

TESTIMONY ON H.B. 443, THE RIGHT TO KNOW LAW

**PRESENTED TO THE
HOUSE STATE GOVERNMENT COMMITTEE**

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On Behalf of:

The County Commissioners Association of Pennsylvania
The Pennsylvania State Association of Township Supervisors
The Pennsylvania Municipal Authorities Association
The Pennsylvania League of Cities and Municipalities
The Pennsylvania State Association of Boroughs
The Pennsylvania State Association of Township Commissioners

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Good morning. I am Elam M. Herr, Assistant Executive Director of the Pennsylvania State Association of Township Supervisors. My testimony today is on behalf of the our Association, the County Commissioners Association of Pennsylvania, the Pennsylvania League of Cities and Municipalities, the Pennsylvania State Association of Boroughs, the Pennsylvania State Association of Township Commissioners, and the Pennsylvania Municipal Authorities Association.

We are pleased to appear before you today to present our comments on open records in general, and H.B. 443 in particular.

Our local government associations have long supported comprehensive revision of the state's open records law, and were participants in the five-year negotiations leading up to the current statute, Act 100 of 2002. We supported revision of the law and passage of the act; the prior law, written in the era when the electric typewriter was new, gave us little guidance to address the storage, management, retrieval, and access issues raised by electronic technologies. We believe Act 100 has generally served our needs in this respect, but we recognize that issues and questions remain and we welcome discourse and debate on the issue of public access to governmental records.

We have a number of specific comments on H.B. 443, but we believe that it is more important today first to give you some contextual framework in which to consider these and other Open Records bills.

Nature of Local Government Records

Popular perception is that the set of records local government keeps encompasses minutes, bills, contracts, ordinances, and correspondence. While these are part of our inventory, there are many other types of records entrusted to state and local government as well. For example, the overwhelming majority of records in county courthouses have to do with transactions and interpersonal records -- deeds, mortgages, wills, land use, property assessment, and all manner of judicial records.

It is equally important to note that many local records are historical documents, and their accessibility, preservation and maintenance are important not just to current users but to future generations as well.

There are also documents dealing with individual, personal matters. Examples of these are school districts' student records, county human services case records, medical evaluations, family and social security records of our employees, and the like.

There are documents important to commerce, such as land records, environmental information, infrastructure mapping, and commercial filings. There are documents important to public safety, including Material Safety Data Sheets, emergency response plans, homeland security information, and police blotters.

Recognition of the mix of records -- standard, transactional, historic, and restricted -- that are held by state and local government is important to the discussion of every aspect of open records legislation. Each engenders different criteria regarding access, security, individual rights, copying, and timeliness.

Access Conflicts

Much of the public debate on open records arises from perceptions of conflicts between requesters and public agencies over access. While we cannot deny that there are cases where public officials attempt to withhold access based on personal or political discomfort or worse, the overwhelming volume of records requests are handled routinely and openly. Many local governments post minutes, ordinances, and other documents on line. Courthouses grant virtually unfettered access to volume after volume of records. We believe it is critical to this debate that there be acknowledgement that our officials by and large grant the access that the letter and spirit of the law requires. We in turn concede that there are some circumstances where the requesting public is unnecessarily delayed, although most of these involve factors such as unusual records requests, staff inadequately trained (or whose position does not qualify them) to make determinations on public accessibility, or difficult questions on access / privacy / security / redaction of a particular record set.

