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TESTIMONY SUBMITTED TO
SENATE STATE GOVERNMENT COMMITTEE
BY
ANDREW HOOVER, LEGISLATIVE DIRECTOR, ACLU OF PA
RE: RIGHT TO KNOW LAW REVISIONS
STATE CAPITOL, HARRISBURG
OCTOBER 21, 2013

Chairman Smucker, Chairman Smith, and members of the committee, thank you for the opportunity to offer testimony on the Right to Know law and potential revisions to it. My name is Andy Hoover, and I am the legislative director of the American Civil Liberties Union of Pennsylvania. Founded in 1920, the ACLU is one of the nation's oldest civil rights organizations. Today our membership numbers more than 600,000 nationwide. I am here today on behalf of the 20,000 members of the ACLU of Pennsylvania.

As you know, the ACLU of Pennsylvania previously offered testimony[1] on specific changes that are offered in Senate Bill 444. We appreciate Senator Pileggi's efforts to address potential revisions to make the law stronger and support several of the provisions of SB 444, including the establishment of the Office of Open Records ("the office") as an independent agency; allowing the office to participate in court proceedings through amicus briefs; and extending the deadline for filing appeals of denied requests.

Meanwhile, we are concerned about provisions of the bill that define commercial use of records; that allow an agency to petition a court for a protective order from a request because it is "unduly burdensome"; and that prohibit the participation of jail and prison inmates in the law, with some exceptions.

In today's testimony, I will further address the idea of inmate prohibition, as the state House of Representatives is considering similar legislation. With your indulgence, I would also like to amend a comment in our previous testimony about access to public-private contracts and related records.

SB 444 explicitly prohibits inmates from requesting records and then enumerates 11 exceptions to that rule. The exceptions all relate to the inmate's personal situation, including records connected to his criminal case; his personal records such as financial and work history; and the policies of the institution in which he is incarcerated. Senator Pileggi's office has been open about discussing revisions to this and other provisions of the bill, and the ACLU of Pennsylvania is grateful for the opportunity to offer input.

House Bill 115, introduced by Representative RoseMarie Swanger of Lebanon County, takes a similar but slightly different approach to inmate records' requests. This legislation does not explicitly prohibit inmate participation in the Right to Know law, but it empowers agencies to

[1] Available at http://www.aclupa.org/files/1813/8193/9378/tstmnySB444SStGovt0513.pdf.

deny inmate requests, if they so choose. HB 115 is currently in the House State Government Committee. The ACLU of Pennsylvania opposes this bill.

An additional bill on inmates and the Right to Know law is House Bill 480, introduced by Representative Rob Kauffman of Franklin County. This bill, which is also in the House State Government Committee, prohibits the release of personal identification information of employees of the Department of Corrections to a person who has been convicted of a felony. The ACLU of Pennsylvania has no position on HB 480.

At the heart of this discussion is a question of what kind of open records law the commonwealth wants. Do we want a Right to Know law? Or do we want a Right-for-Some-to-Know law? Cutting inmate access to the open records law sets a disturbing precedent in which a population can be blocked from using the law simply because one agency finds that population's requests to be challenging. Inmates are not the only Pennsylvanians who regularly exercise the law. Journalists, non-profit advocates, and public interest lawyers all rely on the open records law to shine a light on government activity and to carry out their missions. A prohibition on inmate access opens the door for others to be exempt, as well. There are probably municipal officials who would like nothing more than to exempt certain citizens from the Right to Know law.

An inmate's ability to continue to participate in society, including in the democratic process, is important for his eventual re-entry into the community. Incarceration is an isolating experience, but most inmates will eventually be released. As a commonwealth, we want to encourage these men and women to live healthy, law-abiding lives after they have served their time. A feeling that they are connected to their community matters in their post-prison success. The Right to Know law is one way in which they can continue to participate in democracy, even while incarcerated.

Inmates also have a unique relationship with the commonwealth that those of us sitting here today do not have. By definition, they are in the custody of the state. Thus, they have a vested, personal interest in how the state functions. Most reasonable people agree that government functions best when it is open and accountable to the people. That is the essence of our democratic system. But the Department of Corrections (DOC) and its institutions are less open than other areas of government, as they control all of the evidence about their operations. To be fair to the DOC, individual secretaries can make executive decisions about how open to be about the department's operations. But very little compels them to do so, unless the department is investigated by another agency[2] or is sued.[3]

Inmates play an important role in bringing to light the operations of the DOC, and the Right to Know law is one way in which we learn more about how the department operates. The inmate prohibitions in SB 444 and HB 115 will lead to less accountability for the DOC.

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[2] Department of Justice (2013) *Justice Department finds Pennsylvania state prisons' use of solitary confinement violates rights of prisoners under the Constitution and Americans with Disabilities Act.* May 31, 2013. Available at http://www.justice.gov/opa/pr/2013/May/13-crt-631.html.

[3] See *Disability Rights Network v. Wetzel.* Available at http://www.aclupa.org/our-work/legal/legaldocket/disability-rights-network-v-wetzel/.

This is a bold step that few states have taken. Only Michigan completely prohibits inmates from participating in its open records law. Louisiana almost completely bans inmate participation by only allowing them to access records related to their post-conviction relief. Arkansas prohibits inmates from accessing records produced by the Department of Corrections, which is not broad on its face but, in practice, these are the records that inmates are most likely to request.

These three laws were enacted at least 36 years ago. There is no mass movement by states to block prisoners' access to the law. Some states prohibit inmates' ability to access specific types of records. But almost none are as sweeping as HB 115 and SB 444.

Additionally, there is discussion about alterations to the Right to Know law's provision on public-private contracts and how much access the public has to those records. Currently, Section 506(d)(1) of the law articulates that a record held by a private entity for an act performed on behalf of a public agency shall be considered a public record. Senate Bill 444 alters this language by saying that the records related to these types of contracts that are held by the agency shall be considered a public record. The revised language is silent on the records held by the private actor, which implies that those records are not public.

My testimony on May 13 suggested that the ACLU of Pennsylvania is comfortable with this revision. However, after further analysis, we concluded that this amendment goes too far in restricting access to records that are in the public interest. The current language of 506(d)(1) sufficiently balances the public interest in the activities of private contractors who act on behalf of government agencies while blocking access to contractors' records that are not related to the public work. We agree with the testimony offered by attorney David Strassburger, who said, "(O)nce 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."[4]

In conclusion, the ACLU of Pennsylvania recommends amending SB 444 to preserve the current law on inmates' ability to exercise the Right to Know law and on access to records held by private entities that relate to public work. Chairman Smucker, thank you for the opportunity to offer this testimony today. I look forward to continuing to work with the committee and Senator Pileggi as you move forward with revisions to the Right to Know law.

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[4] Testimony of David Strassburger, Esq., Strassburger McKenna Gutnick & Gefsky, Senate State Government Committee, May 13, 2013. Available at http://stategovernment.pasenategop.com/files/2013/06/strassburger.pdf.