

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1531 Session of
2001

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MUNDY, CAPPABIANCA, CALTAGIRONE, J. WILLIAMS, DIVEN, COSTA,
SURRA, MELIO AND MANDERINO, MAY 7, 2001

REFERRED TO COMMITTEE ON STATE GOVERNMENT, MAY 7, 2001

AN ACT

1 Providing for public oversight and accountability of
2 privatization contracts; and imposing penalties.

3 The General Assembly of the Commonwealth of Pennsylvania
4 hereby enacts as follows:

5 Section 1. Short title.

6 This act shall be known and may be cited as the Public
7 Services Accountability Act.

8 Section 2. Declaration of policy.

9 The General Assembly finds and declares that using private
10 contractors to provide public services formerly provided by
11 public employees does not always promote the public interest. To
12 ensure that residents of this Commonwealth receive high-quality
13 public services at low cost, with due regard for the taxpayers
14 of this Commonwealth, the service recipients and the needs of
15 public and private workers, the General Assembly finds it
16 necessary to regulate privatization contracts and to protect

1 those workers who report conditions and practices which impact
2 on the efficiency and quality of public services provided by
3 private contractors. The General Assembly further finds it
4 necessary to ensure that access to public information guaranteed
5 by the act of June 21, 1957 (P.L.390, No.212), referred to as
6 the Right-to-Know Law, is not in any way hindered by public
7 services being provided by private contractors.

8 Section 3. Definitions.

9 The following words and phrases when used in this act shall
10 have the meanings given to them in this section unless the
11 context clearly indicates otherwise:

12 "Agency." Includes an executive office, department,
13 division, board, commission or other office or officer in the
14 executive branch of the government.

15 "Discrimination or retaliation." Includes a threat,
16 intimidation or any adverse change in an employee's wages,
17 benefits or terms or conditions of employment. In the case of a
18 person who is not an employee of the private contractor, the
19 term includes any adverse action taken against the person or the
20 person's employer, including the cancellation of or refusal to
21 renew a contract with the person or the person's employer.

22 "Employee of a private contractor." Includes a worker
23 directly employed by a private contractor as well as an employee
24 of a subcontractor or an independent contractor that provides
25 supplies or services to a private contractor. The term includes
26 former employees of a private contractor or subcontractor and
27 former independent contractors.

28 "Person." Includes an individual, institution, Federal,
29 State or local governmental entity or any other public or
30 private entity.

1 "Private contractor." Any entity which enters into a
2 privatization contract.

3 "Privatization contract." An agreement or combination or
4 series of agreements by which a nongovernmental person or entity
5 agrees with an agency to provide services, valued at \$100,000 or
6 more, which are substantially similar to and in lieu of services
7 previously provided or that could have been provided in whole or
8 in part, by regular employees of an agency.

9 "Public record." A public record as defined in section 1 of
10 the act of June 21, 1957 (P.L.390, No.212), referred to as the
11 Right-to-Know Law. The term includes any document relating to
12 the privatization contract or performance under the contract,
13 prepared, received or retained by a contractor or subcontractor
14 whether the document be handwritten, typed, tape-recorded,
15 printed, photocopied, photographed or recorded by any other
16 method.

17 "Services." Includes, with respect to a private contractor,
18 all aspects of the provision of services provided by a private
19 contractor pursuant to a privatization contract or any services
20 provided by a subcontractor of a private contractor.

21 "Subcontractor." A subcontractor of a private contractor for
22 work under a privatization contract or an amendment to a
23 privatization contract.

24 Section 4. Privatization contracts and requirements.

25 (a) General rule.--No agency shall make any privatization
26 contract and no privatization contract shall be valid unless the
27 agency and the contractor comply with each of the requirements
28 in this section and sections 5 through 8 and includes the
29 specified provisions in the privatization contract.

30 (b) Statement of services and analysis of bids for

1 privatization contract.--The agency shall prepare a specific
2 written statement of the services proposed to be the subject of
3 the privatization contract, including the specific quality and
4 standard of quality of the subject services. The agency shall
5 solicit competitive sealed bids for the privatization contracts
6 based upon this statement. The day designated by the agency upon
7 which it will accept these sealed bids shall be the same for any
8 and all parties. This statement shall be a public record, shall
9 be filed in the agency and shall be published in the
10 Pennsylvania Bulletin not later than 30 business days prior to
11 the date on which bids are due.

