

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

STATE GOVERNMENT
COMMITTEE HEARING

STATE CAPITOL
HARRISBURG, PA

MAIN CAPITOL BUILDING
ROOM B-31

WEDNESDAY, MARCH 12, 2014
9:00 A.M.

PRESENTATION ON HB 1671
LEGISLATION PERTAINING TO EXECUTIVE SESSIONS

BEFORE:

HONORABLE DARYL METCALFE, MAJORITY CHAIRMAN
HONORABLE ELI EVANKOVICH
HONORABLE MATT GABLER
HONORABLE JERRY KNOWLES
HONORABLE DAVID MALONEY
HONORABLE JOHN MCGINNIS
HONORABLE BRAD ROAE
HONORABLE RICK SACCONI
HONORABLE MARK COHEN, DEMOCRATIC CHAIRMAN
HONORABLE MARY JO DALEY
HONORABLE MARTY FLYNN
HONORABLE DANIEL MCNEILL
HONORABLE DAN MILLER
HONORABLE MICHAEL O'BRIEN
HONORABLE MICHAEL SCHLOSSBERG
HONORABLE BRIAN SIMS

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*Pennsylvania House of Representatives
Commonwealth of Pennsylvania*

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P R O C E E D I N G S

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MAJORITY CHAIRMAN METCALFE: The hour of 9:00 a.m. having arrived, the hearing of the House State Government Committee is called to order.

Before we get started with the attendance, if I could ask all the Members to rise and I would ask Chair Cohen if he would lead us in the Pledge.

(The Pledge of Allegiance was recited.)

MAJORITY CHAIRMAN METCALFE: Thank you, Mark.

If I could ask our Member Secretary, Representative McGinnis, to call the roll call, please. Representative Barrar we are expecting to arrive here but other meetings are going on. He's not here yet.

(Roll was taken.)

MAJORITY CHAIRMAN METCALFE: Thank you, Representative McGinnis.

This morning, we have a hearing on legislation that was introduced by Representative Saccone, and I'd like to ask Representative Saccone if you would like to make a few remarks to open us up on the Bill that he is proposing.

1 REPRESENTATIVE SACCONI: Thank you, Mr. Chairman.
2 I'll be brief because I will have some questions as we go
3 along.

4 I just want to welcome everyone and thank
5 everyone. This is been a long time coming. As I talk to
6 people actually around this State, there is great support.
7 Everyone seems to see the need to reform executive
8 sessions. Everyone has been to a meeting where they've sat
9 there, the public has wanted to participate, but the board,
10 whatever board it is, goes into executive session and comes
11 back out and votes without deliberating in front of the
12 public. And it discourages and chills them from even
13 coming to a meeting because they say why come if I don't
14 have any part in the process?

15 So we need to make sure that we are performing
16 all our deliberations in public as much as possible. It's
17 the public's right to know how our elected officials arrive
18 at their decisions and hopefully this Bill will help to
19 strengthen the ability of the people to participate in the
20 process. And I'm looking forward to some of the
21 suggestions that'll be made to make it even stronger.

22 So it's not a complete work of art yet; it's
23 getting there but we still have some tweaking to do and I'm
24 looking forward to hearing from all of our testifiers
25 today.

1 Thank you very much, Mr. Chairman.

2 MAJORITY CHAIRMAN METCALFE: Thank you,
3 Representative Saccone.

4 Over the years that I've served in office and
5 I've had a concern and I've talked with other Members who
6 have had a concern related to executive sessions and how
7 they're utilized by government entities. Some of the
8 specific examples that I've had over the years have been
9 more related to school boards but it could also apply to
10 other government entities. But we allow in the law that
11 the government entities are allowed to discuss certain
12 issues in executive sessions behind closed doors for
13 personal reasons and some others.

14 But when these boards get behind closed doors and
15 they choose to start talking about other topics that they
16 should be vetting in the public light, that's a serious
17 problem. It's a violation of the law, first of all, and
18 it's a violation of the public's trust even beyond that.

19 So I think this is important legislation and I
20 look forward to hearing the testifiers.

21 Representative Cohen, do you have any opening
22 remarks?

23 MINORITY CHAIRMAN COHEN: Yes, Mr. Chairman. I
24 think we all struggle on the balance between privacy and
25 transparency. Traditionally, the balance has been for

1 privacy when it comes to personnel decisions. This Bill
2 seeks to make the balance towards transparency. Are there
3 problems with this? I'm sure there are benefits and I look
4 forward to the testimony showing some light on what the
5 appropriate balance should be.

6 Thank you, Mr. Chairman.

7 MAJORITY CHAIRMAN METCALFE: Thank you,
8 Representative Cohen.

9 Our first testifier will be Ms. Melissa Melewsky,
10 Media Law Counsel with the Pennsylvania NewsMedia
11 Association.

12 And, ma'am, you can join us at the microphone if
13 you would, and we're ready to hear your testimony when
14 you're ready to begin. Good morning.

15 MS. MELEWSKY: Good morning and thank you for
16 this opportunity. I'm joined today by PNA's Director of
17 Legal Affairs Paula Knudsen, who many of you already know.

18 But I'm going to read a little bit from our
19 testimony and I'm happy to answer questions as we move
20 forward. I've got lots of experience with the Sunshine
21 Act, so please, ask away.

22 Good morning and thank you for the opportunity to
23 appear and offer testimony before the House State
24 Government Committee on House Bill 1671, and it is
25 particularly appropriate to be discussing these issues in

1 light of the fact that National Sunshine Week is closely
2 approaching. It's next week.

3 My name, as you already know, is Melissa
4 Melewsky. I'm Media Law Counsel with the Pennsylvania
5 NewsMedia Association, and I'm going to refer to us as PNA
6 because that's a bit of a mouthful. PNA is the statewide
7 trade association for newspapers and online publications
8 and we count more than 300 print, digital and related media
9 organizations throughout the Commonwealth as our members.

10 One of the functions of PNA is to offer a legal
11 hotline to its members. It's my primary job responsibility
12 to answer this legal hotline on a daily basis, and as a
13 result, I have the opportunity to talk to reporters and
14 editors and publishers about the problems in obtaining
15 access to records and meetings in Pennsylvania. And that
16 happens every day.

17 PNA's legal hotline receives approximately 2,000
18 calls each year, over half of which deal with access
19 issues, both Right to Know law and Sunshine Act.
20 Specifically regarding the Sunshine Act, I answer hundreds
21 of calls every year about reporters' attempts to access
22 meetings and instances where it appears executive sessions
23 have been improperly invoked. In the 7-1/2 years I've been
24 with the PNA, the number of Sunshine Act calls I receive
25 has not decreased; it has remained steady or increased each

1 year, which illustrates the ongoing struggle for basic
2 public access to meetings in this Commonwealth.

3 Given this background, PNA is pleased with
4 Representative Saccone's proposal to reform the Sunshine
5 Act, and we really welcome this opportunity to address the
6 specific proposals in more detail.

7 I'm going to start with Section 708(b)(2) of the
8 proposal. The PNA supports the proposal to amend Section
9 708(b) to require verbatim recording of executive sessions,
10 but we also suggest additional language is needed to
11 clarify the intent of the law.

12 The Act must require all agencies to keep a
13 verbatim record of closed meetings in the form of an audio
14 or video recording. The Act currently does not require any
15 record to be made during an executive session, and when
16 challenged, the only evidence is testimony, often given
17 long after the closed meeting has taken place. It is
18 exceptionally difficult to prove an intentional violation
19 occurred without independently verifiable information, and
20 this hampers and deters enforcement in many circumstances.

21 For example, a Lancaster County Grand Jury
22 investigating Sunshine Act violations found the lack of
23 executive session records hampered its investigation and it
24 recommended the county implement policies that require
25 minutes to be taken during executive sessions and that they

1 be kept in a secure location for a period of five years.

2 The best and irrefutable evidence of what
3 transpired during an executive session is a verbatim
4 recording. If challenged, a court could review an agency's
5 actions and discussions behind closed doors and if a
6 violation did occur, public access could be granted. This
7 type of record is already expressly exempt from public
8 disclosure under the Right to Know Law, and would remain so
9 unless a court ordered public access or if the agency
10 exercised its discretion to release the record.

11 Some alternative language is an agency holding an
12 executive session under this subsection shall make a
13 verbatim audio or video recording of the complete executive
14 session and retain the recording for a period of two years.
15 Such recordings are not subject to public inspection and
16 copying under the Right to Know law except by court order
17 or authorized by the agency. That would be our proposed
18 language.

19 Next, I'll address Section 708(a)(1). And again,
20 the PNA supports the proposed amendment to Section
21 708(a)(1), which we believe is intended to narrow the
22 personnel executive session. On the hotline, one of the
23 most frequent questions I get is about the personnel
24 executive session and how and when it's appropriately used.
25 And we don't have a lot of guidance from the courts on it.

1 We believe the text of the law is clear and should be
2 narrowly construed. Not all agencies, but some agencies
3 take a different view of the law and therein lies the
4 problem.

5 Section 708(b)(3), the PNA does not object to the
6 proposed edition of Section 708(b)(3).

7 Section 714(c), we support the proposed addition
8 of Section 714(c) offering immunity to elected officials
9 who timely report a suspected violation of the law. It's
10 very difficult to enforce the Sunshine Act, and any measure
11 that you could take would help enforcement actions would be
12 a benefit to the public, so we support Section 714(c).

13 Section 708(a)(7), the PNA does not support this
14 proposed addition dealing with security. While of course
15 we recognize the need for private discussions related to
16 safety and preparedness in some circumstances, the language
17 in the proposal is overbroad and could encompass
18 discussions that are and should remain public.

19 For example, school districts routinely
20 communicate evacuation and preparedness plans with students
21 and parents, but the proposal would allow these discussions
22 about the policies to be held in private.

23 Another example came up on the hotline with a
24 call, a school board recently discussed and voted to
25 authorize staff members to carry handguns on school grounds

1 and they did so, both the discussion and the vote, during
2 an executive session. The decision was subsequently
3 announced and many parents were surprised to learn that
4 there would be guns in their children's everyday
5 environment. Residents and taxpayers in the district
6 should have been included in the discussions leading up to
7 board's decision, and the vote was required by law to
8 happen at a public meeting. We take no position on the
9 action taken in that case, but the public is entitled to
10 witness and participate in the discussion process that
11 leads up to the decision.

12 These examples also highlight a significant
13 problem with the Sunshine Act, and that is that it can be
14 ignored with impunity. The biggest problem with the
15 Sunshine Act is not the text of the law or the executive
16 session exemptions themselves. The biggest issue is the
17 way the law has been interpreted to make enforcement nearly
18 impossible.

19 We discuss the issue of enforcement and penalties
20 in more depth below, but we urge this committee not to add
21 an additional executive session. Information that is
22 communicated with the public or that deals with security
23 features that are readily apparent cannot be the subject of
24 private discussions. Information that would reveal
25 nonpublic, highly sensitive security information is already

1 adequately protected in the law. So we oppose the addition
2 of Section 708(a)(7).

3 In addition to the specific amendments suggested
4 above, the public would also benefit if the Sunshine Act
5 were amended to address some of the following public access
6 issues.

7 Remedies: Despite recent legislative action to
8 increase the penalties for violating the Act, which we
9 supported, calls to the PNA hotline have not decreased, and
10 this suggests that suspected violations are no less rare
11 and sadly, enforcement has not increased. We are aware of
12 only two instances of the criminal penalties being imposed
13 in the past seven years and only a handful of civil suits
14 in that same time, only one of which was found in favor of
15 the public.

16 So enforcement is problematic because the courts
17 have interpreted the law to allow agencies to "cure"
18 violations. Court decisions allow public agencies to
19 simply redo a suspected violation at anytime and without
20 penalty, and if they do that, the courts have consistently
21 held that a violation is not actionable. This court-
22 created "cure" remedy makes it nearly impossible to win a
23 Sunshine Act challenge, and it is a huge deterrent for any
24 citizen seeking to enforce the law.

25 Moreover, the law only allows for the imposition

1 of criminal remedies for intentional violations of the law,
2 and civil sanctions when the violation is willful or with
3 wanton disregard. These standards impede enforcement and
4 allow agencies to exclude the public based on unreasonable
5 interpretations of the law or ignorance of its
6 requirements.

7 We believe the Act must clearly set forth the
8 available remedies, including that:

- 9 • A court may declare a violation and order
10 appropriate penalty even where a violation was
11 subsequently "cured" or where violations were
12 not intentional
- 13 • The court should have the power to grant
14 declaratory or injunctive relief to require
15 that a meeting be open to the public
- 16 • Any action taken in violation of the Act is
17 voidable by the court upon a proper showing of
18 evidence
- 19 • Any person may seek declaratory or injunctive
20 relief to prevent a future breach of the Act
- 21 • The current penalty section should be
22 reconsidered to include higher fines and/or
23 misdemeanor level charges

24
25 The issue of quorum discussions is another big

1 one for our members who frequently call the hotline. All
2 too often, agencies claim that they are engaging in
3 preliminary discussions and they use terms like
4 "informational" or "work sessions" when denying public
5 access. And on top of that, a recent Pennsylvania Supreme
6 Court decision allows agency quorums to participate in
7 fact-finding sessions involving agency business. This
8 practice conflicts with the plain letter and the intent of
9 the law. And, moreover, agencies also frequently argue
10 that committee meetings are not subject to the Act despite
11 language plainly to the contrary in the text of the law.
12 These practices effectively remove the public from some of
13 the most meaningful discussions on a particular topic.

14 Public access is not and should not be limited to
15 the end result of agency discussions. A truly informed
16 citizenry can only be accomplished when citizens have
17 access to the same information as their elected officials,
18 and private fact-finding and similar meetings are
19 counterintuitive to that goal. Likewise, some discussions
20 never lead to a final policy or a formal vote, but the
21 public is no less entitled to witness and participate in
22 the process, even if the process ends without a formal
23 resolution. The Act is intended to guarantee public
24 participation at all stages of policy creation, including
25 its genesis. As discussed above, there are already a

1 sufficient number of exceptions in the law that protect
2 certain agency discussions, but not final action, from the
3 public.

