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PENNSYLVANIA NewsMedia ASSOCIATION

TESTIMONY BEFORE HOUSE STATE GOVERNMENT COMMITTEE

Good morning. Thank you for the opportunity to appear and offer testimony before the House State Government Committee on SB 411, which would amend Pennsylvania's Right to Know Law (RTKL). My name is Melissa Melewsky, and I am media law counsel for the Pennsylvania NewsMedia Association (PNA). PNA is the statewide trade association for newspapers and online publications, and we count more than 300 print, digital and related media organizations as members. As media law counsel at PNA, my primary job responsibility is to answer questions received on the PNA Legal Hotline. As a result, I have the opportunity to talk to journalists on a daily basis about their difficulties in obtaining access to records in Pennsylvania.

The PNA, founded in 1925, has for decades advocated for legislation that improves public access laws in Pennsylvania. The PNA was heavily involved in the legislative effort that led to Act 3 of 2008, Pennsylvania's new RTKL, and we appreciate the opportunity to share our thoughts on SB 411.

With this background in mind, we believe SB 411 makes some improvements to the law, but we also believe there are significant issues with the proposal, and many issues that negatively impact public access are not addressed by the bill. We believe the bill should be revised to remove newly created barriers to access and to address shortcomings in the current law. PNA does not support SB 411 in its current form.

Positive aspects of the bill

SB 411 would increase public access to state-related institution records, and their police departments are expressly identified as "local agencies" under the law. PNA has always advocated for greater applicability of the RTKL to PSU and the other state-related institutions, and we support efforts to increase public access to their records under the law.

PNA also supports the expended definition of local agency in SB 411. The bill would now expressly cover economic development authorities and industrial development authorities, both of which are often formed, governed and funded by public agencies for the public's benefit.

SB 411 would define "time response log," which is a public record under the law, although we are concerned that this definition could be undercut by proposed changes to section 708(b)(18). The bill would include in the definition of "time response log," the location of the emergency response. This change recognizes the critical importance of geographic information in a time response log. Without access to geographic information like cross street, mile marker or address,

there is no way to gauge the timeliness of a specific emergency response. PNA supports this provision, but also cautions that the bill later exempts the "home address of the individual who accesses emergency dispatch" from a time response log. This language is inconsistent and will likely lead to confusion and improper denial of access. Time response logs must contain response location, and the additional language in section 708(b)(18) should be stricken.

PNA supports the limitation placed on the non-criminal investigation exemption. One of the biggest barriers to access in the RTKL is the breadth of the non-criminal investigation exemption. SB 411 would provide access to a final safety inspection report made pursuant to law or regulation. Both the non-criminal and criminal investigation exceptions must be further limited, however, and we explore that issue in more detail below.

SB 411 would also clarify that information is to be provided in any format in which it exists. Under current law, many agencies provide static .pdf copies of electronic records, when the agency actually maintains or uses the information as part of a dynamic database. If the agency maintains or uses a database or other format, the law must provide public access in that format.

SB 411 would also expand the time to file an appeal of a denial by 5 business days. This amendment benefits the public because most requesters are not attorneys, have not been involved in an administrative process, and are acting pro se. An expanded time for appeal is beneficial for citizens who are not familiar with the RTKL appeals process or legal proceedings in general.

PNA generally supports language in SB 411 that would permit the OOR to conduct *in camera* review, order agencies to produce records for such review, and confirm the OOR as an independent agency. The best evidence of whether a record is public or not is the record itself, and the OOR must have the ability to review the records at issue in an appeal. Denying the OOR the ability to conduct *in camera* review would hamstring the office and push the appeals into court, which was not the intent of the law and is contrary to the public interest. Further, the OOR's independence is necessary to its ability to act as an impartial tribunal. We do believe that the language granting a 90-day extension any time *in camera* review is needed should be limited to circumstances when the documents to be reviewed *in camera* are complex or voluminous.

SB 411 would also require agencies to submit their RTKL officer's contact information to the OOR. Under current law, many agencies neglect to provide this information to the OOR, which is charged with maintaining and providing this information to the public. Citizens continue to struggle to identify the appointed RTKL officer within agencies, and this provision requires agencies to make that information readily available via the OOR.

The changes above have the potential to positively impact public access and accountability under the RTKL, but they must be viewed in conjunction with significant issues with SB411 and access under the law in general. The bill would impose a number of new, broad restrictions on public access, and there are several issues that have not been addressed by the bill that negatively impact public access.

Problems with the bill

Home addresses

A significant issue with SB 411 is the blanket exemption for the home addresses of public employees. The bill expands the personal identification information exemption, which currently exempts the home addresses of judges and law enforcement officers, to include the home address of all agency employees. Home addresses are a critical tool for identifying individuals, and address information is, and will continue to be, expressly public by law and widely available. The media and the public use home addresses in a number of ways that advance the public interest, including verifying residency requirements for those seeking public office and certain public employees. Members of the media also use address information on a daily basis to confirm the identity of individuals about whom they are writing. This includes individuals charged with a crime, as well as those being honored in their community. For obvious reasons, it is critical that these individuals are properly identified (and that others are not incorrectly identified).

As a more practical matter, home address information is widely available through private databases, internet search tools, voter registration, court, property tax and other records expressly made public by law. In the years since the White Pages were the primary source for home addresses and phone numbers, home address information has become more, not less, publicly available. Voter registration records, used by every public office-seeker in this Commonwealth, contain home addresses and dates of birth. Court records and property tax records contain address information as well. SB 928, which passed the Senate 46-3 this session, would require PennDOT to sell 'basic driver information,' including name, address, driver's license number, and date of birth, to distributors and insurers. Any suggestion that a blanket exemption for public employee addresses in the Right to Know Law is necessary for public safety reasons is disingenuous at best, and this provision should be removed in its entirety.

