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TESTIMONY SUBMITTED TO
HOUSE STATE GOVERNMENT COMMITTEE
RE: SENATE BILL 411 AND REVISIONS TO THE RIGHT TO KNOW LAW
MARCH 22, 2016
STATE CAPITOL, HARRISBURG
SUBMITTED BY ANDY HOOVER, LEGISLATIVE DIRECTOR,
ACLU OF PENNSYLVANIA

Good morning, Chairman Metcalfe, Chairman Cohen, and members of the committee. Thank you for the opportunity to provide testimony today on Senate Bill 411 and revisions to the Right to Know law ("the law"). I am here on behalf of the 23,000 members of the American Civil Liberties Union of Pennsylvania, which is one of 53 affiliates of the ACLU. Founded in 1920, the ACLU is one of the nation's oldest and leading civil rights organizations.

An effective open records law is an essential component of a functioning democracy that encourages citizen participation and that operates with transparency. Pennsylvania has made vast improvements in its open records process, starting with the rewrite of the law in 2009. Like other public interest organizations, the ACLU of Pennsylvania regularly utilizes the law in our work, and it can provide crucial information about the compelling civil liberties issues of the day. For example, the law allowed my colleagues to uncover new information about the practice of civil asset forfeiture in Philadelphia, Montgomery County, and Cumberland County.[1] While one district attorney claimed his office engaged in "lengthy cooperation" in our research,[2] it was, in fact, the teeth of the Right to Know law that compelled him to cooperate. A strong open records law forces agencies to operate in the light of day.

The committee is currently considering Senate Bill 411. As you know, this legislation revises the law in several ways. The ACLU of Pennsylvania is considerably more comfortable with SB 411 than we were with last session's version of this bill, what was SB 444. Several problematic provisions have been removed or clarified.

In my testimony today, I will provide you with the ACLU of Pennsylvania's perspective on some of the remaining provisions and on other areas of the law that need to be addressed.

Establishing the Office of Open Records as an independent agency
SB 411 establishes the Office of Open Records (OOR) as an independent agency, removing it from its current purview within the Department of Community and Economic Development. The current arrangement adds a level of management that can shackle the office, leaving it at the mercy of the latest whims of the department. It leaves the office exposed to the political and financial considerations of the department.

SB 411 frees the office from those considerations by establishing it as an independent agency. This proposed arrangement would allow the office to reach administrative decisions based on what is best for the office, without the hassle of wondering what is best for the department.

[1] More information is available at http://www.aclupa.org/issues/forfeiture/
[2] Statement of the District Attorney of Cumberland County. Available at https://www.ccpa.net/DocumentCenter/Home/View/22825

The ACLU of Pennsylvania supports this provision and hopes it remains in the final version of the legislation.

Expansion of appeals window to 20 days

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

Inmates use of the law

SB 411 explicitly prohibits inmates from requesting records and then enumerates 11 exceptions to that rule. The exceptions all relate to the inmate's personal situation, including records connected to his criminal case; his personal records such as financial and work history; and the policies of the institution in which he is incarcerated. When then-Senator Pileggi first crafted this legislation three years ago, he and his staff- particularly Erik Arneson, now the director of the OOR- were open to suggestions on what exceptions should be included for inmates, and the ACLU of Pennsylvania is grateful that it had the opportunity to advise the senator on that provision. The current language of the bill is the product of those discussions.

That said, concerns remain. The first concern is purely practical. What reasonable exceptions have not been considered? It is impossible to know now what issues may arise in the future in which inmates legitimately ask for records not covered under these exceptions. An attempt at a partial prohibition on inmates' use of the law creates a situation in which records that should be open and available to them will not be because none of us have thought of a particular hypothetical at the time of drafting the legislation.

The second concern is philosophical. What kind of open records law does the commonwealth want? Do we want a Right to Know law? Or do we want a Right-for-Some-to-Know law? Cutting inmate access to the law sets a disturbing precedent in which a population can be blocked from using the law simply because one agency finds that population's requests to be challenging. There are probably municipal officials who would like nothing more than to exempt certain citizens from the Right to Know law.

An inmate's ability to continue to participate in society, including in the democratic process, is important for his eventual re-entry into the community. Incarceration is an isolating experience, but most inmates will eventually be released. As a commonwealth, we want to encourage these men and women to live healthy, law-abiding lives after they have served their time. A feeling that they are connected to their community matters in their post-prison success. The Right to Know law is one way in which they can continue to participate in democracy, even while incarcerated.

Inmates also have a unique relationship with the commonwealth that those of us sitting here today do not have. By definition, they are in the custody of the commonwealth. Thus,

they have a vested, personal interest in how the commonwealth functions. Most reasonable people agree that government functions best when it is open and accountable to the people. That is the essence of our democratic system. But the Department of Corrections (DOC) and the county jails are less open than other areas of government, as they control all of the evidence about their operations. To be fair to the DOC, individual secretaries can make executive decisions about how open to be about the department's operations. But very little compels them to do so, unless the department is investigated by another agency[3] or is sued.[4]

Inmates play an important role in bringing to light the operations of the DOC and the county jails, and the Right to Know law is one way in which we learn more about how the department operates. The inmate prohibition in SB 411 could lead to less accountability in our prisons and jails.

