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State Government Committee Hearing on March 22, 2016  
Right to Know Law (“RTKL”) Proposed Amendments

**TESTIMONY OF SIMON CAMPBELL  
THE “CITIZEN REQUESTER” PERSPECTIVE**

Thank you, Mr. Chairman, and members of the State Government committee for the opportunity to bring a *real world* discussion to the RTKL. The real world is how the law works for your constituents and all citizens of Pennsylvania i.e. the people you wrote the law for. The ‘end user’ perspective is arguably the most important.

With former State Senator Dominic Pileggi leaving the legislature, SB 411 is a captain-less, rudder-less, ship. No amount of government lobbying by OOR should be allowed to salvage this wreck. About two thirds of the bill is bad; really bad. About one third is good. Your constituents are not crying out for you to pass a new RTKL to make the law more convenient for government officials – yet that’s most of the lobbying you hear.

Your constituents want their needs as Citizen Requesters met. Broadly, that means:

- a) More records are made available to citizens not less
- b) Greater ease of process and procedure for citizens
- c) Make it harder for government to use taxpayer-funded lawyers to block access to records

I could pore over SB 411 and tell you about all the bad things in it, but most likely the Pennsylvania Newsmedia Association will go into that in detail. That said, I’ll pick just one example to show you how the Senate was sloppy and why the House needs to be more thorough.

On page 3 of SB 411 a plethora of new items are exempted from access under the header “Personal Financial Information”. Serving the needs of public employees seems to be in fashion for some unknown reason. “Employee benefit election information” is exempt. Do any of you know what that means? (I have no idea). Is it given a definition in the bill? (No). So please allow me explain how the *real world* works in this regard.

One of your constituents, Bob, learns that his school district gave the Superintendent a choice of two taxpayer-funded benefits in his contract: a taxpayer-funded car or a 0% employee contribution healthcare plan. Bob makes a RTKL request for “all taxpayer-funded benefits currently enjoyed by the Superintendent.” Bob gets denied because the government cites to a new denial basis known as “employee benefit election information”. Bob appeals to OOR and

wins. But the school district's lawyers – controlled by the Superintendent - want to deny Bob. Now Bob has to pay a lawyer in Court. Meanwhile the Court cannot find any definition in the amended RTKL for “employee benefit election information” so they make one up and apply it.

What should have been a legislative definition is now Court-defined, and Bob's unhappy. He's out money for a lawyer. He doesn't understand why his State Rep voted for something that had no legal definition. In fact, Bob doesn't even think things like “employee choice” around taxpayer-funded benefits should be exempt! Do you agree or disagree with Bob? If you agree then you're already thinking about amending that exception out. Good for you. By the time someone explains the other 20 items you'll want to amend out, you'll be asking someone to just re-write the bill. And that's when we're in business.

As for Commercial Requesters, if information is public then it's public. Who cares why different people want it? I don't represent commercial interests. But let's suppose you agree it is legitimate public policy to have home addresses kept public for residency checking purposes. Then Susan comes along and uses them for political purposes. What's your instinct? Is it to control Susan? If so, then after you've written a law to control Susan, how will you control the next citizen who uses public information in lawful ways? This is the United States. You are not elected to control anyone and you don't own the information. We shouldn't have to live under the legislature's benevolence.

As for the government lobbying groups that complain about the law being burdensome, just tell them to call the Requester and say “Hi Requester, is there any way you can request this information [not that information], or request it this way [not that way], because the way we store our information it'd lessen our workload.” It's only common sense. How about you instead focus on how to make the law less burdensome for your constituents Bob and Mary?

#### **I. CITIZEN-FRIENDLY IDEAS:**

1. If citizen Mary wins at OOR and the agency appeals its loss in Court and loses again, then the Agency automatically pays Mary's legal fees (logic: give OOR decisions clout; & make agencies think twice about abusing citizens simply because the agency has taxpayer-funded lawyers).
2. Give OOR the power to impose bad faith sanctions on agencies who deny Requesters in wanton disregard of the law. Right now, Requesters can only get this relief from Courts. Bring it down to the OOR level. Trust that OOR will adjudicate this issue fairly and impartially (logic: make agencies think twice before frivolously denying Requesters, acting in bad faith etc.).
3. Make it optional for Requesters to need to be involved in Court appeals. Right now, if an agency loses at OOR and appeals to Court, Bob gets named as the opposing party. Bob was happy with the OOR decision. Don't force the poor guy to start filing court briefs and/or hire a lawyer. Give Bob the power to say “I'm not getting involved. I want the Court to just look at the OOR decision without me.” Maybe in other

disputes Bob is passionate about the case and he wants to get actively involved at the Court level. Let Bob have that option if he wants it. Give Bob the choice.

