TESTIMONY OF THE

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION

BEFORE THE SENATE STATE GOVERNMENT COMMITTEE

REGARDING

NEEDED AMENDMENTS TO THE STATE RIGHT-TO-KNOW LAW

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Chairman Argall, Chairman Street, and members of the Senate State Government Committee, thank you for inviting the Pennsylvania School Boards Association (PSBA) to testify today on behalf of the 5,000 local public school leaders we represent. We are extremely thankful for the work already done by this Committee on these issues last April when the Committee reported out Senate Bill 552 sponsored by Senator Dush dealing with vexatious requesters and Senate Bill 312 sponsored by Senator Brooks dealing with commercial requesters.

Background

At the time of its passage, Pennsylvania's current Right-to-Know law (RtK) was a dramatic shift in granting citizens and taxpayers with access to government records. Prior to the RtK, individuals seeking access to a record had to overcome a presumption that a record was private in order to access the information being sought. The RtK reversed that presumption in an effort to promote greater transparency and accountability.

Despite being a complete re-write of the state's process for obtaining government records, the RtK does not include a preamble or legislative declaration of intent. However, the purpose of the RtK can be determined by looking at judicial interpretations of the law and the legislative history leading to the RtK's enactment.

As stated by the Pennsylvania Supreme Court, the purpose of the RtK is to promote "access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." Levy v. Senate of Pennsylvania, 619 Pa. 586, 65 A.3d 361 (2013).

Further, during deliberations and discussions on Senate Bill 1, which eventually became the RtK, the bill's prime sponsor stated the following on the need and purpose of the bill:

> "But the true foundation of government reform is a strong open records law. Today, we have the opportunity to establish that foundation. Pennsylvania needs a stronger open records law because openness builds trust in government. Transparency gives the public the ability to review government actions, to understand what government does, to see when government performs well, and when government should be held accountable." Sen. D. Pileggi, 2007 Senate Journal page 1405.

Unintended consequences

As is common with sweeping new legislation, there can be unintended consequences. In the case of the RtK, one of those consequences has been the ability of commercial enterprises to use the RtK process to obtain information at taxpayer expense which is then used to generate revenue as opposed to being used for governmental transparency purposes. These types of requests, which are referred to as commercial requests, can take a number of forms. The obvious scenario is a request for names and addresses of residents within the agency that the requester will then use for solicitation. An alternative example is a request for records which the requester will then collate and provide to subscribers as part of a fee-based service.

Another consequence has been the ability of requesters to use the RtK as a means to annoy, harass, punish, extort, or disrupt the operations of an agency. Individuals unhappy with a school district's decision on any matter can barrage their school district with RtK requests in an attempt to get the district to change course or just to simply chastise the district. However, the most common result of

a flood of RtK requests is that the district is required to divert significant resources away from their normal purposes and direct them towards fulfilling voluminous requests for information.

Impact on agencies

As the legislators who enacted the RtK acknowledged, the expansion of the right to access government records would come with an increased cost to agencies. But that increased cost was for a valid and worthwhile purpose - transparency.

Although not among the biggest expenses in school district budgets, district finances and operations are nonetheless negatively impacted by being required to comply with commercial and vexatious requests. Districts must allocate staff to reviewing and responding to requests which include searching, retrieving, reviewing, redacting, and duplicating responsive records. Depending on the volume of requests received by the district, they may even be forced to hire additional staff to assist in responding to requests.

Due to the unintended consequence of the RtK being used as a commercial tool by private enterprises rather than just a transparency tool by citizens, the result is that taxpayer resources are being used by private enterprises for profit. Nowhere in state court decisions nor in Senate or House Journals can remarks about the RtK being intended to facilitate commerce be found as one of its purposes. While school districts have no desire to prohibit commercial requests, a solution must be found to ensure taxpayers are not subsidizing the revenue generation of private businesses.

Likewise, with the ability of requesters to use the RtK process as a weapon, school districts are required to expend significant taxpayer resources complying with the strict timelines in the RtK without any relief in the RtK regarding vexatious requesters. To be clear, we are not trying to prevent or deter individuals from taking an interest in what their government is doing. However, we recognize that there are instances where a requester's interest is not based in transparency and/or the requests have a substantial negative impact on operations and in those cases, school districts need a mechanism in law to obtain relief.

What Should Relief Look Like

Amendments to the RtK law allowing agencies to recover costs associated with complying with requests that are made for commercial purposes and providing agencies with relief from vexatious requesters are needed to protect taxpayer resources and preserve the original intent of the law.