12 (c) Disclosure.--Every bid shall detail:

13 (1) The length of continuous employment of current
14 employees with the contractor by job classification without
15 identifying employee names. In addition, the contractor may
16 submit information detailing the relevant prior experience of
17 employees within each job classification. If the positions
18 identified by the bidder shall be newly created, the bid
19 shall identify the minimum requirements for prospective
20 applicants for each position.

21 (2) The annual rate of current staff turnover.

22 (3) The number of hours of training planned for each
23 employee in subject matters directly related to providing
24 services to residents of this Commonwealth and clients.

25 (4) Any legal complaints issued by an enforcement agency
26 for alleged violations of applicable Federal, State or local
27 rules, regulations or laws, including laws governing employee
28 safety and health, labor relations and other employment
29 requirements, and any citations, court findings or
30 administrative findings for violations of Federal, State or

1 local rules, regulations or laws. The information must
2 include the date, enforcement agency, the rule, law or
3 regulation involved and any additional information the
4 contractor may wish to submit.

5 (5) Any collective bargaining agreements or personnel
6 policies covering the employees to provide services to the
7 Commonwealth.

8 (6) Political contributions made by the bidder or any
9 employee in a management position with the bidding company,
10 to any elected officer of the State or member of the General
11 Assembly, during the four years prior to the due date of the
12 bid.

13 (d) Maintenance of wage standards.--For each position in
14 which a contractor will employ any person pursuant to the
15 privatization contract, the minimum compensation to be paid for
16 the position shall be the greater of the wage rate paid at step
17 one of the grade or classification under which an agency
18 employee whose duties are most similar is paid, plus the cash
19 value of health and other benefits provided to those State
20 employees, or the average private sector compensation rate,
21 including the value of health and other benefits, for the
22 position as determined by the Department of Labor and Industry.

23 (e) Term.--The term of any privatization contract shall not
24 exceed two years. No amendment to a privatization contract shall
25 be valid if it has the purpose or effect of avoiding any
26 requirement of this act.

27 (f) Contract provisions.--A privatization contract shall
28 contain provisions requiring the contractor to offer available
29 employee positions pursuant to the contract to qualified regular
30 employees of the agency whose State employment is terminated

1 because of the privatization contract. A privatization contract
2 shall also contain provisions requiring the contractor to comply
3 with a policy of nondiscrimination and equal opportunity for all
4 persons and to take affirmative steps to provide equal
5 opportunity for all persons.

6 (g) Union neutrality.--State funds shall not be used to
7 support or oppose unionization, including, but not limited to,
8 preparation and distribution of materials which advocate for or
9 against unionization; hiring or consulting legal counsel or
10 other consultants to advise the contractor about how to assist,
11 promote or deter union organizing or how to impede a union which
12 represents the contractor's employees from fulfilling its
13 representational responsibilities; holding meetings to influence
14 employees about unionization; planning or conducting activities
15 by supervisors to assist, promote or deter union activities; or
16 defending against unfair labor practice charges brought by
17 Federal or State enforcement agencies.

18 Section 5. Review of contract costs.

19 (a) Estimate of costs.--Any agency considering whether to
20 enter into a privatization contract shall prepare a
21 comprehensive written estimate of the costs of regular agency
22 employees' providing the subject services in the most cost-
23 efficient manner. The estimate shall include all direct and
24 indirect costs of regular agency employees providing the subject
25 services, including, but not limited to, pension, insurance and
26 other employee benefit costs. For the purpose of this estimate,
27 any employee organization may, at any time before the final day
28 for the agency to receive sealed bids pursuant to section 4(b),
29 propose amendments to any relevant collective bargaining
30 agreement to which it is a party. Any amendments shall take

1 effect only if necessary to reduce the cost estimate pursuant to
2 this paragraph below the contract cost. The estimate shall
3 remain confidential until after the final day for the agency to
4 receive sealed bids for the privatization contract at which time
5 the estimate shall become a public record, shall be filed in the
6 agency and shall be published in the Pennsylvania Bulletin.

7 (b) Evaluation of contractor performance and costs.--After
8 soliciting and receiving bids, the agency shall publicly
9 designate the bidder to which it proposes to award the
10 privatization contract. In selecting a contractor, the agency
11 shall consider the contractor's past performance and its record
12 of compliance with Federal, State and local laws, including the
13 disclosures as required in section 4(c). The agency shall
14 prepare a comprehensive written analysis of the contract cost
15 based upon the designated bid, specifically including the costs
16 of transition from public to private operation, of additional
17 unemployment and retirement benefits, if any, and of monitoring
18 and otherwise administering contract performance. If the
19 designated bidder proposes to perform any or all of the contract
20 outside the boundaries of this Commonwealth, the contract shall
21 be increased by the amount of income tax revenue, if any, which
22 will be lost to the Commonwealth by the corresponding
23 elimination of agency employees, as determined by the Department
24 of Revenue to the extent that it is able to do so.