4 The Act must apply whenever a quorum or committee
5 thereof is discussing agency business, and any exceptions
6 to this general rule must be narrowly construed. The Act
7 should be amended to expressly prohibit any overbroad
8 interpretation of the executive session exceptions and to
9 expressly include agency discussions, regardless of whether
10 a vote or decision was reached at any given meeting or
11 whether it will occur at a future meeting.

12 The burden of proof and the presumption of
13 openness: The Sunshine Act, we believe, must be amended
14 consistent with the Right to Know Law to establish the
15 presumption of openness and put the burden of proof on an
16 agency seeking to exclude the public.

17 The text of the law as it stands right now is
18 silent on this issue, but courts have interpreted the law
19 to place the burden of proof on citizens filing a Sunshine
20 Act challenge. This is not appropriate for many reasons.
21 Citizens who have been excluded from a meeting have no
22 knowledge about what happened and very little information
23 upon which to make a showing a proof. The party with all
24 the information must bear the burden of proof.

25 Similar to the presumption of access and burden

1 of proof in the Right to Know Law, the Sunshine Act should
2 be amended so that the government, which has all the
3 information about a closed meeting, likewise bears the
4 burden of proof to show why excluding the public was
5 appropriate.

6 Technology: Quickly advancing, the Act must be
7 updated to account for today's technology expressly stating
8 that teleconferences, email, and other technology-
9 facilitated discussions by a quorum are subject to the Act.
10 All discussions by a quorum must occur at an open,
11 advertised meeting, including in-person discussions, and
12 those occurring through technological devices. Agencies
13 can't be allowed to circumvent the requirements of the law
14 by using email or real-time chat or other technology.

15 Public comment: The PNA supports House Bill 376,
16 which was sponsored by Representative Krieger, which would
17 amend the Sunshine Act to prohibit governing bodies of
18 political subdivisions and authorities from requiring
19 residents to register prior to their meetings in order to
20 comment. Current law allows agencies to implement
21 reasonable rules and regulations governing the conduct of
22 meetings, and many agencies have created rules that require
23 residents to register in advance in order to comment.

24 Some examples we've seen on the hotline include
25 policies that prohibit public comment from those who

1 haven't registered, policies that require residents to
2 visit the agency's main office during a very small time
3 frame in order to make that registration, policies that
4 limit public comment to agenda items only, policies that
5 require residents to submit their comments in writing and
6 provide copies prior to commenting at a public meeting. We
7 believe these and similar policies are not reasonable in
8 light of the Act's plain language and intent.

9 Advance registration requirements can cause a
10 significant barrier to access and discourage public
11 participation, which is in direct conflict with the clear
12 intent of the Act and we believe the Sunshine Act should be
13 amended to encourage public participation at meetings.

14 I think I heard the bell ring so I'm happy to
15 answer questions.

16 UNIDENTIFIED SPEAKER: I didn't know we had a
17 [inaudible].

18 MS. MELEWSKY: Oh, okay.

19 MAJORITY CHAIRMAN METCALFE: We don't have a bell
20 keeper.

21 MS. MELEWSKY: Okay. The courts sometimes give
22 you a little indication of when your time is up.

23 I'll just briefly mention agendas. Currently,
24 there's no statewide law that requires agencies to produce
25 agendas and many of them don't. An agenda is an important

1 public access tool and a relatively simple one to produce
2 that enables citizens to decide when to attend public
3 meetings and to keep those who can't attend informed.

4 The Act must be amended, we believe, to require
5 all agencies to prepare an agenda prior to public meetings
6 and make it available on the agency's website if one exists
7 and at the agency's office at least 48 hours prior to
8 public meetings. Agencies must also make copies available
9 at the meeting itself. The agenda must include, at a
10 minimum, any item scheduled for official action and must
11 describe with sufficient specificity any previously
12 identified executive session to be held by the agency.

13 Thank you for your attention and on behalf of the
14 PNA, we look forward to working with you as you work to
15 improve public access in the Commonwealth.

16 MAJORITY CHAIRMAN METCALFE: Thank you.

17 MS. MELEWSKY: And I'm happy to answer your
18 questions.

19 MAJORITY CHAIRMAN METCALFE: Thank you for your
20 testimony.

21 MS. MELEWSKY: Sure.

22 MAJORITY CHAIRMAN METCALFE: We've had a couple
23 of Members join us since the attendance was taken,
24 Representative Roae, Representative Evankovich.
25 Representative McNeill had come in and left and come back

1 again. And Representative Miller. Thank you.

2 Representative Saccone, would you like to lead
3 off with---

4 REPRESENTATIVE SACCONE: That's all right. Just
5 put me in the queue. That's all I was saying.

6 MAJORITY CHAIRMAN METCALFE: Representative
7 Miller.

8 REPRESENTATIVE MILLER: Thank you, Mr. Chairman.
9 And thank you for your testimony today.

10 MS. MELEWSKY: My pleasure.

11 REPRESENTATIVE MILLER: And I thank the gentleman
12 for bringing this issue up.

13 You spoke on a lot of issues, some that were not
14 related to the Bill---

15 MS. MELEWSKY: Yes.

16 REPRESENTATIVE MILLER: ---but generally
17 speaking, I find your testimony largely spot on from my
18 personal experience as well, and I'm glad to hear your
19 testimony as well as the effort by the maker to talk about
20 ways to open up more transparency to the process. I would
21 caveat that to say is I sometimes wonder why the State
22 seems to not be as open as we demand local governments to
23 be, but that's a different topic.

24 Real quick with it just on the points of the
25 Bill, the only thing I guess you had mentioned that you

1 were for the executive session recording aspects of it. In
2 my area in my town when I was a commissioner, we fought for
3 the recording of all the public hearing sessions, which was
4 a very controversial part and we got that done finally,
5 thank God. I was very pleased to get that done.

6 Executive sessions obviously are not something
7 that I know my hometown does as yet but would you find that
8 the majority of towns do any recording whatsoever of any of
9 their meetings? Is that your experience or no?

10 MS. MELEWSKY: Well, we don't have access to
11 them, so if they---

12 REPRESENTATIVE MILLER: No, I mean any recordings
13 of anything of any kind.

14 MS. MELEWSKY: Oh, the regular meeting?

15 REPRESENTATIVE MILLER: Yes.

16 MS. MELEWSKY: I think it's very typical for
17 agencies to make their own recording of the public session
18 of a meeting. Sometimes that's in the form of someone
19 taking notes. Sometimes more typically I think lately has
20 been someone has a recording device like an iPhone with a
21 recorder or a video recording. Some of them even
22 broadcast---

23 REPRESENTATIVE MILLER: Can I just sharpen you
24 there for a second?

25 MS. MELEWSKY: Sure.

1 REPRESENTATIVE MILLER: When you said notes---

2 MS. MELEWSKY: Yes.

3 REPRESENTATIVE MILLER: ---forget the notes
4 entirely, all right, because I know---

5 MS. MELEWSKY: They're gone.

6 REPRESENTATIVE MILLER: So I just want to be
7 clear with it because it's not my experience in my county
8 but I'd love your broader perspective just to be sure I
9 understand. Is it your impression that the majority of
10 localities, municipalities, school districts record some
11 versions of their meeting now?

12 MS. MELEWSKY: I think that's typical---

13 REPRESENTATIVE MILLER: Okay.

14 MS. MELEWSKY: ---although I'm not the best
15 resource for that because people don't call me and say,
16 yea, they're recording. They call me and say, no, they're
17 not.

18 REPRESENTATIVE MILLER: Okay.

19 MS. MELEWSKY: So I hear the opposite. What I
20 hear from our members is that they've made a recording and
21 they're not giving us access to it. That's the more
22 typical question that I get, but that also leads to the
23 conclusion that they are making a recording. So I think
24 it's pretty typical. And I think, for what it's worth, it
25 makes the minute-taker's job a lot easier after the meeting

1 is over to go back and listen to---

2 REPRESENTATIVE MILLER: Yes. Thank you. I just
3 wanted to check that. The recording stuff I think is
4 great. I would love to see it everywhere. I didn't know
5 it was so broad as you say. But I'm just concerned of the
6 cost, but overall, I'd love to see more recording with that
7 come up.

8 And I know you made a briefing comment to the
9 solicitor piece. I guess my only thought with that it had
10 been my impression, at least how my town was operating was
11 that the solicitor reviews our agenda. And of course you
12 mentioned that it's not mandated to make an agenda. That's
13 shocking.

14 MS. MELEWSKY: It's completely voluntary.

15 REPRESENTATIVE MILLER: So is it not your
16 impression that the solicitor is involved with the creation
17 of executive session agendas? Is that not what you think?

18 MS. MELEWSKY: Well, that's never the issue. The
19 issue isn't who produces it. It's whether or not it's
20 produced at all. I think it's more unusual for the
21 solicitor to be involved than it is for a member of the
22 board itself to be involved, but again, I'm not the best
23 resource for that. I think the bigger issue is not who
24 produces it but whether or not it's produced at all. And
25 many times it's not, or if it is, it's not made publicly

1 available.

2 REPRESENTATIVE MILLER: Yes, and I'm glad you
3 brought up---

4 MAJORITY CHAIRMAN METCALFE: Representative
5 Miller, if we can move on. Other Members have questions if
6 we could move on to another Member's questions.

7 REPRESENTATIVE MILLER: If I can ask one more,
8 Mr. Chairman.

9 MAJORITY CHAIRMAN METCALFE: We have limited time
10 so we can come back to you after we do a second round.

11 Representative Daley.

12 REPRESENTATIVE DALEY: Thank you, Mr. Chairman.

13 I have a question on the piece about agendas
14 also---

15 MS. MELEWSKY: Sure.

16 REPRESENTATIVE DALEY: ---with the requirement
17 that it be available 48 hours in advance. So my experience
18 in local government is that we did make the agendas
19 available but we also only had two meetings a month and one
20 was a work session but that was open to the public; all of
21 our committee meetings were open to the public, and we did
22 have an agenda. We didn't necessarily have them for
23 committee meetings, although some of those met -- so my
24 question is with 48 hours advance, it just seems that with
25 limited number of meetings, I'm not opposed to making

1 information available to the public at all, but I do see
2 this as potentially burdensome. I know it's not part of
3 the law but I would be concerned with that kind of a
4 requirement, especially on some of the smaller
5 municipalities with limited staff that there ends up being
6 a cost involved. So do you have any comment on that?

7 MS. MELEWSKY: Well, I think that if there is
8 cost involved, I think it would be minimal. Most agendas
9 that I see are one page, skeleton, barebones that says,
10 here's what we plan to talk about. There're certainly not
11 anything that's thicker than two pages long. So I think if
12 there is a cost, it would be fairly minimal and I think it
13 would be an appropriate cost of doing business for the
14 public.

15 REPRESENTATIVE DALEY: But the other concern
16 would be with the 48-hour advanced requirement and a
17 limited number of meetings and requirements on setting up
18 new meetings and availability of a volunteer group of
19 elected officials. They're elected, yes, clearly, but with
20 the kind of meeting schedules that is it really tenable to
21 have 48 hours because it could limit a municipality's
22 ability to act on something that comes up within that -- do
23 you see what I'm saying?

24 MS. MELEWSKY: Yes. I think there's certainly
25 room for flexibility. I don't see any reason why there

1 couldn't be a provision that would be added that says if
2 business that is not on the agenda that was added at the
3 last minute could be addressed nonetheless, but we would
4 certainly hope that they would make every effort to get it
5 on the copies that are available at the meeting itself
6 rather than the 48 hours in advance.

7 So I don't think it has to be a hard-and-fast
8 rule that says if it's not on the agenda, you don't take
9 action on it. I don't think that's what we're promoting.

10 REPRESENTATIVE DALEY: All right.

11 MAJORITY CHAIRMAN METCALFE: Thank you,
12 Representative Daley.

13 REPRESENTATIVE DALEY: Thank you.

14 MAJORITY CHAIRMAN METCALFE: You made a lot of
15 comments outside of what the legislation is doing and I
16 appreciate the testimony on that and appreciate the
17 Members' interest in that, but we do have limited time this
18 morning. So we're hoping to vet the Bill and get your
19 suggestions on that and for the Members, if we can kind of
20 keep the conversation more narrowly focused on the
21 legislation before us and the testimony on that Bill,
22 that'll help us to move along through the morning here.

23 Representative Saccone.

24 REPRESENTATIVE SACCONI: Yes. Thank you,
25 Mr. Chairman. And thank you for your testimony.

1 MS. MELEWSKY: Sure.

2 REPRESENTATIVE SACCONI: Just a couple really
3 quick ones. Upon listening to you and upon getting some
4 calls even this past week, when we say verbatim recording,
5 generally we think we know what that means, but what I
6 worry about is recently a municipality, someone from there
7 called me and said, look, we record our public meetings and
8 there are times that when we turn the tape recorder off.
9 And so we say, oh, stop that, and then they carry on a
10 conversation. Then they turn the tape recorder back on.

11 Do you think the language of the Bill needs to be
12 clarified to make sure that it has to be a continuous
13 verbatim or something like that so that they get in
14 executive session and they're not able to say, okay, we
15 know we're recording this but we're going to turn this off
16 now and talk about something and then turn it back on later
17 so that what we get, if it's challenged, is not -- I don't
18 know. Do you think that needs to be tweaked is what I'm
19 saying?

20 MS. MELEWSKY: I think it could be made stronger,
21 but right now it does say "the entire executive session."
22 So I think that gets the point you're trying to make. But
23 I certainly think it could be clarified so that editing is
24 forbidden or prohibited.

25 REPRESENTATIVE SACCONI: Editing, yes, something

1 like that.