Burden of Proof

Perhaps the most significant philosophical change under Act 100 was to begin a redirection of the burden of proof from the prior standard of the requester having to show that a record should be available and instead placing the burden on government to show proper cause when it deems it necessary to deny access to a record. Although the act did not directly or completely reverse the burden of proof, the requirement that a denial of access must be accompanied by a statement of the legal basis for denial

gives the requester the necessary basis to pursue an appeal and essentially negates the ability of an agency to unreasonably or arbitrarily withhold public information. We believe this shift follows the evolution of the manner in which government business is conducted and, presuming clear and appropriate statutes and procedures would be available to help us meet this standard, we accepted the premise as part of the Act 100 negotiations. *Any further change in the burden of proof needs to include a concurrent detailed expansion of guidance and clarification of the types of records that are open, and the types that are exempt.*

Balance Between Access and Privacy

We believe it to be imperative that open records legislation strikes a balance between the public's right to know and the individual's right to privacy. When we speak of "individual," we are not referring to the privacy of local government officials but instead to the privacy of those we serve. Government has a dual, and sometimes conflicting, role of carrying out the wishes of the majority while concurrently protecting the rights of the minority. It is important that access to some records be limited or restricted, particularly where the balance favors an individual's privacy.

One example of records falling into this description is the treatment records for county mental health programs. Another example is the set of records relating to law enforcement investigations, the indiscriminate release of which could jeopardize the conduct of investigations, the lives of law enforcement officials, and the privacy of victims. A third example is the requirement for schools to maintain the confidentiality of student records unless parental consent is obtained; even then, release is restricted to physicians, police, and other well defined authorities. Yet another example are the tape recordings made by our dispatch centers during 911 calls, which embody the significant and deeply personal trauma of the callers.

Generally, the current law strikes an appropriate balance between requester rights and individual privacy. This balance is achieved by acknowledging privacy requirements of other statutes, regulations, and court decisions, by declaring some records inaccessible on their face, and by requiring redaction of confidential information in other circumstances.

Balance Between Public Access and Public Safety

A matter acknowledged late in the debate on Act 100, but not addressed in the act itself, is community safety. While the law, in the definition of “public record”, allows consideration of confidentiality when an individual’s safety might be compromised by release of information, it is less clear when the balance is a matter of general public safety or of agency security.

Recalling that Act 100 was debated and approved in the spring and summer of 2002, there was recognition at that time of the need to address the broad context of homeland security and the more narrow context of individual and agency security, but there was insufficient time to craft language to address this issue. Examples of records that might be affected include agency terrorism response plans, agency telephone records that could yield the names of informants or allow determination of the subjects of investigation, building permits that could yield the layout of access to a secure building and its security systems, or authority records indicating the specific locations of water lines or water intakes. Even Material Safety Data Sheets, public records intended to assist emergency responders and neighbors in knowing the nature and location of hazardous materials stored on a commercial or industrial property, can also serve as shopping lists for those seeking materials for criminal purposes. The difficulty is crafting the language in a way that protects security without allowing security to be used as a cloak to conceal records inappropriately.

Redaction

Redaction is a new element introduced by Act 100, and local practice and case law continues to evolve on the scope of its requirements. Dependent on the nature of the record, the law allows some records to be kept confidential, under the terms of the law itself or when exempted from disclosure by other statute, regulation, or court decision. Where the record is predominantly a public record but contains protected private information, the agency is required to release the information after redacting the protected information.

While we do not recommend changes at this time, we seek acknowledgement that redaction requires the most thought when striking the balance between public access and individual privacy / agency security. We note as well that changes in other statutes, including greater restrictions on private information such as social security numbers and personal health information, have caused us to revise policies and in

some circumstances may require us to materially revise records themselves to expunge protected information.

Nature, Form and Standards of Access

The continuing evolution of technologies promises to give our constituents unprecedented access to our records, but raises just as many questions on the nature and form of that access. For example, the means by which we communicate has expanded to include e-mail, internet, blogs, wireless access, and audio and video tape. Act 100 addressed electronic records for the first time, so we now have at least nominal direction on standards for access.

The law acknowledges electronic records by defining “record” to include “any document maintained by an agency, in any form . . .” and later, in Section 2, by requiring the agency to furnish the record in the medium requested if the record exists in that medium. In effect, the law generally classifies electronic records in the same manner as their paper counterparts. Importantly, this classification applies to both open records and to records to which access is restricted, regardless of medium or format.