25 (c) Agency certification.--The head of the agency shall
26 certify in writing that:

27 (1) The agency has complied with all provisions of this
28 section and of all other applicable laws.

29 (2) The quality of the services to be provided by the
30 designated bidder is likely to satisfy the quality

requirements of the statement prepared pursuant to section 4(b) and to equal or exceed the quality of services which could be provided by regular agency employees.

(3) The contract cost will be at least 10% less than the estimated cost pursuant to subsection (a), taking into account all comparable types of costs and all the additional costs of the contract as specified in subsection (b).

(4) The proposed privatization contract is in the public interest, in that it meets the applicable quality and fiscal standards set forth in this act.

Any privatization contract entered into by an agency and the agency certification described in this subsection shall be public records subject to disclosure pursuant to the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law.

Section 6. Monitoring and enforcement of privatization contracts.

(a) Subcontracts and amendments to privatization contracts.--

(1) No contractor shall award a subcontract for work under a contract or for work under an amendment to a contract without the agency's approval of:

(i) The selection of the subcontractor.

(ii) The provisions of the subcontract.

(2) Each contractor shall file a copy of each executed subcontract or amendment to the subcontract with the agency, which shall maintain the subcontract or amendment as a public record, as defined under the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law.

(b) Submission of audits.--Any private contractor awarded a

1 privatization contract, and any subcontractor to a private
2 contractor subject to these provisions, shall file with the
3 agency copies of financial audits of the private contractor
4 prepared at least annually during the course of the contract
5 term.

6 (c) Access.--All privatization contracts shall include a
7 contract provision specifying that in order to determine
8 compliance with these principles as well as the contract, the
9 private contractor shall be required to provide the Commonwealth
10 or its agents, except where prohibited by Federal or State laws,
11 regulations or rules, reasonable access through representatives
12 of the private contractor, to facilities, records and employees
13 that are used in conjunction with the provision of contract
14 services.

15 (d) Performance standards.--The private contractor shall
16 submit a report, not less than annually during the term of the
17 privatization contract, detailing the extent to which the
18 contractor has achieved the specific quantity and standard of
19 quality of the subject services as specified by the agency
20 pursuant to section 4(b) and its compliance with all Federal,
21 State and local laws, including any complaints, citations or
22 findings issued by administrative agencies or courts.

23 (e) Enforcement.--The agency may seek contractual remedies
24 for any violation of a privatization contract. In addition, if a
25 contractor fails to comply with section 4(d), (f) or (g), any
26 person or entity aggrieved by the violation may bring a claim
27 for equitable and other relief, including back pay. In such a
28 suit, an aggrieved person or entity shall be entitled to costs
29 and attorney fees.

30 Section 7. Public record ownership and access.

1 (a) Ownership of public records.--

2 (1) No contractor or subcontractor, or employee or agent
3 of a contractor or subcontractor, shall have any ownership
4 rights or interest in any public records which the
5 contractor, subcontractor, employee or agent possesses,
6 modifies or creates pursuant to a contract, subcontract or
7 amendment to a contract or subcontract.

8 (2) No contractor or subcontractor or employee or agent
9 of a contractor or subcontractor shall impair the integrity
10 of any public records which the contractor, subcontractor,
11 employee or agent possesses or creates.

12 (3) Public records which a contractor, subcontractor or
13 employee or agent of a contractor or subcontractor possesses,
14 modifies or creates pursuant to a contract or subcontract
15 shall at all times and for all purposes remain the property
16 of the Commonwealth.

17 (b) Public access to information.--

18 (1) Any public record which an agency provides to a
19 contractor or subcontractor or which a contractor or
20 subcontractor creates shall be and remain a public record for
21 the purposes of the act of June 21, 1957 (P.L.390, No.212),
22 referred to as the Right-to-Know Law, and the enforcement
23 provisions of that law shall apply to any failure to disclose
24 records under this section.

25 (2) With regard to any public record, the agency and the
26 contractor or subcontractor shall have a joint and several
27 obligation to comply with the obligations of the agency under
28 the Right-to-Know Law, provided the determination of whether
29 to disclose a particular record or type of record shall be
30 made solely by the agency.

