

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

HOUSE STATE GOVERNMENT COMMITTEE
PUBLIC HEARING

STATE CAPITOL
HARRISBURG, PENNSYLVANIA

IRVIS OFFICE BUILDING
HEARING ROOM G-50

TUESDAY, MARCH 9, 2021
1:00 P.M.

PRESENTATION ON
COVID-19 OVERSIGHT

BEFORE :

HONORABLE SETH GROVE, MAJORITY CHAIRMAN
HONORABLE RUSS DIAMOND (VIRTUAL)
HONORABLE DAWN KEEFER
HONORABLE ANDREW LEWIS (VIRTUAL)
HONORABLE RYAN MACKENZIE (VIRTUAL)
HONORABLE BRETT MILLER
HONORABLE JASON ORTITAY (VIRTUAL)
HONORABLE FRANK RYAN (VIRTUAL)
HONORABLE PAUL SCHEMEL
HONORABLE LOUIS SCHMITT (VIRTUAL)
HONORABLE CRAIG STAATS
HONORABLE JEFF WHEELAND
HONORABLE ISABELLA FITZGERALD (VIRTUAL)
HONORABLE KRISTINE HOWARD (VIRTUAL)
HONORABLE MALCOLM KENYATTA
HONORABLE BENJAMIN SANCHEZ (VIRTUAL)
HONORABLE JARED SOLOMON (VIRTUAL)
HONORABLE JOE WEBSTER (VIRTUAL)

HOUSE COMMITTEE STAFF PRESENT:

SHERRY EBERLY
MAJORITY LEGISLATIVE ADMINISTRATIVE ASSISTANT
MICHAELE TOTINO
MAJORITY ED FOR STATE GOVERNMENT COMMITTEE
MICHAEL HECKMANN
MAJORITY RESEARCH ANALYST

NICHOLAS HIMEBAUGH
DEMOCRATIC ED FOR STATE GOVERNMENT COMMITTEE

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*Pennsylvania House Of Representatives
Commonwealth of Pennsylvania*

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SUBMITTED WRITTEN TESTIMONY

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(See submitted written testimony and handouts online.)

P R O C E E D I N G S

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3 CHAIRMAN GROVE: Good afternoon. Welcome to this
4 public hearing of the Pennsylvania House State Government
5 Committee on lack of government transparency and right-to-
6 knows during COVID-19. I'm the Committee's Chairman, Seth
7 Grove, from York County. This is the first hearing of four
8 where this committee will review the Executive Branch's
9 COVID-19 policies from agencies which fall under this
10 committee's oversight jurisdiction.

11 These four committee hearings were originally
12 going to be held by our subcommittees. Specifically, the
13 Right-To-Know Law falls under the jurisdiction of the
14 Subcommittee on Government Integrity and Transparency,
15 chaired by Representative Paul Schemel. Subcommittees are
16 designed, at least for this committee, to build technical
17 expertise in their area's jurisdiction. In order for this
18 to occur, I will be turning over the remainder of the
19 hearing to Representative Paul Schemel, as I also may have
20 to periodically step out. Chairman Schemel, it's all
21 yours, bud.

22 REPRESENTATIVE SCHEMEL: Thank you, Chairman
23 Grove, and welcome Chairman Kenyatta, who will be joining
24 us as the co-chair today from the Minority. Having served
25 as a municipal and county solicitor, I've handled numerous

1 right-to-know requests. As a government functionary, they
2 are an unwelcome interruption of ordinary work. You have
3 to stop what you're doing, search for the information, and
4 make a determination as to whether it is appropriate to
5 release. All the while you think to yourself, why does
6 this person even want this information.

7 I recall a request for the wage rates of road
8 crew employees made by an individual who is having a
9 property line dispute with his neighbor, who just happened
10 to work on a municipal road crew. Other than shooting off
11 his mouth at the local watering hole, which the requestor
12 frequented in the evenings, what legitimate purpose could
13 filling their request possibly accomplish?

14 Although the impulse to ask why is
15 understandable, the fact that the public information which
16 government entities holds belongs to the public just as
17 much as do roads and parks, and it is not for our -- it is
18 not our business to question why someone wants this public
19 information or to question whether they deserve it. Were
20 we to travel down that path, it would fundamentally alter
21 the relational posture which the government has with the
22 citizens it serves. The government should not withhold
23 from citizens that which is theirs.

24 The current pandemic has stressed many government
25 operations, but openness and transparency should not be a

1 casualty to the challenges which come with difficult
2 circumstances. As Judge Strickland of the Western Federal
3 District Court explained, our freedoms are not fair-weather
4 freedoms. They are for precisely these times.

5 This afternoon, we will be hearing from three
6 panels each with the unique perspective on the need for
7 open records, as well as the challenges of responding to
8 open records requests. The first panel includes officials
9 from the state Office of Open Records, the second panel
10 will provide the perspective of the news media, and the
11 third panel will include local officials.

12 Now, we will begin this afternoon with member
13 introductions, especially since we are virtual -- many of
14 our members are joining virtually, I think this is
15 important so the members of the public and others can see
16 the Members that are attending. So I'll begin with those
17 that are in this room, starting here on my right.

18 REPRESENTATIVE WHEELAND: Thank you very much.
19 Jeff Wheeland, Lycoming County, Williamsport area, 83rd
20 District.

21 REPRESENTATIVE SCHEMEL: I'm Paul Schemel,
22 representing a portion of Franklin County.

23 MINORITY CHAIRMAN KENYATTA: Representative
24 Malcolm Kenyatta, 181st District.

25 REPRESENTATIVE MILLER: Brett Miller, 41st

1 District, Lancaster County.

2 MAJORITY CHAIRMAN GROVE: Seth Grove, 196th
3 District, York County.

4 REPRESENTATIVE KEEFER: Dawn Keefer, 92nd
5 District, York and Cumberland Counties.

6 REPRESENTATIVE STAATS: Good afternoon. Craig
7 Staats proudly representing the 145th District in Bucks
8 County.

9 REPRESENTATIVE SCHEMEL: And will those who are
10 joining us virtually, please, each unmute and then
11 introduce yourself and then remember to mute yourself once
12 again.

13 REPRESENTATIVE MACKENZIE: Good afternoon. Ryan
14 Mackenzie representing the 134th District in parts of
15 Lehigh and Berks Counties.

16 REPRESENTATIVE WEBSTER: Joe Webster is on, and
17 good afternoon everyone. I represent Montgomery County and
18 House District 150.

19 REPRESENTATIVE DIAMOND: Good afternoon,
20 everyone. Representative Russ Diamond, Lebanon County,
21 102nd District.

22 REPRESENTATIVE HOWARD: Hi, it's Kristine Howard
23 from the 167th in Chester County.

24 REPRESENTATIVE FITZGERALD: Good afternoon.
25 Isabella Fitzgerald 203rd Legislative District and

1 Philadelphia, West Oak Lane, East Oak Lane, and the Lower
2 Northeast.

3 REPRESENTATIVE LEWIS: Good afternoon, everybody.
4 State Representative Andrew Lewis, 105th District in
5 Dauphin County. Good to be here.

6 REPRESENTATIVE ORTITAY: Good afternoon,
7 everyone. Jason Ortitay representing the 46th District in
8 Allegheny and Washington Counties.

9 REPRESENTATIVE SCHMITT: Lou Schmitt, 79th
10 Legislative District, the City of Altoona, and other
11 portions of Blair County.

12 REPRESENTATIVE SCHEMEL: Do we have any other
13 Representatives who have not yet introduced themselves?
14 Representative Sanchez? We see Representative Sanchez is
15 tuned in. Perhaps he is having difficulty with his
16 microphone, so we will acknowledge him as being here.

17 All right. With that, we need to swear in --

18 REPRESENTATIVE SANCHEZ: I'm sorry, Mr. Chairman.
19 I thought I did chime in. I'm here. Ben Sanchez
20 representing Montgomery County.

21 REPRESENTATIVE SCHEMEL: Good. Thank you. Good
22 to hear you.

23 REPRESENTATIVE SANCHEZ: Thank you.

24 REPRESENTATIVE SCHEMEL: All right. With that,
25 we should swear in our first panel, which will be Liz

1 Wagenseller. She is the executive director of the Office
2 of Open Records, and Nathan Byerly, who is the deputy
3 director of the Office of Open Records. I believe that we
4 have Director Wagenseller and Deputy Director Byerly with
5 us.

6 MS. WAGENSELLER: Hello.

7 MR. BYERLY: Hello.

8 REPRESENTATIVE SCHEMEL: All right. Thank you,
9 both. So if you would, please, each raise -- both raise
10 your right -- right hand and then just repeat -- sorry.
11 Oh, sorry. Director Wagenseller, we need to get you on
12 camera. Can you turn on your camera, please?

13 MS. WAGENSELLER: Can you see me now?

14 UNIDENTIFIED VOICE: No.

15 REPRESENTATIVE SCHEMEL: We cannot, but I think
16 he's working on it.

17 UNIDENTIFIED VOICE: You can try leaving and
18 coming back in the meeting, because I don't -- we don't --

19 MS. WAGENSELLER: Okay.

20 UNIDENTIFIED VOICE: -- see you.

21 MS. WAGENSELLER: I'll be right back.

22 UNIDENTIFIED VOICE: We see --

23 MS. WAGENSELLER: Is it good?

24 UNIDENTIFIED VOICE: -- you now.

25 MS. WAGENSELLER: Okay.

1 REPRESENTATIVE SCHEMEL: Very good. Thank you so
2 much. If you could both raise your right hands, please.
3 Thank you.

4 (Oath administered)

5 MS. WAGENSELLER: I do.

6 MR. BYERLY: I do.

7 REPRESENTATIVE SCHEMEL: Very well. Thank you.
8 I'm not sure if you intend to testify as a panel. I know
9 that you have some prepared remarks, so -- forgive me. We
10 do have some housekeeping remarks. Very quickly, I'll make
11 those.

12 We have testifiers and members in attendance
13 virtually as well as public viewing via live stream. Due
14 to Sunshine Law requirements, if either of these platforms
15 experience technical difficulties, we will pause the
16 meeting in order to correct the issues. For the members
17 participating virtually, please mute your microphones.
18 Please know that when you speak, we can all hear you. If
19 you want to be recognized for comments, please raise your
20 hand function. After being recognized, but prior to
21 speaking, please turn on your camera and unmute your
22 microphone. After you've completed your question, please
23 mute your microphone.

24 My goal is to have as many members as possible to
25 ask questions this afternoon, but please limit your

1 question to one person for a maximum of five minutes. This
2 should provide enough time for further rounds of questions.
3 Also, this hearing is about right-to-know requests. Please
4 keep your inquiries on other topics until all member
5 questions have been asked concerning election guidance. We
6 will be holding additional hearings in regard to right-to-
7 know requests, so you may have additional opportunities for
8 those more expanded questions.

9 Very good. With that, I take it back to you
10 Director and Deputy Director. If you would like to offer
11 some prepared remarks, we're happy to hear them.

12 MS. WAGENSELLER: Thank you very much. Thank
13 you, Representative Schemel and Representative Kenyatta and
14 the rest of the House State Government Committee for
15 inviting me to testify. Good afternoon. As mentioned, I'm
16 joined today by Deputy Nathan Byerly. I have submitted
17 some written testimony. We will offer a few opening
18 remarks.

19 By way of background, the Right-To-Know Law
20 dictates that a local or Commonwealth agency must respond
21 to requests for record in five business days unless it
22 applies a 30-day extension. Within 15 days of being denied
23 by an agency, an individual can appeal agency's decision to
24 our office, the Office of Open Records. Decision on the
25 appeal must normally be made within 30 days. Either party

1 may then appeal that decision to the courts. Those studies
2 suggested that less than three percent of all the Right-To-
3 Know Law requests made across the Commonwealth are
4 appealed. We only see, you know, less than three percent
5 of those. We are still deciding about 3,000 appeals a
6 year. Of those, about seven to eight percent are appealed
7 to the courts. So that is how the process functions during
8 normal operations.

9 During the early weeks of the COVID-19 pandemic,
10 the closing of government office buildings greatly impacted
11 the right-to-know process. The Office of Open Records has
12 remained operational throughout the pandemic. Initially,
13 our office issued indefinite stays, which are essentially a
14 pause for all appeals filed from late March to early April.
15 In practice, this means the office continued to receive
16 appeals and process them but allowed agencies to assess any
17 steps it might need to comply with the Right-To-Know Law
18 under the new safety precautions developed in response to
19 the pandemic. It also protected the parties' right to due
20 process and gave the Office of Open Records flexibility in
21 allowing agencies and requestors additional time to present
22 evidence and arguments.