2 And the other thing I was going to say is when we
3 talk about these fact-finding and so forth where the public
4 is excluded, I'm just thinking about this since I heard
5 your testimony, might that be a problem with the
6 definition. We say that all the deliberations should be
7 made public and the definition in Section 702 of
8 "deliberation" is the discussion of an agency business held
9 for the purpose of making a decision and that's who they
10 get around it by saying, well, this is fact-finding; we're
11 not making any decisions so we're not deliberating. I'm
12 just asking your opinion. Should we include that in the
13 definition of deliberation or just change the way we look
14 at this?

15 MS. MELEWSKY: I think that's a way you can go
16 but the situation you've just described is exactly what the
17 courts have done in some circumstances. They've said
18 because there's no planned vote or they're not moving
19 towards a scheduled vote that that's not deliberation, but
20 we think the law as it's written now is broader than that
21 because it includes discussions leading up to a decision.

22 So I certainly think the provision can be
23 clarified. Now, the exact language I can't tell you what
24 we would propose at this point but it certainly is
25 something we think could be improved---

1 REPRESENTATIVE SACCONO: Okay.

2 MS. MELEWSKY: ---because when you read the cases
3 that have come down from the Appellate Courts, that is
4 often where the rub is, is the definition of
5 "deliberation."

6 REPRESENTATIVE SACCONO: Thank you.

7 MAJORITY CHAIRMAN METCALFE: Thank you,
8 Representative Saccone.

9 Representative Cohen.

10 MINORITY CHAIRMAN COHEN: Thank you,
11 Mr. Chairman.

12 Now, your proposed changes, the Chairman
13 indicated, go far beyond the scope of Representative
14 Saccone's Bill. You are seeking an omnibus improvement of
15 the Sunshine Act. Is it possible to negotiate your desire
16 to seek an omnibus improved Sunshine Act with
17 Representative Saccone's desire to make limited
18 improvements?

19 MS. MELEWSKY: Well, we couldn't forgo the
20 opportunity to tell you what we think needs to be changed,
21 so I think that's why we brought up many issues, but we're
22 certainly willing to negotiate, absolutely.

23 MINORITY CHAIRMAN COHEN: Okay. Now, do you have
24 any concern about cost to local government? I mean when
25 you create new records, the records have to be stored, the

1 records have to be analyzed, there are Right to Know
2 requests based on the record. Each new record comes
3 inherently with costs involved, and the more records there
4 are, the more costs there are.

5 MS. MELEWSKY: I certainly think cost is a factor
6 that needs to be considered, but when we're talking about
7 public access, we believe cost is appropriate unless they
8 can show evidence of exorbitant amounts of money. And I
9 don't think we're suggesting anything here that is
10 particularly burdensome, especially in light of the fact
11 that many already do make a recording. This would be added
12 onto the recording and many already do make an agenda, but
13 it would be a formal requirement in the law.

14 MINORITY CHAIRMAN COHEN: Well, we have to move
15 on the Chairman said. Just one more question. Are you
16 worried about the problem of three commissioners, in county
17 commissioners or small members where your recommendations,
18 if taken seriously and fully, would stop the commissioners
19 from ever discussing anything by themselves if two or
20 three---

21 MS. MELEWSKY: No.

22 MINORITY CHAIRMAN COHEN: Two commissioners could
23 not meet in a three-member body or---

24 MS. MELEWSKY: Well, if there's a quorum, I think
25 the law clearly addresses the situations where quorums

1 can't discuss agency business outside of public meeting.
2 There are exceptions to this rule, including administrative
3 action, that would allow the meetings that you suggest
4 between two to discuss things that have already been
5 discussed and voted on publicly at a properly advertised
6 public meeting. So I think there's already flexibility in
7 the law to allow that kind of situation.

8 But as far as talking about proposed policy
9 between a quorum, we believe that has to happen at a public
10 meeting.

11 MINORITY CHAIRMAN COHEN: Okay. Thank you very
12 much.

13 MAJORITY CHAIRMAN METCALFE: Thank you,
14 Representative Cohen.

15 Just quickly, during your testimony you indicated
16 you get quite a few calls, so it sounds like there's a lot
17 of examples across the Commonwealth of where people are---

18 MS. MELEWSKY: Yes.

19 MAJORITY CHAIRMAN METCALFE: ---suspecting that
20 the law is being violated in executive sessions.

21 MS. MELEWSKY: Yes.

22 MAJORITY CHAIRMAN METCALFE: And it was brought
23 to me yesterday by someone I talked to that didn't think
24 maybe the penalty was a real deterrent and the penalty
25 being a summary offense with a \$100 fine. It doesn't seem

1 like it's substantive enough.

2 MS. MELEWSKY: Well, it's a minimum of \$100, a
3 maximum of \$1,000 for a first offense, but the bigger
4 problem is actually getting a court to impose that penalty.
5 I think the bigger deterrent would be if the penalties
6 could be more easily imposed because right now it's
7 virtually impossible to get a Sunshine Act conviction on a
8 criminal offense or a positive ruling in the civil context
9 because of the way the courts have interpreted the way the
10 law is written. And it's very difficult.

11 Paula's going to jump in on that as well.

12 MS. KNUDSEN: I just wanted to jump in there
13 because I do think that as you look around this State,
14 there are very few instances of prosecutions here. We have
15 at least four grand juries, Montgomery County, Bucks
16 County, Dauphin County, and Lancaster County, which you
17 should have in your packets---

18 MAJORITY CHAIRMAN METCALFE: Right.

19 MS. KNUDSEN: ---that have called out instances
20 but far fewer instances of these violations are found. And
21 recently, there was an interesting one involving the
22 Honesdale Borough Council where a police officer actually
23 went to court, filed a private criminal complaint against
24 the entire Borough Council alleging violations. And the
25 magisterial district judge there did find the Borough

1 Council members guilty but---

2 MAJORITY CHAIRMAN METCALFE: Was that western
3 Pennsylvania?

4 MS. KNUDSEN: Honesdale Borough up in---

5 MS. MELEWSKY: Northeastern.

6 MAJORITY CHAIRMAN METCALFE: Northeastern, okay.

7 MS. KNUDSEN: Northeastern Pennsylvania.

8 MAJORITY CHAIRMAN METCALFE: I heard another
9 instance out in---

10 MS. KNUDSEN: There's also a current case pending
11 in Beaver County---

12 MAJORITY CHAIRMAN METCALFE: Right. That was the
13 one that I was talking with someone about.

14 MS. KNUDSEN: So here and there, there are
15 violations but I think you're right, that the enforcement
16 and the penalty is---

17 MAJORITY CHAIRMAN METCALFE: I don't think the
18 penalty is a great enough deterrent.

19 MS. KNUDSEN: Yes. So we would support an
20 increased penalty.

21 MAJORITY CHAIRMAN METCALFE: Thank you.

22 Thank you both for your testimony.

23 MS. MELEWSKY: Sure.

24 MAJORITY CHAIRMAN METCALFE: Our next testifier
25 would be Mr. Joseph Strauch, School Board Director with the

1 Lackawanna Trail School District.

2 And, sir, you can join us and begin when ready.

3 Thank you for being here today.

4 Thank you, ladies.

5 MR. STRAUCH: Thank you. Good morning, Chairman
6 Metcalfe, Members of the House State Government Committee,
7 honorable Representatives, and all others present. Thank
8 you for inviting me to today's hearing. I appreciate the
9 opportunity to meet with you and express my enthusiastic
10 support of House Bill 1671 relating to Executive Sessions.

11 I am Joseph Strauch, and since 2011, I have been
12 an elected member of the Board of School Directors of
13 Lackawanna Trail School District that spans Lackawanna and
14 Wyoming Counties in northeast Pennsylvania. Today, I am
15 here to represent my personal opinions and share those of
16 some of my constituents. In no way should my presence or
17 testimony be interpreted as representing any school board,
18 board, or other private or governmental entity.

19 My board convenes typically twice per month at
20 public meetings that average 45 minutes, and again at
21 lengthy executive sessions before and after each public
22 meeting. The minutes of the public meetings do not mention
23 all the executive sessions, nor the reasons for calling
24 them. This has been noticed by the Auditor General Eugene
25 DePasquale. His July audit, Exhibit A, reported that my

1 district repeatedly violated the provisions of the Sunshine
2 Act related to executive sessions. Those violations
3 continue to this day.

4 In my role as Director, I have seen firsthand the
5 importance of enforcing the Sunshine Act. This Act is
6 essential to reassuring the public that they are ultimately
7 in charge of our school district. They must know that
8 every decision made by the board is open to their review
9 and approval, and there is no secret organization that
10 governs behind closed doors. The changes proposed by House
11 Bill 1671 will help in this regard.

12 Before my term began, I attended years of public
13 meetings, often as the only taxpayer in the audience. I
14 felt deprived of witnessing actual deliberations, policy
15 development, and decision-making, and made it my objective
16 to bring transparency to the process. When I tried to
17 encourage my neighbors to join me at meetings to express
18 their interests, the response was typically, "Why bother?"
19 They were convinced it would be a fruitless and frustrating
20 waste of their time. Many of my constituents still believe
21 that decisions are made in secret and then just
22 rubberstamped in public. Their faith in public government
23 has been eroded. This Bill should help to change those
24 beliefs and validate our rich democratic process.

25 One of the problems that I have observed at

1 executive sessions is a culture of doing business in
2 private except that which must be done in public. There is
3 a difficulty in determining whether material is exceptional
4 and allowed at an executive session or not. I have often
5 questioned items on the agenda only to be told that they
6 were allowable. At almost every session it appears that
7 the board diverges from, or extends beyond, an acceptable
8 agenda and possibly enters unapproved territory. When I
9 first questioned that practice, I was told to just "sit
10 down, shut up, and learn from those already on the board."

11 At recent executive sessions the discussions
12 deviated into the effects of general raises for all Act 93
13 employees, how to manage the school lunch program, and the
14 need to post an employee position. At many other sessions,
15 there were significant discussions about how to grant
16 special tax concessions to a business in an Opportunity
17 Zone.

18 A year ago, the board met on two occasions, in
19 private, to interview and select candidates to fill vacated
20 board positions. The same behavior of appointing board
21 members had made the headline in a recent Scranton Times-
22 Tribune article. It said, "a Scranton board member admits
23 the search for a new director was nothing more than a
24 sham." Well, even that sham was more than I saw at my own
25 district.

1 Any discussion with the solicitor for any reason
2 is automatically treated as a valid excuse for a meeting.
3 The list of violations is as extensive as the number of
4 sessions I have attended. One of the most absurd
5 discussions was about which lavatories should be used by
6 employees. But without any minutes or recordings, none of
7 this can be proven and no enforcement is possible.

8 Recently, there was a training session for new
9 board members conducted by the Intermediate Unit servicing
10 northeast Pennsylvania school districts. When the topic of
11 executive sessions arose, there was general agreement that
12 what happens at executive sessions stays at executive
13 session. Essentially, the position was that all
14 discussions at an executive session are considered
15 confidential and should not be divulged to the public. I
16 found that advice to be offensive and, in my opinion,
17 unsubstantiated.

18 With the changes proposed by this Bill,
19 especially the recording of executive sessions, I hope that
20 these problems will be reduced. Page 1 of the Bill,
21 Section 708(a)(1) addresses the purpose of an executive
22 session. The clarification of what may be discussed, with
23 an emphasized use of the qualifier "specific individual,"
24 addresses a weakness of the existing law. When this Bill
25 adds language that discussions must pertain to a specific

1 individual, all doubt will be erased. When it clarifies
2 that all other business related to employment, et cetera,
3 must be conducted at an open meeting, it reinforces the
4 purpose of the Sunshine Act.

5 Under the current law, it is too easy at meetings
6 to discuss the creation of new jobs, contracts, realigning
7 job duties, schedules, luncheon service, or even the
8 financial impact of employing another teacher, coach, or
9 aid. Those topics will now clearly be mandated for public
10 viewing and participation. There will be no gray area as
11 to the appropriate venue.

12 One of the most frequently cited reasons for
13 holding executive sessions is for the discussion of
14 personnel issues. Now it will be clear that those
15 discussions can only be of a specific individual, not a
16 class of employees, not a position, not a posting. I thank
17 Representative Saccone and the cosponsors for this proposed
18 clarification.

19 Adding Point 7 to the exceptions list should be
20 applauded. It is unfortunate that, in this day of
21 increased security needs, we must be so vigilant for the
22 safety of our students. I am not sure that even as a board
23 member I should be privileged to know the inner secrets of
24 a school's security system. In my opinion, only those who
25 must know should know. This subject matter should be both

1 prohibited at public sessions and restricted to only
2 executive sessions or a committee of the board. If
3 possible, it should be more than just an allowable
4 exception.

5 On page 3 of the Bill, Section 708(b) speaks to
6 the procedure of an executive session. I offer my
7 strongest support to the addition of Point 2 on the next
8 page. That point requires the recording of executive
9 sessions. The need for this cannot be overemphasized.

10 Currently, there is no hard evidence available
11 for a challenge in court. When a board member sees a
12 violation carried out, there is no way to provide evidence
13 to a court. Even with sworn testimony, it becomes a
14 contest of oral arguments. If the majority of a board is
15 of a singular mind to violate the Sunshine Act, nothing the
16 remaining members say could stand up against that
17 testimony. A recording of the meeting would change
18 everything. It would provide indisputable evidence of the
19 background to an alleged violation, as well as to the
20 attitudes of those involved.

21 An additional benefit to recording meetings would
22 be that everyone would be well aware of the microphone and
23 the permanence of their remarks. Board members would
24 refrain from foul language, insults, threats, bullying, and
25 intimidation, knowing that such actions are being collected

1 as evidence. Frankly, I was shocked and amazed at my first
2 executive session when some members used the most colorful
3 language to insult those who disagreed with their
4 positions. The lack of civility and the unrestricted,
5 inappropriate comments saturated the room. We all know
6 that people behave differently when they are being watched,
7 so let's watch the boards. It would be nice if there were
8 a part of the Bill to clarify that these recordings be made
9 available to board members for review, in addition to just
10 being maintained.

