



**Testimony before the House State Government Committee on Senate Bill 411
Presented by: Timothy S. Wachter, Esquire and Emily J. Leader, Senior Deputy General Counsel
March 22, 2016**

Good morning Chairman Metcalfe, Chairman Cohen and members of the House State Government Committee and others. My name is Emily Leader and I am Senior Deputy General Counsel for the Pennsylvania School Boards Association. For over eight years, I have worked with legislative staff, school solicitors, the Office of Open Records, school entity open records officers, and filed briefs in our appellate courts to give input into, training on and to seek clarification of Pennsylvania's Right-to-Know Law. I am very grateful for the opportunity to appear before you today to address these amendments, several of which we support. I also request consideration of the need for additional changes to address some unintended consequences of the current Right-to-Know Law. I am joined today by Timothy Wachter, Esquire of the Knox McLaughlin Gornall & Sennett, P.C. a law firm in Erie, Pennsylvania. KnoxLaw represents over sixty government agencies subject to the Right-to-Know Law, including school districts and municipalities throughout Northwest Pennsylvania and Tim has extensive experience working with these clients on Right-to-Know Law requests, Office of Open Records Appeals and court cases.

Overview

PSBA supports a number of the goals of this legislation. For example, we support a provision which prohibits the use of the Right-to-Know Law for fishing expeditions connected to



administrative agency proceedings or law suits. With regard to such litigation, our members also experience problems when requesters use the Right-to-Know law to circumvent court and administrative agency rules limiting discovery. We support the goal of having those who are using the law only for commercial gain to pay for the costs associated with their requests. There are ongoing legal disputes over use of the Right-to-Know Law to get home addresses of public employees. One case, presently before the Pennsylvania Supreme Court has been in the courts since 2009 and there is a current injunction in place prohibiting release of school employees' home addresses. Many Office of Open Records appeals and several appellate court cases have considered employee rights in this regard. It is not clear to PSBA how, in general, the release of employee addresses provides insight into the operations of government. Given the ongoing legal disputes and the questionable utility of this information to shine a light on governmental operations, PSBA supports the exemption of agency employee addresses from disclosure. PSBA supports and finds very necessary the additional exception at Section 708(b)(31) excluding certain agency financial institution numbers and passwords from access. We appreciate that agencies will be able to secure prepayment if the fees required to fulfill the request are expected to exceed \$50.00. However, PSBA suggests that some of the language meant to carry out these goals requires revision to ensure they achieve their intended purposes. In addition, PSBA requests consideration of additional language, set out in this written testimony, with the purpose of ensuring our taxpayer dollars are not being diverted to matters which have nothing to do with government transparency in Pennsylvania. PSBA cannot support some provisions in this bill for reasons we explain here.

The Right-to-Know Law generally serves its purpose in balancing the need to provide the public with information on government transparency while recognizing some matters should be exempted from public access. In September 2015, PSBA completed a survey of Open Records Officers for School entities that provides information on their experience with the Right-to-Know Law. Information on the results is attached. As you can see, most requests are routine and handled expeditiously. At times, however, requests are so burdensome that they divert staff of the agencies from critical day-to-day operations in school districts which have spent the last several years reducing administrative staff and overhead. Some of the procedures have become unnecessarily burdensome. Many costs associated with fulfilling Right-to-Know Law requests are not recoverable. PSBA suggests that it is necessary to address some of these concerns in amendments to Senate Bill 411.