23 By late April, agency capabilities improved, and
24 our office switched from issuing indefinite stays to 30-day
25 stays. By August, the stays were issued only as needed.

1 On July 27th of 2020, Act 77 became law, and as required,
2 the Office of Open Records published guidelines specifying
3 how a Commonwealth agency must respond to a request for
4 records made during a disaster declaration, when the
5 governor orders the closure of the Commonwealth agency's
6 physical location. Act 77 clarified the steps Commonwealth
7 agencies must take to provide access to government records
8 well under the Governor's disaster declaration; however,
9 Act 77 does present new challenging legal issues.

10 At this time, the biggest issues around
11 surrounding Act 77 include the application of terms. Most
12 significantly, defining data as described in the Act, it
13 may have been previously protected under the Disease
14 Prevention and Control Law but now may be deemed public
15 during a disaster declaration. The definition and
16 application of data in Act 77 will initially fall to our
17 office, the Office of Open Records, and then shift to the
18 courts. The OOR will continue to hear arguments from the
19 parties as to what they believe some of these terms mean.

20 The interaction between Act 77, the Disease and
21 Prevention Control Law, and the Right-To-Know Law continues
22 to evolve. So Act 77 provided significant clarification on
23 how Commonwealth agencies must respond during these
24 situations. Questions do remain regarding some of these
25 terms, as I mentioned. Currently, the Office of Open

1 Records is not hearing any significant complaints about
2 agencies ignoring right-to-know requests, nor seeing any
3 increase in agencies disengaging during the appeal process.
4 However, the number of appeals filed with the Office of
5 Open Records continues to increase. It is on track to
6 reach 3,200 this fiscal year, which would be a 31 percent
7 increase in one year.

8 One additional item that I did not submit in my
9 written remarks, since becoming Executive Director about
10 seven weeks ago, I began exploring how agencies post
11 information about how to make right-to-know requests on the
12 websites, in terms of ease of access, clarity of language,
13 and accuracy of current policies. Based on what I
14 reviewed, the Office is going to commence a more formal
15 review and produce a report outlining best practices on how
16 agencies post information about making right-to-know
17 requests. It's important that citizens understand and can
18 access those policies in order just to make those requests.
19 So with that, I thank you for inviting me to testify, and
20 I'd be happy to answer any questions.

21 REPRESENTATIVE SCHEMEL: Very good, Director, and
22 thank you for reminding us your -- welcome to your new
23 position. I know this is a baptism by fire, but we
24 appreciate your willingness to be here today, as well as
25 the Deputy Director. I think our first question today

1 comes from Representative Mackenzie.

2 REPRESENTATIVE MACKENZIE: Yes. Thank you, Mr.
3 Chairman, and thank you to both of our panelists who are
4 joining us here today. In the opening comments, you
5 mentioned that there was a pause put on right-to-know
6 requests, but I'm wondering since that pause in greater
7 detail, how has the pandemic impacted the Office of Open
8 Records and its ability in the past year to comply with
9 these requests, what changes were made, if any, and can you
10 go into detail and also talk about the speed with which the
11 Office is fulfilling these requests?

12 MS. WAGENSELLER: Absolutely. Thank you,
13 Representative Mackenzie. The Office of Open Records,
14 thanks to my predecessor in working with the team here, we
15 were set to go remote. We had a procedure established for
16 how things would shift remote, so our office, in terms of
17 functionality and doing our work, was minimally impacted.
18 We transitioned very seamlessly to teleworking and
19 processing. Things were more challenging initially because
20 we had to work with different scenarios and situations
21 during those opening months, and we continued to adjust as
22 things became easier for agencies to respond and to reply.

23 The biggest impact we have had this past year has
24 been the volume and complexity of the cases of the appeals.
25 We just see appeals. So there are thousands upon thousands

1 of right-to-know requests that never make it to our door.
2 So in terms of the appeals, we saw a dramatic increase.
3 This year as in previous years, but I think situations also
4 led to an increase here and the complexity of the cases,
5 but by August -- certainly by August, it was sort of
6 business as usual in terms of process and procedures, and
7 even before then, most things were pretty back to normal in
8 terms of our abilities. We never stopped functioning on a
9 normal basis. It was responding to other entities'
10 challenges in accessing records and documents in those
11 initial weeks and months.

12 REPRESENTATIVE MACKENZIE: Okay. So just to
13 clarify here, so there were no major procedural changes.
14 It was just the volume had gone up, and you've addressed
15 that and been able to work through that process now and
16 handle that increased volume?

17 MS. WAGENSELLER: We are -- yes. We are doing
18 the best we can, and we are meeting our 30-day deadline,
19 and you know, the processes that changed only were those
20 stays that we implemented initially. And then, there have
21 been a few situations. One time someone was quarantining
22 where we had to issue another stay because of COVID-related
23 things, but those were just a few here and there, but it's
24 been pretty much back to normal for us in terms of our work
25 in processing the appeals.

1 REPRESENTATIVE MACKENZIE: Okay. Great. Thank
2 you, Mister -- thank you to both the testifiers and thank
3 you, Mr. Chairman.

4 REPRESENTATIVE SCHEMEL: Thank you,
5 Representative Mackenzie.

6 Chairman Grove.

7 MAJORITY CHAIRMAN GROVE: Thank you. First and
8 foremost, Executive Director Wagenseller, congratulations.
9 I did want to at one point say, hey, Liz. Congratulations.
10 You know you have a big fan in the open records office from
11 my perspective, and we look forward to working with you,
12 hopefully, on improving our open records laws as we move
13 forward. So really appreciate -- congratulations and
14 really appreciate the work your team has done over the past
15 year in that office.

16 MS. WAGENSELLER: Thank you.

17 MAJORITY CHAIRMAN GROVE: Going back to kind of
18 Act 77, obviously it was passed unanimously by both
19 chambers of this General Assembly. We make it a priority
20 to make sure that, you know, the Right-To-Know Law is our
21 predominant premier transparency law in the Commonwealth.
22 So you know, hearing on how we can improve upon that from
23 you and other stakeholders is critically important. But
24 when we go back in dealing with Act 77, I know your
25 remarks -- and you spoke to it, some clarification on data

1 and stuff, so just want to take some time and work through
2 that with you quickly because I know the administration
3 cites the Disease and Prevention Control Law repeatedly on
4 its filings when we do data.

5 So when we did this law, we were trying to
6 ascertain information on why mitigation orders were being
7 presented, and we wanted to know the data behind that,
8 like, what was the agency seeing that provided that outcome
9 of, this is the direction we need to go in, the predictive
10 models, you know, the Department of Health contracted with
11 Carnegie Mellon to do data modeling -- collect data, do
12 data modeling. What does that say? When you use the data
13 in these quantitative ways, what does it come out with? So
14 really the goal of this is to provide that background
15 information on why agencies are making the decisions they
16 are, that impact everyone's lives. And we felt it
17 particularly important under emergency declaration to have
18 enhanced transparency because it really has been a
19 unilateral control of the executive branch for months on
20 end, there. So we worked out a legislation, and I applaud
21 my colleagues on the Democratic side to bring up, I think,
22 well-written amendments to improve that legislation.

23 To give you the legislative background on it, we
24 do want data on emergency declaration, even it pertains to
25 the Disease and Prevention Control Act to be open and

1 transparent. That law was designed to do that
2 specifically, to make sure we have maximum amount of
3 understanding of why mitigation orders are being done,
4 what's the data behind that, and you know, to this day, the
5 past few, I will give Governor Wolf's office credit, the
6 Department of Health. They have been providing more data.
7 They've been providing more case studies on current
8 mitigation orders. So we are thankful for that happening,
9 but the prior ones, we really didn't have any real data to
10 say, yeah, this warranted this mitigation order.

11 So that's kind of the background behind how we
12 kind of came up with Act 77 and trying to provide residents
13 of the Commonwealth more context and background to as how
14 decisions were being made moving forward. With that, I
15 know there's the guideline orders that OOR put out. Can
16 you kind of break us down what those current guidelines are
17 and how they've worked because I -- of course, I haven't
18 heard any complaints since they were out, so from my
19 perspective they've been working great but just want to
20 hear from your contacts how they've been operating.

21 MS. WAGENSELLER: Sure. I'll go over them
22 quickly and talk about some of them more specifically. So
23 really quickly, they were -- the guidelines that we issued
24 within five days of the act going into law, public
25 notification of changes to the Right-To-Know Law process.

1 So on your agency's website, here's what's going on because
2 of COVID-19. That was one. Ensuring agency establishes
3 the capability to remotely respond to the Right-To-Know Law
4 requests. If your right-to-know officer is someone who
5 cannot work remotely, then you need to find a new right-to-
6 know officer. Confirming that the normal timelines
7 continue to make changing processes abilities, procedures
8 for obtaining records, locating in a building that is
9 physically closed. Procedures when a requestor needs to
10 inspect records on site. Sometimes, I think it's pretty
11 rare, but that happens that a requestor needs to go to an
12 office building to look at documents, so making sure you
13 have a process for that. The OORs -- then it also talked
14 about our ability -- our office's ability to invoke
15 reasonable extensions when a physical building is closed.

16 You know in this case, with COVID, as you know
17 this is not -- the physical buildings aren't blocked by a
18 flood or a fire or something like that, but if there's
19 something during an emergency declaration that prevents
20 physical access to a building, we can say, you don't have
21 to go swim in your boat to the Keystone building to get
22 these for a right-to-know request. That type of situation.
23 And then making sure that agencies update their policies to
24 ensure compliance with Act 77, so making sure that they are
25 aware of that act and can apply that appropriately when

1 they receive the right-to-know request where that might
2 apply.

3 In terms of these -- the application of these, we
4 have not heard a lot of complaints. There's been some
5 concern about the public notification on agency websites
6 explaining current processes for Right-To-Know Law requests
7 that may be a little outdated, but that's something, as I
8 mentioned, that we've decided to look into a little bit
9 closer in terms of how agencies are displaying and how
10 people can access information about how to file a Right-To-
11 Know Law request on agency websites.

12 REPRESENTATIVE MACKENZIE: Do you think this will
13 be helpful -- obviously, we are prone to natural disasters
14 here in the Commonwealth: tornadoes, floods, you name it.
15 For those emergency declarations in smaller geographic
16 areas, this is a good tool, as far as Act 77 goes -- it's
17 going to be a good tool for, kind of those areas --

18 MS. WAGENSELLER: Yes.

19 REPRESENTATIVE MACKENZIE: -- to try to work
20 through those emergency declarations for those natural
21 disasters as well, correct?

22 MS. WAGENSELLER: Absolutely. It's a fantastic
23 way -- footprint for how to do that. You know, 2008 when
24 the Right-To-Know Law was enacted wasn't that long ago, but
25 I think the concept that thousands of state employees could

1 telework still was not something that people thought
2 through, so I think this provides an important update to
3 allow access to records to continue even in those
4 situations.

5 REPRESENTATIVE MACKENZIE: Great. Thank you so
6 much. And again, we're really looking forward to working
7 with you in obviously improving the open records laws in
8 this Commonwealth, so our citizens can have full access, so
9 thank you so much.

10 MS. WAGENSELLER: Thank you, Chairman. I'm
11 looking forward to it, too.

12 REPRESENTATIVE SCHEMEL: Thank you, Mr. Chairman.
13 And the Committee would like to acknowledge that
14 Representative Solomon has joined us. And our next
15 question, Chairman Kenyatta.

16 MINORITY CHAIRMAN KENYATTA: Thank you so much,
17 Mr. Chairman. And congratulations, again, Director, and
18 welcome to the gig. I just wanted to start by making the
19 broad point about how important this conversation is, and
20 I'm happy we're having it. You know, government
21 transparency and government accountability are the
22 lifeblood of a functioning democracy. And so the ability
23 for citizens to be able to get information about the things
24 that their government is doing is absolutely key, and
25 obviously, you have an important role in that.