11 Point 3 requires obtaining legal advice prior to
12 an executive session. That is a great step in the right
13 direction, but I have no faith in the advice of an
14 attorney, who has no skin in the game. All that a board
15 would need to do is ask for advice and their attorney could
16 then provide the requisite approval and the board has an
17 automatic defense to present in court if they are charged
18 with a violation. I've read of many cases that failed to
19 prosecute because of this defense. There must be some way
20 to hold an attorney responsible for incorrect
21 interpretation of the law thereby issuing the board a "get
22 out of jail free" card.

23 I have personally observed executive sessions at
24 which an attorney would direct the board into topics that,
25 by a reasonable reading and interpretation of the Act,

1 should not have been allowed. The most egregious of these
2 sessions was one at which a solicitor initiated and
3 directed a board discussion that focused on closing down a
4 private citizen's website, LTSD.info, that the board felt
5 relayed too much public information about the district.
6 This was never told to the public, probably because the
7 board knew that the public relied on that website and
8 overwhelmingly supported it. But there was no evidence to
9 prove what happened at that executive session.

10 Section 714 is adding a new subsection (c) under
11 penalty for immunity. This could have a profound effect on
12 the willingness of board members to come forth and provide
13 testimony for violations. Without this change, if I were
14 to report a violation to an appropriate authority, I would
15 be incriminating myself as one of the board guilty of the
16 infraction. That would make me think twice about taking
17 action. This barrier to appropriate reporting would be
18 removed by the proposed change. Together, testimony from a
19 board member, substantiated by a recording of the meeting,
20 would be a worthwhile enhancement to the enforcement of the
21 Sunshine Act.

22 Unfortunately, the penalty only applies to the
23 intention to violate the Act. Wouldn't it be better to
24 also apply the penalty to the actual violation rather than
25 just the intention?

1 In summary, I fully endorse this Bill and
2 encourage its approval. Thank you for your attention and
3 the opportunity to speak. At this point I would welcome
4 questions from the committee.

5 MAJORITY CHAIRMAN METCALFE: Thank you, sir. The
6 first question will be from Representative Miller.

7 REPRESENTATIVE MILLER: Thank you, Mr. Chairman.

8 Sir, thank you for coming today. And as someone
9 who's always appreciated the role of school directors, I
10 thank you for your service to your community. All those
11 types of things are very tough and time-consuming so---

12 MR. STRAUCH: Thank you for your service.

13 REPRESENTATIVE MILLER: ---I appreciate that.

14 I also would applaud you. I think that LTSD.info
15 site, that was your site you were referencing, right, sir?

16 MR. STRAUCH: I built it a few years ago because
17 the school district's own site was consistently failing and
18 did not give information.

19 REPRESENTATIVE MILLER: Fair enough. I just
20 wanted to make sure I had the right website. And if I may,
21 I want to applaud you for your efforts to communicate with
22 your citizens. That's a great thing.

23 MR. STRAUCH: When I became a board member, I
24 divested myself of that management of that site, and it
25 is---

1 REPRESENTATIVE MILLER: Okay. Thank you for
2 letting me know.

3 Sir, you made reference to recording, and just so
4 I understand because I did ask the last testifier as well,
5 does your district right now record anything?

6 MR. STRAUCH: I am not aware of the district
7 recording it. We do typically have two reporters from the
8 local paper. They do recordings.

9 REPRESENTATIVE MILLER: Okay.

10 MR. STRAUCH: But I've never heard of any.

11 REPRESENTATIVE MILLER: Okay. So no audio
12 recording as well? Nobody in your district is pressing
13 "record" at any time?

14 MR. STRAUCH: Not that I'm aware of.

15 REPRESENTATIVE MILLER: Okay. And, sir, if I
16 can, I want to go right to actually where my main question
17 is on this Bill, which is in relation to the employment
18 matters. And if I can frame it just real quick and
19 hopefully see your thoughts on it, as written, there is
20 specific language that goes into termination of employment,
21 evaluation of performance matters, promotion discipline.
22 Now, and we know, I'm imagining your district is the same,
23 that there are large parts of school district employees
24 that are unionized that have contracts that would also
25 handle grievance matters and so forth---

1 MR. STRAUCH: Yes, sir.

2 REPRESENTATIVE MILLER: ---with situations that
3 come up, and we know that some employees in the school
4 district perhaps are not unionized given their job
5 classifications and so forth. My overall point is in
6 recognition that some of those employees or perhaps a large
7 degree of those employees would have contracts that would
8 already address such matters. Do you not have a concern
9 that by bringing into public the assessment of whether or
10 not or how an employee themselves functioned, personally
11 directly identifying who that person is, then going through
12 the matters that may have brought them into question, do
13 you not think that that would subject your school district
14 to a variety of other possible legal ramifications by
15 bringing that issue public?

16 MR. STRAUCH: Sir, I did not read that as that
17 meaning. What I saw was that a specific individual could
18 only be spoken about -- that at an executive session, it
19 could only be held for a specific individual. I did not
20 read anything as to the public meetings.

21 REPRESENTATIVE MILLER: All right. Let me
22 rephrase because---

23 MR. STRAUCH: I may have not seen that.

24 REPRESENTATIVE MILLER: ---I want to be sure,
25 maybe I'm getting it wrong. Do you think that talking

1 about somebody perhaps being fired is something that should
2 be done in executive session or not?

3 MR. STRAUCH: I believe that should be restricted
4 to executive session.

5 REPRESENTATIVE MILLER: Okay. Maybe I'm wrong.
6 All right. Thank you very much. I perhaps read it wrong.
7 I appreciate that clarification.

8 MAJORITY CHAIRMAN METCALFE: Thank you,
9 Representative Miller.

10 Representative Roae?

11 REPRESENTATIVE ROAE: Thank you, Mr. Chairman,
12 and thank you, sir, for your testimony.

13 I just have kind of a comment kind of a question.
14 As a school board member, when you feel that there's an
15 executive session that strays into areas that shouldn't be
16 in executive session, that should be in the regular public
17 meeting, have you considered when you go back to the public
18 meeting telling everybody what you talked about? I mean
19 how could they stop you if you said, hey, I just want
20 everybody in the audience to know that we talked about
21 school lunch menus when we were in executive session and
22 that's against the law. And then anybody in the audience
23 would hear it, the media would hear it, the people taking
24 minutes would record it. Have you ever thought about doing
25 that?

1 MR. STRAUCH: Absolutely. And I've done that
2 many times and there's currently a difference of opinion
3 between the rest of the school board and myself as to being
4 able to do that. The rest of the school board and the
5 solicitor insist that every word spoken at an executive
6 session cannot be revealed to the public. And I've been
7 attempting to get that qualified so that only those
8 protected discussions by Federal or State law are
9 restricted, that anything not so protected should be open to
10 the public. But right now, I've been hesitant to reveal
11 anything until this matter is straightened out.

12 REPRESENTATIVE ROAE: All right. Thank you.

13 MAJORITY CHAIRMAN METCALFE: Thank you,
14 Representative Roae.

15 Representative Knowles.

16 REPRESENTATIVE KNOWLES: Thank you, Mr. Chairman,
17 and thank you, sir, for your testimony.

18 As a former local official, I certainly recognize
19 the need for executive sessions. I guess then the problem
20 that we have is because of the abuse that takes place, and
21 I certainly think that we need to make sure that the law is
22 enforced.

23 My question deals with the recording of the
24 executive sessions. And let's remember that the executive
25 sessions could be maybe something that would be necessary

1 or needed by the people that they're talking about, as well
2 as the local government itself. But when you talk about
3 recording executive sessions, I think that if somebody
4 knows that there's a recording going, you're exactly right;
5 they're very careful in terms of what they say. But if we
6 want to get all the information out on the table so that
7 when we go back into the meeting, we can make right
8 decisions, people need to feel free and they need to be
9 able to talk about the matter that's before them.

10 When you say "recording executive sessions," do
11 you mean a designated person such as the secretary
12 recording or do you mean that any member of that group
13 would have the right to pull out their recorder and record
14 it?

15 MR. STRAUCH: That's an excellent question.
16 According to the way I read the law right now at a
17 proposal, that would be typically the job of a secretary or
18 a recording secretary, but according to Section 711, it
19 clearly says that anyone attending a meeting may record it.
20 And I've been trying to resolve that also to mean that I as
21 an executive session member can record my own meeting.

22 REPRESENTATIVE KNOWLES: In executive session?

23 MR. STRAUCH: Yes, sir.

24 REPRESENTATIVE KNOWLES: Does that not somewhat
25 defeat the whole purpose of an executive session? If

1 everybody in that meeting decides that they're going to
2 record, what prevents them from going out and sharing that
3 information that possibly should not be shared and could
4 jeopardize not only the local government but maybe the
5 person who is being discussed in executive session?

6 MR. STRAUCH: Well, that'll be the personal
7 ethics of the person doing those recordings. I know I have
8 memory that is not as specific as a tape recorder would be
9 and I would like to record things and know later on did we
10 exactly say that or am I misinterpreting something that was
11 said? And it would be a memory aid to myself and it would
12 never be divulged to anyone else.

13 REPRESENTATIVE KNOWLES: Mr. Chairman, thank you.
14 And I want to commend Representative Saccone. I'm looking
15 very closely at this legislation, and again, as a former
16 local government official, I recognize the need for
17 executive session but I also know that people are taking
18 advantage of it in situations that there shouldn't be
19 executive session.

20 Thank you, sir.

21 MR. STRAUCH: Thank you.

22 MAJORITY CHAIRMAN METCALFE: Thank you,
23 Representative Knowles.

24 Representative Cohen.

25 MINORITY CHAIRMAN COHEN: Thank you,

1 Mr. Chairman.

2 Are you worried about additional costs at all? I
3 mean I think your points are right that if you have a
4 lawyer who regularly works with the board, he becomes to
5 some degree a bureaucrat and less of an independent judge,
6 but do you say, okay, we're going to get around that?
7 We're going to keep rotating law firms or having additional
8 lawyers added? There's costs involved. You want to
9 document things for lawsuits. Each lawsuit imposes costs.
10 Where do you draw the line in terms of limiting costs here,
11 as well as limiting costs vis-à-vis the flow of
12 information? Do you think no cost is too much to create
13 more information?

14 MR. STRAUCH: I don't see that there is any
15 additional cost other than the cost of purchasing some
16 equipment to do the recording and then transcribing it into
17 some digital media for storage. As far as the additional
18 suits and so forth, that would be responsive to anyone
19 bringing a suit. I don't see any additional cost.

20 MINORITY CHAIRMAN COHEN: But you don't believe
21 there would be additional lawsuits if you have additional
22 information for litigation?

23 MR. STRAUCH: I believe that a lot of lawsuits
24 now have not been filed because people realize that it
25 would be frustrating and no way of enforcing it.

1 MINORITY CHAIRMAN COHEN: And do lawsuits in your
2 mind incur costs to school districts?

3 MR. STRAUCH: Yes, sir, they would incur costs
4 but it would also restrict the behavior of these groups so
5 that we would comply with the Sunshine Act. And once we
6 complied with the Sunshine Act fully, there'd be no need
7 for any court costs.

8 MINORITY CHAIRMAN COHEN: Okay. Thank you very
9 much, Mr. Chairman.

10 MAJORITY CHAIRMAN METCALFE: Thank you,
11 Representative Cohen.

12 For our final question, Representative Saccone.

13 REPRESENTATIVE SACCONI: Thank you, Mr. Chairman.
14 Thank you for your testimony.

15 Do you think that people are afraid to report?
16 Because I get comments about this myself and you can give
17 me your opinion on this. People are afraid to report
18 violations. One reason is because they don't even know who
19 to report it to. It's not clear. Who do I tell? Am I
20 going to call the Attorney General's office? What do I do?
21 How do I report a violation of the Sunshine Act?

22 Do you think we need to clarify how to report and
23 who to report to?

24 MR. STRAUCH: Absolutely. In fact, just last
25 night I was speaking with one of my constituents who said

1 what is the Sunshine Act? We need better public education
2 about what's happening there, what the Act is all about,
3 why it's trying to make information public.

4 As far as how to file, yes, there should be a
5 how-to. It took me quite a while and I did file once with
6 the District Attorney of Wyoming County. And after a
7 lengthy process and it was expensive to the members that
8 were charged with a violation, the judge said "do-over."
9 And that was the only result of that. There was no
10 possible evidence that there was an intention to break the
11 law, so essentially, everyone walked and they just had a
12 "do-over."

13 REPRESENTATIVE SACCONI: Thank you.

14 MAJORITY CHAIRMAN METCALFE: Thank you,
15 Representative Saccone.

16 Thank you, sir, for your testimony today.

17 MR. STRAUCH: It was a pleasure. Thank you.

18 MAJORITY CHAIRMAN METCALFE: I appreciate it.
19 Have a great day.

20 Next, we have Mr. Elam Herr, the Assistant
21 Executive Director of the Pennsylvania State Association of
22 Township Supervisors. And I know Elam has another meeting
23 to get to when he's done with us here, so I appreciate you
24 joining us today.

25 MR. HERR: Yes, sir. I appreciate that. I do

1 have to present another testimony at 25 after 10:00, so
2 I'll try to keep this short.

3 Mr. Chairman, my name is Elam Herr. I am the
4 Assistant Executive Director for the State Association of
5 Township supervisors, and I want to thank you and the
6 Committee for giving me the opportunity to present
7 testimony this morning.

8 I will not read our written testimony. You have
9 that before you and you can read that at your leisure. I
10 will just highlight what our concerns are with House Bill
11 1671. Also, I will keep my comments to the Bill that is
12 before you today.