4. Correct horrible court decisions. The list is too long for one hearing. As just one example, the Commonwealth Court ruled that a “personal e-mail address” is a government e-mail address. Under current court precedent, [mcohen@pahouse.net](mailto:mcohen@pahouse.net) is exempt under the RTKL. I don’t believe that Rep. Cohen thinks this government e-mail is his “personal” one. It’s a simple fix. You add a couple of sentences to the definitions section of the law to say that a personal e-mail address is an “e-mail address that is not issued by an agency.” We can all agree on that, I assume? Many other similar fixes are available but which require knowledge of case precedent.

## **II. HOME ADDRESSES – WAIT!**

In 2009 PSEA initiated a lawsuit to keep public school employees’ secret. They obtained a single Judge preliminary injunction in July 2009 as a stop gap measure. Ever since then, they’ve lost practically every court decision. The case is now ripe for final disposition at the Supreme Court. Oral argument is weeks away. I have standing in the case. The Supreme Court will be making a determination on the constitutionality of the RTKL re: home addresses. I don’t think PSEA stand any chance of winning, but prudence suggests waiting. Let’s get that Court decision behind us before we move any bill forward with or without home addresses inside it.

## **III. OOR IS GOVERNMENT – THE WRONG GROUP TO PRESUME TO HAVE CITIZENS’ BEST INTERESTS AT HEART**

OOR are adjudicators of disputes. You established OOR and you funded it with taxpayer dollars so your constituents could have their disputes heard impartially without needing to pay a lawyer. Not to disparage the mindset of any OOR official but OOR are government adjudicators. They can, and often do, ‘get it wrong’. Meaning they deny access to records and then citizens have to go to court to get OOR decisions overturned. I should know.

OOR has its own interests. The workload created by inmates is an OOR interest. Your constituents Bob and Mary probably don’t care about that (let’s be honest). Bob and Mary want their needs taken care of, not the Government’s needs. Does OOR support SB 411? If so, does that mean it is a good bill for Bob and Mary? Hardly. To generate legislation that is good for Bob and Mary you arguably need to spend most of your time listening to the end users of the law.

The OOR has historically been staffed by transparency-minded people but should not be seen as your immediate “go to” people for the simple reason that what they are saying could have self-interest. If you ask Erik Arneson if he supports having his home address withheld under the RTKL (because SB 411 currently does that) while your constituents Bob and Mary have their addresses released, Erik isn’t going to say “it’s because I’m a special person being a government employee” because it would seem rude. But ask yourselves what Bob and Mary would think about that – once again being told that public employees are a special breed of citizen.

The RTKL does not exist to make the lives of Government officials easier. It exists so Bob and Mary can hold their officials accountable, and do whatever lawful things they want to do in a free country with public information. Yes, there's a cost to that. But what is the cost of secrecy in a democratic society? Secrecy breeds corruption – I have personally seen it happen and the RTKL is a tool to uncover it.

#### IV. OOR MEDIATION? – FORGET IT!

OOR seems to be on a push to promote themselves as mediators to help resolve disputes in a cost-effective way. It reminds me of the nine most terrifying words in the English language: “*I’m from the government and I’m here to help.*” See OOR’s webpage: <http://www.openrecords.pa.gov/Appeals/Pages/Mediation-Program.aspx#.VuvzbeIrJhE>

The only mediation that the ‘OOR Government’ (yes, OOR is government) is offering to ‘help’ with, is mediation *after* a Requester initiates an appeal. OOR doesn’t exist in the RTKL during the ‘request stage’. I am a Requester. If I file an appeal with OOR then it means I’m already in battle mode with the agency. They’ve denied me records, after all. Now I’m supposed to believe that the nice OOR Government people will help mediate a dispute? See the OOR’s link. OOR is telling the public:

“Mediation sessions are not open to the public. All discussions, negotiations and materials created specifically for the mediation process are confidential. **See 42 Pa. C.S. 5949** (relating to the confidentiality of mediation communications and documents).”