Fees for Commercial Users
Fees for Burdensome Requests
Requests from Out-of-State Residents
Sections 1307 and 102

PSBA members are repeatedly drawn into time consuming work on requests from commercial entities for information or to respond to vague, harassing, overbroad, voluminous requests that can be characterized as fishing expeditions. At least two commercial entities from out of state make requests multiple times per year, typically seeking records only in electronic form which means, under the Office of Open Records fee structure, that there is no charge at all for the records they receive. We understand that when this law was passed in 2008, a Third Circuit Court of Appeals decision required states to permit requests from out of state requesters and that the definition of “Requester” had to honor that decision. However, the United States Supreme

Court issued a decision which nullified this Third Circuit case. The definition of “Requester” should be limited to Pennsylvania citizens: PSBA questions why taxpayers should have to support its government expending even an hour of time to provide records for commercial requesters and also why Pennsylvania taxpayer dollars and resources are being diverted to out of state requesters. Many states permit agencies to charge a fee for searching for records, compiling them, time spent redacting and copying them and putting them away. Typically, if the state even allows the law to be used for commercial requests, it distinguishes between fees charged for commercial versus noncommercial requesters. As with this amendment, certain requesters such as press and those using information for educational purposes are generally excluded from the definition of commercial vendors and are treated like private requesters. Some amount of time or some number of copies or both is provided without charge to noncommercial requesters. PSBA supports distinguishing commercial from noncommercial requesters but also to permit agencies to charge fees for time expended in responding to requests that take over an hour to process. This will encourage requesters to make more specific, targeted requests.

PSBA seeks the following changes to be inserted in lieu of the language on page 21, lines 8-22:

(g.1) Additional fees.--

(1) Notwithstanding subsection (e), each agency may assess fees for responding to commercial requests under this act. In addition to fees under subsections (a) and (b), reasonable standard charges may be charged for document search, retrieval, review and redaction for documents for commercial use.

(2) Fees under paragraph (1) must be calculated at no more than the hourly wage of the lowest-paid public employee of the agency who is capable of searching, retrieving, reviewing and providing for redaction of the information necessary to comply with the request.

Delete:

~~(3) A fee may not be charged under paragraph (2) for the first hour of search and retrieval time for all commercial requests from a single requester in a 90-day period.~~

Insert:

(g.2) Additional fees.--

(1) Notwithstanding subsection (e), each agency may assess fees for responding to noncommercial requests which take more than one hour to fulfill. In addition to fees under subsections (a) and (b), reasonable standard charges may be charged for document search, review, redaction and supervision of inspection of records for noncommercial requests which take more than one hour of agency employee time.

(2) Fees under paragraph (1) must be calculated at no more than the hourly wage of the lowest-paid public employee of the agency who is capable of searching, retrieving, reviewing, providing for redaction and supervision of inspection of records. Such fees may be charged even if there are no responsive records.

(3) If the agency ascertains that a requester has submitted multiple requests in any calendar month, it may aggregate the time expended and apply fees pursuant to this provision.

(4) If an agency ascertains that requesters have made multiple requests in any calendar month on behalf of the same entity or individual, it may aggregate the time expended and apply fees pursuant to this provision.

Definition of “Commercial Purpose”

Section 102

PSBA seeks a minor revision to this to ensure that vendors who request records in order to sell access to agency records are subject to the special provisions relating to commercial purpose requests. At least one vendor provides electronic access to records and could avoid the provisions addressing commercial users if this is not corrected.

PSBA seeks the addition of the words “or access to: at page 2, line 11 as follows:

"Commercial purpose." The use of a record:

(1) For the purpose of selling or reselling any portion of ~~or access to~~ the record;

Definition of “Requester”

Section 102

PSBA seeks to restore language included in the original amendment, which limits the definition of “Requester” to Pennsylvania citizens. The 2008 RTKL extended the status of requester to out of state legal residents due to a Third Circuit Court of Appeals decision which was abrogated by the United States Supreme Court in *Mcburny v. Young*, 133 S. Court 1709 (2013). Pennsylvania

taxpayers should not have to support processing requests of any nature from out of state requesters. This has been identified as a particular issue for PSBA members, particularly with regard to out of state commercial requesters.

PSBA recommends the following language:

Re-insert definition on page 4, a line 11:

"Requester." A person that is a legal resident of [the United States] this Commonwealth and requests a record pursuant to this act. The term includes an agency.

