COUNTY COMMISSIONERS
Association of Pennsylvania

TESTIMONY ON
RIGHT-TO-KNOW LAW IMPACTS ON COUNTIES AS LOCAL GOVERNMENT AGENCIES

Presented to the Senate State Government Committee

By
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Good morning. Thank you Chairman Argall, Chairman Street and members of the Senate State Government Committee for the opportunity to testify today. I am Ashley Lenker White, Director of Government Relations for the County Commissioners Association of Pennsylvania (CCAP). CCAP is a non-profit, non-partisan association providing legislative, educational, insurance, research, technology, and similar services on behalf of all of the commonwealth's 67 counties.

We appreciate the opportunity offer our remarks on the Right-To-Know Law (RTKL) and its impacts to county governments. Counties strive to provide accessible local government and are a key partner with state government in serving our residents. We appreciate the attention of the General Assembly on this issue, particularly since we have been working on behalf of Pennsylvania's counties for several legislative sessions to improve the RTKL by addressing challenges we face in implementation.

We believe that government has responsibility for maintaining records of its actions, and records of the broad range of public transactions. This responsibility includes retaining records as appropriate for the use of future generations, making them accessible for individual use, and making them available as a means of promoting governmental accountability and transparency. We believe there is a balance that must be maintained among access, privacy and security concerns.

With the significant work of the General Assembly during the 2007-2008 legislative session to update the Right-to-Know Law, Act 3 of 2008 made changes to definitions, requests for access, electronic access, retention, response standards and redaction. Most importantly, it changed the presumption on records and burden of proof on their disclosure: rather than a limited number of records being open and the burden of proof being on the requester, all records became open unless covered under an exception and the burden of proof falls to the government agency to show that a record meets an exception.

Contrary to what many might suppose, our Association supported the rewrite, and invested a considerable amount of time working with all stakeholders in crafting what became Act 3 to update the law to provide guidance for the scope and nature of open records in an age of new media and technologies.

In general, the law has provided the guidance counties need, while striking an appropriate balance between the public's need for access and the privacy rights of the individuals we serve. However, with over a decade of experience under the law, there are some common concerns that arise on a regular basis and which we have been trying to address through legislative changes to the law. Chief of these is the volume of requests we get from commercial ventures, which file requests that amount to data mining by a business seeking to use the data for the entity's profit and voluminous, repeated or other requests made to harass an agency, thereby also preventing them from addressing other critical work.

Our belief is that the law is intended to allow citizens – corporate or individual – to monitor the activities of their government, not to use government resources for private profit. Second, there

are recurring issues of the dividing line of personal privacy versus public access, often revolving around addresses and related matters.

In this context, we have been seeking amendments that would update the existing law to make changes in response to concerns that have been repeatedly raised by CCAP members. Following is commentary on several areas that would have a particular impact on county government, related to proposed changes to the RTKL.

Balancing Transparency and Cost

As mentioned, CCAP supported the implementation of Act 3 of 2008, recognizing the need for a transparent government and maintaining open records. However, that additional responsibility for government agencies also comes at a cost to taxpayers and counties take their stewardship of taxpayer money very seriously. Responding to Right-To-Know requests takes time and resources from any agency, but this can be especially draining on the resources of smaller agencies with few staff. Some tasks include gathering and compiling the data, redacting sensitive or personal information, and responding to the request within the statutory timeframe. Sometimes the requests capture a large number of records, sometimes the requests require attorney review, and sometimes the requests appear to seek information at no cost to the requester that might otherwise be gained through other means. All of these result in staff time away from other important responsibilities and the use of county-funded resources, such as computer systems, copiers, paper and more.

While counties generally recognize the services they provide under this law as important for the public to access, they also seek balance with the cost to taxpayers that comes with enormous requests, especially those requiring legal review, or requests whose only intent seems to be aimed at disrupting the agency's work. Further, some counties also noticed that many of the most high-cost requests do not even come from residents of the county, or sometimes the state. This indicates that the RTKL has become, in some cases, a tool used beyond its intended purpose to circumvent other, more costly ways for a citizen or company to obtain information, all while taking time away from activities that might better serve the residents of the county itself.