1 I know you're only seven weeks in, and so maybe
2 this is a question even more so for your deputy, but beyond
3 Act 77, are there additional things that you would want to
4 see statutorily, legislatively that could make the work
5 that you're doing at the office, you know, even more
6 streamlined, even better for the folks in our districts
7 that you're ultimately here to serve, in terms of making
8 sure they understand how their government is functioning.
9 Is there anything else that we ought to be doing, thinking
10 about, that would make the job that your office has to do
11 better?

12 MS. WAGENSELLER: Yes. Thank you, Chairman, for
13 those questions. Yeah. They're certainly are things. You
14 know, this law, when we -- this office first opens, there
15 was not case precedent, there was not -- were not thousands
16 of appeals that we've decided to become a more complex,
17 a -- more time consuming for each appeal that we get. So
18 you know, one of the things that I think you're going to
19 hear from other testifiers, too, that we don't see as much
20 is that they -- what we call vexatious requestors, someone
21 who requests over and over and over again. And I know
22 there's some legislation on that, but that's one issue
23 that, you know, is not -- it doesn't touch us as much, but
24 I think that it impacts agencies and that's one you hear
25 about and one of -- and other things like that.

1 You know, in terms of our capabilities, there
2 would be, you know, a need for -- you know, we could use
3 some additional staff because we've had such a huge
4 increase in the amount of appeals that we receive and the
5 way the law works. If for some reason we don't get to an
6 appeal in 30 days, it automatically goes to the courts.
7 And for your average citizen, it is challenging,
8 intimidating to go to court, it is challenging financially,
9 and it takes quite a bit of years for a court to decide one
10 of these cases.

11 So you know, ensuring that we have the resources
12 we need to continue to receive and process those appeals in
13 a timely manner I think is critically important. You know,
14 and the other thing that we provide -- we've trained --
15 provided training for thousands of agency officials across
16 the state, and the ability and understanding the agencies
17 have about right-to-know requests is something that could
18 continue to improve. I don't know if that's -- I don't
19 think that's necessarily a piece of legislation, but
20 agencies understanding the law and how to use it when
21 requestors come in. And I'm going to turn it over to my
22 deputy, Nathan Byerly, to add anything else that he thinks
23 might be helpful.

24 MR. BYERLY: Yes. I know that -- to add to what
25 Liz was saying, the other areas that we could see

1 improvement on, and it relates to the training that she was
2 talking about, was with respect to the submission of
3 affidavits. Part of the process of appearing before the
4 Office of Open Records to be involved in an appeal is you
5 have to present evidence, and based upon the timelines, you
6 know, the courts have said that the appropriate way to do
7 this is through written testimony, so they do that in
8 affidavit form. And many times, we receive conclusory
9 affidavits, which are basically, you know, the record is
10 exempt because it's an investigative record, and we need
11 more than that to make a decision.

12 We need to know, you know, what's contained in the
13 records generally, why are these records exempt, how are
14 the records used, how are they potentially going to fall
15 under one of the exemptions, so there needs to be more
16 detail in the affidavits, and that ties in to the training
17 that was just talked about. And we need to, to the extent
18 that we can, get the word out there, which we have, and use
19 our webinars, which have helped us a lot. But the big
20 thing is being able to update the solicitors and the
21 attorneys and the counsel for the agencies on how these
22 affidavits would work, and that can sometimes be difficult
23 because there can be a pretty decent amount of turnover
24 from time to time depending on what's going on in a
25 specific agency.

1 Additionally, I think it's important that we be
2 able to train the agency open records officers on this as
3 well. And there is a -- again a pretty high turnover rate
4 there, so you can go from having a very experienced open
5 records officer to one who is really completely new to the
6 job and needs just the basic training. And those are the
7 areas that we try to get the word out, and that would help
8 greatly, if we could get additional assistance on getting
9 the word out that training is available.

10 CHAIRMAN KENYATTA: Just one quick follow-up.
11 How many people do you have on your staff currently, and
12 what is the complement that you think would be necessary to
13 achieve the type of results that you're talking about?

14 MS. WAGENSELLER: We currently have a staff of
15 twenty, and we're hoping to receive the funds to hire at
16 least one additional appeals officer to help with the
17 workload.

18 CHAIRMAN KENYATTA: Thank you, Mr. Chairman.

19 REPRESENTATIVE SCHEMEL: Thank you, Mr. Chairman.
20 Next question comes from Representative Ortitay.

21 REPRESENTATIVE ORTITAY: Thank you, Mr. Chairman.
22 Thank you, Director and Deputy Director, for being here
23 today. I want to follow up a little bit off of Chairman
24 Grove's questions, but go in a little bit of a different
25 direction. The Department of Health, school boards, county

1 jails, may have been impacted not only by operational
2 challenges of COVID-19 but also by an increase in interest
3 to their subject matter and corresponding increase in the
4 number of requests. Can you provide any insight on which
5 agencies or government entities experienced this dual
6 challenge?

7 MS. WAGENSELLER: Yes. We will have -- I can
8 provide some additional numbers to you after the meeting,
9 but I know that the Department of Health -- let me step
10 back. So we only see the appeals, so we won't see all the
11 right-to-know requests but those that are appealed to our
12 office. We have seen a significant increase in appeals
13 regarding the Department of Health, Department of Community
14 and Economic Development. And I don't think I have any
15 numbers on county prisons, but I would not be surprised if
16 there was an increase there. But Department of Health
17 certainly had a significant increase compared to previous
18 years in appeals to our office.

19 REPRESENTATIVE ORTITAY: All right. And to
20 follow up on that, how were these entities' response times
21 and compliance with the Right-To-Know Law impacted by these
22 challenges?

23 MS. WAGENSELLER: Yes. You know, we -- it's like
24 I said earlier in my testimony and my initial remarks,
25 there was an initial adjustment period where people just

1 had to get used to what was going on. And once that has
2 happened, we haven't seen a significant change, but I'm
3 going to have Deputy Byerly talk about that in a moment.
4 You know, we have very strict deadlines the way the law is
5 written, but we are not unreasonable if both parties agree
6 for extensions, which we have used on occasion, if both
7 parties agree. But I'll have Deputy Byerly talk a little
8 bit about how those agencies have dealt with it the past
9 year.

10 MR. BYERLY: I can't really speak to how they
11 have necessarily dealt with it themselves. I just can, you
12 know, basically convey to you what we have seen. And how
13 the system works, is the appeal will be filed, and they
14 have the -- the requestor has five business days to appeal
15 if they get denied or don't hear anything from the agency.
16 And we've seen, you know, a number of different situations
17 where agencies will argue before us that they were not
18 open, and they would ask for the case to be dismissed. And
19 in the cases that that has happened, we decline to do that
20 and have the agencies get to the merits of the case and
21 discuss why they felt that the records should be withheld,
22 and then we've decided the case.

23 But as far as the impact, like the Executive
24 Director was testifying, there -- you know, there's --
25 initially, there was that period where we issued the stays,

1 everybody kind of took a deep breath, and then we kind of
2 went on with deciding the appeals on the information we had
3 and we really set up a flexible process where they could
4 convey to us and communicate to us what was going on with
5 their specific agency, why they were seeing the delays, and
6 what the timeframe they think -- they thought they could
7 get the information to us to make a decision, and that's
8 how we proceeded.

9 And we continue to work with the agencies as
10 needed to be able to develop a process that everybody gets
11 a full and fair hearing. And that was our big emphasis
12 through this was to make sure that both sides had the
13 opportunity to present their case and present their
14 evidence and their arguments to us so that we could make
15 the right and fair decision.

16 REPRESENTATIVE ORTITAY: It sounds like from the
17 opening testimony that you gave, Director, that once you
18 were able to post the updates on the department's websites,
19 or they were able to post it, that it certainly alleviated
20 a big portion of the log jam there. Was there anything
21 else that your office did to help alleviate that and make
22 the process move a little faster or smoother?

23 MS. WAGENSELLER: Yes. So we utilized our
24 ability to do virtual trainings immediately, from the very
25 beginning when the pandemic started. And you know, this is

1 one of those little things during the pandemic that kind of
2 opened up our eyes that, you know, we used to travel around
3 the state doing trainings, but these virtual trainings
4 offer a great way for so many more people to come. We
5 would have capacity of 250 people to our virtual trainings,
6 additionally, to explain how to deal with things during the
7 pandemic, and we would break that constantly. Just an
8 incredible desire to hear from our office how to handle
9 these situations.

10 And so we provided many, many trainings. We
11 continue to provide trainings. We get called every day
12 with how to handle certain situations. We can't always
13 provide explicit guidance depending on the situation, but
14 we have trained thousands and thousands of people the past
15 year on how to deal with this, and we continue to and
16 always are here to provide that service.

17 REPRESENTATIVE ORTITAY: Well, that's good to
18 hear, and keep up the great work. Thank you for the work
19 that you're doing, and thank you, Mr. Chairman.

20 REPRESENTATIVE SCHEMEL: Thank you,
21 Representative Ortitay. Next, we have Representative
22 Staats.

23 REPRESENTATIVE STAATS: Thank you, Chairman
24 Schemel, and thank you to our panel for your time today.
25 We appreciate it. PennDOT's Right-to-Know website

1 states -- and this is as of today, by the way, that, and I
2 quote, in response to Governor Tom Wolf's guidance on
3 COVID-19 mitigation, the Commonwealth Keystone Building is
4 closed as of March 16, 2020 -- one year ago. Any requests
5 for public records submitted to PennDOT on or after March
6 16th, 2020, will be deemed to have been received by
7 PennDOT's open records officer on the first day of the
8 reopening of the Keystone Building. We appreciate your
9 patience and understanding.

10 So the Keystone Building remains closed at this
11 time, nearly a year later. Is PennDOT, in fact, taking the
12 position that they have not legally received any right-to-
13 know requests since the emergency declaration, and if they
14 are, does the OOR have a plan for bringing them into
15 compliance with the law?

16 MS. WAGENSELLER: Thank you for that question.
17 Yes. We are going to do a review of how the right-to-know
18 requests' information is displayed on agency websites. And
19 that language is concerning; however, I will note that we
20 have continued to receive appeals for PennDOT right-to-know
21 requests. So it appears that they are still processing
22 them. They are still doing that. That language needs to
23 be updated, and that's part of what we're going to be
24 working on going forward, identifying and providing best
25 practices making sure information is up to date. That's

1 not something that we have the authority to enforce, but
2 certainly, our office has an interest in making sure that
3 the public has access to how to submit a right-to-know
4 request.

5 REPRESENTATIVE STAATS: To me, this is anything
6 but transparent. And you know, from where I'm sitting, it
7 seems like it's more out of convenience than necessity. So
8 while I appreciate your answers, I think it's something
9 that we need to take a hard look at. Thank you.

10 MS. WAGENSELLER: Thank you.

11 REPRESENTATIVE SCHEMEL: Thank you,
12 Representative. Representative Miller has a question.

13 REPRESENTATIVE MILLER: Thank you, Mr. Chairman,
14 and thank you testifiers for joining us here today. I want
15 to follow up on what Representative Staats said and just to
16 highlight that point. I did some research myself noting
17 that the Department of Human Services is accepting, L&I,
18 PDE are accepting, Office of Administration is accepting,
19 Department of State is accepting, Attorney General's is.
20 The Agriculture Department is accepting, but it's
21 ambiguous. It has a message saying that the clock only
22 starts when the office opens. Aging says the office is
23 closed, but it's accepting requests. Liquor Control Board,
24 it's hard to find the right-to-know requests on their
25 website, and there's no information on how to submit a

1 right-to-know request on their website. State Police is
2 accepting, DCNR is accepting. DEP still has the same
3 notice that Representative Staats had stated previously,
4 and PennDOT was mentioned as well. PSERS is accepting, and
5 PASSHE is accepting.

6 So I would like to put an exclamation point on
7 whatever your office can do to make sure that those
8 websites are updated because the people are looking to,
9 typically, go into those websites for information that's
10 germane to that particular agency. So anything you could
11 do to help in that regard would be greatly appreciated. I
12 would add that it would -- the Department of Health, I
13 believe, is updated, but that -- I had checked in February,
14 and that one was still under the old language similar to
15 PennDOT's as well. So I would appreciate if you could --
16 going on to a question that I have related to -- in your
17 testimony, Ms. Wagenseller, you had mentioned about data.
18 And can you define a little bit more what your particular
19 definition and how you're perceiving the term data. On
20 page three of your testimony, you talked about the
21 definition and application of data. Can you talk about how
22 you're interpreting that in the context of the OOR?