**Litigation related requests
Sections 506(a) 1.1 and 707(e)**

PSBA members strongly support an amendment which addresses this issue but the language of Senate Bill 411 does not accomplish the protection needed. It would allow anyone to request records using the Right-to-Know Law in connection with planned litigation or pending litigation except a party to a case where the agency is a party. It does not require a requester to certify the request is unrelated to litigation. The proper way to secure information related to litigation is to use the court provided means of securing information through discovery or subpoenas.

However, use of the Right-to-Know Law for litigants creates improper advantages to parties and diverts extra taxpayer dollars to lawsuits which are generally brought to benefit individuals and not to promote government transparency. Thus, people considering suing an agency make broad requests for records for use in preparing a case. Those who have sued or are being sued by an agency request and secure records that are purely for use in a lawsuit and avoid court set deadlines and limitations on what must be provided in connection with the litigation, creating an unfair advantage since the agency cannot respond with similar requests to a private individual.

Finally, it is common for private litigants, e.g. in domestic cases, to use the Right-to-Know Law

to secure records for the litigation rather than using the subpoena process which, under proper circumstances, could be quashed or modified by a court overseeing the case. The use of the Right-to-Know Law to support private interests such as divorce actions or similar personal litigation does absolutely nothing to increase government transparency.

PSBA seeks revision to this amendment and additional language on page 6, lines 1-7 as follows:

(1.1) An agency may deny a request for any records requested in connection with any contemplated or pending civil action or proceeding when the request is:

Delete:

- ~~(i) is material to a pending civil action or proceeding to which the agency is a party and the Pennsylvania Rules of Civil Procedure or the Federal Rules of Civil Procedure apply; or~~
- ~~(ii) was previously made in litigation discovery.~~

Insert:

- (i) Related to a contemplated or pending civil action in which any Rules of Administrative Procedure, Pennsylvania Rules of Civil Procedure or the Federal Rules of Civil Procedure apply; or
- (ii) was previously made in litigation discovery.

(2) A denial under this subsection shall not restrict the ability to request a different record.

To ensure this is observed and enforced, PSBA seeks the following additional language be added as Section 707(e), page 9 between lines 27 and 28:

(e) Requests made by a party to litigation or on behalf of a party to litigation.--An agency may require a requester to certify in writing whether the request is for records described by Section 506(a)(1.1). Certification shall be submitted on a form developed by the Office of Open Records. A requester that submits a false written statement shall be subject to 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Requests for Trade Secrets or Confidential Proprietary Information Section 707(b)

In the Right-to Know Law, special provisions require that agencies notify certain vendors with an interest in protecting trade secrets or confidential proprietary information of a request and give them an opportunity to object to access to their protected information. However, the timelines have the

odd result of shortening the time the agency has to respond to a request for protected information and they limit application of this requirement to situations where “the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information.” Most vendors do not know about this requirement and yet many would assert that their product or service includes trade secrets or confidential proprietary information.

PSBA recommends amending this provision as follows:

(b) Requests for trade secrets.--An agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information or if the agency, in its discretion, recognizes the record should reasonably be considered to contain trade secret or confidential proprietary information. Notification shall be provided to the third party ~~within five~~ no later than fifteen calendar ~~business~~ days of the sending of an extension letter to the requester, which notice shall include the date by which input must be provided in order to be considered by the agency. ~~receipt of the request for the record.~~ The third party shall ~~have five business days from~~ receipt of notification from the agency to provide input to the agency on the release of the record no later than five business days prior to the required response date. The agency shall ~~deny the request for the record or release the record within ten business days of the provision of notice to the third party~~ respond to the request accordingly and shall notify the third party of the decision.

Written Requests Addressed to Administrative Offices Section 703

The amendment which permits records to be addressed to the administrative office of an agency is not necessary as individuals have become accustomed to submitting requests to the attention of an open records officer or of clearly marking a request as a Right-to-Know Law request.

