovery only if it is relevant to the lawsuit. If it is not relevant, the parties do not need to spend time and money producing the information or discussing it. On the other hand, there is no relevance test for a Right to Know request, nor should there be. The mere fact that someone is a party to a lawsuit has no impact on that person's right, under the Law, to receive information every other person in the Commonwealth has a right to receive. It must be remembered

that many litigants, dare I say the majority of litigants, are litigants involuntarily, because they have been subject to suit or prosecution. The proposed amendment says you may lose your rights under the Law as a collateral consequence of becoming an unwilling participant in the suit or prosecution, or because you have been forced to file a lawsuit to seek redress of your grievances. That is not fair.

Moreover, one of the premises of the Law, under section 301(b), is that the purpose of a request has no bearing on whether the request should or should not be granted. The proposed amendment represents an erosion of that principle, without any substantial justification.

The third and final proposed change to section 506 may be the most significant. Currently section 506(d)(1) addresses what is commonly referred to as the privatization principle. As local and state agencies try to contain costs, they often look to private contractors to perform work traditionally performed by the government itself. Privatization in many instances reflects good government. Nevertheless, once the private company assumes responsibility for the public work, public oversight would be lost if there were no mechanism in place to scrutinize the activity. The need to scrutinize the work of public contractors must be balanced against the business interests of the contractors themselves, which are not public agencies and should not expect intrusive inquiries into their business to the same degree as the government itself.

Pennsylvania struck the right balance in current section 506(d)(1), which says that a record in the possession of a party that has contracted to perform a governmental function on behalf of an agency, and which directly relates to the governmental function, and is not otherwise exempt, is a public record under the Law. Section 506(d)(1) is a very narrow inroad into a private contractor records. Only if the contractor is performing a government function for the agency, only if the record DIRECTLY RELATES to that function, and only if the record is not otherwise exempt, will the record be subject to disclosure. The case law has made clear that not every government contractor performs a government function, and many, many contractor records are unrelated, or only indirectly related, to the government function, and therefore not subject to disclosure.

It is hard for requesters to obtain information under section 506(d)(1), and it should be. But it also allows for access to a narrow class of documents that would shed light on public works by private contractors.

We need to remember one of the events that contributed to the legislative dialogue to repeal the old statute. During the evening rush hour of August 1, 2007, the Mississippi River Bridge collapsed into the river outside of Minneapolis, Minnesota, killing 13 people and injuring more than 100. Pennsylvania has thousands of bridges, many under the supervision of PennDOT, but in 2007, PennDOT told the General Assembly and the public that bridge inspection reports

were not subject to public scrutiny. That calamity, and PennDOT's reaction to it, contributed meaningfully to open records reform in this Commonwealth. The purpose of the Right to Know Law is not merely to facilitate public scrutiny of government spending. An equally important purpose is to promote public safety.

Many state and local agencies today subcontract inspections and other safety work to third-party contractors. PennDOT does it routinely. The City of Pittsburgh's Bureau of Building Inspections subcontracts most of its inspection work, too, as do various local and state health departments. The Pittsburgh Water and Sewer Authority is now run entirely by a private contractor. If the only record that is public is the contract with the agency, then the public will never be able to scrutinize the critical work of safety personnel for various agencies throughout the Commonwealth because most of the safety records are in the possession of the contractor and not the agency. In other words, the proposed amendment defeats an important reason for the change in the law in the first place. In fact, it is even more restrictive than the prior law, because even under the prior law access was allowed to "essential components" of government contracts, and not merely to the contract itself.

Section 506(d)(1), as currently written, is a better compromise than the approach taken by other jurisdictions that have tried to tackle the issue of privatization. Section 506(d)(1) is surgical in its approach: it focuses on the work of the

contractor, and how the record is connected to the work. Most jurisdictions that have addressed the privatization problem sweep more broadly, and instead focus on the definition of agency or governing body. If the contractor meets the definition of an entity that is subject to the Act, then the contractor's records are subject to disclosure. For example, in Kentucky, an entity that derives at least 25% of its funds it spends in Kentucky from state or local funds may subject to its open records act. In Tennessee, the threshold is 30%.