13 We strongly support the need for transparency in
14 all levels of government. Citizen participation is an
15 essential component of the political system. The current
16 Sunshine law generally strikes a reasonable balance between
17 the public's right to know and the need for private
18 discussions on sensitive issues, particularly those
19 regarding employee issues. It should be noted that local
20 elected and appointed officials are subject to more
21 stringent requirements for open meetings and public
22 participation than the General Assembly itself. In
23 contrast, local government boards must hold deliberations
24 for the purpose of making a decision at an advertised
25 public meeting.

1 In 1987, the Sunshine law was liberalized to the
2 point that all deliberations held for the purpose of making
3 a decision must take place at a public meeting. In
4 essence, there is very little today that a local governing
5 body can discuss outside of a publicly advertised meeting.
6 The Sunshine law must be fair and equitable to all parties
7 involved.

8 House Bill 1671, as written, would impose a
9 significant unfunded mandate on all local governments
10 across the State. Local governments are required to comply
11 with a long list of Federal and State employment laws.
12 There are a host of additional laws protecting certain
13 individuals and employees or classes of employees, and as
14 such, local government boards are often in the spotlight on
15 employment issues.

16 Currently, the law provides a broad umbrella for
17 discussions concerning these issues. We believe that this
18 is the only way to allow a board to function without adding
19 to the risk of lawsuits and the loss of public dollars.

20 House Bill 1671 would significantly narrow the
21 scope of what employment issues may be discussed in an
22 executive session requiring disclosure of the employee or
23 prospective or former employee's name before the executive
24 session could be held, creating the need for a legal
25 opinion prior to holding an executive session, and

1 mandating that these private sessions be recorded. We
2 strongly oppose these provisions as they would
3 significantly increase the expense and risk of litigation
4 while placing the local government boards as employers in a
5 very difficult if not impossible position.

6 Let's play this out. Say that an employee files
7 a harassment complaint with a local government board.
8 Before an executive session could be conducted, a record, a
9 legal opinion, would have to be created. In addition, the
10 board would have to disclose that they were going into an
11 executive session to discuss employment issues related to
12 the individual submitting the complaint and the alleged
13 perpetrator, which may lead both employees to the
14 conclusion that the harassment issue will be discussed,
15 which may lead the perpetrator to retaliate against the
16 harassed employee, thus creating an even larger legal
17 problem for the local government. Finally, the board would
18 have to record the executive session and retain the
19 recording for a year. If a lawsuit is filed by either
20 employee, the recording and other documents would likely be
21 "discoverable" and could lead to a financial judgment
22 against the municipality. This is just one example. I
23 have provided others in the written testimony.

24 The entire nature of an executive session is a
25 commonsense provision that allows local government to have

1 a legal private meeting to discuss limited matters of a
2 very sensitive nature. The law clearly lists the existing
3 reasons for holding such a meeting and we support the
4 current language. A requirement to record these meetings
5 would completely eliminate any purpose for holding such a
6 meeting as any recording would likely be considered a
7 public record under the current Right to Know law. If the
8 recording of the meeting constitutes a public record, then
9 the executive session would no longer be private. This
10 provision would effectively eliminate the ability to hold
11 an executive session and place governing boards in a
12 tenuous situation of being required to discuss every
13 sensitive issue in public, thus making it impossible to
14 conduct business, such as to interview employees, discuss
15 hiring of employees, discuss litigation strategies, plan
16 arbitration negotiation strategies, and the list goes on.

17 Even if these records were not considered public
18 records, attorneys would know they exist. Any job
19 applicant who was not hired would attempt to acquire the
20 tapes to determine and prove that they were not hired for
21 an illegal reason so as to sue the township. Any employee
22 who was disciplined or dismissed would obtain the
23 recordings looking for evidence that a board member said
24 the wrong thing. Opposing attorneys would certainly be
25 interested in acquiring the tapes of any discussions

1 between the board and its attorney concerning litigation
2 strategy.

3 Also, the provision to obtain legal advice from
4 legal counsel before each and every executive session that
5 may be held would only serve to increase legal fees because
6 every board would be forced to obtain every opinion in
7 writing. In addition, there is a question of whether this
8 legal opinion would be subject to the Right to Know law.
9 While the attorney-client privilege may protect these
10 documents, how else could a board prove that it followed
11 this requirement? Even if the opinion is protected under
12 the Right-to-Know law, it would certainly be discoverable
13 during the course of legal action.

14 We are deeply concerned that the provisions in
15 this Bill would go against common sense and create an
16 unprecedented liability exposure for the local governments
17 to the point where it would make it nearly, if not truly,
18 impossible to govern and would create disincentives for
19 individuals to run for public office. Requiring boards to
20 create documentation of their most sensitive conversations
21 simply serves to unnecessarily place our elected officials
22 in the spotlight and make it easy for lawyers to find
23 ammunition for a lawsuit.

24 Finally, we can support the security and
25 emergency preparedness executive session language that's in

1 the Bill. However, we are concerned that this provision
2 would not be useful if the session must be recorded and
3 legal opinion is needed before the executive session may be
4 held, which could lead to sensitive information being made
5 public.

6 Mr. Chairman, I want to thank you for giving me
7 this opportunity and I will try to answer any questions you
8 may have.

9 MAJORITY CHAIRMAN METCALFE: Thank you. Our
10 first question from Representative Miller.

11 REPRESENTATIVE MILLER: Thank you again,
12 Mr. Chairman, and thank you, sir, for your testimony today.
13 I'll try and be real quick here for you.

14 Sir, it's always been my understanding that
15 executive session itself was an exercise in "may" not
16 "shall," meaning that if a commission wished to bring any
17 item to the public arena, they already had that right to do
18 so whether their counsel agreed to do it or not.

19 MR. HERR: Correct.

20 REPRESENTATIVE MILLER: I'm correct with that,
21 right?

22 MR. HERR: Correct. Executive sessions are a
23 "may" provision if needed and they're limited to the seven,
24 I guess, that are in the law.

25 REPRESENTATIVE MILLER: Okay. I want to first

1 real quick focus on -- you did read the Bill, I'm sure,
2 today, right?

3 MR. HERR: Correct.

4 REPRESENTATIVE MILLER: Okay. In the beginning
5 of course I recognize in 708(a) the language is "may," and
6 I would appreciate this response and for helping me
7 understand an area of confusion that I had. (a)(1) talks
8 about an individual employee's I'll say privacy concerns
9 right there. At the end of (a)(1) it makes reference to
10 all other agency business relating to the same items in
11 essence that are referenced earlier in that section. And
12 thanks to the sponsor, I was able to understand that that's
13 to basically talk about not the individual person's
14 employment status but the policies to which employees are
15 governed. And those are my words, not the sponsor's. Do
16 you see any confusion? Am I wrong in finding initial
17 confusion there or is there any language that you think or
18 perhaps if you see any that you think would help specify or
19 clarify that should this become law? It's the personnel
20 matters, not the individual to which the end of (a)(1) is
21 referencing to?

22 MR. HERR: I would disagree with you somewhat. I
23 think in the beginning you are talking about an individual,
24 but when you get into the other employment matters,
25 especially when you get into collective bargaining with

1 groups, which actually does set up some of the procedure
2 process, there are other statutes out there that we have to
3 follow in those instances. And I think the way this is
4 written, those matters would be out in public and we could
5 not put them in executive session.

6 REPRESENTATIVE MILLER: Okay. So you don't see
7 confusion? That's what I'm looking for.

8 MR. HERR: Yes. I don't see the confusion.

9 REPRESENTATIVE MILLER: Okay. Great. So I'm
10 sure it's my limitations. So thank you for clarifying
11 that. I wanted to know.

12 Let me ask you, you said cost as a concern, and
13 again I reference how my town has -- I know the cost that
14 we did for our video system. That was more elaborate than
15 most. And let's assume that I were to agree with the
16 executive session recording, but do you honestly see an
17 audio recording as a large cost encumbrance upon localities
18 to maintain for a year?

19 MR. HERR: The actual recording using whatever
20 kind of device, a tape recorder, whatever, will not be that
21 much of a cost. It's what goes along with that. Once you
22 have a record, I think you were the one asking earlier
23 about recording of regular minutes, if a municipality or
24 political subdivision records under the present law and
25 it's used for personal matters, it is not open for public.

1 But once a municipality records, if they keep it, it is a
2 public document. It can be searched. It can also then,
3 especially in this type of situation with personnel
4 matters, it could be "discoverable." That's when the
5 attorneys get involved. That's when the cost comes into
6 play.

7 MAJORITY CHAIRMAN METCALFE: Representative
8 Miller, we do need to move on. You've asked a couple
9 questions. We'll come back to you if we have a second
10 round if you don't mind there.

11 REPRESENTATIVE MILLER: Thank you.

12 MAJORITY CHAIRMAN METCALFE: Representative
13 Gabler.

14 REPRESENTATIVE GABLER: Thank you. And I
15 appreciate the testimony and the understanding. And I
16 think you've identified a number of things in the Bill that
17 may transpire as unintended consequences.

18 So I just wanted to get your opinion on one thing
19 that you mentioned, ambiguity as to whether or not some of
20 these records in executive session would be able to be
21 requested under the Right to Know law. Do you think it
22 would be possible to draft language to the Bill that would
23 fix and ameliorate some of your concerns with regard to
24 unintended consequences?

25 MR. HERR: I cannot answer that question. I'd

1 have to talk to our legal counsel. I never try to second-
2 guess what the courts do.

3 REPRESENTATIVE GABLER: Thank you.

4 MAJORITY CHAIRMAN METCALFE: Thank you,
5 Representative Gabler.

6 We'd appreciate hearing back from you on that
7 question if you're able to chat with your---

8 MR. HERR: I will do that.

9 MAJORITY CHAIRMAN METCALFE: ---legal staff.

10 MR. HERR: And I will get back to both staffs.

11 MAJORITY CHAIRMAN METCALFE: Thank you. Thank
12 you.

13 Representative Maloney.

14 REPRESENTATIVE MALONEY: Thank you, Mr. Chairman.
15 I apologize for having to get out. I had a Bill voted in
16 the Senate and I really wanted to get back here, but I
17 apologize for missing the last testifier, too.

18 But there's a lot in this and, Elam, I know you
19 stated several concerns and you talked about the cost and
20 that the advertising -- and I think you wrote in your
21 testimony that in essence there is very little today that a
22 local governing body can discuss outside of a publicly
23 addressed meeting. Well, I think in practicality, you're
24 probably right, but in reality, that's not what happens. I
25 am a former school board director, was in many an executive

1 session, dealt with many a township board, and was very
2 much on the negative side of the treatment with executive
3 session.

4 When two township supervisors out of a second-
5 class township decide to meet for breakfast and they
6 discuss all the matters that are going to take place in the
7 township meeting, how do we address that?

8 MR. HERR: I'm not sure this legislation would
9 address that. That is against the law. It's always
10 difficult even if they're not addressing any township
11 meeting, there's always that assumption that if two
12 township supervisors or two county commissioners meet
13 somewhere, they're talking "business." There's nothing you
14 can do unless you totally wire them 24 hours a day to make
15 sure that they don't. The law says they are not to do it.

16 If it is found that they are violating, there are
17 means to address that. That's even outside of what is
18 discussed here as far as the executive session.

19 REPRESENTATIVE MALONEY: I appreciate that and
20 you're right. I think my point was to make a little bit of
21 a comment to what you really basically stated as to the
22 strict requirements. We have supervisors making decisions
23 on sewage plants, making decisions on -- I'll give you an
24 example. I'm very privy to a township near me that I
25 happen to now end up representing. They are bankrupt with

1 a sewage decision that was made and now every resident of
2 that township is paying the bill because those supervisors
3 were legally given the ability to sign the \$20 million
4 note.

5 Now, my thought is if that was out in the public
6 letting the public know what they're hearing in executive
7 session about what the cost is going to be when we talk
8 about cost, that would be a concern of mine and I thought
9 I'd bring that up with respect to when you say that these
10 things will cost the township in litigation and so on.

11 MAJORITY CHAIRMAN METCALFE: Thank you,
12 Representative Maloney.

13 REPRESENTATIVE MALONEY: Thank you.

14 MAJORITY CHAIRMAN METCALFE: Representative
15 Cohen.

16 MINORITY CHAIRMAN COHEN: Thank you.

17 Mr. Herr, do you have any figures as to the legal
18 costs of the Right to Know legislation or the Sunshine Act
19 so far under current laws?

20 MR. HERR: No, I do not.

21 MINORITY CHAIRMAN COHEN: Do you have the sense
22 that it's increasing over time or no sense at all?

23 MR. HERR: I cannot give you an honest answer
24 there. We only hear, as a previous speaker said, when
25 questions are asked of us, particularly if they're being

1 challenged or whatever. But the end result is that it's a
2 cost of your legal counsel; it's a cost of court filings
3 and everything that goes with it. On an individual case,
4 that varies substantially. I do not think any State agency
5 or any other agency keeps track of total cost of those two
6 Acts.

7 MINORITY CHAIRMAN COHEN: Okay. Thank you very
8 much.

9 MAJORITY CHAIRMAN METCALFE: Thank you,
10 Representative Cohen.

11 Representative Saccone.

12 REPRESENTATIVE SACCONI: Thank you, Mr. Chairman.

13 I just want to clarify the recording of the
14 executive session is for the determination of a violation
15 alone, and it shouldn't be used for any other purpose. And
16 I think that we can get wording to clarify that to make
17 sure that that's what it's used for. So I'm confident we
18 can do that.

19 I'm really disturbed. I just have to make one
20 more comment and you can comment on this if you'd like.
21 But even since I've introduced this Bill, lots of elected
22 officials have called me and said they don't like it
23 because they like to be able to go into executive session
24 and talk about things in private. And so the fact that we
25 have so many violations reported across this State,

1 literally in the thousands, tells you that we have a
2 problem with this and we need to address it. The cost
3 thing I just think is a red herring because everybody has a
4 tape recorder these days. That's not a cost. If you're
5 going to say the cost of litigation, okay, fine. I think
6 having these recordings will curb the violations and we'll
7 actually have fewer lawsuits. But I do appreciate your
8 testimony. I just wanted to clarify a couple of those
9 things.