Because of how Commonwealth Court analyzed the meaning of this provision in *Pennsylvania Gaming Control Board v. Office of Open Records*, 74 A. 3d 1027 (Pa. 2013), this could lead to confusion once again over what kinds of requests constitute written Right-to-Know Law Requests. PSBA opposes this amendment. Individuals who misaddress requests intended to be considered under the law will soon be informed and can correct this mistake, resending it to the Open Records Officer. Requests clearly delineated as Right-to-Know Law requests already must be forwarded to the Open Records Officer. There is simply no need for an additional recipient. If, however, an amendment is still considered important for reasons not addressed here, PSBA recommends that the term “Agency Head” be substituted for “Administrative Offices” as the latter is ambiguous and subject to misinterpretation and litigation.

PSBA recommends deletion of the addition of the amendments relating to administrative offices of agencies found at Page 8, lines 8-10.

Computer Formatting Issues Section 701 - Access

The bill would require that PSBA members provide electronic records in the format requested if it exists in that format, e.g., send excel files without conversion to .pdf. PSBA recommends excluding this language since it allows for the manipulation of data within a file and can result in, e.g., the creation of false invoices or purchase orders from the district, creation of false records that is misleading and will deny the public accurate information. Further, a .pdf provides

an exact snapshot of the information in the requested record as of the date of the request. The ability to manipulate the data may be useful, but the danger to agencies outweighs this mere convenience.

PSBA seeks deletion of some language on page 7, lines 18-20 and the addition of the right to provide records as .pdfs when provided electronically:

A record being provided to a requester shall be provided in the medium, ~~computer file format or other format~~ requested if it exists in that medium, ~~computer file format or other format~~ and it may be converted to a .pdf when provided electronically to prevent tampering;

**Agency Possession of Records
Section 506(d)**

Case law has interpreted this section to attribute a wide array of records in the possession of contractors as being within the agency's possession. This has resulted in a lot of litigation and difficulties in getting cooperation or securing records. This provision was only meant to address those times agencies could not locate a record it once had that would be a public record and to ensure it secures it from its contractor that still has the record. It has now in itself become a burdensome request mechanism and should be deleted.

PSBA seeks deletion of:

~~(d) Agency possession.--~~

~~(1) A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.~~

~~(2) Nothing in this act shall be construed to require access to any other record of the party in possession of the public record.~~

~~(3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee established under section 1307(b)¹ and upon collection shall remit the fee to the party in possession of the record if the party duplicated the record.~~

Predecisional Deliberations
Section 708(b)(10)

PSBA continues to seek clarifying language for this section of the law. The language does not adequately address the kinds of predecisional deliberation which are intended to be exempt.

PSBA maintains the current law's use of the word "deliberation" in two places but proposes clarifying language. PSBA is also concerned because deliberation under the Sunshine Law takes place in permissible closed Executive Sessions as well as in public meetings. This should only apply to deliberations held in the RTKL agency's public meetings.

PSBA seeks an amendment to this exception as follows on page 11, lines 23-30 and page 12, lines 13:

(10)(i) A record that reflects, contains or includes:

(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, consultants or advisors including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

(ii) Subparagraph (i)(A) shall apply to agencies ~~subject to 65 Pa.C.S. Ch. 7 (relating to open meetings)~~ in a manner consistent with 65 Pa.C.S. Ch. 7 (relating to open meetings). A record which is not otherwise exempt from access under this act and which is presented or distributed to a quorum of the decision making body of an agency for their deliberation at a public meeting in accordance with 65 Pa.C.S. Ch. 7 shall be a public record, regardless of whether a vote occurs at the meeting.

Recommended technical amendments:

Definition of Personal Financial Information
Section 102

PSBA notes that the language exempting certain tax forms filed is inadvertently limiting because filings are frequently not made with the "taxing authority." We anticipate we will then face

litigation over such forms which are in the possession of but were not filed with the taxing authority, etc.