Refusing access to parties to litigation

SB 411 would deny public records to parties that are in litigation when the records relate to that litigation. In other words, the bill would prohibit a party in litigation to request records that any other citizen could request and be entitled to receive under the law. This provision is unworkable and easily avoided via a third party who is not involved in litigation. When a record is public, it is public. As such, it must be provided under the law, regardless of who is making the request.

Time Response Logs

As noted above, the definition of "time response log" would expressly include block information/cross street/mile marker, but the exemption in section 708(b)(18) exempts the "home address" of the person who called 911. This must be clarified. Either the language in section

708(b)(18) should be stricken, or it should be modified to add, after 'emergency dispatch,' "except for information in time response logs."

Other Issues

SB 411 expressly excludes local tax collectors from the definition of local agency. This is contrary to the public interest because local tax collectors are responsible for the collection and administration of public funds, and should be accountable to the public.

Newly created section 708(b)(5.1) would restrict access to payment information for public utility bills. Public utilities are public agencies and their actions must be subject to public accountability. Rates, delinquent payer information, and enforcement records are essential for the public to understand whether a public utility is functioning properly, and this provision should be removed in its entirety.

SB411 also provides a blanket exemption for records of volunteer fire, ambulance, rescue and similar organizations from public disclosure, regardless of the public funding received by those organizations. In the absence of a formal contract between the organization and an agency, access would be difficult, at best, under the contractor provision and creates an invitation for agencies to operate informally with these organizations.

Current law states that requesters "should" identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested. SB411 would change "should" to "shall" in section 703, giving agencies another basis for denial. The original language should be retained.

Similarly, although the bill would modify the language in section 1101 regarding what a requester must include in an appeal, it continues to require specific information in an appeal. At a minimum, language should be added to make it clear that an appeal shall not be dismissed or denied for the failure of a requester to include the listed information, e.g., "a requestor's failure to include the listed information shall not be grounds for dismissal or denial of an appeal."

Issues not addressed by SB411 that negatively impact public access:

The criminal and non-criminal investigation exemptions are overbroad. Neither exemption has any temporal limit: once a record is deemed "investigatory," it can always be denied regardless of whether the investigation has ended. Many states and the federal government allow access to some records or a final report after an investigation is closed. The RTKL should be amended so that the investigation exemptions include a temporal limit and permit access to information after an investigation has been closed.

The broad nature of the criminal investigation exemption has made access to basic police records nearly impossible. The courts have interpreted the law in a manner that renders police incident reports non-public. These reports are the basic who, what, when, and where of police interaction with citizens, the same information you would see if you were standing on the street watching an

incident unfold. The RTKL makes "blotters" - a chronological listing of arrests – public records, but many police agencies, including the Pennsylvania State Police, maintain that they do not keep a blotter and are not required to create one in response to RTKL requests. In the absence of a blotter and as a result of the criminal investigation exemption, Pennsylvanians are left without any means to access basic information about criminal activity in their community. We do not believe the General Assembly intended to prohibit public access to this kind of basic information, but the current state of the law puts the public at a disadvantage and unable to gather information about public safety in their community. The RTKL should be amended to grant access to basic criminal incident information and public agencies' initial response thereto.

The non-criminal investigation in the current law is also extremely broad, and can present a significant barrier to access. Under the old (1957) version of the Right to Know Law, the final decision or result of a non-criminal investigation was a public record, and the current, remedial law should not offer less access. Outcomes of non-criminal investigations reflect agency decisions and often involve the spending of a significant amount of public funds. The initial reason for separating the "criminal" from the "non-criminal" investigations was to make more non-criminal investigative material public. This has not been the result. To that end, we believe that the non-criminal investigation exemption must be amended make it clear that "an agency decision or final report regarding a non-criminal investigation" is public.

The pre-decisional, deliberative exemption in the law is one of the most frequently cited bases for denial, and it creates a significant barrier to access. This provision of the law should be amended to limit the exemption's applicability. For example, the board packet exemption to the RTKL, found in section 708(b)(10) was intended to enable public access to records being discussed at public meetings so that the public can follow along, understand, and comment on agency business at public meetings. This provision of the law is often ignored by agencies that deny access based on various exemptions or take advantage of the timing provisions to thwart access in a timely manner. SB 411 takes a step in the right direction by expressly not conditioning access on a vote, but the law should also be amended to guarantee public access, regardless of when the records are assembled or distributed to elected officials. If a record is being discussed at a public meeting, the law must require agencies to provide access.

Finally, the courts have construed the conflict provisions of the RTKL in a manner that re-writes the law and ignores not only the legislative intent of the RTKL, but the legislative intent of other state and federal laws intended to provide public access to information. Decisions by the appellate courts have concluded that even when other laws expressly enable public access to records, the RTKL exemptions can be applied to prohibit access to some or all of this information. These decisions have resulted in state agencies applying RTKL exemptions to deny access to records that are expressly made public in other laws, which were enacted long before the current RTKL and never intended to be construed in conjunction with it. The RTKL, by its plain terms, is superseded by more specific law, but that clear intent has been ignored in several appellate court decisions. The RTKL should be amended to expressly state that when

information is accessible to the public under a separate state or federal law, the RTKL exemptions do not apply, regardless of the means of access or lack thereof enshrined in other law.

Thank you again for allowing the PNA to comment on SB 411. We look forward to working with this committee to improve access for all Pennsylvanians, and are, of course, available for any questions you may have. Thank you again for your time and consideration.