Pennsylvania Freedom of Information Coalition
4075 Linglestown Rd. #312 Harrisburg, PA 17112-1020
www.pafoic.org

Remarks on Pennsylvania's Sunshine Act and HB 1671

Wednesday, March 12, 2014
House State Government Committee

My name is Kim de Bourbon, and I am executive director of the Pennsylvania Freedom of Information Coalition, a nonprofit educational group that helps people understand and use the state's open meetings and open records laws. We support transparency at all levels of state and local government.

Our reason to exist is promoting good citizenship by helping people stay informed about what government agencies are doing. We present public information sessions across the state and provide information and resources on our website, pafoic.org.

Our most effective tool is our online Open Government Forum, where we answer questions anyone might have about the Sunshine Act and Right to Know Law. Since the website was launched in 2007, we have fielded more than 2,500 posts — many of them questions from regular citizens frustrated by shortcomings in the state's open meetings law.

Browse through the posts on our forum, and you will gain insight into what the average citizen faces when confronted with public officials who meet behind closed doors too often, only to emerge and announce their decisions on everything from staffing matters to major purchases with little or no public discussion or debate.

And the questions and complaints we receive are not always from members of the public. Elected officials who find themselves in the "minority" opinion often also find themselves on the outs when it comes to public meetings. Some examples from our forum:

"Is it permissible for commissioners to stay in the back room after the executive session has ended and some of the commissioners have left? Many times there is a quorum in the room after the executive session has officially ended. … I am

concerned as a commissioner as to the discussions that occur after I leave. I feel some stay to plan things, out of the presence of all the commissioners."

And:

"I am a school board member who has fought repeatedly to force the board to obey the Sunshine Act. Just this week the board president suggested scheduling a closed meeting. She wanted to have a closed meeting where board members would work to create goals for the district."

We hear of willful defiance of the law, but more often it seems to be a case of simple ignorance or long-standing misunderstanding on the part of a board or its solicitor, which is why we do not think the well-intended amendment mandating legal counsel before executive sessions would provide the intended result. (We often tell citizens to print out to the state's "Open Meetings" guide book and present a copy to solicitors who are unaware of provisions such as the public's right to videotape public meetings.)

Just look at the case of an "executive committee" established by the Derry Township School board. This committee, which was not provided for in the district's policies, met routinely with elaborate agendas on many issues the board would eventually address, but only select members of the board were invited to attend along with the superintendent, and on one occasion, an elected, but not yet sworn-in board member. No public notice of these meetings was ever given and not all board members would be aware of what was discussed or potentially decided there. The scope and detail of this group's "agendas" changed dramatically after one board member inquired as to its purpose. The whole concept of this group was recently disbanded, but only after a group of citizens hired an attorney to look into the matter and submit a report to a newly-elected board.

And so one critical issue — which HB 1671 does not do enough to address — is the power agencies have assumed to ignore the law or adopt a "so, make us" attitude when faced with Sunshine Act complaints from the public.

Unlike the new Right to Know Law, the Sunshine Act provides no simple enforcement mechanisms. Citizens who think their government should be more transparent have no real recourse but to try persuasion, and if that doesn't work, to file a court complaint to try to make an agency change its secretive ways.

We don't feel citizens should have to go to court just to make the Sunshine Act work.

We especially are concerned with the Supreme Court's recent ruling upholding the Commonwealth Court decision in *Smith v Richmond Township*, which seems to allow a board to meet behind closed doors for "non-deliberative" discussions.

This is in direct opposition to the very idea of openness. We believe the definition of "deliberation" should be revisited and refined to allow for greater transparency and to make it clear that informational meetings and briefings must be open to the public.

This issue is especially difficult because the burden of proving that deliberations took place at a closed meeting is always on the plaintiff … and because even if deliberative discussions DO take place illegally, the current law maintains an overly lenient "no harm, no foul" approach — basically allowing that even if it can be proven that a decision was agreed to improperly in a closed-door meeting, there is no legal violation as long as a vote on the matter is later made in a public meeting.