We recommend this be revised at page 3, lines 20 and 21 to read:

...forms required to be filed by a taxpayer with a Federal or Commonwealth taxing authority, tax collector, State Department of Revenue or Internal Revenue Service.

**Home Addresses as Public Records
Sections 504 (c) and 708(b)(6)(i)(C)**

The exemption from disclosure of agency employee home addresses makes the inclusion of special notice requirements unnecessary. In addition, PSBA asserts that the system set up to provide employee opt outs is flawed and will lead to further litigation and very likely a finding this violates employees' due process rights.

A technical amendment is needed to delete at page 5, lines 11-12, Section 502 (c).

**Financial Records Redaction
65 P.S. §708(c)**

A technical amendment is needed to ensure the information exempted by the new exception pertaining to agencies' financial institution account numbers, routing numbers, credit card numbers and passwords may be redacted as follows:

(c) Financial records.--The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) ~~or~~ (17) or (31). An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.

**General Rule
Section 901(b)**

We think an amendment is needed to ensure that there is not an inadvertent belief that verbal in-person requests must be treated like written in-person requests.

We recommend adding the word "written" in Section 901(b), page 15, lines 12-14 as follows:

(b) Time for response.--The time for response shall not exceed, in the case of a **written** request made in person or submitted by regular mail, e-mail, and web form, facsimile or similar means,...

Thank you again for your attention to our input on Senate Bill 411. We look forward to working with you to carry out the important goals of this legislation and ensure Pennsylvania citizens have access to governmental operations.



**RIGHT-TO-KNOW LAW
SURVEY OF MEMBERS' OPEN RECORDS OFFICERS
August 18, 2015 – September 18, 2015**

Introduction

PSBA surveyed 585 Open Records Officers and received responses from 223 (38%). Responders included individuals serving Pennsylvania school districts, career and technical schools, intermediate units and community colleges. The purpose of this survey was to evaluate the nature and number of requests our members have processed in the past two school years, what number and kinds of requests take an hour or more to process, what changes they believe are needed in the Right-to-Know Law and what training they need.

Problems in Past Two School Years, if any, with Right-to-Know Law (110 of 175 Respondents Provided Examples of Problems)

The full response is illustrated by Chart 1, attached.

Number of Requests for School Years 2013-2014 and 2014-2015 (220 Respondents)¹

2013-2014 – 3045

2014-2015 - 3299

Two year total - 6,344

Kinds of Requests which took More than One Hour to Process (220 Respondents)

The full response is illustrated by Chart 2, attached.²

Did you pay any legal fees in association with any Right-to-Know Law requests in either of the past two school years? (223 Respondents)