An example of this type of inappropriate use of that law is that local governments often must respond to very broad requests that appear to be motivated by intent to litigate an issue as a sort of "pre-discovery," thereby circumventing the process for litigation that is already in place and creating a burden on the county and its taxpayers.

Requests for Commercial Purposes

Counties, like other local governments, have reported that the greatest increase in requests under the RTKL are for records to be used for commercial purposes, including information regarding excess proceeds from tax sales, unclaimed funds, environmental sites assessments, union payrolls, bid packages, contracts and RFPs, and questionnaire and research projects. While this information may be available for purchase elsewhere, companies and other organizations

have found that they can get this information through public records and are turning to Right-to-Know requests as a way *to limit their own expenses, but at the expense of the taxpayer instead*.

CCAP members would support the implementation of a fee for records requested for commercial purposes in order to provide resources to address the excessive demands of such requests. An example of language CCAP supports is found in SB 312, sponsored by Sen. Michele Brooks, and already approved by this committee. The language of SB 312 is similar to that in SB 492 (sponsored by Sen. Doug Mastriano), which would just need minor adjustments to be consistent with SB 312. However, the language currently found in HB 2524 does not meet the need of counties or other local governments because, while it attempts to address commercial requesters, it leaves significant gaps that would allow a wide array of commercial requesters to be exempt from the very provisions intended to preserve taxpayer resources. House Bill 2524 narrows the definition of commercial requester to address requests for the purposes of solicitation and for the sale and resale of records, but leaves a variety of other purposes for which the requester might generate revenue unaddressed, such as when a requester collates and reformats the data provided by a local agency and then provides it to subscribers as part of a fee-based service. The bill also adds broad and vague exceptions that would create substantial loopholes rendering the commercial requester provisions virtually useless, such as use for "an educational or noncommercial scientific institution" or for "real estate-related records used for real estate purposes."

It is important to stress that some companies seek to weaken our supported language to avoid paying for the data they are seeking to sell for profit through their business or state that their business model provides service to alleviate local governments from having to respond to so many requests because subscribers will turn to their data for a fee, rather than seek the data for free from local government agencies. This claim is wholly untrue, and in any event taxpayers should not continue to subsidize the cost of data provided to commercial businesses so they can use that taxpayer-funded service to generate a profit.

Vexatious Requesters

Over the years of implementing the RTKL, counties have satisfied their duty to maintain open records and fulfill requests under the law. However, we have also found that in some instances the law is being overused in a way that the original law never contemplated. Counties would like to see the issue of vexatious requesters addressed so that the law can no longer be used as a weapon to burden or harass agencies in more severe instances, or, in other instances, to tie up their resources and keep them from performing other important duties.

Counties have worked for several legislative sessions with the General Assembly, the Office of Open Records and other stakeholders to address the issue of vexatious requesters but have yet to see relief from those who use the law to harass agencies. The Local Government Conference members have come together to support language found in SB 552, sponsored by Sen. Cris Dush, also approved by this committee and the full Senate. Senate Bill 552 strikes a balance in maintaining government transparency, while also ensuring that requesters are not using the law to harass agencies and tie up their resources unnecessarily on the backs of local taxpayers. This

language does not exist currently in SB 492 and CCAP would propose that the bill be amended to include this important assurance that local governments have tools to address misuses of the law.

Importantly, the language in HB 2524 attempting to address vexatious requesters does not provide an effective tool to allow an agency to address vexatious uses of the RTKL because the definition of "vexatious requester" in that bill makes it incumbent upon the agency to prove the person's conduct "demonstrates an *intent* to annoy or harass a local agency" and may not be found to be vexatious based on the number of requests they have filed. However, Section 703 of the current RTKL law states that a "request need not include any explanation of the requester's reason for requesting or intended use of the records unless otherwise required by law" and further, agencies have no means to collect additional information or evidence to prove vexatiousness, such as issuing subpoenas, requiring depositions or other tools available in the usual civil discovery process.

