Eastern Region Office
PO Box 40008
Philadelphia, PA 19106
215-592-1513 T
215-592-1343 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
313 Atwood St.
Pittsburgh, PA 15213
412-681-7736 T
412-681-8707 F

TESTIMONY SUBMITTED TO
PENNSYLVANIA SENATE STATE GOVERNMENT COMMITTEE
SUBMITTED BY
ANDY HOOVER, LEGISLATIVE DIRECTOR, ACLU OF PENNSYLVANIA
RE: SENATE BILL 444
MAY 13, 2013
STATE CAPITOL, HARRISBURG

Chairman Smucker, Chairman Smith, and members of the committee, thank you for the opportunity to offer comments on Senate Bill 444. Founded in 1920, the American Civil Liberties Union is one of the nation's oldest civil rights organizations and currently boasts 600,000 members nationwide. I am here today on behalf of the 20,000 members of the ACLU of Pennsylvania.

As you know, SB 444 revises the Right to Know, or open records, law ("the law") in multiple ways. The ACLU of Pennsylvania was an outspoken supporter of the last major revision to the law in 2008. During that debate, our advocacy focused on improving the process of open records access. We supported the establishment of the Office of Open Records ("the office") and the presumption that records are open.

In the current debate over SB 444, we are again interested in the process. A strong open records law is a key component of democracy, ensuring that citizens have access to their government and that government operates in the sunlight.

Senate Bill 444 both includes improvements to the law and raises concerns about the functionality of it. Thus, at this time, the ACLU of Pennsylvania has no position on SB 444, pending further analysis and consideration. In my testimony, I will articulate the provisions of the bill that the ACLU of Pennsylvania supports and those provisions that raise concerns.

First, SB 444 re-establishes the office as an independent agency. Currently, the office operates in the Department of Community and Economic Development. This arrangement adds a level of management that can shackle the office, leaving it at the mercy of the latest whims of the department. It leaves the office exposed to the political and financial considerations of the department.

SB 444 frees the office from those considerations by establishing it as an independent agency. This proposed arrangement would give the director greater access to the governor and would allow the office to reach decisions based on what is best for the office, without the hassle of wondering what is best for the department. The ACLU of Pennsylvania supports this provision and hopes it remains in the final version of the legislation.

In addition, the legislation allows the office to participate in court proceedings via the filing of amicus briefs in appeals of decisions made by the office. This important change will allow the office to fully participate in the process of an open records request, from the initial filing of the request to its ultimate conclusion. By doing so, the office can better articulate why it reached the

decision it reached and provide greater insight into the functionality of the office. This type of participation allows the office to operate in a more open way.

The ACLU of Pennsylvania also supports extending the deadline for filing an appeal of a denied request from its current 15 days to 20 days and supports clarifying that public contracts and "any public records of the agency related to the contract" are, indeed, public records. The extension of the appeal deadline lowers another hurdle to records access and increases the likelihood that the average citizen can participate in the process. Most people do not engage in records requests as part of their vocation and must tend to the average responsibilities of daily life. By extending the deadline, citizens who want to participate in their government are able to do so.

These provisions of SB 444 strengthen the Right to Know law. The ACLU of Pennsylvania supports these provisions and hopes that they remain in any final legislation.

There are several pieces of the legislation that raise concerns, however. We are hopeful that the primary sponsor of SB 444 will consider amendments to address these concerns.

First, the language in the bill on commercial use needs to be strengthened and clarified. To avoid confusion, the law should be clear that all requests are presumed non-commercial and that a request is only considered commercial after reaching a very specific set of criteria.

In its current version, SB 444 defines a "commercial purpose" as the use of a record for one of three purposes- to sell or resell the record, to "reasonably expect to make a profit," or for the purpose of solicitation. This language leaves the definition of "solicitation" unclear. It is possible that any number of activities undertaken by non-profit organizations could be considered solicitation. This could include voter registration drives, fundraising requests, public education or legislative advocacy efforts. Presumably, the intent is to prohibit the use of records requests by commercial entities to build mailing and phone lists for sales purposes and other profit-making techniques. But the language of the bill is not clear.

The ACLU of Pennsylvania is also concerned about the provision of the SB 444 that prohibits inmates from requesting records. To be clear, the ACLU of Pennsylvania recognizes the reality that responding to inmates' requests occupies a great deal of time for both the Department of Corrections and the Office of Open Records. And it is apparent that the primary sponsor has attempted to carve out exceptions for the information that inmates are most likely to need for their own criminal proceedings and other information related to their incarceration. This includes not only an inmate's personal records, such as case-related information and financial data, but also records on housing information and policies of the institution in which the inmate is incarcerated.

These are critical carve-outs in the bill. However, can the authors of the bill be sure that they have covered every imaginable scenario in which an inmate legitimately needs access to a record? If this language passes into law, it is possible that the General Assembly will need to return to this section time and time again to further revise it.

By prohibiting inmates, generally, from requesting records, the bill further removes inmates from participating in democracy. Specifically, a prohibition on inmate requests for open records would severely limit prison journalism. Because of their personal situations, inmates may be even more aware of governmental operations than the average citizen. As you know, the commonwealth is in a new era in the debate over incarceration, sentencing, and parole with recent focus on alternatives to prison. Inmates provide a critical voice in that discussion. Shutting off their ability to use the open records law limits the ability of inmates to be heard in that debate.

One need only peruse the most recent edition of *Graterfriends*, a newsletter published by the Pennsylvania Prison Society, to see the ways in which inmates are aware of their government and the issues of the day.[1] The February edition of *Graterfriends* includes articles on a case recently decided by the Court of Appeals for the Third Circuit, the possible execution of innocent people in Texas, and recent changes to juvenile sentencing laws resulting from a case before the United States Supreme Court and legislation passed by the General Assembly.

As currently written, SB 444 would suppress this type of engagement in the democratic process by inmates and would severely limit this outlet for inmate expression. This type of expression can be critical for inmates to feel like they are still invested in the community, even while confined.

In addition, blocking inmates' ability to use the open records law sets a new precedent for carving out entire groups of people that the Office of Open Records or a particular agency finds irritating. Many non-profit organizations regularly use the law to gather data about government activity. Will we be back here in a few years talking about blocking Community Legal Services of Philadelphia or the ACLU of Pennsylvania from using the law?

Finally, the ACLU of Pennsylvania is concerned about the provision of SB 444 that allows an agency to petition a court for a protective order if a request or series of requests is "unduly burdensome." The phrase "unduly burdensome" is undefined and potentially allows agencies to run to court for any manner of requests. At what point does the public not get a record? It is possible that agencies could misuse this provision to unburden themselves from records requests. The unavoidable fact is that the burden of responding to RTK requests falls most heavily on those agencies whose operation are of most interest to the public, so this provision could, perversely, work to cut off the most critical and timely public debate and investigations. And, with the advent of requiring commercial requesters to pay for the staff time involved in responding to requests, one could see the same request being thought "unduly burdensome" from a member of the public who won't pay for it but not too burdensome at all if made by a commercial requester who can pay for the work required to respond. That would be the worst of all possible outcomes.

The Right to Know law is an essential tool for allowing the public to participate in democracy. The ACLU of Pennsylvania appreciates the efforts of Senator Pileggi and the committee to further fine-tune the law and for the opportunity to present our views. We look forward to working with you as SB 444 moves forward in the legislative process. Senator Smucker, thank you for the opportunity to be here today.

[1] Retrieved May 8, 2013, from http://media.wix.com/ugd//4c2da0_0d544bda2073e6ea1a3e9aa83bbb1f6c.pdf.