10 Thank you, Mr. Chairman.

11 MAJORITY CHAIRMAN METCALFE: Thank you,
12 Representative Saccone.

13 Representative Miller, do you have a final
14 question for us?

15 MR. HERR: You caught him off guard.

16 MAJORITY CHAIRMAN METCALFE: We have a minute or
17 two you could go ahead and ask that if you'd like.

18 REPRESENTATIVE MILLER: Yes. Oh, I'm sorry.
19 Thank you, Mr. Chairman.

20 Sir, one quick thing, I guess I was under the
21 impression, and again, I'm referring back to my experience;
22 I know we have a bunch of previous local officials as well.
23 But with executive session topics, aren't the executive
24 session topics -- I forget; it was you directly who may
25 have said about a particular law suit, for example. I was

1 under the impression that the municipality, for example,
2 had to make reference to what the executive session was
3 actually about. So, for example, they wouldn't say we're
4 being sued with a great detail about what the lawsuit
5 matter is in a way that would somehow impede advice from
6 counsel and so forth, but they would say we discuss a
7 litigation matter generally on A, B, or C. Am I wrong with
8 that?

9 MR. HERR: No, you're basically correct. Under
10 the law it says that you must state before, during, or
11 after a meeting that you're going to or have had an
12 executive session, and you must state when it was or when
13 it will be and what the subject matter is to be discussed.
14 And it has to be one of those. And I think the list is
15 seven topics.

16 REPRESENTATIVE MILLER: Okay. And since that's
17 accurate, somebody had made reference earlier that there's
18 no law that says you have to do an agenda. And again, I'm
19 imagining that the subject of executive session could be
20 something added to an agenda or I guess could be verbally
21 done. But are you under the impression that nobody has to
22 conduct or write down or present an agenda to the public?
23 Is that your understanding?

24 MR. HERR: From an executive session, no, but
25 what has to be is why you stated before, during, or after

1 is that it's added to the agency's official minutes so that
2 it will be recorded there that X, Y, Z township met
3 whatever date to discuss personnel issues, police
4 bargaining contract. And then that would be in the minutes
5 of either that meeting or the next meeting when it was ever
6 stated.

7 REPRESENTATIVE MILLER: Thank you, sir.

8 Thank you, Mr. Chairman.

9 MAJORITY CHAIRMAN METCALFE: Thank you,
10 Representative Miller.

11 Thank you, sir, for your testimony today.

12 MR. HERR: Thank you. And please forgive me for
13 rushing out.

14 MAJORITY CHAIRMAN METCALFE: No problem. Have a
15 great day.

16 Our next testifier will be the Executive Director
17 of the Pennsylvania Freedom of Information Coalition,
18 Ms. Kim de Bourbon. And we are ready for you to begin when
19 you're ready, ma'am.

20 MS. DE BOURBON: Thank you. Thank you for
21 inviting me.

22 My name is Kim de Bourbon, and I'm Executive
23 Director of the Pennsylvania Freedom of Information
24 Coalition. We're a nonprofit educational group, and
25 basically our purpose is to help people understand and use

1 the State's open records and open meetings law. We support
2 transparency at all levels of State and local government.

3 The reason we even exist is to promote good
4 citizenship by helping people stay informed of what their
5 governments are doing, and on a practical matter, we
6 present public information sessions across the State and
7 our primary resource is our website. We have an Open
8 Government Forum, which is one of the main things I do.
9 It's basically an online bulletin board. People can get on
10 there and post their questions about the open records and
11 open meetings law. And I try to answer to the best of my
12 ability. I'm not a lawyer but I come at this and our group
13 comes at this from the regular-person perspective. We
14 think it's incredibly important that regular people
15 understand and use the law and are aided by the law.

16 So when you get a moment, get onto our forum and
17 you can look through the posts. We have an open records
18 section and an open meetings section. And you can gain
19 some insight into what the average citizen faces when
20 confronted with public officials who meet behind closed
21 doors too often only to come out and they may take a vote
22 but there's absolutely no discussion in public often on
23 everything from staffing matters to major purchases with
24 little or no public discussion or debate.

25 You will also see in our forum that the questions

1 and the complaints we get are not always from members of
2 the public. Often, elected officials will find themselves
3 in the minority opinion, especially in small townships
4 where there's only three supervisors, and they often find
5 themselves on the outs when it comes to public meetings.

6 Here are just a few examples from our forum: "Is
7 it permissible for commissioners to stay in the back room
8 after the executive session has ended and some of the
9 commissioners have left? Many times there's a quorum in
10 the room after the executive session has officially ended.
11 I am concerned as a commissioner as to the discussion that
12 occurred after I leave. I feel some stay to plan things
13 out of the presence of all commissioners."

14 Here's another one from a school board member who
15 said that he had "fought repeatedly to force the board to
16 obey the Sunshine Act. Just this week the board president
17 suggested scheduling a closed meeting. She wanted to have
18 a closed meeting where board members would work to create
19 goals for the district," clearly not a permitted use of
20 executive session.

21 We do hear sometimes of what we would consider
22 willful defiance of the Sunshine Act, but more often, I
23 think my gut reaction is that it's a case of simple
24 ignorance or it's long-standing misunderstanding of the law
25 on the part of the board or even its solicitor, which is

1 why not too enthused about the amendment, although it's
2 well-intended, that mandates legal counsel before executive
3 sessions because we don't think it would really provide the
4 result you intend.

5 We often tell citizens to print out the State's
6 Open Meetings Guidebook. This is available as a .pdf from
7 the State and we also have it on our website, and it's just
8 a very simple guidebook. But often, we find this is a
9 helpful tool. They have something from the State they can
10 print out and show because there's a lot of ignorance out
11 there about how the law is supposed to work.

12 As mentioned previously, one critical issue which
13 HB 1671 doesn't do enough to address is the power that
14 agencies have assumed to simply ignore the law or adopt
15 what we call a "so, make us" attitude. A citizen comes up,
16 complains, hey, you're not supposed to be meeting in
17 private on this; you're not open enough, and it's just they
18 sit back, well, okay. So make us. Because there's very
19 little the public can do.

20 Unlike the new Right to Know law, the Sunshine
21 Act, as has been discussed, provides no simple enforcement
22 mechanisms. The citizens who think their government should
23 be more transparent have no real recourses. We urge them
24 to try persuasion, to be polite but persistent to try to
25 explain how the law is supposed to work and why it's

1 important. But if that doesn't work, all they can do is
2 file a court complaint to try to make an agency change its
3 secretive ways. And the bottom line is we don't think
4 citizens should have to go to court just to make the law
5 work, which is the way it exists today.

6 We're especially concerned with a recent Supreme
7 Court decision upholding a Commonwealth Court decision in
8 *Smith v. Township of Richmond*, which seems to allow the
9 board to meet behind closed doors for non-deliberative
10 discussions. This business of deliberation, what's
11 deliberation and not deliberation, is a real problem. Some
12 are very tightly interpreting it to mean, well, if you're
13 not having a discussion about a vote that's about to
14 happen, then it's okay to discuss it in private. We don't
15 think that's true. We think this is in direct opposition
16 to the very idea of what openness should be.

17 So we think this definition of deliberation
18 should be revisited and refined to allow for greater
19 transparency and to make it clear that informational
20 meetings and briefings must be open to the public. As also
21 has been noted, this issue is especially difficult because
22 the burden of proving the deliberations took place behind
23 closed doors is always on the plaintiff, the person
24 complaining, because even if deliberative discussions do
25 take place illegally, the current law maintains this overly

1 lenient "no harm, no foul" approach basically allowing that
2 even if you could prove that a decision was agreed upon
3 improperly behind closed doors, there's no legal violation
4 as long as the vote on the matter is later made in a public
5 meeting.

6 We believe the law can be improved with a stated
7 presumption of openness such as what is written in the new
8 Right to Know law that makes it clear the legislative
9 intent that a government agency's business, all of a
10 government agency's business, should be discussed and
11 enacted openly with rare exception.

12 In any case, I respectfully ask and our group
13 respectfully asks that you remember that the premise of the
14 Sunshine Act is to make the government more transparent and
15 its officials and agencies more accountable for their
16 actions by having their discussions and debate in public.
17 We ask the Committee to therefore please give careful
18 consideration not only to the amendments proposed in this
19 Bill but to all parts of the Sunshine Act and to listen to
20 all sides and to give extra consideration on behalf of
21 citizens for whom the law was written. And we ask that you
22 always keep the public's right to know in mind.

23 In my written testimony we go over the points in
24 the proposal. I'll just highlight them real briefly. We
25 think refining the personnel exemption to make clear that

1 executive sessions are permissible to discuss only specific
2 individuals is an excellent change. Too often, boards are
3 just citing personnel. We just discussed about when a
4 board goes into an executive session or has, they're
5 supposed to announce the reason why. So often, all they
6 just say is "personnel matter" or "legal matter" and the
7 courts have determined that's not enough, that you have to
8 be more specific. But they are using the personnel
9 exemption right now to discuss everything from wide-ranging
10 staffing decisions or layoffs and cutbacks, and that's not
11 the intent of the provision.

12 We do find the addition of the emergency
13 preparedness exemption a little problematic. We're all
14 concerned with homeland security but the phrase "reasonably
15 likely" is open to wide interpretation. In our experience,
16 people use these kind of exceptions to claim there is a
17 chance, you know, it could happen that this and this and
18 this could happen. But often, that chance is so infinitely
19 small, it's practically nonexistent. So we think like the
20 public has a right to know what the evacuation plans are
21 and what the security measures are to protect them without
22 going into the details of the blueprints or the code words
23 that make the system work.

24 We do agree with the amendment requiring
25 executive sessions to be recorded. We think this is

1 essential. Contrary to previous testimony, I mean right
2 now the Right to Know law specifically excludes any minutes
3 taken at an executive session, so any recording an
4 executive session would also not be a matter of public
5 record. It simply is a tool to deter boards from
6 discussing matters behind closed doors that they're not
7 supposed to, as well as providing a path to judicial
8 enforcement. We do think that you could clarify it a bit
9 by specifically allowing a court to review this recording
10 when a claimed violation is filed.

11 I mentioned the provision requiring a legal
12 opinion every time a board would like to hold an executive
13 session. It seems like a good idea but we don't really
14 feel it's going to be all that useful. Ultimately, that
15 amendment would be meaningless if the board solicitor is
16 not working to protect the public and its right to
17 government openness. So we think this is going to be the
18 case too often to really endorse that change.

19 Some other things very quickly we think that
20 needs to be fixed, strengthening the public participation
21 provision to make sure everyone gets a fair comment to make
22 meaningful comment. While agencies must be allowed to
23 establish rules for orderly conduct of their meetings, they
24 have to be prohibited from requiring residents to register
25 ahead of time.

1 We talked about agendas. It's often baffling to
2 people when I say there's no requirement for an agenda. We
3 think that's easy enough to do.

4 And, most importantly, provide better enforcement
5 mechanisms. Penalties were increased two years ago but
6 these higher penalties are meaningless when the violations
7 are so impossible to prove.

8 Recording executive sessions is a good step in
9 the right direction but more needs to be done.

10 And that's it for me.

11 MAJORITY CHAIRMAN METCALFE: Thank you, ma'am.

12 Representative Gabler, question.

13 REPRESENTATIVE GABLER: Thank you very much. I
14 appreciate your testimony.

15 I wanted to ask your opinion on exactly how you
16 view the specific individual amendment working. Mr. Herr
17 had mentioned in his testimony -- I think in the written; I
18 don't think he had said it verbally -- but one of the
19 concerns that was raised in his testimony was the idea what
20 if you have an employee of a municipal organization that is
21 suspected of stealing? And if there would be an executive
22 session and the counsel would have to say we're going to
23 have an executive session to talk about personnel matters
24 related to Mr. Jones. Well, now, Mr. Jones is going to
25 know they're on to me and it's going to give him the red

1 flag to destroy whatever evidence he might have of himself.
2 Do you think that the specific individual to whom is being
3 discussed, do you think that name needs to be disclosed?

4 MS. DE BOURBON: No.

5 REPRESENTATIVE GABLER: Okay.

6 MS. DE BOURBON: And the current law and the
7 court readings don't provide that either when describing
8 the purpose of the meeting. It just basically needs to be
9 specific enough so people know there's a real discreet
10 thing being discussed. So you would say a personnel matter
11 to discuss a disciplinary measure with an individual. I
12 don't think anyone's recommending we have to name anybody.

13 REPRESENTATIVE GABLER: Okay. Thank you.

14 MAJORITY CHAIRMAN METCALFE: Thank you,
15 Representative Gabler.

16 Representative Cohen.

17 MINORITY CHAIRMAN COHEN: Thank you.

18 You said the extra penalties are meaningless
19 without adequate enforcement. If we made some of the
20 changes, would it be okay to go back to the old penalties?

21 MS. DE BOURBON: Well, I don't think we need to
22 go backwards.

23 MINORITY CHAIRMAN COHEN: You just said they were
24 meaningless.

25 MS. DE BOURBON: Well, they're relatively

1 meaningless because enforcement is all but impossible for
2 anybody to enact. Because people have to go to court; you
3 have to file a court complaint. The Right to Know law, at
4 least we have the Open Records Office. There are problems
5 there as well, but at least there's someone to go to other
6 than having to hire a lawyer and go to court just to get a
7 government agency to meet the way it's supposed to.

8 MINORITY CHAIRMAN COHEN: It seems to me the more
9 the penalties there are, the more the litigation there are
10 and the penalties themselves then become an obstacle to
11 getting what you want because people feel they have to
12 defend their own actions to avoid the penalties.