23 MS. WAGENSELLER: Yes. I'm going to offer some
24 broad remarks and then turn it over to Deputy Byerly. So
25 data. The way that Act 77 is written, it says data used by

1 a Commonwealth agency for any rules, policies or actions
2 taken by the Commonwealth agency in relation to a disaster
3 declaration, which, you know, seems to narrow it down a
4 bit, but you know, how do you define what data they use.
5 And so Deputy Byerly could talk about some of the
6 challenges we experience and how we tend to -- we -- you
7 know, the way the act -- the Right-to-Know Act as law is
8 written, is the burden of proof is on the agency to prove
9 that it is not subject to this. So I'm going to turn it
10 over to Deputy Byerly to talk a little bit more about the
11 challenges we've had with that aspect.

12 MR. BYERLY: Yeah. What you have going on here,
13 is there's an interaction between basically three laws.
14 You have Act 77, you have the Disease and Prevention
15 Control Law, and you have the Right-To-Know Law, and one of
16 the key issues is going to be how data is defined. And up
17 to this point in our final determinations, that has not
18 been issued. We actually have cases pending before us with
19 Department of Health, so there will be more definitive
20 guidance given on that. We can't really go into detail on
21 pending cases and the legal issues that are being
22 considered, but we have not definitively defined data yet,
23 and that -- we're in the process of looking at that.

24 But the interaction between the three laws
25 presents an issue for us to look at, you know, what the

1 definition of data is and then to see what exemptions in
2 the Right-To-Know Law may apply as well because Act 77 says
3 that information and records that the Department of Health
4 or a Commonwealth agency may have are still going to be
5 subject to a right-to-know exemption. So there could be
6 investigative exemptions that we have to look at and
7 determine whether or not those apply, and a number -- you
8 know, there's 30 different exemptions within the law that
9 could potentially apply. So those will come in to play as
10 well as we try to develop this.

11 We're still in the early stages of this because
12 the -- and with staying the cases early on, our decisions
13 have been pushed forward a little bit, so to speak. And
14 one of the other issues that we continue to work through is
15 the development of affidavits and getting the sufficient
16 affidavits that we need from the various agencies.

17 REPRESENTATIVE MILLER: So in essence, an answer
18 to that question is forthcoming?

19 MR. BYERLY: Correct.

20 REPRESENTATIVE MILLER: I just would argue, I
21 guess, or advocate that deference to the public is the
22 underlying principle behind Act 77, the Right-To-Know Law,
23 and data should be, I think, construed in terms of the
24 public's need to know and request to know in that, so that
25 would be my own advocacy and would just put that forward.

1 We look forward to seeing what forth comes from your
2 agency. Thank you very much.

3 MS. WAGENSELLER: Thank you.

4 MR. BYERLY: Thank you.

5 REPRESENTATIVE SCHEMEL: Thank you,
6 Representative Miller. Representative Wheeland.

7 REPRESENTATIVE WHEELAND: Thank you, Mr.
8 Chairman, and thank you Director. Welcome aboard. Get
9 ready. It's going to be a rough ride, I'm afraid. So in
10 your written testimony, you noted a 31 percent increase in
11 appeals. I believe it's calendar year or fiscal year.
12 Regardless, there's been a 31 percent increase. Does this
13 increase stand in line pre-pandemic? In other words, is
14 this trend is going into the -- beginning of the pandemic,
15 through the pandemic, is -- were we headed for that
16 percentage, or is this related to COVID-19, the spike?

17 MS. WAGENSELLER: Well, it's continuing a trend
18 from before the pandemic, and I am sure the pandemic may
19 have added to it, but it is not something that came as a
20 surprise to us. It's the way things have been going before
21 March of 2020, an increase in submitting appeals by people
22 all across Pennsylvania, so it has been a continuation of a
23 trend.

24 REPRESENTATIVE WHEELAND: So a lot of the --
25 obviously, the requests are COVID-related. Would that

1 be -- one form or another -- would that be an accurate
2 statement?

3 MS. WAGENSELLER: I think there are a fair
4 number, but it does not account for the increase -- all of
5 the increase in this fiscal year.

6 REPRESENTATIVE WHEELAND: So would it be fair to
7 say that then it's reflecting public health concerns, or is
8 it like the previously mentioned dispute -- ongoing, never-
9 ending dispute on data?

10 MS. WAGENSELLER: You know, I don't know. I
11 just -- it seems that there is an increased interest in
12 recent years in both local and state government. People
13 seem to be more engaged, paying attention, and are hungry
14 for information. And we only see the appeals, as I
15 mentioned, so I don't know if this coordinates with an
16 increase in right-to-know requests in general, or if
17 there's an increase in appeals. You know, we see the
18 people who are unhappy with the decision the agency made,
19 but clearly, there's been a rise in that. So I think
20 there's different factors in play, but I -- certainly, I
21 think that just more engagement with governments, more
22 interest in information, which leads to appeals -- more
23 appeals, and the pandemic also added to that increase.

24 REPRESENTATIVE WHEELAND: And may I ask the
25 Deputy Director is that what you're seeing? Is that -- and

1 again, I'm going back in history. You've been there a
2 while.

3 MR. BYERLY: Right. Yes. There's been general
4 increases over the year. We've just seen -- just you know,
5 over time the -- every year there'd be a little percentage
6 of increase, and if it would drop down a little bit one
7 year, the next year, it would jump up to, again, even out
8 to an average increase. There has been -- I would say it's
9 a pretty significant -- I mean, the 31 percent's a pretty
10 significant jump. And again, as the Executive Director
11 laid out, it's kind of unclear what's exactly driving
12 that -- you know, if it was interest in things that went on
13 with the election, whether it was the pandemic, but there's
14 definitely an increase in cases coming in.

15 I mean, there's one point in December where our
16 fields officers were handling 60 appeals each, and it was
17 just almost to a -- we were stretched very far at that
18 point. And you know, on top of that we have situations
19 where we have to do reviews of -- actually look at the
20 record. So you know, atop of the 60 cases, you're looking
21 at 4- or 5,000 pages of records to try to determine what's
22 going to be released and not. So I hope that answers your
23 question. It's kind of a hard one to definitely gage, but
24 we definitely see an increase. You also have a situation
25 where when people are not out and active as much, that they

1 have the ability to look into things and maybe pursue
2 right-to-know requests that they may not have in the past.

3 REPRESENTATIVE WHEELAND: And if I may, I'd like
4 to ask a little question here. In your experience -- and
5 question to both, would the agencies be using the appeals
6 process as like a means to compensate for slower response
7 times in requesting records? For instance, you know, the
8 state, there's so many agencies that are still working
9 remotely as compared to perhaps counties that are not.
10 Municipalities are not. It seems to be just the state
11 agencies that are closed down. For goodness sakes, grocery
12 stores are still open, but state government tends to be
13 working remotely. So are these agencies -- within the
14 state, are they, you know, utilizing this to compensate the
15 fact that they're not working, except remotely?

16 MS. WAGENSELLER: You know, I don't know the
17 answer to that, but I -- you know, one -- if an agency does
18 not respond to a right-to-know request after a certain
19 number of days, it automatically comes to our office and is
20 considered a denied request. And I don't think we've seen
21 a dramatic increase in that, but in terms of how they use
22 the appeals process, you know, it tends to be more work for
23 them once there is a record appealed -- or it should be --
24 you know, they need to provide additional documentation to
25 our office. So you know, it's a question that I'm not sure

1 what their intentions are, but it doesn't seem to be
2 something that I've heard about, but it's not something
3 that I have asked them either.

4 MR. BYERLY: And to add on to that, we see -- you
5 know, if there was a situation where agencies were doing
6 that, it typically can become readily apparent. And we've
7 seen the cases that have come before us are litigated on
8 the basis of exemptions that are being disputed by the
9 parties. So -- and that's, kind of, the key point of them
10 disengaging from the process. We've not seen a lot of
11 that.

12 We've seen agencies -- you know, both
13 Commonwealth and local agencies participate in the appeal,
14 give arguments, give evidence. You know, we would like to
15 see a little bit better evidence from the agencies in their
16 affidavits, but they are, for the most part, engaging, and
17 we haven't seen anything that would indicate that it's
18 being used as any stall tactic by any of the agencies,
19 Commonwealth or local.

20 REPRESENTATIVE WHEELAND: Okay. Thank you very
21 much.

22 REPRESENTATIVE SCHEMEL: Very good. Thank you,
23 Representative Wheeland. And next will be Representative
24 Nelson.

25 [pause]

1 All right. In that case, Director and Deputy
2 Director, your testimony describes the improvement in
3 agency and OOR capabilities last April and the transition
4 to only using 30-day stays as needed in August. Testimony
5 from others here today assert -- the panelists that will
6 come later from the written testimony that most open
7 records offices remain closed until May, and the 30-day
8 stays remain frustratingly common as well as consecutive.
9 Can you provide any insight into these experiences by
10 stakeholders, and in particular, to what degree can 30-day
11 stays be granted consecutively for the same request?

12 MS. WAGENSELLER: Yeah. Well, I believe what
13 some of the other panelists are mentioning is, once an
14 agency receives a right-to-know request, the law states
15 that they should respond in five business days, unless for
16 specific reasons provided in the law, they can extend it to
17 30 calendar days. And I believe the frustration a lot of
18 them are speaking to is it's maybe that they feel that the
19 agencies are automatically jumping from 5 to 30. And the
20 law does not offer any opportunity to challenge that. Even
21 if they could, you know, time will keep ticking away. So I
22 believe that is the frustration that they are speaking to,
23 and we -- as we deal with appeals -- so separately, when
24 appeals come to us, the law states we have 30 days to
25 decide the appeal.

1 Now, if there are extenuating circumstances or
2 there's a lot of data to review, we can request having
3 extension to make that decision, and that's something we
4 use on a case-by-case basis, but it is not something that's
5 a default for our office. We want to get this out the door
6 in 30 days. That is our intention. But there may be cases
7 where we have to ask for an extension to review additional
8 documents, make decisions, and that type of thing. But
9 that is not something that we do as a norm. Deputy Byerly,
10 anything to add to that?

11 MR. BYERLY: No. That was my understanding as
12 well, and I would encourage the stakeholders that if there
13 is something that they see in the appeal process to please
14 let us know. My reading of the testimony was that it was
15 the frustration with the taking the automatic 30 days, and
16 there potentially could've been maybe some frustration with
17 our stays at the beginning. But we didn't receive any
18 feedback or requests that any of our appeals be expedited
19 or receive different treatment in those circumstances, so
20 the stays stayed in place.

21 REPRESENTATIVE SCHEMEL: Very good. Thank you.

22 [pause]

23 Very good. Thank you very much, Director and
24 Deputy Director for your time this afternoon. We certainly
25 appreciate it, and now we're going to transition over to

1 the next panel.

2 MS. WAGENSELLER: Thank you very much.

3 MR. BYERLY: Thank you very much.

4 REPRESENTATIVE SCHEMEL: Our next panel is from
5 the NewsMedia Association. We have Cate Barron, President
6 of the PA Media Group, and Melissa Melewksy from the Media
7 Law Counsel of the Pennsylvania NewsMedia Association. I
8 think we're going to be getting them here on the screen, so
9 once we have them visible.

10 UNIDENTIFIED VOICE: Can you folks see us?

11 UNIDENTIFIED VOICE: We can see you.

12 UNIDENTIFIED VOICE: Are your cameras on?

13 UNIDENTIFIED VOICE: Yep.

14 UNIDENTIFIED VOICE: Yep.

15 REPRESENTATIVE SCHEMEL: All right. We can't see
16 you yet, and we have to see you in order to be able to
17 administer the oath.

18 UNIDENTIFIED VOICE: Yeah. Perhaps leave the
19 meeting and come back again like last time. I'm not sure.

20 UNIDENTIFIED VOICE: Will do. Be back shortly.

21 REPRESENTATIVE SCHEMEL: There we are.

22 UNIDENTIFIED VOICE: Okay. We see one -- there
23 she is.

24 REPRESENTATIVE SCHEMEL: While we're waiting,
25 Frank Ryan, can you indicate if you have joined us?

1 REPRESENTATIVE RYAN: Paul, actually I've been
2 here for other -- I joined the call probably about 1:15 --
3 1:20. Very well, then the Committee will recognize that
4 Representative Ryan has joined us.

