



TESTIMONY SUBMITTED BY
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THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
TO THE PENNSYLVANIA SENATE STATE GOVERNMENT COMMITTEE
PUBLIC HEARING ON PROPOSED UPDATES TO PENNSYLVANIA'S RIGHT TO KNOW LAW

June 23, 2022

Background

The legislature enacted Pennsylvania's [Right-to-Know Law](#) (RTKL) in 2008¹ because the prior open records law was largely considered a failure of transparency and among the worst open records laws in the country.² 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.**

¹ [Act 3 of 2008, 65 P.S. § 67.101 et seq.](#)

² Act of June 21, 1957 (P.L.390, No.212).

For the purposes of this testimony, we are only analyzing provisions in [HB 2524](#) (PN 3235) and [SB 492](#) (PN 591). Rather than addressing the bills separately, we have instead identified **four restrictions we believe are the most problematic**, not because they are restrictions per se, but because they are each defined by **who is making the request**—a new and unprecedented departure from how we have historically approached questions concerning open records and one that invites a troubling precedent for permitting the government to pick and choose to whom it responds.

1 | Restricted access for incarcerated people

[HB 2524](#) (PN 3235) and [SB 492](#) (PN 591) have nearly identical provisions that restrict the right for incarcerated people to access public records and are therefore addressed together.

A | Current law

Under current law, incarcerated individuals, as any other residents of Pennsylvania, have full and equal access to the RTKL.

B | Definition

"Inmate" is defined by both bills as an "individual incarcerated, after having been sentenced by a court of competent jurisdiction, in a Federal, State or county correctional facility or prison." Both bills would create a new section under the current RTKL as "Section 508–Inmate access," which (1) categorically excludes "inmates" from the definition of "requester" under the Right to Know law, and (2) creates something akin to a pre-approved list of records that incarcerated people are entitled to—a narrow list of 11 types of documents, such as personal records or records related to their detention or criminal case, which assumes incarcerated people are not interested in—or should not have the right to—any other kind of public document other than ones that pertain to their specific life or circumstances. The bills do not prohibit agencies from responding to other requests by incarcerated individuals (i.e., requests for records not on the pre-approved list), but they are not legally obligated to do so.

C | Specific concerns

Categorically excluding incarcerated people from the RTKL prevents them from exercising their First Amendment right to petition the government.

These bills categorically exclude incarcerated individuals from the RTKL and from exercising their right to petition the government. Enacting this legislation would deny approximately [37,000 people](#)³ serving a state sentence of incarceration and over [10,000 people](#)⁴ serving their sentence in a Pennsylvania county jail from exercising their civil right to seek public records from an agency—a right denied to them based solely on their incarceration status.

Former Secretary of the Pennsylvania Department of Corrections John Wetzel recently [remarked](#) that "[e]liminating this [access to the RTKL] would be unconstitutional." He is correct. The right to submit public records requests under the RTKL constitutes activity that is protected by the fundamental right to petition the government in the First Amendment.

Categorically excluding incarcerated people from the RTKL would violate the Equal Protection Clause of the Fourteenth Amendment.

The restrictions imposed on incarcerated people by these bills would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment, as well as [Article I, Section 26](#) of the Pennsylvania

³ Pennsylvania Department of Corrections, [Monthly Population Report as of May 30, 2022](#).

⁴ Vera Institute of Justice, [Incarceration Trends in Pennsylvania \(2019\)](#).

Constitution. By creating two classes of people—(1) those who are not incarcerated and are able to exercise their First Amendment right to submit RTKL requests and (2) those who are incarcerated and are unable to exercise that First Amendment right—the legislature would create a class-based distinction that permits only some people to exercise a fundamental right, in other words, it would treat them unequally. And because there would be no compelling state interest in such a distinction, nor would this categorical exclusion of incarcerated people from the RTKL be narrowly tailored to whatever interest the government is trying to achieve, these provisions would fail the Equal Protection test and would therefore fail the constitutionality test.

Provisions restricting access for incarcerated people are fraught with (presumably) unintended consequences.

