



MEMORANDUM

TO: The Pennsylvania Senate State Government Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: April 26, 2024

RE: OPPOSITION TO SB 525 P.N. 699 (DUSH)

Bill summary: [SB 525](#) (PN 699) would amend Pennsylvania's [Right to Know Law](#) (RTKL) to add a new section regarding "vexatious requesters". Under current law, in order to reduce the administrative burden on agencies, [Section 506](#) of the Right to Know Law (RTKL) includes a provision that permits agencies to deny requests that are duplicative and unreasonably burden an agency. However, nothing in the RTKL permits an agency to deny requests for *other* records that have not been previously sought by the requester.

SB 525 would allow agencies to petition the Office of Open Records (OOR) for relief from a vexatious requester. The petition, which must also be provided to the requester, must include the number of requests filed and pending, the scope and content or nature of the request, other communication with the agency, and the conduct the agency deems to be unreasonably burdensome or harassing to the agency.

SB 525 would establish a timeline for determining if the petition is warranted and to provide a decision. When an agency files a petition alleging vexatious conduct, the executive director of OOR will notify the requester within 5 business days. Requesters would have 10 business days to file a response. The executive director must file an initial finding within 30 calendar days. If the executive director determines that further proceedings are warranted, the executive director can pursue a resolution through a hearing and/or mediation. The executive director must render a final opinion on the petition within 90 calendar days. If it is determined to be vexatious conduct, the executive director may provide appropriate relief that includes, but is not limited to, an order that the agency does not need to comply with future requests from the vexatious requester for no more than one year. Requesters would have 15 days from the issuing of the final opinion to appeal to the Commonwealth Court.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 525.

SB 525 would introduce an unprecedented approach to considering public records, permitting the government to pick and choose who is entitled to those records.*

If enacted, SB 525 would, for the first time in the 65-year history of Pennsylvania's public records law, permit agencies to pick and choose which Pennsylvanians are entitled to access to public records (**see endnote*). ***If a record is public, then it should be available to all members of the public without exception.*** Permitting the government to pick and choose who is entitled to public records sets a dangerous precedent and will directly result in agencies choosing to label as "vexatious" individuals with different political ideologies or individuals the government finds inconvenient or simply irritating.

Denying “vexatious requesters” access to public records would violate the right to petition the government protected under the First Amendment.

SB 525 would run afoul of the First Amendment to the U.S. Constitution. Filing a RTKL request is itself a constitutionally-protected petition to the government that asks for information from the government. In *Campbell v. Pennsylvania School Boards Association* (2018),¹ the United States District Court for the Eastern District of Pennsylvania held that right to know law requests constitute protected speech under the First Amendment’s right to petition the government, and as such, are permitted to be unreasonable and even harassing as long as they represent “a genuine effort to procure governmental action.”² The Court’s analysis was squarely grounded in First Amendment precedent, holding that courts “regularly recognized that statutorily authorized petitions” such as RTKL requests, “are protected by the First Amendment.”³ The federal court found that even requests perceived by government agencies as problematic are protected by the First Amendment, no matter how voluminous or annoying they may be. Even in a case with facts as extraordinary as the *Campbell* case, the District Court recognized and affirmed the use of the RTKL process as constitutionally protected speech. If this bill were to become law, it could be subject to constitutional challenge and if challenged, it is likely to be found constitutionally infirm.

The “vexatious requester” provision under SB 525 would violate procedural due process rights under the Fourteenth Amendment.

Because the RTKL **codifies a right** to submit public records requests, any individual who is at risk of losing that right must have pre-deprivation notice and an opportunity to be heard as to why that right should not be lost. Failing to provide notice and hearing prior to losing a right would violate the procedural due process protections guaranteed under the Fourteenth Amendment. The so-called vexatious requester would have only 10 days to file a response to the Office of Open Records to combat the claims by the agency, a period of time that cannot seriously permit a person to receive such a petition out of the blue, understand the statutory structure, obtain counsel, and rebut the points with the OOR. While the requester waits for the three month time period to expire, the person’s RTKL rights have been curtailed. This is not pre-deprivation process—it is **post-deprivation** process, of the type that is rarely allowed by the Pennsylvania Supreme Court.⁴

Identifying a “vexatious requester” relies on the ability to discern the intent of the requester—an unrealistic standard that is ripe for abuse.

SB 525 fails to define “vexatious requester”. Instead, SB 525 lists 8 criteria to use to determine whether a petitioner is a “vexatious requester”:

1. The number of requests filed.
2. The total number of pending requests.
3. The scope of the requests.
4. The nature, content, language or subject matter of the requests.
5. The nature, content, language or subject matter of other oral and written communications to the agency.
6. Conduct the agency alleges is placing an unreasonable burden on the agency.
7. Conduct the agency alleges is intended to harass the agency.
8. Any other relevant information.