5 MS. BARRON: Can you see me now?

6 REPRESENTATIVE SCHEMEL: Yes. Okay. Thank you,
7 Ms. Barron. And Ms. Melewsky?

8 MS. MELEWSKY: I'm here. Can you see me?

9 REPRESENTATIVE SCHEMEL: I can hear you. We're
10 working on seeing you.

11 MS. MELEWSKY: Okay. My camera is turned on.

12 REPRESENTATIVE SCHEMEL: All right.

13 REPRESENTATIVE SCHMITT: Mr. Chairman, this is
14 Lou Schmitt, we can -- I can see them remotely from my
15 location.

16 REPRESENTATIVE SCHEMEL: Oh, interesting. Maybe
17 try clicking your camera off and on, Ms. Melewsky.

18 MS. MELEWSKY: Any better?

19 REPRESENTATIVE SCHMITT: Now you're off.

20 MS. MELEWSKY: Now I'm off. Anything yet?

21 UNIDENTIFIED VOICE: We saw you briefly for a
22 moment earlier. I don't know what you did, but kind of
23 went away again.

24 MS. MELEWSKY: I just hit the button. I'll leave
25 and try to log back in again.

1 UNIDENTIFIED VOICE: There you are.

2 REPRESENTATIVE SCHMITT: There you are.

3 MS. MELEWSKY: There I am?

4 REPRESENTATIVE SCHEMEL: Yes.

5 MS. MELEWSKY: Okay. I'm not --

6 REPRESENTATIVE SCHEMEL: Good to see --

7 MS. MELEWSKY: -- going to touch anything.

8 REPRESENTATIVE SCHEMEL: -- you both. And I can
9 tell you with what joy and delight we Representatives get
10 to ask news media members questions today. This is all off
11 the record, although it's public and you'll be under oath.
12 With that, I would ask you each to raise your right hands.
13 Thank you.

14 (Oath administered)

15 MS. BARRON: I do.

16 MS. MELEWSKY: I do.

17 REPRESENTATIVE SCHEMEL: Very well. Thank you
18 very much. I know that you both have some prepared
19 remarks, so if you'd like to start, perhaps we'll start
20 with Ms. Barron.

21 MS. BARRON: Okay. Thank you very much. Good
22 afternoon and thank you, Chairman Grove, Members of the
23 House State Government Committee. My name is Cate Barron,
24 and I'm the President of PA Media Group. It's the parent
25 company of The Patriot-News newspaper and PennLive.com.

1 And we are active members in PNA. Thanks so much for
2 allowing me to offer testimony on what it has been like for
3 newsrooms to cover the pandemic and barriers in the way of
4 this reporting.

5 Just a little bit about me, I've been a
6 journalist in this state for 40 years, even more actually,
7 first as a reporter in my hometown of Lewistown and then as
8 an editor with The Patriot-News and PennLive. Throughout
9 my career, including the last 18 months as publisher, I've
10 heard from readers every day, but I have to say never as
11 much as I have in the past year. I'll quote the prior
12 session, people are hungry -- very hungry for information
13 about COVID.

14 Last March, our newsroom shifted resources pretty
15 dramatically to provide blanket coverage of the pandemic,
16 including everything going on up on the Hill. And we
17 watched as PennLive's audience grew by more than 74
18 percent. This astonished us as well. It's now the most
19 read news and information website based in all of
20 Pennsylvania. Your constituents looking for information
21 powered this growth.

22 I'm going to talk about some of the real hot
23 buttons for them: Information on business shutdowns, COVID
24 in nursing homes, the status of the stimulus, problems with
25 unemployment benefits, and above all, especially now, where

1 to get the vaccine.

2 So here are a couple barriers that we've been
3 hitting getting that information. As you know, as Liz
4 mentioned, the state stopped processing open records
5 requests last March. For us, we didn't really see a strong
6 resumption until May, and then, again, as Liz said, one 30-
7 day extension would often lead to the next and still does.
8 I'll give you a quick example. It took PennLive reporter,
9 Jan Murphy, from March 30th to August 6th to get a list of
10 the businesses requesting waivers. I'll also mention the
11 Reporters Committee for Freedom of the Press hit similar
12 delays in a series of requests. And these were for much
13 simpler requests, like contracts.

14 We also welcomed Act 77's passage in July, but it
15 hasn't meant necessarily smooth sailing for transparency.
16 In particular, getting detailed nursing home information
17 remains a major issue. Just last week, a Post-Gazette
18 reporter asked the state for the percentage of vaccinated
19 long-term care staff. The statewide number was available,
20 but not the all-important percentage by facility. Now, in
21 fairness, these reporting requirements are set by the feds,
22 not the state, but Pennsylvanians with loved ones in homes,
23 they don't care. They just want to get that information
24 and know how safe their parents or their grandparents are.

25 Just today, I'll point out that I read -- our

1 partner, Spotlight PA, posted a story about the lack of
2 race and ethnic data around COVID testing, cases, and who's
3 getting the vaccine. Another big burning question on
4 readers' minds, how close are we to getting all healthcare
5 workers vaccinated? The state's not tracking the
6 percentage but knowing how close they are to getting this
7 done would give everybody a better idea of where people
8 under 65 will be eligible. I mean, seriously, I've had
9 people call me in tears wanting to know. First they
10 couldn't get on a site to get the vaccine and next when's
11 it going to open up to their children and so on and so on.

12 So one specific hurdle, and it's been mentioned a
13 bit, reporters say the health department and some county
14 health departments are overusing the old Disease Prevention
15 and Control Law to deny access to COVID-related records.
16 This is nothing new. My health writer, Dave Wenner, told
17 me that this was actually used to shut down information
18 about West Nile during the Rendell years. Well, we all
19 respect an individual's right to medical privacy, but this
20 is blocking broader information that would help people
21 gauge the amount of serious diseases in their community.

22 Beyond the pandemic issues, I do want to quickly
23 mention some needed improvements for the Right-To-Know Law.
24 The Law currently has some three dozen exceptions. I'm
25 going to single out just four, but they are especially

1 problematic. Number 1, disciplinary records for public
2 officials. Our websites are full of reports about police
3 and school administrators that are terminated in one town,
4 rehired in another one before their background comes to
5 light. When a public employee is fired for any cause or
6 just cause, the public should know why.

7 Number 2, police records. Right-to-know should
8 be modified to provide access to criminal incident reports,
9 not just the arrests. People need to know when crimes
10 happen in their neighborhoods. These should be released in
11 a timely and a complete fashion, and they're often not,
12 reporters around the state are telling me.

13 Number 3, emails for state legislators.
14 Currently, only legislative records are public. These do
15 not include the emails. Number 4, police video and audio
16 recordings. More departments, as you know, these days are
17 using dash cams and body cameras. They're great sources
18 for evidence, but they're also supposed to hold officers
19 accountable for their actions. But thanks to PA Act 22,
20 police are given wide latitude to deny their release on the
21 grounds they're part of ongoing investigations. As a
22 result, we never see them -- or rarely. These should fall
23 under Right-to-Know.

24 And finally, I have one more recommendation.
25 Require government agencies who unsuccessfully appeal OOR

1 decisions to pay their opponents' legal bills. Many
2 blatant RTK violations go unchallenged because financially
3 strapped newsrooms just can't afford it. We really do need
4 to even the playing field for requestors who face just
5 hordes of taxpayer-funded attorneys working to deny access.
6 That's true for pandemic-related cases and going forward.

7 Thanks for your time and consideration. I'm
8 happy to answer any questions that I can. These times do
9 call for an unprecedented amount of transparency.
10 Pennsylvania's news media plays the essential role in
11 providing the state's citizens with accurate, timely
12 information. We need a strengthened Right-To-Know Law and
13 strong, open records office to help us do so. Our readers
14 and your constituents will thank you indeed. Thank you
15 today.

16 REPRESENTATIVE SCHEMEL: Thank you, Ms. Barron.
17 I think before we go to questions, we'll go right to Ms.
18 Melewsky's comments as well, please.

19 MS. MELEWSKY: Thank you. Good afternoon,
20 Chairman and Members of the House State Government
21 Committee. Thank you for the opportunity to appear and
22 offer testimony on the Right-To-Know Law. My name's
23 Melissa Melewsky. I am Media Law Counsel for the
24 Pennsylvania NewsMedia Association. We're the statewide
25 trade association for newspapers and online publications in

1 the Commonwealth. We were founded in 1925, and since that
2 time, we've advocated for legislation that improves public
3 access laws in Pennsylvania. We have over 300 members,
4 print and digital alike, and our members stand in the shoes
5 of the public that they serve, and it's a privilege to
6 bring you that perspective today. Oftentimes, we find
7 ourselves one of the few organizations that are advocating
8 on the side of the public, and like I said, it's a
9 privilege to do that with you today.

10 As Media Law Counsel at PNA, my primary -- one of
11 my primary job responsibilities is to answer questions on
12 our legal hotline. I talk to journalists every day about
13 problems accessing records in Pennsylvania. And I answer
14 approximately 2,000 calls each year, and over half of those
15 deal with public access issues. And that's been consistent
16 during my 14-plus years on the job, so I hear a lot about
17 access problems. And I'm happy to talk to you a little bit
18 about them today.

19 Now, there's no question that we're better off
20 today under the remedial Right-To-Know Law than we were 12
21 years ago under the old, more restrictive law, but problems
22 still exist. And in some cases, Pennsylvanians are worse
23 off under the current law than they were under the prior,
24 more restrictive Right-To-Know Law.

25 We have a comprehensive list of suggested

1 amendments, but today, I'm just going to focus on some of
2 the most common issues I hear. And I want to start off
3 initially by talking about the pandemic and how that has
4 shaped access over the past year, but I'm also going to
5 talk a little bit about the ongoing issues that pre-date
6 and continue on through the pandemic.

7 So I'll start by noting that the pandemic has
8 obviously caused significant problems for public access --
9 you know, it turned the world upside down, and public
10 access was one of the, you know -- is one of the ways --
11 one of the things that have been massively affected.
12 That's understandable. And our members really rose to the
13 challenge when it comes to accessing records and providing
14 information. Our industry has provided a consistent source
15 of accurate information with coverage that helped tamp down
16 on unsubstantiated rumors and misinformation. It helped
17 the public understand how to stay safe, and we rely on
18 public records to serve that purpose.

19 So during the pandemic, journalists have faced
20 numerous access issues, and in some cases, access was
21 severely limited or even outright prohibited. Even today,
22 almost a year into the disaster declaration, some agencies
23 are still not answering requests in accordance with the
24 law, and we've already touched on some of -- we've already
25 touched on the Right-To-Know Law websites for some state

1 agencies. It's not just state agencies where the problems
2 exist. It's also the local agencies. For example, York
3 County, when you submit an emailed request to York County,
4 they have an automated response that bounces back that
5 basically says the same thing that PennDOT's website says.
6 It says, you know, we're closed. Essentially, we'll get to
7 the request or the time will begin to tick against us under
8 the Right-To-Know Law once we're open, and it's been over a
9 year.

10 Now obviously, that's not consistent with the
11 Right-To-Know Law, either its letter or its intent, but it
12 happens nonetheless. Now, I know York County is still
13 responding to requests despite that bounce-back message, so
14 there's a little inconsistency with how they're initially
15 responding and how they are actually treating these
16 requests. So that's something that's not plain to me as a
17 requestor or an attorney representing requestors, what's
18 actually happening on the ground in York County, for
19 example? This plays out in small agencies across the
20 Commonwealth. It's inevitable that that kind of response
21 or that kind of posting on a website will discourage people
22 from seeking access, or at a minimum, cause questions about
23 whether or not the Right-To-Know Law is actually even
24 applicable during the pandemic.

25 So there are ongoing issues that are related to

1 that information that I think should be addressed
2 legislatively or can be addressed legislatively because
3 government continues to function during the pandemic, as it
4 must, and transparency is a necessary component of that
5 government function. And we understand the pandemic has
6 created unique challenges. We face them ourselves. But
7 York County and PennDOT's positions ignore the law as well
8 as the nature of the request.

9 We believe that agencies must make a good faith
10 effort to first read each request that is received when it
11 is received and make a good faith effort to determine
12 whether access is appropriate and possible under the
13 circumstances. Anything less is really -- is inconsistent
14 with the law and with the concept of open government. Most
15 requests are simple, straightforward, and easy to fill.
16 And the Legislative Budget and Finance Committee conducted
17 a study on Right-To-Know Law compliance that clearly
18 illustrated that. So agencies must make reasonable efforts
19 to provide access to the extent possible in accordance with
20 the law, even during the pandemic.