The problem with this approach is it is both overinclusive and underinclusive at the same time. An entity performing bridge inspections that derives only 10% of its income from the Commonwealth would not be covered, but an entity that derives half of its income from the Commonwealth would be subject to open records scrutiny, even for work paid for by private dollars. Pennsylvania's approach is far more thoughtful by comparison, because it requires disclosure only of those records that truly provide insight into work that should be subject to public scrutiny.

For all of these reasons, the proposed amendments to Section 506 of the Right to Know Law should be stricken from SB444.

I would like to conclude by briefly touching on two issues, one related to new proposed exemptions and the other related to some comments from our friends in the Third Branch.

On the issue of new, proposed exemptions, it was my hope that the Commonwealth's experience over the past four years

would show that the Right to Know Law is working well, that openness promotes public trust, and that the General Assembly would begin to roll back significantly or delete entirely many of the exemptions. SB 444 does not do that. To the contrary, it adds an entirely new exemption for voluntary fire, ambulance companies, and the like. This exemption is very troubling. I would commend to this Committee an article in the Patriot News written by Monica Von Dobeneck, dated February 20, 2012. She writes: "Two Lewisberry Community Fire Company officers are charged with stealing at least $20,000 from the company. A Steelton Volunteer Fire Company treasurer steals $55,000 from his colleagues. A fire company treasurer is accused of stealing $116,000 from the Goldsboro Volunteer Fire Company and $100,000 from the Penbrook Volunteer Fire Company. A treasurer for the former Goodwill Fire Company in Swatara Twp. steals $66,000 from the company's coffers. All within the past year and a half." The Dobeneck article explains in great detail the problems of financial management confronted by volunteer fire companies, and why more scrutiny, not less, is needed in the modern age. She quotes one volunteer fire chief whose comments are worth repeating: "When I joined in 1990, that was before the Internet, and the fire department was more a part of the community. It had status within the community. People helped no matter what their skills were. But as volunteerism has dropped, the caliber of people who can do financial analysis has dropped. We're left with just the people who want to fight the fires. We had to swallow our pride and

realize we don't have the people or time to manage the money the way it needs to be managed. It's a full-time job just to plan finances." To that end, I would ask this Committee to remember that volunteerism is not an exemption from public scrutiny. Most volunteers welcome the oversight, because it will shed light on the good, important work that they do. Fear of deterring volunteerism is not a reason to exempt these organizations from public scrutiny, especially in light of the unusual frequency with which we seem to discover they get themselves into financial trouble.

As for my friends on the appellate bench, in the past two months, I have had the privilege of sitting on two panels for Continuing Legal Education seminars where the topic was the Right to Know Law. Commonwealth Court Judge Mary Hannah Leavitt was on the first panel, and Commonwealth Court President Judge Dan Pelligrini was on the second panel. In each session, the judges independently told the assembled lawyers that their primary concerns about the Right to Know Law related to process and procedure. I told President Judge Pellegrini I would be speaking here today, and he asked me to communicate that point. There are, in fact, a number of procedural issues left open in the Right to Know Law that, in my view, are more pressing than some of the substantive issues SB 444 addresses. For example, the Right to Know Law does not address what happens when an agency tries to raise new objections on appeal that were not raised when initially denying a request. It does not address whether a third party who has been allowed to intervene

may file an appeal when the agency has decided it does not intend to file one itself. It does not address whether an agency should receive an automatic stay for further appeal after a court has rejected the agency's initial appeal. And it does not address the recurring problem of how to combat agency non-acquiescence; that is, how to enforce a decision of the Office of Open Records that has not been appealed, but that the agency has not honored.

Despite these open questions, my message today is one of pride. The Right to Know Law in its current form is not perfect, it needs to be tweaked, adjusted, scrutinized, considered, and reconsidered. But the existing legislation was the end result of a remarkable and historic display of democracy. It created a presumption of access that is strong and vital. It created a quick and simple administrative procedure that promoted the goal of access, and it created a limited right to inspect discrete information in the hands of private entities to avoid letting privatization become an instrument of secrecy. The Right to Know Law is legislation you should be proud of, that we should all be proud of, and I that I am proud to say I am proud of.

I would be happy to answer your questions on the record, or at your convenience as you consider the bill. Thank you for the opportunity to address the Committee.