If citizens want the nice OOR Government people to help them, then citizens would be subjecting themselves to a confidentiality law. **A law.** I can’t remember everything I say to government agency people. Suppose I left an OOR mediation session and I inadvertently talked about it in some way? I guess I could be prosecuted for breaking the law. If you think OOR mediation is a good thing (personally I don’t; I think it’s an artificial crutch) then you surely need to remove all liability risk around citizens engaging in it.

As for ‘problem’ agencies (when things are disputed at the *request stage*) nobody needs an OOR Government mediator there either. Citizens only need learn to learn how to negotiate and ‘wheel and deal’ with the taxpayer-funded lawyers determined to make citizens’ lives a misery. An example of such wheeling and dealing at the *request stage* is on my website ([http://www.parighttoknow.com/Retirement\\_Statements.php](http://www.parighttoknow.com/Retirement_Statements.php)). SERS, i.e. the Wolf administration, wanted to starve my family by illegally forcing me to pay \$780.00 just to process a RTKL request. I tried all known forms of polite mediation to try to get them to change an incorrect final answer to an interim answer. I didn’t think to call in the OOR government mediator. Instead, I made a lobbying video with sound reason and logic (plus some Sex Pistols music) and sent it to Wolf’s legal team. It’s on the webpage. Within 20 minutes SERS had changed their position. I’d like to think it was my discussion of the law that caused them to soften their position but it might have Steve Jones’ guitar riffs. My point is this; when you think about “mediation” Erik and the team at OOR are lovely people. They genuinely mean well. It’s

just that citizens might get prosecuted if they don't gag themselves after signing up for help from the OOR Government.<sup>1</sup>

## V. THE JUDICIAL BRANCH

Please watch the AOPC Kings' webpage at [www.parighttoknow.com](http://www.parighttoknow.com). This is a HUGE constitutional separation of powers issue. I'm respectfully asking that you become familiar with the problem: Section 304 of the RTKL lies at the heart of it. We are not a society in which citizens must succumb to black-robed rulers. The Rule of Law is under attack by AOPC<sup>2</sup>.

## VI. WE NEED A HOUSE CHAMPION – WHO WILL STEP FORWARD?

SB 411 is a tired old horse. It is time to put it to rest. Let's pick the good pieces out of it, discard the bad pieces, and write a comprehensive new RTKL House Bill to bring forward for a vote of this Committee. We need a House Leader from this Committee. The Senate held hearings for years and its final product was a sloppy, special interest laden, mostly anti-Citizen mish mash of ideas. Let's pick apart SB 411 and write a better, clearer, even more comprehensive bill. Who is up to the challenge?

I'll happily stop being a pest and instead sit inside a thoughtful room with the best transparency advocates in Pennsylvania. I'll ask Terry Mutchler to be in that room; I'll ask Craig Staudenmaier to be in it (arguably two of the best lawyers in this business). I'll ask Melissa from Pennsylvania Newsmedia Association. I'll ask Corinna over at the Pennsylvania Freedom of Information Coalition. Let's bring in OOR if you like. We'll make a pot of tea and write a fantastic new RTKL bill in 4-6 hours: better than the legislative drafting bureau could draft. Then present it to the House Champion. If it needs tweaking we'll tweak it.

## VII. CONCLUSION

SB 411 is a fixer upper property in need of serious repair. A huge number of amendments would be needed. The work would be messy. It'd be far easier to see the land's potential, demolish the house, and build a new one from scratch. Out with the old; in with the new. The State House needs to be the leader now. And don't worry about being able to get the votes. Leave the lobbying to me. I know how to get an appointment with all your colleagues.

Feeling transparency-inspired, anyone?

Regards,



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<sup>1</sup> There is some irony in the OOR's promotion of *secrecy* in merely discussing what records should be released.

<sup>2</sup> Did you file your RTKL requests of Common Pleas Courts yet? Please witness this problem yourselves.