21 So in addition to halted or delayed Right-To-Know
22 Law processing during the pandemic, I also hear about other
23 issues that are caused by other laws that create barriers
24 to access, and we've already touched on the Disease and
25 Prevention Control Law, and I refer to it as the DPCL. The

1 DPCL has been an ongoing problem, as Cate mentioned. It's
2 not a new law, it's not a new barrier to access, but like
3 so many other things, it's been brought into focus by the
4 pandemic because people need information. And the Disease
5 Prevention and Control Law grants wide discretion to
6 agencies to deny access, and those discretionary
7 determinations are not appealable. Once an agency deems
8 something non-public under the Disease Prevention and
9 Control Law, the Right-To-Know Law falls away, its
10 presumption of access falls away, and the mechanisms that
11 are enshrined in law to protect public access fall away.
12 So there needs to be -- we believe that's inconsistent with
13 the presumption of access that forms the cornerstone of
14 Pennsylvania's Public Access Law. And we're going to urge
15 you to consider amendments that bring it in line with both
16 the letter and the intent of the Right-To-Know Law.

17 We did support Act 77 when it passed. We still
18 support it today, and we plan on filing amicus briefs in
19 cases that have bubbled up to the Commonwealth Court in
20 interpreting how the Right-To-Know Law, the Disease
21 Prevention and Control Law, and Act 77 interact. So
22 there's more to come on that. We'll -- we plan on being
23 involved in that, and hopefully, the courts will come down
24 on the side of access. But there's always room for
25 improvement legislatively, especially with regard to the

1 Disease Prevention and Control Law, which is -- far pre-
2 dates the Right-To-Know Law and certainly far pre-dates Act
3 77.

4 Turning to non-pandemic issues. First I'd like
5 to address -- obviously, everything I'm going to talk about
6 as a non-pandemic issue are issues during the pandemic.
7 The pandemic has made them worse, but these are issues I've
8 consistently heard about for the past decade. First I'd
9 like to address the investigations exemptions both criminal
10 and noncriminal. Both are broad and have no temporal
11 limitations. Investigatory records including the results
12 of an investigation never become public under the Right-To-
13 Know Law, even after the investigation has been closed. I
14 answer that question with journalists on a weekly basis.
15 They say, well, don't we have some kind of access, once the
16 investigation is closed. And the answer is no. Under
17 Pennsylvania, we do not have access once the investigation
18 is closed, and that's different than most other states and
19 FOIA. And we believe that's not appropriate or necessary.

20 With regard specifically to the criminal
21 investigation exception, we believe we have one of the most
22 restrictive in the nation. Once a record is deemed
23 investigatory for criminal purposes, it's always exempt
24 under the law, even if the crime's been solved and the case
25 has been closed. And in addition to that temporal issue,

1 the exemption's language and the courts' interpretation of
2 it has made it virtually impossible to access basic law
3 enforcement records.

4 For example, access to criminal incident reports,
5 which Cate just mentioned, that's one area where the
6 public's rights are demonstrably worse under current law.
7 Under the prior, more restrictive Right-To-Know Law, law
8 enforcement agencies were required to provide access to
9 criminal incident reports. But the courts have interpreted
10 the current law in the manner that renders incident reports
11 nonpublic. Now, we appreciate the need to keep some
12 investigative records nonpublic. But there -- we believe
13 there must be a minimum level of access to records that
14 illustrate criminal incidents in the community and law
15 enforcement's response to them.

16 A criminal incident report includes basic
17 information about police interaction with citizens. They
18 basically say the same thing that you would see if you were
19 standing on the street watching the incident unfold. But
20 the law has been interpreted by the courts to categorically
21 deny access to this basic information.

22 Pennsylvanians, as a result, are left without
23 meaningful access to basic information about criminal
24 activity in their community and law enforcement responses
25 thereto. And that puts them at a distinct disadvantage.

1 For example, if the police -- we believe the public has a
2 right to know when police respond to, for example, a
3 suspected burglary, so that they can take steps to keep
4 themselves and their property safe. Public access also
5 allows the public to assist the police as they work to
6 solve crimes, it combats misinformation, which can run
7 rampant in today's high-tech world, and public access
8 serves as a necessary and appropriate means of
9 accountability. Under the Right-To-Know Law, law
10 enforcement agencies have no affirmative legal duty to
11 provide this kind of basic information, and we don't
12 believe that was the intent of the General Assembly when it
13 passed the Right-To-Know Law in 2008.

14 Turning to the noncriminal investigation
15 exemption, like its criminal counterpart, it's broad and
16 not subject to temporal limits. Additionally, the courts'
17 interpretation of this provision has made assessing agency
18 function difficult at best. The courts have determined
19 that this exemption allows agencies to prohibit access to
20 any inquiry conducted as part of an agency's statutory
21 duties. That's potentially everything an agency does, and
22 this has the potential to swallow the Right-To-Know Law's
23 general presumption of access.

24 A few examples of records that have been denied
25 pursuant to this exemption include daycare inspection

1 summaries, nursing home inspection reports, and gas
2 drilling inspection reports that are -- that determine
3 whether drillers are in compliance with state and federal
4 laws designed to protect the public. We respectfully
5 suggest that prohibiting public access to this kind of
6 information that allows citizens to make informed decisions
7 about their welfare was not intended by the General
8 Assembly when the Right-To-Know Law was enacted. We
9 believe the noncriminal investigation exemption should be
10 amended to make clear that at a minimum the result of a
11 noncriminal investigation is a public record.

12 Another issue that I'll mention today is delays
13 in access, and I hear about this almost every day. The law
14 requires agencies by its plain terms to respond as promptly
15 as possible under the circumstances, but not longer than
16 three -- not longer than five business days. The law also
17 allows agencies to take an additional 30 calendar days in
18 limited circumstances; however, many agencies misapply or
19 overuse this extension provision.

20 Obviously, delays have been a problem during the
21 pandemic. We understand that. But I've been talking to
22 journalists about this for years. Some agencies routinely
23 take the maximum amount of time to respond regardless of
24 need or appropriateness. For example, it's not unusual for
25 journalists to receive a 30-day extension letter for

1 records that are undeniably public and easily accessible,
2 like meeting minutes and salary records. The Right-To-Know
3 Law was intended to facilitate access quickly, except in
4 rare circumstances, but the 30-day extension has become pro
5 forma for many agencies.

6 We respectfully request this Committee to
7 consider amendments that limit an agency's ability to take
8 unwarranted extensions of time. We'd like you to consider
9 mechanisms for oversight of this extension provision and
10 ability to challenge its application and/or a penalty for
11 its misuse.

12 Another common issue that I talk to journalists
13 every day, and it's becoming more and more common as we
14 move into the -- further into the 21st century, involves
15 access to the format of records. So the law requires
16 agencies to provide access to records in the format that's
17 requested, as long as the agency maintains the record in
18 that format.

19 So for example, if an agency maintains a
20 database, the law requires access to that in an electronic
21 format. The courts have interpreted that to mean that an
22 electronic record can be provided in any electronic format
23 regardless of how the agency stores or uses the record.
24 And as a result, many agencies provide static PDF printout
25 of a dynamic database, when in practice, the agency

1 maintains and uses the information as part of a dynamic and
2 functional database. By doing so, the agency removes the
3 public's ability to use and understand the information in
4 the same manner as the agency, and that puts them at a
5 disadvantage. We believe the public has a right to access
6 and use information the same way an agency does.

7 I address a few additional issues in my written
8 testimony, but in closing, I'd like to address one that I
9 don't address in my written testimony, and that's an issue
10 I see, again, almost daily. It's 2:19 at this point, and
11 I've already addressed this issue twice today before I
12 logged on for testimony today. That's the issue of
13 specificity. The law requires requestors to be
14 sufficiently specific to enable the agency to ascertain
15 which records are being requested. The courts have created
16 a balancing test to help define what that means in
17 practice. But unfortunately, many agencies use this case
18 law in a manner that frustrates both the letter and the
19 intent of the law.

20 In some cases, it's become making a request
21 sufficiently specific has become a bit of a wordplay game,
22 with agencies requiring requestors to use magic words,
23 special terminology, or inside information about records
24 that requestors simply cannot provide. The public has no
25 access to records at the request stage, and therefore,

1 cannot provide more than basic information about them. The
2 law recognizes this simple truth in its cornerstone
3 presumption of access and burden of proof, which falls on
4 the agencies, who have all the information about records.

5 We urge this Committee to consider amendments
6 that protect the fundamental cornerstones of the law and
7 limit an agency's ability to deny access based on a lack of
8 specificity. That -- I'll stop talking there today. I
9 appreciate the opportunity to come before you today and
10 present some of the issues I hear about most. There are
11 many others. I'm happy to answer questions on any aspect
12 of what I do or what I talk about with journalists and
13 members of the public, and I appreciate the opportunity,
14 again, to be here with you today.

15 REPRESENTATIVE SCHEMEL: Thank you, Ms. Melewsy.
16 First question comes from Chairman Kenyatta.

17 REPRESENTATIVE KENYATTA: Well, I just want to
18 thank both of you. Your testimony, written and delivered
19 here today, was very thorough, so you actually answered a
20 lot of the questions I would've had. But I just want to
21 say thank you for what you're doing. What you do is more
22 important than ever. My chief of staff is a former long-
23 time reporter and editor, and so you know, I get an earful
24 all the time about the importance of what you do, how
25 difficult your work is. And so you know, I think this is

1 incredibly thorough and provides, you know, all the
2 necessary feedback and questions. So I won't belabor the
3 points that you made so well here. Thank you so much.

4 MS. BARRON: Thank you.

5 MS. MELEWSKY: My pleasure.

6 REPRESENTATIVE SCHEMEL: Thank you, Chairman.
7 Chairman Grove has the next question.

8 MAJORITY CHAIRMAN GROVE: Thank you. I first
9 want to thank the NewsMedia Association as well as the
10 Pennsylvania general newspapers for their help in getting
11 Act 77 across the goal line. And to clarify, it's Act 77
12 of 2020. I know we've been doing election hearings on Act
13 77 of 2019. Two very significant different bills. So we
14 are on the Transparency Act 77 of 2020. And I know we
15 discussed the Disease Control Prevention Act numerous times
16 and how that coalesces, and I know there's been a request
17 to update that language because, again, the goal isn't
18 HIPAA information on individuals. It's aggregate
19 information that residents are craving, and I don't think
20 anything highlighted that more than what we've seen during
21 this pandemic. So can you kind of bring that to light what
22 you're looking for within that Disease Control Prevention
23 Act language and the kind of aggregate data you're looking
24 for?

25 MS. MELEWSKY: I mean, I think the simplest way

1 to address the problems with the DPCL is to make those
2 records subject to the Right-To-Know Law. The Right-To-
3 Know Law already contains numerous exemptions that would
4 shield HIPAA-protected records, individual medical records.
5 Things that -- you know, those -- that -- they -- the
6 DPCL's confidentiality provision, I think, is based in the
7 same type of protections that are mirrored in the Right-To-
8 Know Law. And I think the Right-To-Know Law largely
9 subsumes those concerns and addresses them adequately. I
10 think the easiest way, and I think the most appropriate way
11 is to have the DPCL not address public access at all and
12 leave that information purely subject to the Right-To-Know
13 Law and its numerous exemptions that already exist to
14 protect that type of information.

15 If anything, I would make Disease Prevention and
16 Control Law affirmatively address the fact that the
17 presumption of access does apply absent an applicable
18 exemption. Because like I said, the Right-To-Know Law
19 contains numerous specific exemptions that already protect
20 that type of information. But what the DPCL doesn't
21 contain is the presumption of access, the burden of proof,
22 the appeal mechanisms that all protect to exist -- that all
23 exist to protect the public's right to know. Those are all
24 absent from the DPCL. So if you don't make it subject to
25 the Right-To-Know Law itself, mirroring the Right-To-Know

1 Law's burden, presumption, and appeal mechanisms and
2 request mechanisms would be a helpful step. But I think
3 there are a lot of ways to, kind of, address that issue.
4 The easiest way is to make it subject to the Right-To-Know
5 Law.