Amendments related to commercial requesters should include the following components:

- A clear definition of commercial purpose which includes:
    - Selling/reselling the records sought (or any portion thereof);
    - Using information such as names, addresses, or other contact information for commercial solicitation; and
    - Any other purpose by which the requester expects or intends to generate revenue from the information requested.
- An exception for bona fide research or other activities where the generation of revenue is ancillary to the request such as:
    - Requests from journalists or other members of the news media;
    - Requests from attorneys so long as their client does not intend to use the information for a commercial purpose.

- Limitations that prevent agencies from profiting from commercial requesters yet ensure that taxpayers are reimbursed for costs associated with responding to commercial requests.

Amendments related to vexatious requesters should include the following components:

- Due process which ensures the alleged vexatious requester is informed of the agency's allegation and provided with an opportunity to respond.
- Flexibility for the agency to allege vexatiousness based on a variety of factors that is not limited to the requester's unprovable intent or purpose for submitting requests.
- A fair timeline for the allegations to be heard by the Office of Open Records.
- Direction for the agency on how it is to handle any pending or future requests from the alleged vexatious requester until the matter is resolved.
- Appropriate relief from responding to requests made by vexatious requesters including, but not limited to permission to not fulfill requests made by the vexatious requester for a period of time.

As mentioned in the introduction to this testimony, PSBA believes that Senate Bill 552 dealing with vexatious requesters and Senate Bill 312 dealing with commercial requesters appropriately thread the needle and include all the necessary components above in a fair and reasonable manner. PSBA thanks Senator Dush and Senator Brooks for their leadership on these issues, and we urge the Committee to continue to support these bills and any other legislation which addresses these issues in the same fashion and to reject legislation that fails to adequately address these issues.

House Bill 2524 Misses the Mark

Although House Bill 2524 is intended to provide, among many other things, the relief long sought by school boards and other local government agencies for commercial and vexatious requesters, it completely fails to provide meaningful and effective relief which local agencies can use, and in some cases creates new problems with the law.

The definition of "commercial purpose" included in House Bill 2524 only includes the use of a record for commercial solicitation and the sale/resale of the record. It does not include the myriad of other commercial purposes for which records are requested such as requesting information related to current contracts which the requester will then use in future bidding to obtain more contracts. The definition also contains significant, broad, and vague exceptions creating substantial loopholes allowing a wide array of commercial requesters to be exempt from the very provisions intended to preserve taxpayer resources. These issues, taken together, lead us to believe that the commercial requester provisions will have very little impact in terms of reimbursing taxpayers, and will likely lead to years of litigation as the courts try to navigate who would qualify for the exceptions.

Additionally, the definition of "vexatious requester" and the provisions of section 906(a) in House Bill 2524 require an agency seeking relief to prove by "clear and convincing evidence" that the requester's intent in submitting a request or requests was to annoy or harass the agency. Requesters would also be exempt from being considered vexatious because of the number of requests they make or records they seek.

Section 703 of the current RtK law expressly states that a "request need not include any explanation of the requester's reason for requesting or intended use of the records unless otherwise required by law." Neither the current RtK law nor House Bill 2524 contain provisions which would allow an

agency alleging vexatiousness to collect any additional evidence which might be relevant to a requester's intent. Agencies would not be able to issue subpoenas, require depositions, or avail themselves of any other tool in the usual civil discovery process. Absent some other evidence volunteered by a requester, we do not believe that an agency would ever be able to successfully prove that a request was made with the specific intent to harass rather than promote governmental transparency, or to meet the unachievably high standard of "clear and convincing evidence".

Further, the definition of vexatious requester is incomplete in that only one of the factors in section 906(a)(3) of the bill (the factors which an agency can use to allege vexatiousness) relates to the harassment of the agency. Instead, many of the other factors in section 906(a)(3) focus on the effect that a request or series of requests have on the agency. Despite a requester's intent in submitting requests, the effect of those requests can have a severe impact on the ability of a local agency to fulfill its normal day-to-day responsibilities. An excellent analogy would be denial of service attacks (which we have experienced before). Since section 901 of the RtK law only gives agencies 5 days to provide a response, the sheer number/volume of requests an agency receives could have the effect of preventing an agency from fulfilling its regular responsibilities. Even if an extension is taken under Section 902, a significant amount of time and public resources would be directed away from day-to-day responsibilities and toward complying with the number/volume of requests.