1 (3) No contractor or subcontractor or employee or agent
2 of a contractor or subcontractor shall disclose to the public
3 any public records:

4 (i) Which it possesses, modifies or creates pursuant
5 to a contract, subcontract or amendment to a contract or
6 subcontract.

7 (ii) Which the agency:

8 (A) is prohibited from disclosing pursuant to
9 Federal or State law in all cases;

10 (B) may disclose pursuant to Federal or State
11 law only to certain entities or individuals or under
12 certain conditions; or

13 (C) may withhold from disclosure pursuant to
14 Federal or State law.

15 (4) No provision of this subsection shall be construed
16 to prohibit any contractor from disclosing public records to
17 any of its subcontractors to carry out the purposes of its
18 subcontract.

19 (5) No contractor or subcontractor or employee or agent
20 of a contractor or subcontractor shall sell, market or
21 otherwise profit from the disclosure or use of any public
22 records which are in its possession pursuant to a contract,
23 subcontract or amendment to a contract or subcontract, except
24 as authorized in the contract, subcontract or amendment.

25 (6) Any contractor or subcontractor or employee or agent
26 of a contractor or subcontractor which learns of any
27 violation of this section shall, no later than seven calendar
28 days after learning of the violation, notify the agency and
29 the Attorney General of the violation.

30 (c) Penalties.--In addition to any remedies provided under

1 the Right-to-Know Law:

2 (1) If any person violates subsection (a) or (b), the
3 Attorney General may bring an action against the person
4 seeking:

5 (i) damages on behalf of the State for the
6 violation;

7 (ii) restitution for damages suffered by any person
8 as a result of the violation; or

9 (iii) imposition and recovery of a civil penalty of
10 not more than \$50,000 for the violation.

11 (2) In addition to the remedies under paragraph (1), any
12 person aggrieved by a violation of subsection (a) or (b) may
13 bring an action to recover any damages suffered as a result
14 of the violation.

15 (3) In any action brought under paragraph (1) or (2),
16 the court may:

17 (i) order disgorgement of any profits or other
18 benefits derived as a result of a violation of subsection
19 (a) or (b);

20 (ii) award punitive damages, costs and reasonable
21 attorney fees; and

22 (iii) order injunctive or other equitable relief.

23 (4) Proof of public interest or public injury shall not
24 be required in any action brought under paragraph (1) or (2).
25 No action may be brought under paragraph (1) or (2) more than
26 three years after the occurrence of the violation.

27 (5) Any person who knowingly and willfully violates
28 subsection (a) or (b) shall, for each violation, be fined not
29 more than \$5,000 or imprisoned for not less than one year nor
30 more than five years, or both.

1 Section 8. Prohibition against discrimination or retaliation
2 for disclosure of information.

3 (a) General rule.--No person shall retaliate or discriminate
4 in any manner against any public employee or employee of a
5 private contractor because that employee, or any person acting
6 on behalf of the employee, in good faith:

7 (1) Engaged in any disclosure of information relating to
8 the services provided by a private contractor pursuant to a
9 privatization contract.

10 (2) Advocated on behalf of service recipients with
11 respect to the care or services provided by the private
12 contractor.

13 (3) Initiated, cooperated or otherwise participated in
14 any investigation or proceeding of any governmental entity
15 relating to the services provided pursuant to a privatization
16 contract.

17 (b) Attempts.--No person shall retaliate or discriminate in
18 any manner against any public employee or employee of a private
19 contractor because the employee has attempted or has an
20 intention to engage in an action described in subsection (a).

21 (c) Restrictions on reporting prohibited.--No person shall
22 by contract, policy or procedure prohibit or restrict any
23 employee of a private contractor from engaging in any action for
24 which a protection against discrimination or retaliation is
25 provided under subsection (a).

26 (d) Confidential information.--This section does not protect
27 disclosures that would violate Federal or State law or diminish
28 or impair the rights of any person to the continued protection
29 of confidentiality of communications provided by Federal or
30 State law.

1 (e) Good faith action.--With respect to the conduct
2 described in subsection (a)(1), an employee of a private
3 contractor shall be considered to be acting in good faith if the
4 employee reasonably believes that:

5 (1) the information is true; and

6 (2) the information disclosed by the employee:

7 (i) evidences a violation of any law, rule or
8 regulation or of a generally recognized professional or
9 clinical standard; or

10 (ii) relates to the care, services or conditions
11 which potentially endanger one or more recipients of
12 service or employees employed pursuant to a privatization
13 contract.