13 MS. DE BOURBON: The problem is we have too many
14 lawyers. That's really what it is. Yes.

15 MINORITY CHAIRMAN COHEN: That's right and we
16 are---

17 MS. DE BOURBON: Apologies to the lawyers.

18 MINORITY CHAIRMAN COHEN: We're going to have
19 more lawyers.

20 MS. DE BOURBON: Yes.

21 MINORITY CHAIRMAN COHEN: Those of us on the
22 Committee who are lawyers can look forward to great legal
23 careers after serving in the Legislature because of all
24 this.

25 MAJORITY CHAIRMAN METCALFE: So we should pass

1 that immediately, Mark.

2 Representative Saccone.

3 REPRESENTATIVE SACCONI: Thank you, Mr. Chairman.

4 Just let me clarify that point. I don't look at
5 it that way at all. I look at penalties as not an obstacle
6 but a deterrent. Right now, people tell me, so what?
7 That's a \$25 fine or a \$100 fine? You know, go ahead. Sue
8 me. If they know that there's a severe penalty for
9 violating an executive session mandate, then they're going
10 to be very much more careful.

11 I wanted you to comment one more time, give me a
12 chance to convince you here about the advice of legal
13 counsel. The way I look at it and my thinking on this
14 might change your mind a little bit. I think when a
15 solicitor has to put that decision on the record, then
16 they're going to be much more careful because their
17 competence will be on the line if challenged.

18 So in the case of your example if the board wants
19 to go into executive session to talk about the goals of the
20 district and you say, Mr. Solicitor, is this a legal
21 purpose for executive session? He says, oh, yes, this is a
22 legal purpose. And then that's on the recording and it's
23 challenged and a judge says, what? We got a lawyer here
24 that doesn't know that this is -- his competence is going
25 to be on the line. That's where I see this going, not that

1 you don't have solicitors out there that are ignorant of
2 the law; I see them all the time. But it will cause them
3 to be more meticulous in their decision-making when that
4 decision will be on the record. Does that help clarify for
5 you?

6 MS. DE BOURBON: Yes. Yes, I mean I do
7 sympathize if this is going to require a legal opinion
8 that's going to take them days to write down and bill by
9 the hour for, but assuming most solicitors are at public
10 meetings where they're about to go into executive session
11 and they can be consulted quickly, yes. Like I said, it's
12 very well intended. There's probably no harm in doing it.
13 I'm just, I guess, cynical about solicitors, not that there
14 aren't a lot of really good ones out there who are really
15 supportive. It's just there are a lot we see that just
16 don't know the law.

17 REPRESENTATIVE SACCONI: Thank you.

18 MAJORITY CHAIRMAN METCALFE: Thank you,
19 Representative Saccone.

20 Thank you very much for your testimony today,
21 ma'am.

22 MS. DE BOURBON: Is that it? Okay.

23 MAJORITY CHAIRMAN METCALFE: Ma'am, we have one
24 more question.

25 Representative Maloney.

1 REPRESENTATIVE MALONEY: I'm sorry, Mr. Chairman.

2 On Representative Saccone's point, how about the
3 other side of that where, with respect to a solicitor's
4 advice being good quite frankly but it being---

5 MS. DE BOURBON: Ignored?

6 REPRESENTATIVE MALONEY: ---ignored?

7 MS. DE BOURBON: Yes. Yes.

8 REPRESENTATIVE MALONEY: All right. Just a
9 point.

10 MS. DE BOURBON: Yes. That is a good point.

11 REPRESENTATIVE MALONEY: I've been there,
12 experienced it so he raised a really good point and I just
13 thought it would be important even for the defense of the
14 solicitor for that fact---

15 MS. DE BOURBON: Yes.

16 REPRESENTATIVE MALONEY: ---that that man could
17 say, look, I told you so.

18 MS. DE BOURBON: Right. Right.

19 REPRESENTATIVE MALONEY: Thank you.

20 MAJORITY CHAIRMAN METCALFE: Maybe just an
21 additional point.

22 MS. DE BOURBON: Sure.

23 MAJORITY CHAIRMAN METCALFE: I don't know if it's
24 been a complaint that's been made to your organization or
25 not but one that I think may be an issue out in my area of

1 the State where township supervisors say or school board
2 members might utilize either a township manager or a school
3 superintendent for their conduit to conversations with the
4 other board members and other supervisors to line up votes
5 amongst their majority needed before they go to a public
6 meeting, thereby kind of using a loophole around the
7 executive session---

8 MS. DE BOURBON: Yes.

9 MAJORITY CHAIRMAN METCALFE: ---the Sunshine law
10 and not even going into executive session. But I've heard
11 of instances where there's two of five supervisors meeting
12 with a township manager in my area prior to a meeting and
13 other supervisors that are not privy to the same
14 information that may be given out to these meetings where
15 they don't have a quorum but they're certainly discussing
16 the things that should be -- have you had any complaints
17 made like that?

18 MS. DE BOURBON: It's easier than ever to do this
19 now, but as I often tell people, you can't legislate
20 against bad behavior. I mean there are always going to be
21 ways. With the Right to Know law, for instance, we
22 establish the records are open but there's nothing about
23 phone calls. I mean people have always been able to meet
24 in diners, make phone calls. None of that is really
25 accessible in any way. It's behavior that shouldn't

1 happen. But there are all kinds of ways. We've heard of
2 instances at a public meeting where board members are text
3 messaging each other. That's certainly not covered in any
4 kind of -- I mean if you want to do it, there are ways to
5 do it.

6 MAJORITY CHAIRMAN METCALFE: Which was brought up
7 in earlier testimony about addressing the use of technology
8 to skirt the law.

9 MS. DE BOURBON: But obviously technology really
10 should make things -- we've heard a lot about the expense
11 and the burden of the expense to agencies. In this day and
12 age, I mean putting .pdfs online doesn't cost anything.
13 Electronic recording devices, you don't even have to keep
14 copies of physical tapes. That can all be stored
15 electronically. The cost is really minimal.

16 MAJORITY CHAIRMAN METCALFE: Right. Thank you,
17 ma'am.

18 MS. DE BOURBON: Yes.

19 MAJORITY CHAIRMAN METCALFE: Have a great day.

20 Our next testifier and our final testifier for
21 this hearing today is Mr. Robert Rolley. He's a Publisher
22 with The Express out of Lock Haven, Pennsylvania. Sir,
23 we're ready for you to begin once you're ready to start.
24 So thank you for being with us today.

25 MR. ROLLEY: Thank you. You need to know I

1 haven't been here since sixth grade, so I am humbled.

2 MAJORITY CHAIRMAN METCALFE: Welcome back and you
3 might want to catch a tour after you're done. It's not
4 changed a whole lot since then, but I'm sure you would
5 gather additional information you didn't receive when you
6 were in sixth grade. So thanks for being here today.

7 MR. ROLLEY: Thanks. In terms of the opinions,
8 interpretations of the amendments to House Bill 1671, my
9 views would parallel the Pennsylvania NewsMedia
10 Association. I'm here sort of as a reporter representing a
11 newspaper that did some investigation into practices by
12 governmental bodies in regard to the Sunshine law. And my
13 testimony is relatively brief.

14 But thanks, Chairman Metcalfe and Representative
15 Saccone, for inviting me to offer remarks and just to talk
16 about transparency in government in general.

17 I'm publisher of The Express, a 132-year-old
18 community newspaper serving about 10,000 daily print
19 edition readers and thousands more at LockHaven.com. Our
20 market includes all of Clinton County and portions of
21 Centre and Lycoming Counties in central Pennsylvania.
22 We're based in Lock Haven.

23 I've worked for the newspaper industry for about
24 30 years, carrier, reporter, editor, and also was interim
25 publisher of the Williamsport Sun-Gazette for a couple

1 years.

2 I've learned that among the newspaper's most
3 important jobs is being a watchdog of local governments so
4 the taxpayers and constituents are properly and accurately
5 informed about how their money is being invested.

6 For some context, Clinton County is very rural.
7 Seventy percent of the county is State forestland but it
8 does have about 30 municipalities, city, several boroughs,
9 and a bunch of second-class townships, some with few
10 permanent residents, so very rural.

11 When it comes to local government, there are a
12 lot of good public servants. It's important that I say
13 that; I know many of them. That's partly why my mission,
14 and that of the newspaper where I work, is to always be
15 credible, accurate, objective, and have integrity. We work
16 to be a consensus builder amid what I see is a growing
17 culture where opinion and perceptions are narrated as fact.

18 In the scheme of making decisions about money,
19 people, policies, and everything that goes with governing,
20 I see too many examples of what I'll politely call a lack
21 of proper protocol. Finances are tight. People need to be
22 held accountable. Our local government leaders constantly
23 face the difficult choice between doing what's right and
24 doing what they're forced to do or want to do.

25 In recent years, we've experienced increasing

1 situations where we've had to be more diligent at the
2 newspaper that is about getting information from public
3 officials to provide to the public. It is like pulling
4 teeth at times. It's about accountability, and we hold
5 that mirror in front of our faces, too.

6 We have situations in our rural area where, out
7 of the blue, a township board or borough council will call
8 an executive session and say it's for legal issues. A good
9 example is Mill Hall Borough, 1,500, 2,000 on the outskirts
10 of Lock Haven, a small municipality, a single building, one
11 meeting room. This council has been notorious for holding
12 lengthy closed-door sessions, especially when it was
13 working on a consent order and agreement with the State
14 Department of Environmental Protection that mandated
15 significant improvements to its sanitary sewage collection
16 system. It was crumbling and had a lot of storm water
17 seepage. The bill to repair it was going to be massive.

18 But the public is truly inconvenienced when a
19 closed-door session is held because we have to leave the
20 building. The Borough Hall has no other public rooms. It
21 consists of the borough office/meeting room, the garage
22 area, and the police department. Citizens congregate in
23 the parking lot until they run out of patience and leave or
24 until a councilmember opens the door to signal that we can
25 come inside again. If they want to stay warm in the

1 winter, we have to sit in our personal cars and run our
2 engines.

3 This kind of experience compelled us this past
4 year to have reporters cover regular meetings and, if
5 circumstances arose bringing into question the Sunshine
6 law, they were to make special notes. We focused on
7 several councils and the school board over several months
8 of meetings. We found violations of the Sunshine law
9 rather frequently. We published multiple stories on one
10 day in November, and we've submitted a series as part of
11 our testimony called "Behind Closed Doors" to the Committee
12 and for the record.

13 In this series, we'll start with Keystone Central
14 School Board. We found practices on October 3rd of 2013 at
15 the meeting that did not appear to be in compliance with
16 the Sunshine Act. About an hour into the meeting, they
17 called an executive session without explanation. They
18 returned about 40 minutes later and again they did not
19 explain the reason for the session.

20 The board called another executive session at its
21 November 7th meeting. It lasted for quite a while and was
22 held for "personnel reasons." But it came during a meeting
23 attended by parents concerned over a recent and serious
24 situation whereby State Police felt someone was a
25 "potential threat" to commit violence at the high school.

1 That threat was meant to be for building staff only, but it
2 was made public on Facebook and had prompted hundreds of
3 parents to pull their kids from school one day about a week
4 earlier. The executive session came at a time when parents
5 attended to ask the board questions about the incident,
6 about what happened, about the protocol, but it prompted
7 many to leave believing the board wouldn't hear them.

8 Wayne Township Board of Supervisors: We
9 documented Sunshine Act compliance concerns concerning a
10 supervisors' meeting. As you'll read in the stories that
11 we wrote and that I submitted, supervisors announced an
12 executive session at 7:20 p.m. on October 21st. The
13 solicitor used the phrase "pending and potential
14 litigation" to justify the session. Our reporter objected
15 to the description as too vague and mentioned the law
16 requires a level of specificity, including the name of the
17 plaintiff or complainant and the defendant, and the case
18 number if available. The attorney just laughed as he
19 walked into the room for the executive session.

20 Bellefonte Area School Board: Board Vice
21 President Jeff Steiner, who was running the October 8th
22 meeting of 2013 in the president's absence, said, "The
23 board will be meeting in executive session regarding a
24 personnel matter." No further explanation was offered.
25 More detail should have been offered in compliance with the

1 Sunshine law and the Commonwealth Court ruling that holds
2 that agencies must announce specific reasons, identifying
3 real, discrete matters best addressed in private when
4 announcing justification for an executive session.

5 Bellefonte Borough Council: Council went into
6 executive session October 21st to discuss personnel
7 matters. Again, it's not sufficient. After the public
8 meeting adjourned, Bellefonte Manager Ralph Stewart told
9 The Express that the council discussed the vacancy of a
10 part-time position within the police department and then
11 returned to the public meeting later that evening to
12 approve filling the position. Saying only to discuss
13 personnel matters is deficient. It's not compliance.

14 For the sake of balanced reporting, we also took
15 notes at Lock Haven City Council's meeting in our reports
16 as an example of a local government that does it right we
17 felt. They always hold executive sessions at the end of
18 their meetings and they provide adequate explanation as to
19 what they're discussing. They schedule executive sessions
20 and put that schedule on their public meeting agendas so
21 the public and the media know when to expect them.

22 Unfortunately, just last week Lock Haven City
23 Council held interviews for prospective council candidates
24 following a midterm resignation. They told The Express the
25 interviews on March 3rd would be closed on the grounds that

1 a discussion of council candidates falls under "personnel."
2 We objected, and in concert with our media counsel at PNA,
3 told the mayor the process of filling a vacancy in elected
4 office must be public, including interviews, if conducted
5 by a quorum of the council. We subsequently talked to the
6 city solicitor and he agreed that the process should've
7 been open based on the fact that the campaign and the
8 election process people go through to obtain elected office
9 is public, so the process to fill a vacant seat should be
10 no less public.