We believe the law can be improved with be a stated presumption of openness — such as that written into the new Right to Know Law — that makes clear the legislative intent that all of a government agency's business should be discussed and enacted openly, with rare exception.

In any case, we respectfully ask you to remember that the premise of the Sunshine Act is to make government more transparent and its officials and agencies more accountable for their actions by having their discussions and debates in public.

We ask that this committee therefore please give careful consideration to *all* parts of the Sunshine Act and to listen to all sides, but to give extra consideration on behalf of citizens, for whom this law was written.

Please always keep the public's right to know in mind.

Comments on the HB 1671 amendments

— Refining the personnel exemption to make clear that executive sessions are permissible to discuss only specific individuals is an excellent change. Too often, boards are meeting behind closed doors to discuss wide-ranging staffing decisions or issues (such as layoffs and cutbacks), when clearly this was not the intent of this provision.

— We find the addition of an emergency preparedness exemption problematic. While the language does include a qualifying phrase that would permit a closed-door meeting only "if disclosed [it] would be reasonably likely to jeopardize or threaten security or preparedness," that phrase "reasonably likely" is open to wide interpretation, and in our experience may be used to claim "there is a chance" of such a threat, no matter if it is so infinitely small as to be practically non-existent. We think the public has a right know evacuation plans and what security measures protect them.

We do appreciate that the amendment specifies discussions on costs and equipment must be held at an open meeting. However, this is not specific enough. This language could be interpreted to allow public access only to discussions of the general (aggregate) cost of implementation and equipment, not letting the public be privy to discussions of specific purchase items. We already see requests for records under the Right to Know Law being denied under the guise that letting the public know how much is being spent on specific items somehow will endanger public safety.

— The amendment requiring executive sessions to be recorded is essential, as it should serve to deter boards from discussing matters behind closed doors that need to be discussed in public, as well as providing a path to judicial enforcement.

As Judge Leavitt said in the Commonwealth Court decision *Smith v. Richmond Township*, "the true difficulty is that a violation of the Sunshine Act can be shown only by testimony, under oath, of those in attendance at the meeting."

In other words, as the law now stands, unless someone at the closed meeting in question talks, there is no way someone who suspects deliberations or decisions took place there can prove it, rendering enforcement difficult if not impossible.

A clarifying sentence should be added, however, that specifically would allow a court to review the recording *in camera* when a claimed violation is filed.

— The provision requiring a legal opinion every time a board would like to hold an executive session seems like a good idea at first glance, since the intent is to make sure no illegal executive sessions are held.

But ultimately this amendment would be meaningless if the board's solicitor is not working to protect the public and its right to government openness. We find this to be the case too often to be able to endorse this change.

— The "whistleblower" provision, providing criminal liability immunity for agency members who report Sunshine Act violations, is also well-intentioned, but needs to include civil suit immunity as well. What if a public official sues an agency whistleblower for defamation?

What else needs to be fixed

— Strengthen the public participation provision to make sure residents and taxpayers are given a fair opportunity to make meaningful comment.

While agencies must be allowed to establish rules to keep their public meetings running in an orderly fashion, they must be prohibited from requiring residents to register ahead of time in order to speak.

Agencies must also be prohibited from allowing public comment only at the beginning of a meeting, before board discussion on issues has begun.

Both of these all-too-common practices are a deterrent to free speech, and make it impossible for the public to respond to issues that arise at a meeting, which surely was not the intention of the legislature.

— Provide better enforcement mechanisms.

Penalties for willful violation of the law were increased two years ago, but higher penalties are meaningless when violations are so impossible to prove. Providing for recording of executive sessions is a good step in the right direction. But more needs to be done.

We would like to see a provision that awards attorney's fees to all prevailing plaintiffs, which would encourage people to bring meritorious cases and make the violating agency face a real consequence.

###