Applicability to other RTKL provisions: Both bills propose a new section, Section 508, which states that “an inmate may not be a requester for purposes of this act.” This categorical exclusion has the effect of making Section 508 an island in the middle of the RTKL, unaffected by the other provisions within the Right to Know law. This has two, presumably unintended, consequences:

1. If “inmates may not be requesters,” then none of the other requirements under the RTKL would apply, even to requests for documents on the pre-approved list of records. So for example, the RTKL currently requires agencies to respond to requests within a certain amount of time. But that timetable is not duplicated or referenced under the proposed Section 508—and because “inmates are not considered requesters,” the timetables that govern all other requests would not apply to requests from incarcerated people. An agency may have a legal obligation to provide those records, but when responding to a Section 508 request, an agency could happily take months or years to do so without any consequences. A similar problem arises with appeals: the RTKL gives people defined as requesters the right to appeal to the OOR or the Commonwealth Court when a request is denied. But because inmates are not considered requesters, and Section 508 fails to include any appeals procedures, incarcerated people are, by definition, denied the right to appeal a denied request.
2. Perhaps more astonishing is how the Section 508 island would apply—or not—to exempted records. Section 508 lists 11 types / categories of records that agencies “**shall** provide” to incarcerated people, as long as the record does not “diminish the safety or security of any person or correctional facility.” Meanwhile, the current RTKL lists *30 exemptions* under [Section 708\(b\)](#), records that are exempt from access by “requesters under this act.” But since incarcerated individuals *are not requesters*, these exemptions—along with everything else in the RTKL—do not apply to them. In other words, if an incarcerated person requests an approved record under Section 508, and the record does not “diminish the safety or security of any person or correctional facility,” then an agency would be required to provide that document, *even if it is exempt under Section 708*.

Determining incarceration status: Again, the bills define an “inmate” as an “individual incarcerated, *after having been sentenced* by a court of competent jurisdiction, in a Federal, State or county correctional facility or prison” (emphasis added). That means it would not apply, for example, to a person held pretrial or a person held on a probation/parole detainer. In practical terms, how is an agency supposed to tell the difference and know whether the RTKL request they receive from a person who is incarcerated comes from an “inmate” who has no RTKL rights or a person who maintains such rights? This is an administrative morass that is going to cause additional delays and harms for agencies as they face additional appeals and litigation over their failure to respond to RTKL requests based solely on the return address for the individual.

D | Recommendation

We strongly recommend striking this section in its entirety.

2 | Restricted access for “vexatious requesters”

The category of “vexatious requesters” is only proposed under [HB 2524](#) (PN 3235).

A | Current law

To reduce the administrative burden on agencies, [Section 506](#) of the 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.

B | Definition

“Vexatious requester” is defined under HB 2524 (PN 3235) as “a person who, by the person’s conduct, demonstrates an intent to annoy or harass a local agency. An individual may not be found to be a vexatious requester solely due to the number of requests they have filed or the number of records sought.”

C | Specific concerns

“Vexatious requester” approach would violate the right to petition the government protected under the First Amendment.

In addition to the troubling public policy implications of saying that public records are only public to some, the approach taken by this bill 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),⁵ 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.”⁶ 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.”⁷ 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.

By limiting a codified right to request records, the “vexatious requester” provision 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.⁸

⁵ [Campbell v. Pa. Sch. Bds. Ass’n.](#), 336 F.Supp. 3d 482 (2018).

⁶ *Id.*, at 495.

⁷ *Id.*, at 496.

⁸ 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”).

Pennsylvanians' due process rights would be further violated by permitting OOR to "request that the Commonwealth Court impose a civil penalty commensurate with the burden placed on the local agency due to the vexatious conduct." The legislature cannot vest a court with unlimited and unfettered authority to impose a penalty on an individual in any amount that it wants, with no process to hear from the requester. Indeed, there would not even be a case before the Commonwealth Court and nothing in any statute or procedural rule authorizes a court to consider such a petition. It is a provision, quite frankly, that is untethered from legal reality.

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

In order to determine who would “count” as a vexatious requester, an agency would somehow be expected to deduce a requester’s intent to “annoy” the agency from the fact that they filed multiple requests. This is the sort of vague, amorphous, and unconstitutional standard that is ripe for abuse by government agencies to silence their critics. Certainly in the midst of the COVID-19 emergency, numerous agencies ranging from health departments to school districts felt that the myriad RTKL requests directed to them demonstrated an intent to annoy the agencies by 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 of Pennsylvania has for years submitted a RTKL request to Berks County for a copy of its daily jail admissions log, since it does not make that information publicly available otherwise. 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 annoy the Berks County RTKL officer. But from the Berks perspective, it would be easy to see why they would think that the ACLU of Pennsylvania is trying to “annoy” the agency. Critically, under the current RTKL (and its predecessor), our intentions are completely irrelevant to the legitimacy of our requests.

Under the vexatious requester provision proposed in HB 2524, simply by virtue of filing a petition to label someone vexatious, *each and every* RTKL request that person submits would 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 three months. And worse, the agency can continue to file frivolous petitions over and over with no limitation. A provision that suggests that the agency can only file one petition every twelve months is in the subsection dealing with appeals to the Commonwealth Court, meaning that as long as the agency does not appeal an adverse decision to the Commonwealth Court, it can file a petition against the same requester as often as it wants—nothing would stop an agency from filing a petition every day of the year. Indeed, there may ultimately need to be a “vexatious agency” provision to stop agencies from abusing this provision.

