TESTIMONY ON
RIGHT-TO-KNOW LAW AND COVID-19 IMPACTS TO COUNTIES

Presented to the House State Government Committee

By
Richard W. Perhacs
County Solicitor and Open Records Officer County of Erie

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The County Commissioners Association of Pennsylvania (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 and its impacts to counties. 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 during the many challenges we have faced over the past year with COVID-19 changing the way we are able to fulfill our responsibilities.

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. We believe there is a balance that must be maintained among access, privacy and security concerns.

As you know, in the 2007-2008 legislative session, the General Assembly undertook significant work to update the Right-to-Know Law, which ultimately became Act 3 of 2008. While retaining some of the language of prior law, Act 3 also 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. The issue for counties was that the prior law was written in an era of manual typewriters, and gave us no guidance on the scope and nature of open records in an age of new media and technologies.

In general, the law has provided us the guidance we need, while striking an appropriate balance between the public's need for access and the privacy rights of the individuals we serve. That said, with over a decade of experience under the law, there are some common concerns that arise on a regular basis. Chief of these is the volume of requests we get from commercial ventures, which file requests that amount to data mining for commercial purposes. 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 welcome amendments that would update the existing law to make changes in response to concerns that have been raised since the enactment of Act 3. Following is commentary on several areas that would have a particular impact on county government,

including some comments on how COVID-19 has impacted counties with respect to the Right-To-Know Law.

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. Although we are sure that it goes without saying, 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 designating a Right-To-Know officer, 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 that comes with enormous, sometimes frivolous, requests, especially those requiring legal review. 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 Right-To-Know law 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.

Findings During COVID-19

Over the past year, we have faced many changes across health, life, education and certainly government. COVID-19 was disruptive in more ways than we will likely know for some time. While many, including our counties, have adapted to a new way of existence that balances health, safety and government duties, we changed and adjusted to new challenges many times in those first few months.

Certainly, agencies, including counties, may not have had normal access to their records if they abruptly closed offices, implemented telework procedures or rotated staff who were present in offices at given points in time for COVID mitigation. These logistical changes in how counties operate caused complications in complying with the required timeframes. Furthermore, during a time when human capacity became limited and counties operated (or continue to operate) with

fewer staff, we also saw an uptick in volume of requests, resulting in strain on county capacity to fulfill its many responsibilities.

A prime example of a hurdle counties faced was with jail-related Right-To-Know requests. However, instead of inquiries aimed at positive action for the benefit of inmates, counties saw a rise in voluminous requests related to COVID-19, vaccination and releases that appeared to be designed to fuel litigation in one of the most challenging settings to be facing a pandemic.

Although it seems that those some of the logistics-related hurdles may be behind us for now, we would urge the committee to consider changes to the law that provide some flexibility for agencies that face such unforeseeable circumstances as a pandemic, sudden staff displacement or shortages or other emergency situations.

Requests for Commercial Purposes

Counties, like other local governments, have reported that the greatest increase in requests under the Right-to-Know Law 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.

We believe our 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. Because many records are ultimately provided in electronic form, to which copying charges do not apply, but which still require efforts and expense to identify, organize, and review for redaction, the only effective charge would likely be an up-front application or access fee. Bona fide news operations, media, and journalists could be exempted from such fees.

Vexatious Requesters

Over the years of implementing the Right-To-Know Law, 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 over-used 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 in prior legislative sessions with the General Assembly, the Office of Open Records and other stakeholders to address the issue of vexatious requesters and we are making another attempt to do so this year. Local government groups have come together to propose language that we agreed would strike 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.

Closely related to the problem of vexatious requesters is the problem created by patently unreasonable requests. This is often a problem of volume. By way of example, in Erie County we have been working on creating 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. Our IT administrator estimates that the request encompasses over 10,000 electronic documents alone. This amount of data is beyond our 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) will require that an attorney review each record. Our objection that the request lacked sufficient specificity was rejected by the Office of Open Records and is now in 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 Right-to-Know Law 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 and obviously frivolous requests.

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.

Time Response Logs

The current requirements of the Right-To-Know Law 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.

Exemption for Home Addresses of Employees

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

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. We are pleased that the House State Government Committee is interested in understanding the impacts of the law on counties and other local governments and we stand ready to be a partner in addressing the impacts of the Right-to-Know Law, now that we have enough experience with its requirements and idiosyncrasies to deal meaningfully with elements needing change.

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