¹ *Campbell v. Pa. Sch. Bds. Ass’n*, 336 F.Supp. 3d 482 (2018).

² *Id.*, at 495.

³ *Id.*, at 496.

⁴ See, e.g., *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (approving post-deprivation due process in prison context only where pre-deprivation process “is not feasible”).

The first two criteria—number of requests filed and pending requests—should have no bearing on “vexatious” behavior. The public has a constitutionally protected right to request as many public records or submit as many requests as it wants. It also has the right to request a broad or narrow scope of records (third criterion). Criteria three (scope of requests) and six (unreasonable burden on the agency) can be denied if the petitioner is requesting records that are not already created by the agency. Criteria four and five are dangerously vague and subjective and ripe for agency abuse.

Also ripe for abuse is the seventh criterion—conduct “intended to harass the agency.” In order to determine who would “count” as a vexatious requester, an agency would be empowered to presume a requester’s intent. This sort of vague, amorphous, and unconstitutional standard invites government agencies to silence their critics. For example, in the midst of the COVID-19 emergency, numerous agencies ranging from health departments to school districts surely felt “harassed” by the deluge of RTKL requests they received seeking granular information about their COVID responses. Fortunately, those agencies were not permitted to simply refuse to comply with the RTKL requests. As another example, the ACLU-PA has for years submitted a RTKL request to Berks County for a copy of its daily jail admissions log, since it does not otherwise make that information publicly available. At this point, that request has been sent over 1,000 times. Our intent is to understand the jail population and reasons for admission, not to harass the Berks County RTKL officer. Nevertheless, under the current RTKL, our intentions are (and should be) completely irrelevant to the legitimacy of our requests.

Additionally, this list **does not include any exemption for news or media agencies**—a glaring oversight that was offered in prior proposals to limit “vexatious” RTKL requests.⁵

And finally, under SB 525, simply by an agency filing a petition to label someone vexatious, *each and every* RTKL request that person submits could be stayed for as long as three months. This is precisely the type of provision that will make the process ripe for abuse by agencies. Filing these petitions will be a win-win for agencies: even if the petition is denied by OOR, the agency has stymied the petitioner for up to 90 days—or longer if the agency wants to appeal a decision to the Commonwealth Court.

There are at least two, arguably fatal, constitutional problems with any vexatious requester provision: (1) it would violate the First Amendment right to petition the government, and (2) it would violate the Fourteenth Amendment right to due process. If enacted, SB 525 would create unprecedented permission to allow the government to define access to public records based on who or why a person is making the request. If a record is public, then it should be available to **all** members of the public—without exception. Changing this framework to allow government agencies to condition access based on who the requester is, or what their intentions are, opens a Pandora’s box that would be nearly impossible to close and could easily, if not presumptively, bite the hand that penned it.

For these reasons, we ask you to oppose Senate Bill 525.

⁵ See HB [2524 \(PN 3499\)](#) of 2021-2022, page 19, line 13.

Endnote

The legislature enacted Pennsylvania's [Right-to-Know Law](#) (RTKL) in 2008⁶ because the prior open records law was largely considered a failure of transparency and among the worst open records laws in the country.⁷ Whereas the old law required that the person requesting the records prove why they should be made public, the RTKL assumes that every government record should be public for the residents of this Commonwealth to inspect, and if an agency wishes to withhold a record, it must prove that the record falls within one of the 30 exemptions under [Section 708](#).

The Right to Know law is an important civil liberties tool that ensures open access to government and enables government oversight. Whether a person is concerned about how law enforcement operates or the government's response to COVID-19, the RTKL allows the public to obtain records to look under the hood of government operations—not just what the government puts out in press statements, but what the records show it is actually doing. This transparency is a key tool in our representative democracy so that residents and the press have access to what our state and local governments do in order to hold them accountable.

The RTKL also works hand-in-hand with the First Amendment right to petition the government. The request for records *is itself* a petition that asks the government to turn over information that should be public. And, by enabling Pennsylvanians to obtain important information about their government and its operations, it furthers their ability to petition the government to make changes. Without the knowledge that records provide, the right to petition risks fading into irrelevance.

Under the RTKL, the reason for a document request or the identity of a requester is irrelevant. The only question is whether the record is a public record. If it is, then all members of the public are entitled to access it, regardless of who they are or why they want it. It is the nature of a document itself that determines whether the document should be released.

Notably, neither the RTKL nor its predecessor have ever conditioned access to public records based on the identity of the requester. From 1957 until 2008, any “citizen of the Commonwealth of the Pennsylvania” had a right to inspect records. Our current Right to Know law expanded that definition by permitting requests from any “person that is a legal resident of the United States.” **For the 65 years that it has had an open records law, Pennsylvania has never defined access to public records based on who is making the request.**

⁶ [Act 3 of 2008, 65 P.S. § 67.101 et seq.](#)

⁷ Act of June 21, 1957 (P.L.390, No.212).