11 I also want to make an important note as to a
12 trend that the newspaper has seen in recent years. You'll
13 find many smaller local governments and even the Keystone
14 Central School Board have stopped past practice of having
15 solicitors at their public meetings. I would offer it's
16 because of cost. But as a result, we think that has opened
17 the door to more varied interpretations and practices and
18 violations as to how executive sessions are handled or
19 held. In fact, I'd say the practice has led to some local
20 government leaders interpreting the Sunshine law as they
21 see fit.

22 It's clear the media and individual citizens are
23 the ones enforcing the Sunshine law. I'll only conclude by
24 saying that we have to keep the laws supporting
25 transparency in government strong. We have to keep our

1 public servants accountable so that we can keep ourselves
2 accountable. We cannot ask anything less of ourselves.
3 Mandatory training on Sunshine law I think is necessary.
4 Cost, I think there's a balance to be found.

5 But thank you very much for allowing me to
6 testify.

7 MAJORITY CHAIRMAN METCALFE: Thank you very much,
8 sir, for your testimony. A question from Representative
9 Gabler.

10 REPRESENTATIVE GABLER: Mr. Rolley, thanks for
11 coming to Harrisburg, and I hail from neighboring
12 Clearfield County, so thanks for being here with us.

13 I wanted to just follow-up and basically ask you
14 the same question that I asked Ms. de Bourbon on the
15 previous one just to try to understand the expectation from
16 you as a member of the media. What would your expectation
17 be on how something would be enumerated or expressed before
18 it an executive session has begun? And I'll refer back to
19 Mr. Herr's concerns about tipping off an employee who's
20 suspected of wrongdoing before they have gathered all the
21 evidence. Should that employee's name be mentioned? You
22 mentioned in the Wayne Township example in your testimony
23 that you would like to see the name of the case referenced.

24 So I just kind of wanted to see for our own
25 edification what do you think would be the proper balance

1 between enabling the business to be transacted in a proper
2 way and maybe the proper level of discretion being enabled
3 but also disclosing enough to the public about what is
4 being done to prevent wrongdoing by the council?

5 MR. ROLLEY: Common sense and reasonableness
6 should always rule. In that case, Wayne Township does have
7 their solicitor there. There's been criminal charges filed
8 amongst the supervisors over property rights. The
9 solicitor has to be there. In that case, I think they
10 should have named the complainant. I think they should
11 have named him and maybe even provided some very vague
12 information about the nature of the complaint. I mean
13 because the ramifications to the township and its costs and
14 the liability involved, it's common sense. It's common
15 sense.

16 In terms of disciplinary with personnel, no,
17 names don't have to be used. But do they have to be
18 identified as a paid township employee? I think so.

19 REPRESENTATIVE GABLER: Thank you very much.
20 That clarifies it for me. I appreciate it.

21 MAJORITY CHAIRMAN METCALFE: Representative
22 Miller.

23 REPRESENTATIVE MILLER: Thank you again,
24 Mr. Chairman.

25 Sir, thank you for your testimony today. To be

1 honest, you said "varying interpretation." And I had
2 written down "wide disparity," in between some
3 municipalities, township boroughs, whether it be size-wise,
4 economic status of it, any type of degrees. And you
5 mentioned again you went into the solicitor point because
6 to be honest with you, when I'm looking at a version of
7 what we've heard today, as we've said, going over 708(a)(1)
8 when we're talking about "may" disclose information, I
9 believe the right already exists to do that. When we look
10 at the policies of, for example, employment manuals and
11 personnel policies, those are open now. I mean you could
12 walk right into my town and grab them off the shelf and
13 look at them or get a copy of them without a problem.

14 So I do agree. I think your "varying
15 interpretation" question is a massive one for us to
16 understand and to look at regarding how we're effectuating
17 our law. So some towns have greater capabilities. Some of
18 them choose not to of their own will.

19 But you mentioned a solicitor present information
20 and that went to another point of this Bill because again
21 when I'm looking at who -- we're a home rule charter where
22 I'm from and where I'm looking at how our agenda is done,
23 it's done in conjunction with the manager, the solicitor,
24 and the president of the commission. There's nothing that
25 gets on the executive session that isn't approved by the

1 solicitor as fitting a category appropriate for executive
2 session. So for me that's basic; it's how it's been done.
3 I don't know a different scenario for it in my experience.

4 But I would acknowledge that I do find that
5 townships of varying sizes have to be careful with their
6 legal budget of how they---

7 MR. ROLLEY: Sure.

8 REPRESENTATIVE MILLER: ---handle such matters.
9 That being the case, I find it to be difficult and I want
10 to see more access to the public, not less, but I do think
11 that is something for us to consider is how townships are
12 handling their finances.

13 That leads me to one other point that has come up
14 and I believe you had mentioned on it, which is technology.
15 So I believe, as written, our law would say that if you're
16 texting messages regarding what would otherwise be
17 disclosed through an email, for example, that those texts
18 would be subject. I believe that's how it's written.
19 Whether or not it was written with that in mind, I don't
20 know, but as it's written, I think that would fall into the
21 category of what would be discoverable for a Right to Know
22 request.

23 The issue of course comes up with, again, we're
24 getting into cost.

25 MR. ROLLEY: Right.

1 REPRESENTATIVE MILLER: I would love to know if
2 you have an understanding or can talk me through in a
3 brief, quick moment as to how a cell phone text, if you're
4 sitting there, like you said, in an executive session or a
5 public session, texting the commissioner to your left
6 saying, hey, you know, how would we effectuate that on a
7 practical sense? How would we get that record?

8 MR. ROLLEY: I'd let the court interpret that
9 through discovery I mean seriously because I mean it's
10 going to happen. You're not going to know it; you are
11 going to know it. That's obviously the very gray area.
12 When I was asked to testify with the PNA and of course
13 we're a member of them and I looked at the Bill and I
14 thought to myself, well, taping executive sessions, I
15 generally support that. I'd like to see some more
16 development of the proposal as it relates to the Sunshine
17 law entirely.

18 But going back to my point is I'm here to tell
19 you there are a lot of violations. I'm here to tell you
20 that there are local elected government officials out there
21 who could give a crap. I mean I'm being honest. That's
22 what we found. We were surprised. We went through some
23 training in the summer and we thought let's do this.

24 And quickly, because I know you guys don't have
25 much time, but quickly, I want to just read a piece that

1 has stuck with me in one of the stories. When Wayne
2 Township supervisors announced an executive session on
3 October 23rd, the solicitor used the phrase "pending and
4 potential litigation." When a reporter objected to the
5 description as too vague and mentioned the law requires a
6 law of specificity, including the name of the plaintiff or
7 complainant and the defendant, the case number if
8 available, the attorney just laughed as he walked into a
9 nearby room. He then joked with the reporter if the
10 reporter knew an attorney who actually understood the
11 myriad aspects of the complicated open meetings law, you
12 can have him talk to my attorney and have him explain it to
13 me so I know.

14 And I'm not picking. I'm just saying that that's
15 the attitude that we're running into. And we struggle
16 sometimes to get agendas.

17 REPRESENTATIVE MILLER: Sir, if I can because I
18 know I've got to give up the mike---

19 MR. ROLLEY: Sure.

20 REPRESENTATIVE MILLER: ---just so I'm clear
21 though. In your investigative work, your work that you do,
22 have you come across any way that the practical side of the
23 technology gap regarding text messages or regarding like a
24 Facebook post, are you aware of any effort that you can
25 point to to, say, help give us guidance to say this is how

1 you could close that gap on a practical sense? This is how
2 it could work?

3 MR. ROLLEY: I mean, no, not without sitting down
4 and truly thinking through some experiences and talking to
5 the staff. No, I think not.

6 REPRESENTATIVE MILLER: I'm sorry. Thank you
7 very much. I appreciate your time.

8 Thank you, Mr. Chairman.

9 MAJORITY CHAIRMAN METCALFE: Thank you,
10 Representative Miller.

11 Representative Cohen.

12 MINORITY CHAIRMAN COHEN: Thank you.

13 It seems to me that the more cases there are --
14 and the law is very simply written. I remember voting for
15 it. But the more cases there are, the more complex it is.
16 And if we say hypothetically there are 100 cases a year now
17 and we raise it to 200 or 300 or 400 or 500. You're just
18 going to generate extra cases. There'll be extra case law
19 and the more the lawyers whose duty is to plow through vast
20 amounts of material at X number of hundreds of dollars an
21 hour. There's a cost to all this and complexity raises
22 costs and more cases increase complexity because there are
23 going to be more different decisions by more different
24 judges and they're not going to agree with each other. The
25 facts will be different. The legal interpretations will be

1 somewhat different.

2 And it seems to me the goal ought to be to codify
3 the existing law and brush through the thousands and
4 thousands of pages of case law that now make everything
5 much more complicated.

6 MR. ROLLEY: I get that. I get that. I get what
7 you're saying, and I think that maybe in some respects sort
8 of putting words in Representative Saccone's mouth is that
9 his attempt to amend the law is basically a signal that
10 we've got some problems out there. We've got some problems
11 that need to be addressed and we need to consider cost and
12 we need to consider privacy and we need to consider a lot
13 of different issues. But something needs to be done
14 because this surprised us. These are good people. Maybe
15 they're overwhelmed when there are internal disputes at a
16 local government or school board, that's, you know -- but I
17 get what you're saying. Something needs done.

18 MAJORITY CHAIRMAN METCALFE: Thank you. Thank
19 you, Representative Cohen.

20 It's kind of interesting. We had a pretty
21 controversial vote by one of my school boards last night
22 and the way it's being reported that I read today it sounds
23 like they came out and announced before they even started
24 the meeting that they were going to move in this direction
25 of agreeing with the majority of constituents that showed

1 up. So it just kind of makes you wonder the way it was
2 reported it almost seemed like board members kind of all
3 knew what they were doing before the meeting and they each
4 knew what each other was doing before the meeting is the
5 way it was reported. I'm not sure how it played out last
6 night but that was the way it seemed to be written in the
7 news report.

8 But I mean I hear this a lot and I think it's a
9 red herring, cost, cost, cost. It was used with my voter
10 ID bill, cost, it's going to be excessive cost to make sure
11 that we've got integrity in our election process. Now it's
12 too much cost to make sure that government is complying
13 with the law. I think there's actually going to be a
14 savings if you can make sure that local officials are
15 complying with the law and disclosing information to the
16 public as they should because I think then there's more
17 accountability. And I think if the elected officials are
18 held more accountable, I think you'll see reduced costs in
19 government operations that will easily cover the additional
20 costs of this. And I think it can be written in such a way
21 as to avoid a lot of the litigation that's feared.

22 Representative Saccone for a final question.

23 REPRESENTATIVE SACCONI: Thank you. More of a
24 comment, Mr. Chairman, but thank you.

25 MAJORITY CHAIRMAN METCALFE: Well, it was a

1 question recognition but I guess I'll recognize you for
2 comments then.

3 REPRESENTATIVE SACCONI: All right. Thank you,
4 Mr. Chairman, for indulging me.

5 I think there's no doubt we have a problem, as
6 you said, and I appreciate your testimony on that. And to
7 maintain this presumption of openness, we've got to amend
8 the law. Improving the law I think will cause these boards
9 to take the Sunshine law more seriously because many of
10 them don't in this case.

11 But I want to just touch on a couple things. One
12 is not only is it important to get an agenda and to know
13 why you're going into executive session, but recording
14 executive session really helps because once they get in
15 there, they go off onto other tangents in executive
16 session. So they may have declared we're going to go in
17 there for a legitimate purpose, but once they get in there,
18 they could be talking about all kinds of different things.
19 And I've had that experience where I've had to try to
20 correct them.

21 In the case for Representative Gabler's comment,
22 as you mentioned, there's already a court case out there
23 and we're going to talk about this and it's public
24 information; we might want to reveal the name. And if we
25 don't, that's another good purpose of recording the

1 executive session because you could say in there on that
2 recording why you didn't reveal the name. So if it was
3 ever challenged, you could say, look, we didn't reveal the
4 name in this case because we thought it would be
5 detrimental to this or that. And then you know you're on
6 record, and if it goes before a judge, you're going to have
7 to defend it that way.

8 So again, these things will help tighten it up.
9 And those are the purposes behind it and that's what I
10 wanted to say.

11 Thank you for your testimony and thanks,
12 Mr. Chairman.

13 MAJORITY CHAIRMAN METCALFE: Thank you,
14 Representative Saccone.

15 And I appreciate you pointing out for a second
16 time the instance that you had in the investigative report
17 related to the attorney laughing when the reporter had
18 challenged him on giving more specifics as the law
19 requires. I mean the first time you read it, it came
20 across as arrogance. The second time you read it, it came
21 across as arrogance but then with a component of ignorance
22 because if he's asking for the reporter to have an attorney
23 explain to his attorney when he's an attorney, I mean it
24 really shows -- if you're an attorney and you don't
25 understand how to counsel your client, then maybe you

1 should go back to school.

2 So I do appreciate you bringing those examples to
3 our attention. It really seems like an issue that the
4 whole Legislature needs to become aware of. Our Committee
5 is aware of it now and we appreciate all the testifiers
6 today and appreciate Ms. Melissa Melewsy, who had given us
7 a very broad explanation of changes that she believes need
8 to be made with regard to Sunshine law. She went beyond
9 the Bill but it was all good information for the Committee
10 to receive, so I appreciate you taking the opportunity to
11 share some additional thoughts, and appreciate you, sir,
12 making the trip here today.

13 MR. ROLLEY: Thank you.

14 MAJORITY CHAIRMAN METCALFE: So everyone have a
15 great day. We have a Motion to Adjourn. Representative
16 Gabler seconded by Representative Maloney. This meeting is
17 adjourned. Everyone have a great day.

18

19 (The hearing concluded at 10:57 a.m.)

1 I hereby certify that the foregoing proceedings
2 are a true and accurate transcription produced from audio
3 on the said proceedings and that this is a correct
4 transcript of the same.

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