“Vexatious requester” provision would introduce an unprecedented approach to considering public records, permitting the government to pick and choose who is entitled to those records.

If enacted, HB 2524 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 receive access to public records. 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 of different political ideologies or individuals who the local government finds inconvenient.

D | Recommendation

There are at least two, arguably fatal, constitutional problems with the vexatious requester provision: (1) it violates the First Amendment right to petition the government, and (2) it violates the Fourteenth Amendment right to due process. Litigation would be inevitable—small agencies like the Tamaqua Area School District would use this provision and find themselves on the losing end of a federal lawsuit (which would include attorneys' fees for the requester/plaintiff).

Thus, given the multiple constitutional violations attendant with the vexatious requester provision, as well as the practical problems with implementing such a provision, our best recommendation would be to either abandon the idea altogether or take it back to the drawing board to find a different approach.

3 | Restricted access for parties to a lawsuit against an agency

Although [SB 492](#) (PN 591) does not have a vexatious requester category in the way that [HB 2524](#) (PN 3235) does, it would limit the ability of parties to litigation against an agency (i.e., because that agency has violated the law) to use the RTKL to obtain public information.

A | Current law

Under current law, individuals who are involved in litigation against an agency, just like any other residents of Pennsylvania, have full and equal access to the RTKL.

B | Definition

SB 492 would amend [Section 506\(a\)\(1\)](#) of the RTKL to create a new subsection permitting agencies to deny requests made by someone involved in litigation against that agency:

- (1.1) An agency may deny a request to a party to litigation when the request:
- (i) is material to a pending civil action or proceeding to which the agency is a party and the Pennsylvania Rules of Civil Procedure or the Federal Rules of Civil Procedure apply; or
 - (ii) was previously made in litigation discovery.

C | Specific concerns

Denying access to requesters who happen to be involved in a lawsuit against the government agency invites conflicts of interest.

Again, requests should not be conditioned on who is making the request, including parties to litigation against an agency. This is especially true when the litigation alleges wrongdoing by a government agency—indeed, this is *precisely* when the law should be the most vigilant in protecting the public's access to government records. If the record is public, it's public, regardless of the requester's status in a pending lawsuit. Furthermore, this provision would be impossible to enforce or police and maximally possible to skirt, since it would only require the person's lawyer or friend to submit the request, and then the agency would have to grant it as with any other member of the public.

D | Recommendation

We recommend striking this subsection. It is alternately problematic and toothless.

4 | Restricted access to “commercial” requesters

Both [HB 2524](#) (PN 3235) and [SB 492](#) (PN 591) would add new categories of commercial requests that are subject to different rules and fee structures. We take no position on the approach taken in HB 2524. However, the approach in SB 492 is vague and overbroad and is therefore the focus of the analysis below.

A | Current law

The RTKL does not currently distinguish between requests for commercial or noncommercial purposes.

B | Definitions

Included in SB 942’s definition of “[commercial purpose](#)” is whether the record is “for the purpose of generating revenue **or in a manner through which the requester can reasonably expect to generate revenue.**” If the request is determined to be for a commercial purpose, SB 492 would allow an agency to assess additional fees, as defined in a new subsection, [Section 1307\(g.1\)](#).

C | Specific concerns

“Commercial purpose” is too broadly defined, which will likely result in erroneous and/ or subjective designations, imposing additional fees and/or delays on those requesters.

It is not clear what “*a manner through which the requester can reasonably expect to generate revenue*” means or what the scope will be as interpreted by each individual agency. If a nonprofit organization requests records related to government malfeasance and publicizes those records, the nonprofit may “reasonably expect to generate revenue” as a result of its actions—does that make this a commercial request?

Based on whether an agency believes this to be a commercial request, the agency could then charge hourly fees for document search, retrieval, review, and redaction—substantial expenses to which no current RTKL requests are subject.

The definition of “commercial request” in SB 942 would have a substantially negative impact on the ability of journalists, nonprofit entities, and others to reliably obtain information from the government without having to be subject to additional delays and onerous fees.

D | Recommendation

To avoid the problems likely triggered by the vague definition of “commercial purpose” in SB 492, we recommend using the definition proposed under HB 2524 in [Section 102](#), which more narrowly and specifically explains what does and does not constitute a commercial request.

Summary

If enacted, these bills would, for the first time in the 65-year history of Pennsylvania’s public records law, allow government agencies to pick and choose to whom it responds. 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.