14 (f) Confidentiality of complaints to government agencies.--
15 The identity of an employee of a private contractor who
16 complains in good faith to a government agency or department or
17 any member or employee of the General Assembly about the quality
18 of services provided by a private contractor shall remain
19 confidential and shall not be disclosed by any person except
20 upon the knowing written consent of the employee of the private
21 contractor and except in the case in which there is imminent
22 danger to health or public safety or an imminent violation of
23 criminal law.

24 (g) Enforcement.--

25 (1) (i) Any current or former public employee or
26 employee of a private contractor who believes that the
27 employee has been retaliated or discriminated against in
28 violation of subsection (a), (b) or (c) may file a civil
29 action in a court of competent jurisdiction against the
30 person believed to have violated subsection (a), (b) or

1 (c).

2 (ii) If the court determines that a violation of
3 subsection (a), (b) or (c) has occurred, the court shall
4 award damages which result from the unlawful act or acts,
5 including compensatory damages, reinstatement,
6 reimbursement of any wages, salary, employment benefits
7 or other compensation denied or lost to the employee by
8 reason of the violation, as well as punitive damages,
9 attorney fees and costs, including expert witness fees.
10 The court shall award interest on the amount of damages
11 awarded at the prevailing rate.

12 (iii) The court may issue temporary, preliminary and
13 permanent injunctive relief restraining violations of
14 this law, including the restraint of any withholding of
15 the payment of wages, salary, employment benefits or
16 other compensation, plus interest, found by the court to
17 be due and the restraint of any other change in the terms
18 and conditions of employment and may award other
19 equitable relief as may be appropriate, including
20 employment, reinstatement and promotion.

21 (iv) An action may be brought under this subsection
22 not later than two years after the date of the last event
23 constituting the alleged violation for which the action
24 is brought.

25 (2) Any person who violated subsection (a), (b) or (c)
26 shall be subject to a civil penalty not to exceed \$10,000 for
27 each violation. In determining the amount of any penalty
28 under this subsection, the appropriateness of the penalty to
29 the size of the business of the person charged and the
30 gravity of the violation shall be considered. The amount of

1 any penalty under this subsection, when finally determined,
2 may be:

3 (i) deducted from any sums owing by the Commonwealth
4 to the person charged; or

5 (ii) ordered by the court, in an action brought for
6 a violation of subsection (a), (b) or (c) brought by the
7 employee or employees who suffered retaliation or
8 discrimination.

9 (h) Burden of proof.--

10 (1) In any civil action brought under this act, the
11 complainant shall have the initial burden of making a prima
12 facie showing that any behavior described in subsections (a)
13 through (c) was a contributing factor in the adverse action
14 or inaction alleged in the complaint. A prima facie case
15 shall be established if the complainant can show that:

16 (i) the respondent knew of the complainant's
17 protected activities at the time that the alleged
18 unfavorable action or inaction was taken; and

19 (ii) the discriminatory action occurred within a
20 period of time such that a reasonable person could
21 conclude that an activity protected by subsection (a) or
22 (b) was a contributing factor in the discriminatory
23 treatment.

24 (2) Once the complainant establishes a prima facie case,
25 the burden shifts to the respondent to demonstrate, by clear
26 and convincing evidence, that it would have taken the same
27 action or inaction in the absence of the behavior.

28 (i) Notice.--

29 (1) Each private contractor shall post and keep posted
30 in conspicuous places on its premises where notices to

1 employees and applicants for employment are customarily
2 posted, a notice setting forth excerpts from or summaries of
3 the pertinent provisions of this act and information
4 pertaining to the filing of a charge under this section.

5 (2) Any employer that willfully violates this section
6 may be assessed a civil penalty not to exceed \$100 for each
7 separate offense.

8 Section 9. Nonpreemption.

9 Nothing in this act preempts any other law and nothing in
10 this act shall be construed or interpreted to impair or diminish
11 in any way the authority of any locality, municipality or
12 subdivision to enact and enforce any law which provides
13 equivalent or greater protection for its employees.

14 Section 10. Applicability.

15 This act shall apply as follows:

16 (1) Section 8 shall apply to acts of retaliation or
17 discrimination occurring on or after the first day of the
18 first month that begins after the date of the enactment of
19 this act.

20 (2) The remaining provisions of this act shall apply to
21 any privatization contract entered into after the effective
22 date of this act.

23 Section 11. Effective date.

24 This act shall take effect in 60 days.