6 MS. BARRON: Yeah. One example of the kind of
7 information that we want -- look, we know we're not going
8 to publish people's names who are sick in the hospital with
9 COVID, unless, of course, they want us to. But we do want
10 to know ages, and I think that not being able to say, there
11 were so many people under whatever cohort of age really hid
12 how serious the disease was for people that were younger
13 than, say, 65. And that was an issue. We had people
14 saying, well, this is only affecting older people, this is
15 only affecting senior citizens, when in fact we knew
16 anecdotally that there were a lot of people in their 20s
17 and 30s sick in the hospitals, suffering from COVID, did
18 not have the information.

19 MAJORITY CHAIRMAN GROVE: Wow. And a last
20 question here, as the pandemic rolled out, I think there
21 was an expectation of we had no idea of what was happening
22 a year ago today. But as things transpired we realized we
23 can be operational and deal with COVID-19, I think, in a
24 responsible rational way. From your engagement with
25 different levels of government -- you know, I know the

1 House continued to do right-to-know requests the entire
2 time. What areas really kind of shut down? We know -- and
3 we know some agencies -- state agencies continued with
4 right-to-know requests, some did not. How about county
5 governments, local governments? Were there any issues as
6 far as those operations, kind of ceasing for a little while
7 during COVID-19?

8 MS. MELEWSKY: Yeah. I heard about issues from
9 every level of local government. It wasn't just
10 Commonwealth agencies. I think they struggled with the
11 same issues that the news media struggled with. How to get
12 everybody remote? You know, it took some of our members a
13 few weeks and a lot of money to get up and running
14 remotely. The same issues impacted local agencies. But
15 for what it's worth, I do believe that most of them made
16 their best effort to comply with public access requests
17 during that time. I don't think anyone used the pandemic
18 as an excuse to not provide access.

19 I think the pandemic and the closures created
20 legitimate reasons that they couldn't respond. I'm not
21 aware of anyone -- no journalist said to me, they're just
22 using the pandemic as an excuse here. I just -- that's
23 just not an experience that I think -- I don't have any
24 experience with that. I don't know that it happened. I
25 think the pandemic created significant and legitimate

1 issues, but I think agencies and requestors acted
2 reasonably to address them. And I think for the most part,
3 many of those issues have been resolved.

4 There are some -- there are obviously, still
5 outstanding issues, you know, with the PennDOT site, the
6 York County automatic response, the, you know, extensions
7 that are not necessarily warranted. But I think for the
8 most part, agencies did what they were required to do that
9 was in their -- local agencies did what was required of
10 them to the best of their ability under the circumstances.
11 And that's -- I mean, that's really all we can ask for
12 in -- you know, in the first months of a pandemic response
13 that's worldwide. It was -- you know, it's an
14 unprecedented event. I think we all did the best that we
15 could, including the local agencies and Commonwealth for
16 what it's worth.

17 I can't sit here and say one type of agency was
18 more problematic than any others. What I can say is, I
19 don't think anyone used it as an excuse to otherwise not
20 provide records that they had.

21 MS. BARRON: I agree.

22 MAJORITY CHAIRMAN GROVE: Thank you.

23 REPRESENTATIVE SCHEMEL: Thank you.

24 Representative Schmitt.

25 REPRESENTATIVE SCHMITT: Thank you, Mr. Chairman.

1 And there were a couple things that came out in each of
2 your testimonies that struck me, and I'll start with
3 Attorney Melewsy first. I got a strong sense from your
4 testimony that the aspirational goals as set forth within
5 the Right-To-Know Law itself are simply not being realized
6 in practice. Would you say that that -- would you agree
7 with that statement?

8 MS. MELEWSKY: Absolutely. Yes. I think, on
9 paper, the presumption of access and the burden of proof
10 and all the protections that exist in the Right-To-Know Law
11 are wonderful. I think the problem is, when the rubber
12 meets the road, it's not translating into actual access,
13 and I think that may have to do with some turnover.
14 There's -- I know there's very high turnover at the local
15 level, anyway, for Right-To-Know Law officials. It's a
16 hard job. People don't stay in it for a long time. I
17 think unfamiliarity with the law and its cornerstones is
18 part of that problem. And I think -- when Liz and Nathan
19 talked about the need for additional training, I think that
20 can address some of that issue.

21 I mean, the Right-To-Know Law was supposed to
22 be -- was intended as a sea change, right, remedial law
23 designed to improve access. I think that sometimes is lost
24 kind of in the shuffle of how we actually go about our
25 business day to day. And I think a refresher course in

1 what the law is -- you know, what the law means, what its
2 intent is, what its purpose is, would be beneficial.

3 REPRESENTATIVE SCHMITT: Thank you. Ms. Barron,
4 I wanted to make a remark on something that you had said.
5 You had said something about publishing information with
6 regard to patients and healthcare facilities, and you said
7 we don't want to put their names in the paper. And I have
8 to put a plug in for my -- a local newspaper which I love,
9 the Altoona Mirror. But I remember as a young man -- I've
10 been reading in the Altoona Mirror for 50-some years, but I
11 remember back in the old days when the Altoona Mirror would
12 publish the names of people who were admitted to our local
13 hospital and the names of people who were discharged from
14 our local hospital, and I will say, I have to admit, that I
15 read that with some interest every day.

16 Now, I know we can't do that anymore, but I
17 certainly always was interested to see whether any of my
18 friends or neighbors or relatives, even, were in the
19 hospital or out of the hospital. So we won't go back to
20 that, but I wanted to revisit that old -- the way it was in
21 the old days.

22 MS. BARRON: Well -- and babies being born. That
23 was so women --

24 REPRESENTATIVE SCHMITT: Oh, yeah.

25 MS. BARRON: When we couldn't -- when we had to

1 stop publishing them, what an uproar. I heard from so many
2 people. And by gosh, it was many, many years ago, but we
3 used to always put newborns and we'd even say the sex of
4 the baby, but --

5 REPRESENTATIVE SCHMITT: Yes. Well --

6 MS. BARRON: You're

7 REPRESENTATIVE SCHMITT: -- the good old days, I
8 suppose. I have a question for each of you. One of the
9 things that we do as legislators when we're considering an
10 issue and doing our research, as we look a lot of times at
11 what other states are doing. You know, what have other
12 states done on this issue? What are other states doing on
13 this issue? What are other states contemplating on this
14 issue? And I would assume that you have some interaction
15 with people in other jurisdictions and you have some
16 familiarity with what's going on with regard to
17 transparency and right-to-know in other states, other than
18 Pennsylvania. So I'm interested in your feedback on how
19 Pennsylvania's management of transparency and right-to-know
20 requests stacks up against some other states that you're
21 aware of.

22 MS. MELEWSKY: It's difficult to kind of give us
23 a grade. When we were under the old Right-To-Know Law,
24 pre-2008, we were ranked consistently by organizations that
25 put us way at the bottom -- you know, failing grades on

1 access. I think now, though, it's difficult to gauge us as
2 an overall -- we're not there anymore. We're clearly
3 typically in the, you know, B, B- range. But when you get
4 into the specific types of issues that you can compare and
5 contrast with other states, there are some areas where
6 we're really good, and then there are some areas where
7 we're probably the worst. I tried to highlight a few of
8 the problematic ones today, but it really depends state to
9 state.

10 I mean, the gold standard for public access, we
11 would look to Florida's law typically. I mean, they're the
12 Sunshine State in more than just their motto, The Sunshine
13 State. They have what's widely considered the best public
14 access law in the nation, but they are that way because the
15 government officials in charge of the law start from the
16 presumption that these records are public. And that's just
17 systemic.

18 I think in Pennsylvania, we don't have that
19 systemic understanding or acknowledgement of the
20 presumption of access. I think, unfortunately, government
21 agencies still view records as government records that they
22 give out to the public, when, in fact, they are public
23 records that happen to be in the possession, control, or
24 custody of a government agency. And that's what the
25 presumption of access was supposed to flip in 2008, but

1 we're still working to meet that goal.

2 So in comparison with other states, we are
3 certainly improved from where we were in 2008. We've gone
4 from failing grades to, you know, A's in some areas, B's in
5 some area, and maybe some poorer grades in other, more
6 specific areas. But you'd really have to look issue to
7 issue to get a true understanding of where we stand when
8 compared with other states.

9 MS. BARRON: I do think it's --

10 REPRESENTATIVE SCHMITT: I'm sorry, go ahead.

11 MS. BARRON: The most glaring example of that,
12 though, I think is the whole dashcam/bodycam issue.

13 MS. MELEWSKY: Yeah.

14 MS. BARRON: Most other states in the union do
15 allow media access to this, and we don't have -- it's like
16 we haven't quite entered that century yet. It's coming,
17 and yet if you look around you'll -- why do -- look at
18 Pennsylvania. You just don't see the kind of footage that
19 you'd see elsewhere unless someone -- unless a private
20 citizen took it, which happens quite often, and they're
21 getting more familiar with giving it to the media. But we
22 are woefully behind in that area, and that's a huge
23 problem.

24 REPRESENTATIVE SCHMITT: Well, that's an
25 interesting point because oftentimes when I'm watching the

1 news --

2 MS. BARRON: You see it.

3 REPRESENTATIVE SCHMITT: -- on television, I will
4 see dashcam footage from other parts of the United
5 States -- extensive dashcam footage, prior to an incident,
6 during an incident, subsequent to an incident. I almost
7 never see that in Pennsylvania.

8 MS. BARRON: You're exactly right. And you don't
9 unless they're rare occasions when we do get access, often
10 because it favors the person that holds the video,
11 obviously. But I would also point out that it's -- again,
12 it's part of the whole accountability issue that is such a
13 hot button issue in this day and age. It --

14 REPRESENTATIVE SCHMITT: Right.

15 MS. BARRON: -- not only does it provide, like I
16 said, a great source of evidence for police departments to
17 use in incidents, but it also holds them accountable. You
18 can see how things were conducted. And we all know those
19 very notorious cases in the past year you don't have that
20 in Pennsylvania. So they're paying all this money --
21 taxpayer money to buy this equipment, most departments now
22 have it, but I do not feel it's being used in all its best
23 possibilities.

24 REPRESENTATIVE SCHMITT: Yeah. Well, let me give
25 somebody else a chance here. I'll take my leave. But let

1 me say that we kind of circled back to my first statement
2 that the aspirational goals as set forth in the Right-To-
3 Know Law itself aren't being realized in practice, and I
4 think as legislators, it's our job to make sure that those
5 aspirational goals are met in practice where the rubber
6 meets the road. So I thank both of you for coming in this
7 afternoon, and thank you, Chairman Schemel.

8 REPRESENTATIVE SCHEMEL: Thank you,
9 Representative. Next Representative Keefer has a question.

10 REPRESENTATIVE KEEFER: Thank you, Mr. Chairman.
11 Quick question. Following up on Representative Grove
12 first. Your opinion was that you did not think that any
13 of -- any agencies were using the COVID-19 pandemic to
14 circumvent the Right-To-Know Laws; however, I commiserated
15 with reporters quite frequently throughout the spring and
16 summer as we were all trying to get information. Did you
17 mean that just for the local agencies or the state agencies
18 as well?

19 MS. MELEWSKY: Well, primarily the local
20 agencies. I know it was a problem with the state agencies
21 because they had physical closures where many of the local
22 agencies did not. I certainly spoke to my share of
23 journalists, and I still speak to them every day, who have
24 problems with access during COVID time. Whether or not
25 they can say it's absolutely because of COVID and not

1 because there are loopholes in the law, I think that's a
2 bit trickier question.

3 REPRESENTATIVE KEEFER: Okay. I just say that in
4 Jan Murphy's challenge, and our challenge, to get that list
5 of those waivers and to even get the criteria for the
6 waivers that they wouldn't put out that I believe that, you
7 know, anybody that was shut down deserved to have that
8 criteria and that data.

9 MS. MELEWSKY: Yeah. And some of that gets to
10 the actual provisions in the law that say what can be
11 denied and what can't. If you would've requested those
12 records outside the pandemic, I imagine, the Department of
13 Health would've made the same objections based on the same
14 provisions of the law. So there are numerous challenges,
15 COVID related. I don't know if it's only COVID or if it's
16 COVID plus other things as well. My guess is that it's
17 COVID plus a lot of other things.

18 REPRESENTATIVE KEEFER: Okay. And my other
19 question -- you answered part of it in your testimony when
20 you -- we spoke about York County's automated response that
21 they had regarding when they would deem a right-to-know
22 request received as well as PennDOT's. And you said you
23 did know that they are actually responding to those. Are
24 there any that you know that are not being responded to?