House Bill 2524 also fails to address the detrimental impact a request or series of requests can have on an agency, aside from the requester's intent, such as negative effects on the ability of the agency to continue to fulfill its regular, day-to-day responsibilities. By way of example, in Erie County efforts had been underway to create a new community college for many years and a requester asked for, literally, every scrap of paper and electronic document ever generated that related in any way to that project. The county's IT administrator estimated as of 2021 that the request encompassed more than 10,000 electronic documents alone. This amount of data is beyond the county's physical capacity to inspect. To identify and redact records that are subject to exception (e.g., attorney-client communications, and personal, as opposed to governmental, email addresses) required that an attorney review each record. The county's objection that the request lacked sufficient specificity was rejected by the Office of Open Records (OOR) and moved to litigation with problematic chances of success.

Finally, given the large number of records that are maintained in electronic form, consideration ought to be given to allowing agencies to require requesters of such records to provide search terms that meet the purpose of their requests so that the inevitable search can be confined to a reasonable scope.

Requests by Inmates

Counties have reported an ongoing issue with time-consuming requests from prison inmates. Sometimes, these requests seek records that are not in the county's possession or that do not even exist, but the agency is required to respond to all requests and to invest additional time if an appeal is taken. While section 506(a)(1) of the RTKL provides an exception for disruptive requests, allowing an agency to deny a requester access to a record if the requester has made "repeated requests for that same record, and the repeated requests have placed an unreasonable burden on the agency," this language is only helpful when a duplicate item is sought. It provides no relief for *multiple, different requests*. We understand, though, that a balance must be struck between the ability of inmates to procure information relevant to their

own cases and the ability of inmates to submit excessive requests and those aimed at causing disruption.

In an attempt to address this issue, we would recommend implementing language that strikes a balance by ensuring inmates continue to have access to records related directly to themselves, provided there are no safety or security concerns in doing so. The language must also appropriately recognize existing policies and procedures for inmates to obtain this information. Specific to this topic, CCAP has previously supported language similar to that in SB 492.

Time Response Logs

The current requirements of the RTKL stipulate that call logs are open records. The public's primary interest is in determining whether we are adequately and promptly providing 911 service. Counties have supported past language that clarified what constitutes a time response log, while continuing to exempt the home address of the individual who accesses emergency dispatch. This approach provides clarity to counties and a measure of privacy and protection to witnesses and those who report crimes, who might be less inclined to do so if they knew personal information would be disclosed.

Specific to this topic, CCAP has previously supported language reflected in SB 492 and HB 2524; however, the latter, as discussed previously, contains commercial and vexatious requester language that CCAP cannot support.

Exemption for Home Addresses of Employees

As well, counties would support language that would extend the exemption currently existing under the RTKL for the home addresses of law enforcement officers and judges to *all home addresses of public employees*. Although case law has established that in certain instances, privacy of some personal data under the Pennsylvania Constitution may supersede the RTKL, providing clarity in the law itself would be helpful and would likely result in better efficiency responding to requests and privacy for employees that may be targeted for harm or harassment.

Court Costs and Attorney Fees

One strong concern related specifically to HB 2524 is its inclusion of changes to the RTKL related to court costs and attorney fees. The current version of the bill would allow the OOR to award court costs and attorney fees to requesters, as opposed to the current law which restricts the awarding of costs and fees to a court of law. CCAP strongly opposes allowing OOR to award court costs and attorney fees to requesters and believe that this remedy should be reserved exclusively for courts.

Conclusion

Counties manage huge volumes of information, not only about county governance but also records covering all manner of corporate, civil, and judicial interactions. We believe we have a duty to be open and transparent to the public, but at the same time we have a duty to assure that the privacy rights of individuals are respected and protected. Therefore, it is important to note that due to several difficulties with language discussed in HB 2524 that would not lead to

sufficient relief for counties, CCAP maintains its opposition to the bill. Senate Bill 492 contains a version of language that CCAP has generally been supportive of during past legislative efforts and we believe that with some adjustments, such as to the commercial requester language and with the addition of SB 552's vexatious requester language, CCAP could support the bill.

We are pleased that the Senate State Government Committee is interested in understanding the impacts of the law on counties and other local governments and we hope there is a genuine effort to partner in addressing these very real concerns that cost taxpayers sums of money each year by taking the time of our dedicated and talented county staff and resources away from doing other important county business.

We look forward to working with you on these and other recommendations affecting our records responsibilities. Thank you for your consideration of these comments. I would be pleased to answer any questions you may have.