Yes – 134³

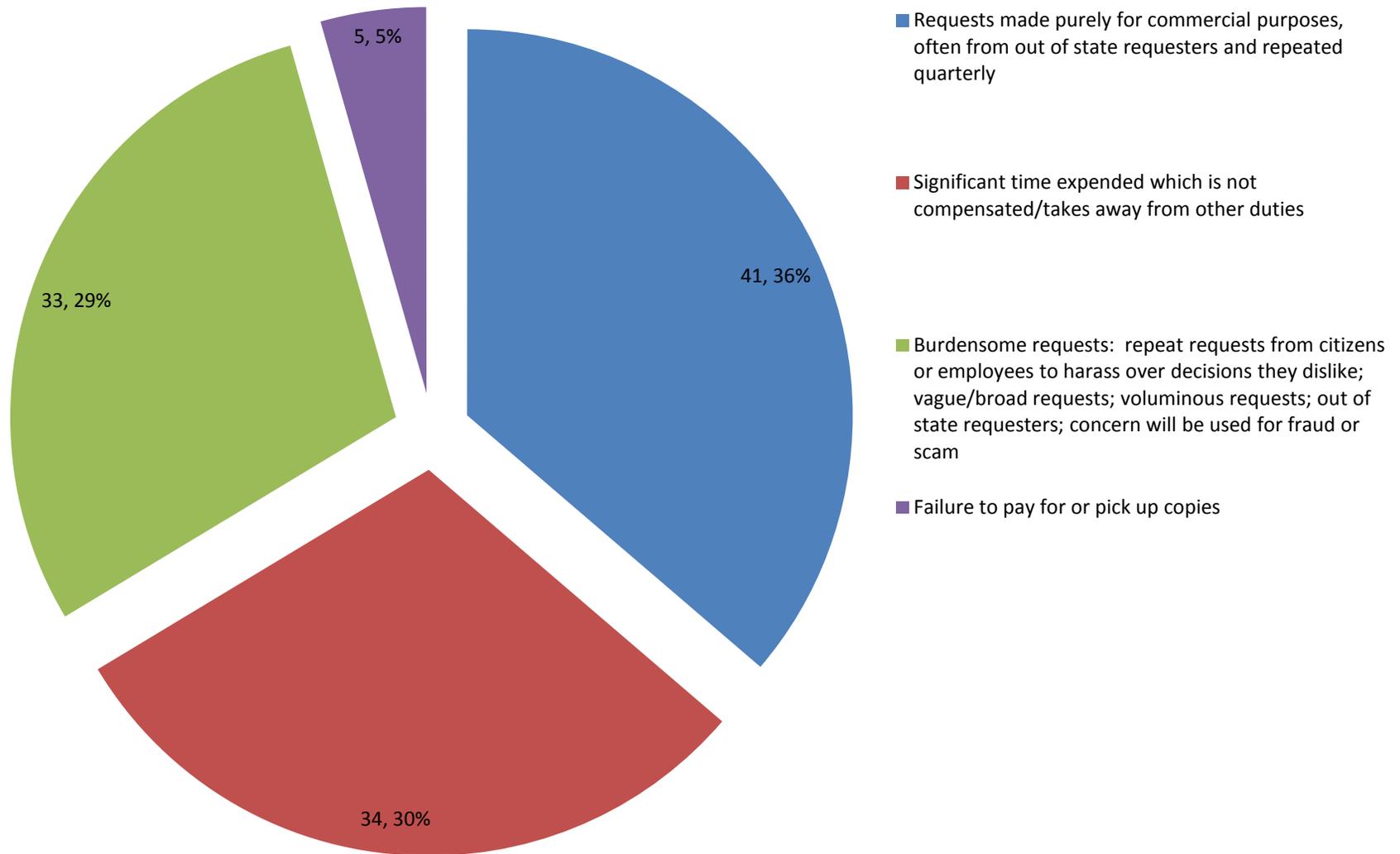
No – 89

¹ Five entities received no RTKL requests. Fourteen received requests but did not have specific figures. 19% of the requests took a minimum of one hour to process. This question did not seek specifics on the amount of time expended per request which exceeded an hour to process.

² Note that 161 of the respondents identified one or more of these requests as being related to litigation; 150 identified one or more of these requests as being for commercial or profit-making purposes and 130 identified these as representing requests from frequent requesters.

³ While this question sought only a “yes” or “no” response, nine noted the fees were minimal and two noted consultations were included in their annual retainer and six commented about incurring substantial fees as follows: \$3000.00, \$10,000.00, \$1599.00, spent significant sum (amount not provided) having attorney review and redact records in response to request for all information related to district’s high school construction project, \$3,000 for each of two separate requests, thousands (amount not specified).

Describe problems you have experienced with the Right-to-Know Law in the past two school years, if any. (110 of 175 individual respondents to this open-ended question provided examples of issues.)



One or more of the following types of requests took a minimum of an hour of staff time to process. 220 responders checked all that apply.

