TESTIMONY BY
THE PENNSYLVANIA STATE ASSOCIATION OF
TOWNSHIP SUPERVISORS

BEFORE THE
HOUSE STATE GOVERNMENT COMMITTEE

ON

HB 1671 *(PN 2297)*

PRESENTED BY

ELAM M. HERR
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HARRISBURG, PA

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Chairman Metcalfe and members of the House State Government Committee:

Good morning. My name is Elam M. Herr and I am the assistant executive director for the Pennsylvania State Association of Township Supervisors. Thank you for the opportunity to appear before you today on behalf of the 1,454 townships in Pennsylvania represented by the Association.

Townships comprise 95 percent of the Commonwealth's land area and are home to 5.5 million Pennsylvanians — 44 percent of the state's population. These townships are diverse, ranging from rural communities with fewer than 200 residents to more populated communities with more than 60,000 residents. Thank you for the opportunity to testify today on an issue that is of importance to townships across the state.

We strongly support the need for transparency in all levels of government. Citizen participation is an essential component of local government and should be encouraged and facilitated to the greatest extent possible without losing sight of common sense. The Association supports the rights of citizens to attend public meetings at which business is deliberated and acted upon. The current law generally strikes a reasonable balance between the public's right to know and the need for private discussions by local officials on sensitive issues, particularly those regarding employee issues.

It should be noted that local elected and appointed public officials are subject to more stringent requirements for open meetings and public participation than the General Assembly, which has exempted itself, particularly through the caucus provisions, from the rules that local governments must follow. In contrast, local government boards must hold deliberations for the purpose of making a decision at an advertised public meeting. The exceptions are for executive sessions, administrative action, emergency meetings, and limited information-gathering.

In 1987, the Sunshine Law was liberalized to the point that all deliberations held for the purpose of making a decision, except those protected in the limited executive session provisions, must take place at a public meeting. In essence, there is very little today that a local governing body can discuss outside of a publicly advertised meeting. This presents a challenge to local government boards, particularly our many three-member boards, where a meeting of just two of the members constitutes a quorum and triggers concerns with Sunshine Law compliance. These current provisions can actually impede the ability of local officials to operate efficiently and effectively.

PSATS maintains that the Sunshine Law must be fair and equitable for all parties involved, without imposing an undue burden on municipalities. We are very concerned that HB 1671 *(PN 2297)* as written would impose a significant unfunded mandate on local government boards across the state.

Like private employers, local governments are required to comply with a long list of federal and state employment law. In addition, local governments have a host of additional laws protecting certain employees or classes of employees and as such, local

government boards are often in the spotlight on employment issues. Existing laws place significant constraints on what local government boards may say and do as employers.

The Sunshine Law currently provides a broad umbrella for discussions concerning employment issues, including those with more than one employee, in executive session. We believe that this is the only way to allow a board to function without adding to the risk of lawsuits and loss of public dollars. As such, we support the current common sense wording in the Sunshine Law concerning executive sessions.

In contrast, HB 1671 would significantly narrow the scope of what employment issues may be discussed in executive session, require disclosure of the employee or prospective or former employee's name before the executive session may be held, create the need for a legal opinion prior to holding an executive session, and mandate that these private sessions be recorded. We must strongly oppose these provisions as they would significantly increase expenses and risk of litigation, while placing the local government boards as employers in a very difficult, if not impossible position.

Let's play this out. Say that an employee files a harassment complaint with a local government board. Before an executive session can be conducted, a record, a legal opinion, would have to be created. In addition, the board would have to disclose that they were going into an executive session to discuss employment issues related to the individual submitting the complaint and the alleged perpetrator, which may lead both employees to the conclusion that the harassment issue will be discussed, which may lead the perpetrator to retaliate against the harassed employee, thus creating an even larger legal problem for the local government board. Finally, the board would have to record the executive session and retain the recording for a year. If a lawsuit is filed by either employee, the recording and other documentation would likely be "discoverable" and could lead to a financial judgment against the township.

A similar result would occur if evidence was discovered that an employee was stealing money. The public notice and even the legal opinion would likely tip off the employee that they had been discovered, thus leading to an incentive to destroy evidence or perhaps disappear, leaving the township unable to prosecute or recover their losses.

When hiring, the names of the candidates to be interviewed and discussed would be public and anyone not hired could look to the recording to support a lawsuit. When properly subjecting an employee to discipline, hearing the name of the problem employee disclosed again and again would lead the community to jump to conclusions and spawn rumors. Even if the board was simply conducting performance evaluations or looking to promote an employee, the disclosure of that employee's name in conjunction with an announcement for executive session would be interpreted negatively by the public, particularly in our many small communities.

In addition, HB 1671 would eliminate the current ability of local government boards to interview and discuss the qualifications of candidates for appointed office. This

existing authority is a valuable resource that allows boards to properly vet candidates for appointed office without requiring that sensitive issues be discussed in the public's eye.

We can support the security and emergency preparedness executive session language in the bill. However, we are concerned that this provision would not be useful if the session must be recorded and a legal opinion is needed before the executive session may be held, which could lead to sensitive information being made public.

The entire nature of an executive session is a common sense provision that allows a local government board to have a legal private meeting to discuss limited matters of a very sensitive nature. The Sunshine Law clearly lists the existing reasons for holding such a meeting and we support this language. A requirement to record these meetings would completely eliminate any purpose for holding such a meeting, as any such recording would likely be considered a public record under the current Right-to-Know Law. If the recording of the meeting constitutes a public record, then the executive session would no longer be private. This provision would effectively eliminate the ability to hold an executive session and place governing boards in the tenuous situation of being required to discuss every sensitive issue in public, thus making it impossible to conduct business, such as to interview employees, discuss hiring of employees, discuss litigation strategy, plan arbitration negotiation strategies, etc.

Even if these records were not considered public records, attorneys would know they exist. Any job applicant who was not hired would attempt to acquire the tapes to determine and prove that they were not hired for an illegal reason so as to sue the township, any employee who was disciplined or dismissed would obtain the recordings looking for evidence that a board member said the wrong thing. Opposing attorneys would certainly be interested to acquire the tapes of any discussions between a board and its attorney concerning litigation strategy.

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

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

Thank you for the opportunity to appear before you today. I would be happy to answer any questions that you may have.