This latter provision has been the subject of some debate, although case law is slow to evolve. For example, is the raw database a public record, or is the record just the routine reports generated from that database? The law also relieves us of responsibility for converting data to formats we cannot accommodate, and for generating custom reports, although we can choose to do so and charge reasonably for doing so. We are also required, where a record is maintained only on an electronic basis, to provide direct public access to that electronic record and to provide the record on paper if requested.

Identity Theft

Many of the records we maintain contain personal information that could potentially be used to steal identity. Court records that contain social security numbers and other identifiers have been problematic, and both statutory changes and policy changes are dealing with this matter. We also have experienced public protest when information that has been historically assumed to be public – assessment rolls being a common example – is made more accessible by internet posting. Although it is the same information that is available to anyone coming to the courthouse, the ease of internet access and the existence of data mining software have caused many counties to limit data availability on the internet. We note

parenthetically that S.B. 729, which requires state and local government to post public official and employee salaries on the internet, causes us this same concern.

Commercial Use

The availability of public data by electronic means has been a boon to commerce, but is an area of continuing debate. The policy question is whether the commercial sector should be able to use data generated for a public purpose and at public expense to some commercial end. Most of the members of this Committee have purchased voter databases. Title companies regularly access land records. The question arises most prominently however when names and addresses are purchased for probable resale for other reasons. One statute restricting commercial reuse of records relates to resale of voter records, although there are practical questions of enforcement. Generally, we cannot limit commercial reuse, but we recognize that it is a matter of public discomfort.

Records Retention

E-mail has replaced a large volume of individual and commercial correspondence, and this is true within government as well. With increasing frequency the investigation of the course of public deliberations on an issue involves tracing e-mail correspondence, and misperceptions arise when routine file maintenance and records deletion is construed as somehow obfuscating accountability.

At our request, Act 100 included language that “nothing in (the) act is intended to modify, rescind or supersede any record retention and disposition schedule established pursuant to law.” The records retention schedules developed and published by the Historical and Museum Commission, which serve as the basis for local records retention, establish minimum time limits for retention of various classes of records, ranging from short term to indefinite. Consequently, returning to our example, e-mail correspondence and electronic records fall in the same retention schedule as their paper counterparts. Our concern is that an agency not come under undue criticism simply for disposing of records for which the retention requirement has expired.

Parenthetically, we also note that the Commission has indicated that there are certain classes of records, particularly those intended for indefinite retention, which must be converted to and kept in “human readable” formats. The requirement stems from the recognition that physical electronic storage media

such as tapes and CDs deteriorate over time, and that the hardware and software by which they are read can become obsolete.

Timeliness of Response

The law requires government agencies to fulfill individuals' information requests within ten business days for the Commonwealth, and five business days for all other agencies, including political subdivisions. When Act 100 was under consideration, we argued that this standard is easily achievable for larger municipalities and school districts, and for routine record requests such as wills, deeds, contracts, and minutes, but it is not as easy in municipalities and school districts with smaller staff complements nor for record requests that are unusual due to the volume or nature of the records. In response, the act was written to "business days" versus "calendar days", and exceptions were provided in section 3.4 for volume of work or inadequate staffing.

Nature of Response

The law permits requests for information to be made verbally. This is important since most requests and responses are routine, making a written request unnecessary. Written requests are required if there is a need to establish timelines in the event a request is to be appealed.

Relatedly, we are not permitted to ask the reason an individual is making a request, on the basis that such questioning can be interpreted as being coercive. We can ask questions to help narrow or focus the request, however.

Appeals Process

Generally the appeals process instituted under the act has worked well. The appeal involves first an appeal to a responsible individual within the agency for final agency determination, and then appeal to court. Shortly after passage of Act 100 a court rule negated the ability of an appeal to be taken to district magisterial judges, since they are not equipped to be a court of record. The MDJ appeal had been seen as a means to provide a more accessible and affordable venue. There are other proposals to replace that level of appeal with a process that involves a new state agency or some other extraordinary process. We would oppose this mechanism, since it is unlikely to reduce the expense, expedite the appeal, or result in a more certain decision.