Many of our members have experienced instances where the sheer volume of requests or information requested from a single requester has substantially disrupted operations or placed an unreasonable administrative and financial burden on the agency, and therefore our taxpayers. Inundating an agency with requests is also a favorite method for punishing an agency for an unpopular decision.

House Bill 2524 would also harshly punish agencies who were unsuccessful in claiming vexatiousness by prohibiting the agency from filing a petition alleging vexatiousness for a year. Agencies should not run the risk of being completely vulnerable to other instances of vexatious requesters simply because they do not receive relief on a separate petition.

Our final significant concern with House Bill 2524 relates to the changes made to section 1304 of the current RtK law regarding court costs and attorney fees. Currently, only a court of law is permitted to award court costs and attorney's fees to a requester if it determines that the agency acted in bad faith or relied on an unreasonable interpretation of the law. But, House Bill 2524 would also allow the Office of Open Records (OOR) to award court costs and attorney's fees to requesters and make determinations about an agency's actions. We are vehemently opposed to allowing OOR to award court costs and attorney's fees to requesters in any situation and believe that this remedy should be reserved exclusively for courts which are in a much better position to evaluate all evidence presented and make decisions.

For these reasons, PSBA is staunchly opposed to House Bill 2524.

<u>Other Concerns</u>

There are some advocates who argue that the focus on commercial and vexatious requesters is misplaced. That instead the Legislature should focus on so-called "burdensome requests". In this scenario, agencies would be allowed to charge any requester for the time and work required to respond to requests for information that meet their definition of "burdensome".

We do not support this approach as it would impact any requester, including taxpayers and residents with a valid transparency interest in the records or information, and could create a chilling effect on

the rightful access to information. Requesters with a legitimate transparency interest in a topic should not be charged or otherwise punished for filing what might be considered a burdensome request. We recognize that this will happen, and in the interest of transparency, we believe it is right to accommodate those requests. However, when it comes to commercial and vexatious requesters, agencies still need the ability to preserve taxpayer resources and obtain relief from those requesters who routinely abuse their RtK rights in filing requests to punish agencies or which seriously disrupt agency operations.

There are also some advocates who argue that data service companies should be exempt from commercial purposes because they provide a public service and create efficiency for local agencies since they would no longer have to respond to requests for information that could now be handled by the data service companies. While we applaud the interest of data service companies in helping local agencies increase efficiency, we do not agree with this premise. The data service industry is not a true public service, it is a multi-billion-dollar industry. Taxpayers would have to pay data service companies for records and information that they are entitled to access for free. Because the data service company is going to profit from the information that they are currently getting from local agencies for free, and because data service companies are most often providing their services to other business which intend to use the information for commercial purposes, local agencies should be allowed to charge the data service companies for their requests.

Senate Bill 492

While Senate Bill 492, introduced by Senator Mastriano, covers many of the same issues as House Bill 2524, PSBA does not have significant concerns with the legislation. In fact, we look forward to working with Senator Mastriano to make Senate Bill 492 a bill we could fully support.

Senate Bill 492 does provide for relief from commercial requesters in a very similar way to Senate Bill 312 which we appreciate and support. The legislation does not currently address the issue of vexatious requesters, so PSBA would request that if this legislation is moved forward, that provisions similar to those in Senate Bill 552 are included so that agencies do not miss out on this much needed relief.

Senate Bill 492 does pose two issues of concern which we believe should be addressed. First, the bill requires agencies to provide requesters with access to agency databases which could be interpreted as requiring agencies to let citizens directly access an agency's computers and data rather than simply providing a copy of the information contained in the database. We believe this provision should be clarified to ensure that access is only provided to the requested information and not direct access to an agency computer or data. Second, the bill would significantly expand the type and amount of documents which an agency must redact by striking language which refers to a "public record, legislative record, or financial record", all of which are defined terms, and making redaction requirements appliable to all "records". We believe that this change to the law should be stricken from the bill.

If the Committee is considering advancing an omnibus RtK reform bill, PSBA would urge the Committee to work on Senate Bill 492.

Conclusion

I would like to thank the Committee again for inviting PSBA to testify today about these important issues and bills. On behalf of public school leaders across the Commonwealth PSBA urges the Committee to support their schools and local governments by addressing the issues of commercial

and vexatious requesters in a manner which aligns with Senate Bill 312 and Senate Bill 552, and to reject House Bill 2524 which fails to provide needed relief and would create new concerns with the law.

PSBA looks forward to working with the Committee on reforms to the law and I am happy to answer any questions.