This is a bold step that few states have taken. Michigan, Virginia, and Wisconsin completely prohibit inmates from participating in their open records laws. Louisiana almost completely bans inmate participation by only allowing inmates who are incarcerated for a felony conviction to access records related to their post-conviction relief. Arkansas prohibits inmates from accessing records produced by the Department of Corrections, which is not broad on its face but, in practice, these are the records that inmates are most likely to request.

There is no mass movement by states to block prisoners' access to the law. Some states prohibit inmates' ability to access specific types of records. But very few are as sweeping as SB 411.

Prohibition for parties to litigation

The legislation also prohibits parties to litigation from filing RTK requests to the agency that is a party to the litigation. This provision is perplexing and again places unnecessary restrictions on citizens' use of the law. While it is certainly possible that a person in litigation will subpoena records, a person should not lose the ability to use the open records law because they have chosen to exercise the right to litigate in civil court. If a record is open, then it should be available to all. The ACLU of Pennsylvania agrees with the Pennsylvania NewsMedia Association, which said in a memo to the state Senate, "If a record is a public record, it must be publicly available."[5]

Access to footage from police cameras

Senate Bill 411 does not speak to the issue of the availability of police camera footage. But based on current activity in both the General Assembly[6] and the state courts[7], it is

[3] Department of Justice (2013) *Justice Department finds Pennsylvania state prisons' use of solitary confinement violates rights of prisoners under the Constitution and Americans with Disabilities Act.* May 31, 2013. Available at http://www.justice.gov/opa/pr/2013/May/13-crt-631.html.

[4] See *Disability Rights Network v. Wetzel.* Available at http://www.aclupa.org/our-work/legal/legaldocket/disability-rights-network-v-wetzel/.

[5] Available at http://panewsmedia.org/docs/default-source/government-affairs/2015-2016/pna-opposes-sb411-in-current-form.pdf?sfvrsn=4

[6] Senate Bill 976 is currently before the Senate Appropriations Committee. This bill amends the Wiretap Act to allow an exception for police cameras to record inside a home, in limited circumstances.

clear that there is movement to resolve this issue. In *Pennsylvania State Police v. Grove*, the Commonwealth Court ruled that footage from a police dashboard camera is presumed open, unless it falls under the investigation exemption of the law. Although the case does not involve footage from a police body camera, it is reasonable to believe that this type of footage would also fall within that presumption.

The movement of SB 411 provides the General Assembly with an opportunity to address this issue, and the ACLU of Pennsylvania has crafted best practices that balance both privacy and the public's interest in transparency and accountability in policing. Police video footage that is of public interest must be presumed to be an open record under the Right to Know law. Incidents of public interest include any arrest, a shooting of a person and other uses of force by a police officer, and a dispute between an officer and a person about the facts of an encounter. In order to deter the use of cameras for widespread surveillance, public humiliation, or gossip, police video footage that is not in the public interest should be exempt.

The purpose of utilizing police cameras is to allow the public to better monitor police behavior and to clarify disputed facts in a situation. Although they are not effective 100 percent of the time, these cameras can provide a tool for both monitoring inappropriate behavior by police and for clearing police officers who are falsely accused of wrongdoing. The purpose of police cameras is not to provide embarrassing and entertaining fodder for social media and reality cop shows or to re-victimize those who have been subjected to violence or crime. That's why finding a balance between public accountability and privacy is critical.

Burden in appeals

The Right to Know law needs revised to provide less of a burden on the requester in the appeals process. Records should be presumed open, and the burden should always be on the agency to prove why a record is exempt.

Although the law places the burden on the agency to show that the record sought is exempt from the law, when a request is denied and the requester appeals, the law has been interpreted by the Commonwealth Court to place the burden on the requester to then prove that the records do not fall into the exemption(s) cited by the agency.[8] This is a problem because agencies will frequently cite boilerplate exemptions without giving any individualized reasons why the record is exempt or even say whether or not the record exists. This makes it virtually impossible for a requester to prove that a record is public on appeal.

When agencies do not meet their burdens under the law to say whether a record exists and provide specific reasons why the record is exempt, the burden should remain on the agency to prove that the record is exempt at the appeals stage. Otherwise, agencies have no incentive to provide this information prior to an appeal, thus defeating a central purpose

[7] *Pennsylvania State Police v. Grove*, 119 A.3d 1102 (Pa. Cmwlth. 2015)
[8] *Saunders v. Department of Corrections*, 48 A.3d 530 (Pa. Cmwlth 2012)

of the 2009 revisions, which was to shift the burden to agencies to prove records are exempt rather than requiring the requester to prove records are public.

The ACLU of Pennsylvania believes that regular revisiting of the Right to Know law by the legislature is an important exercise to ensure that the law is operating with as much transparency as possible. Pennsylvanians need and deserve an open records law that requires government agencies to operate openly. Chairman Metcalfe, thank you for the opportunity to present our views.