Penalties

The act provides criminal and civil penalties for an agency, public official, or public employee who violates the act or a court order pursuant to the act. While we have no problem with the agency penalty, we believe individual public officials and employees should not be liable. This is a philosophical point we apply broadly to any legislative issue; the policies of an agency and their implementation are ultimately the responsibility of the governing body establishing those policies, and not of any individual acting in good faith pursuant to those policies. Hence, no one individual, either elected official, appointed official, or employee, should be held criminally or civilly responsible. Otherwise, if an agency is found guilty of improperly withholding the record, on whom does the penalty fall – the counter clerk, the clerk’s supervisor, the agency’s solicitor, the governing body (and if the latter, to every member of the body or just those who voted in favor of the errant policy)?

Fees

Section 7 permits fees for postage and duplication. Other fees may apply, including fees for custom work, enhanced electronic access, or other directly incurred costs. The agency is to adopt and post a fee schedule.

We support the language of this section, believing that it gives us adequate flexibility to set reasonable fees to meet our local costs. Nonetheless, fees continue to be a matter of contention under the law, and particularly duplication fees which are to be “based on prevailing fees for comparable duplication services provided by local business entities.”

Most governmental agencies take this to mean a community standard of acceptable fee structures, and in fact although the actual cost might be considerably less, we have few complaints about fees ranging from \$.10 to \$.25 per page for photocopying. Our problems arise where there are long-set standard fees, and more prominently where there are fees that depart from an approximation of raw copying costs.

Examples of the former include the flat fee charged by the Commonwealth’s Bureau of Vital Statistics for birth and death certificate copies and searches, fees charged by county row offices for certifications necessary to establish the legal validity of copies, transcript fees charged by the courts, and fees charged by many state and local agencies for the convenience of on-line records access.

Examples of the latter include electronic databases such as voter registration, assessment records, or GIS databases. While a time-and-materials cost for copying any of these databases might be only pennies, we believe appropriate fees can consider the value of the records and more particularly what they might cost when obtained from private sources. On that basis, several hundred dollars can be justifiable for purchase of voter registration or assessment databases, and several thousand dollars for a GIS database. We do not believe the public should pay for creation of complex databases and then reproduce them for private use at rates far below their value in the open market. To do so would also place government agencies in a situation of unfair competition with the private sector.

Commentary on H.B. 443

General. The bill retains much of the language of the current law on matters such as definitions, requests for access, electronic access, retention, response standards, and redaction which, given the relative newness of Act 100, allows us to continue to develop internal practices without having to convert to another new standard. The bill makes several significant changes, however, that we consider to be problematic.

Burden of Proof. The bill reverses the burden of proof. Although we are currently required to provide an explanation with legal citation when we deny access to a record, if the matter goes up on appeal we have to prove that we appropriately denied the record based on statute or case law, rather than the requester having to prove that we violated statute or case law. As noted earlier, we accept this change in burden, but only if the statute is adequate in defining the areas of exemption and in appropriately drawing into statute the body of case law that has previously settled questions of public interest or of the balance between public access and individual privacy. While the bill includes much of this detail, later in this testimony we give examples of areas where further clarification or further additions may be necessary.

Definitions. The bill makes modest changes and clarifications in the definition of “public record”, keeping its application to records relating to agency finances or duties. While the changes are only nominally substantive, concern had been expressed during the debate on Act 100 that a change to the definition could serve to reverse standing case law, and we note specifically that case law is not referred to in the definition. If it is an accurate assessment that case law is vacated by the statutory change, then we must have additional clarifying language in the bill that mirrors settled law. It is the lack of clarity in

the current definition that leads to the most confusion when fulfilling records requests, and consequently leads to our reliance on case law.

We are also concerned with some of the provisions of the definition of “agency” that are written more broadly than current law, and particularly the inclusion of “(14) any body created by State or local authority in any branch of government” – apart from using terms in a manner inconsistent with Pennsylvania usage, we believe this definition is overly inclusive and instead should tie its effectiveness to a test whether the body carries out a governmental purpose or is given authority to act on behalf of the political subdivision. Similarly, we are puzzled by the inclusion of “(15) Every State or local government officer” as an “agency,” and how this would play out in a records request.

Section 303 Exceptions. With the reversal in burden of proof, this section becomes important in establishing the criteria by which we judge individual records, undertake redaction of records, and provide balance between individual privacy and public openness. The number of items on the list is not important to the debate, but its consideration of the broad array of records we keep is. Generally we find this list to be reasonably inclusive and to be reflective of discussions we have had with various interests over the last decade, and more recently with the Governor’s office and others drafting similar legislation. Note however that, as we continue to review statutes and case law, we reserve the right to bring requests for other appropriate exceptions to the Committee. As examples, we believe there should be an exception for information subject to copyright, for private correspondence with individuals, and for certain military records, as well as allowable limits on access to documents of a valuable historical character, and for expansion of the claims and litigation section to include communications with insurance carriers.

Non-Commonwealth Agency Response to Written Requests for Access. This section closely follows the procedure in the current law, including definition of responsibilities, establishment of deadlines, deemed denial, extensions, and nature and process of denial. We believe this current process has been workable, and respects the capacity and organizational structure of both large and small political subdivisions as well as the needs of the overwhelming majority of requesters.

Office of Access to Public Records. On its surface, we do not believe the OAPR (parenthetically, both the definition and the body of the statute use the acronym “OATR” instead of “OAPR”) should be both

the records fulfillment agency for the Commonwealth (section 306(a)) and the independent arbiter of records access (chapter 5). We have some questions on its role in “request(ing) information from . . . agencies” and the extent of its role in “guid(ing) and oversee(ing) the compliance with this act by all . . . agencies” We do support its roles in providing a list of Federal and State laws that exempt records from disclosure, and providing training for agencies and staff on compliance with the statute.

OAPR Appeals. The office takes appeals from initial Commonwealth and non-Commonwealth agency decisions, and may hold hearings. While this procedurally mirrors the current “agency head” provisions, we are concerned about taking local appeals to the state level. The current appeals regimen – final determination by the agency head or designee and then appeal to the common pleas court (local) or Commonwealth Court (state) is relatively quick, and relatively local. House Bill 443’s requirement that appeals from initial agency decisions have to be taken to a state-appointed office, who may or may not hold hearings locally, makes the process more difficult, expensive, and time-consuming for both requester and agency. The bill still provides for judicial appeals of local agency decision to the local court of common pleas.

Administration and Enforcement. The bill retains much of current law relative to penalties, court costs, frivolous complaints, and immunity. The addition of potential mandatory training is a novel approach.

Fee Limitations. These provisions also closely mirror current law, including establishment of rules and schedules, certification, conversion of records, enhanced electronic access, waiver of fees, limitations, and prepayment. The only open question is the extent to which the OAPR “may promulgate uniform rules and regulations”, and particularly whether these will be procedural rules, and whether specific agencies will be able to obtain waivers based on the type of record or organizational structure. We would oppose a Commonwealth agency establishing local fee structures.

Commercial Purpose. We appreciate the inclusion of this section, which we believe gives the public some nominal comfort that records we are required to collect and maintain will not be used to the public’s disadvantage.

Prohibition Against Destruction or Damage of Records. We support the general statement, prohibition, and availability of civil action against any person who interferes with our duty to maintain records. We believe the sections on records retention to be redundant and perhaps in conflict with our records retention statute, however, and suggest that this simply state that nothing in this statute affects records retention and disposition schedules established by law.

Conclusion

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. We have invested much time in development of what became Act 100, and will look forward to working with the Committee and the General Assembly on any recommendations affecting our records responsibilities.