25 MS. MELEWSKY: I don't.

1 REPRESENTATIVE KEEFER: Okay. All right. Just
2 double checking. I mean, I know it's not -- the issue is
3 that that response is not compliant to the -- how we wrote
4 Act 77, but I just wanted to know if you knew of any that
5 had gone ignored.

6 MS. MELEWSKY: I don't think so. Early on, there
7 were examples, like the City of Philadelphia, for example,
8 just stopped responding to requests for a good, I think, a
9 month and a half. Used the same kind of language you see
10 from York County. That has ended. They're responsive at
11 this point, so I think there were those -- there were
12 examples of that but not anymore.

13 REPRESENTATIVE KEEFER: Great. Thank you very
14 much.

15 REPRESENTATIVE SCHEMEL: Thank you,
16 Representative Keefer. This is a question for Ms. Barron.
17 Like a number of my colleagues, I have a district that is
18 on the state line, and I can go on dashboards from some of
19 the surrounding states near my district and find a lot of
20 very granular information specifically regarding COVID-19.
21 I've been requesting from the Department of Health and the
22 Department of Education information on COVID rates among
23 school-age children because I have school districts in my
24 district, some that have closed schools, some that have
25 opened schools, and they want to know are the opened

1 schools experiencing a higher rate of COVID than the closed
2 schools. I have not been able to get that information
3 because the state agencies tell me that that is too
4 granular, and therefore, would be in violation of state
5 law. But I can get that information about my neighboring
6 states.

7 So Ms. Barron, you made reference to other states
8 and dashcams, but with specific regard to COVID information
9 that your news organization has attempted to collect, have
10 you also had experiences with other states and have you
11 seen some states that maybe are more forthcoming with
12 information than Pennsylvania, or what has been your
13 experience?

14 MS. BARRON: Off the top of my head, I would just
15 say that Maryland has done a really good job. They seem to
16 have been out in front and getting more results. Penn
17 State -- or Pennsylvania does come there eventually, but
18 they're a little -- they're slow to follow. Takes them a
19 while to power up.

20 Another thing I'm going to mention, and it's not
21 under right-to-know, but another impediment to us early on
22 was the virtual press conferences. We understand why these
23 had to be held. They were held for a very long time, but
24 the liability of them is there is no time -- questions are
25 selected by the Department, and there -- the opportunity

1 for follow-up is very, very poor.

2 And it was another thing that we would look at
3 other states, especially New York, and see how they were
4 handling pressers. They opened them up and had physical
5 presence with all COVID safety implied much, much sooner
6 than we did here in Pennsylvania. And I do know that was a
7 big source of frustration for -- I must have talked to a
8 dozen reporters in preparing this. Almost everybody
9 mentioned it. The whole need to have deep, granular
10 conversations, to your point, to get that kind of in-depth
11 information was very difficult especially in those early
12 days.

13 REPRESENTATIVE SCHEMEL: So New York might have
14 been having live information -- just bad information
15 perhaps, but with specific --

16 MS. BARRON: (Indiscernible - simultaneous
17 speech)

18 REPRESENTATIVE SCHEMEL: -- regard to FOIA
19 requests, since that's the purview of this particular
20 hearing, have you made -- or had to make right-to-know
21 requests in any other states, and are you seeing any that
22 are doing anything differently than Pennsylvania? And if
23 you don't have any experience in that, that's fine.

24 MS. BARRON: I'll say no. I could always find
25 out for you. I do not think so. I pretty much have an

1 idea of what everybody was applying for this year, and I
2 think it was all in Pennsylvania. If not, I'll get back to
3 you.

4 REPRESENTATIVE SCHEMEL: And I'll ask this as a
5 concluding question to this panel. It was answered by the
6 earlier panel, but is there anything else that you would
7 tell the Committee about your experience with right-to-know
8 and any improvements needed? You've both detailed a number
9 of improvements. But following questions, if anything else
10 has come to mind that you would like to share with us at
11 the conclusion of this panel?

12 MS. BARRON: Melissa, if I could real quickly. I
13 have a wish list that I didn't get into because I was
14 worried about time limits. But speaking of time limits,
15 let's create limits for police and criminal records. As
16 soon as a case is adjudicated, basic investigatory records
17 should become subject to right-to-know. Two more, one --
18 another one is, maintain a commonly requested site that
19 will give proactive public access to records that are most
20 requested free of charge. This is done in some other
21 states. This is done by freedom of information groups very
22 effectively and it would take some of the burden off of
23 replying to these requests.

24 And then finally, I'm going to toss this out, and
25 this is not a statutory situation, but we ask you to look

1 into your Skype for Business Phone System. The system was
2 installed back in 2018, but as far as we can tell, it only
3 archives the last 30 days of Skype calls. And I don't
4 think it's -- we don't think it's anything limited in the
5 system, we just think that it hasn't been looked in to. We
6 would ask you to look into the best practices for the Skype
7 for Business Phone System that agencies are using and see
8 if it can update the laws.

9 MS. MELEWSKY: And going hand-in-hand with that
10 is the issue of record retention. Public access is great
11 when it works, but if a record is destroyed purposely or
12 unintentionally, we can't get access to it, and record
13 retention isn't addressed anywhere in the text of the
14 Right-To-Know Law itself. And we believe there are some
15 improvements that can be made by requiring agencies to, at
16 a minimum, not destroy a record or you know, otherwise not
17 retain a record subsequent to a request being made. That's
18 one of the issues we'd like to see addressed legislatively.

19 We have an entire -- probably four pages worth of
20 recommended amendments. I don't want to go into them. We
21 don't have time to go into them here today, but I'm happy
22 to share that list with the Committee that addresses, you
23 know, granular issues in the statute, specifically with
24 suggested language and problems that have resulted from
25 case law. And I'm happy to share that with you after the

1 hearing.

2 REPRESENTATIVE SCHEMEL: Thank you. And we do
3 have one further question from Chairman Kenyatta.

4 MINORITY CHAIRMAN KENYATTA: Ms. Barron, just
5 very quickly, you talked about the free public facing
6 proactive records website that you said some other states
7 were employing. Do you know, just off the top of your
8 head, some of the other states that are doing that?

9 MS. BARRON: I will get it to you. I don't know
10 the actual states, but I know that there was a -- there's
11 also a freedom of information organization that has it. I
12 will get that to you.

13 MINORITY CHAIRMAN KENYATTA: Okay. Thank you.

14 MS. MELEWSKY: In the federal context -- if I can
15 jump in.

16 REPRESENTATIVE KENYATTA: Yeah. Please.

17 MS. MELEWSKY: The federal FOIA for the federal
18 agencies, it's called the FOIA Reading Room, where agencies
19 have to provide their -- I think it's 50 most commonly
20 requested records affirmatively on -- in their FOIA Reading
21 Room both on their website and in their physical offices
22 when they are open. And that's a concept we think would do
23 a lot to address some of the burden that agencies feel
24 accompanying Right-To-Know Law requests.

25 MINORITY CHAIRMAN KENYATTA: Okay. Thank you

1 both.

2 MS. BARRON: Thank you.

3 REPRESENTATIVE SCHEMEL: Good. Ladies, thank you
4 so much for your time and attention this afternoon.

5 And at that, we will move on to our last panel,
6 which will include Joseph Gerdes, Director of Government
7 Relations of the PA State Association of Township
8 Supervisors, and Richard Perhacs, County Solicitor and Open
9 Records Officer for the county of Erie. It will take just
10 a moment to get them up onto the screen.

11 [pause]

12 UNIDENTIFIED VOICE: Mr. Gerdes, can you hear us?

13 MR. GERDES: I can. Can you hear me?

14 UNIDENTIFIED VOICE: Yeah. We're not seeing your
15 picture. Can you check if your camera's on?

16 MR. GERDES: All right. How's that?

17 UNIDENTIFIED VOICE: No. Not yet.

18 MR. GERDES: I'm seeing you, and I'm seeing --

19 UNIDENTIFIED VOICE: Perhaps you can leave the
20 meeting and come -- there we go. We got you. Thank you.

21 MR. GERDES: Okay.

22 REPRESENTATIVE SCHEMEL: Very good. Welcome
23 gentlemen. Thank you for appearing today. First if we can
24 swear you in. If you'd both raise your right hands. If
25 you'd both raise your right hands. Mr. Gerdes, if you

1 could raise your right hand, please.

2 MR. GERDES: Yep.

3 REPRESENTATIVE SCHEMEL: Ah, thank you. Oh --

4 MR. GERDES: Sorry.

5 REPRESENTATIVE SCHEMEL: -- maybe you had it.

6 Sorry. It was out of the --

7 MR. GERDES: It is.

8 (Oath administered)

9 MR. PERHACS: I do.

10 MR. GERDES: I do.

11 REPRESENTATIVE SCHEMEL: Very well. Gentlemen,
12 I've already introduced the two of you while you were
13 coming on to our screen. So Mr. Gerdes, if you'd like to
14 begin if you have any remarks that you'd like to offer.

15 MR. GERDES: Thank you, Mr. Chairman. Chairman
16 Grove, Chairman Schemel, Chairman Kenyatta, and Members of
17 the Committee, good afternoon. My name is Joe Gerdes, and
18 I'm the Director of Government Relations for the
19 Pennsylvania State Association of Township Supervisors, or
20 PSATS. Thank you for the opportunity to provide comments
21 on behalf of the 1,454 townships of the Second Class in
22 Pennsylvania that's represented by our association.

23 Transparency is a governmental responsibility
24 that the Association and its membership takes quite
25 seriously. When the pandemic first hit, and the shutdown

1 began over one year ago this week, PSATS actively worked
2 with our members to provide guidance and clarification on
3 how to comply with Commonwealth orders while continuing to
4 provide critical governmental services. This communication
5 was delivered via direct daily emails, virtual town halls,
6 continually updating our website, and through hundreds of
7 direct phone calls and emails. Township officials wanted
8 to know how they could serve their residents safely, and
9 this meant rethinking how we govern and communicate and
10 deliver those services to those constituents.

11 We appreciate that the General Assembly provided
12 clarifications with Act 15 of 2020, allowing our boards and
13 commissions to meet remotely and providing a temporary
14 pause on mandatory reviews and approvals for development.
15 In addition, the Office of Open Records have provided
16 guidance, and we worked well with them on both the Right-
17 To-Know Law and the Sunshine Law as early as March, which
18 we promoted through the platforms that I previously
19 mentioned.

20 During the early days of the shutdown, township
21 officials working from home may not have had access to all
22 the documents and requests were quite challenging to
23 fulfill within the required five business days. The OOR
24 advised local agencies that had continuity of operations
25 plans that right-to-know issues and requests should be

1 handled and clearly communicated to the public. In a lot
2 of cases, this meant that local agencies needed to take
3 additional time to respond to those requests and using up
4 to 30 days as provided by the law. Agencies were
5 encouraged, at that point, to reach out to requestors to
6 see if an extension would be agreeable and to find out the
7 timely need for the information. Local agencies were
8 appropriately reminded that transparency builds trust,
9 especially in times of crisis.

10 As the reopening began, the Office advised that
11 those agencies in yellow and green counties process
12 requests as they normally would in compliance with the law.
13 This guidance has been in place since May. While we had a
14 handful of questions and concerns about the Right-To-Know
15 Law requests during the lockdown, many of these were
16 frustrations at some entities submitting identical requests
17 to hundreds of municipalities across the state during a
18 global pandemic often as a means of marketing research, at
19 the added expense to the taxpayers.

20 For example, American Transparency sent out a
21 mass request in late March, and there was a union that sent
22 one out in May. The biggest challenge for our members was
23 how -- the biggest challenge for our members was to change
24 how to hold safe and transparent township meetings that
25 still provided public participation opportunities for

1 residents and taxpayers. Suspending local government
2 operations was simply not an option as our residents rely
3 on those services and functions.

4 Townships met this challenge with creativity and
5 finding solutions that worked for their particular
6 community. These solutions were exemplified by a full range
7 of meetings virtually, by teleconferencing, live streaming,
8 Zooms, outdoor drive-in movie theater meetings, basically
9 ways of finding safer venues to allow these meetings. We
10 embrace these and work with the public to provide these
11 options. Some expanded opportunities for public
12 participation by using these options, and we encourage
13 participation by asking for written comments by email or
14 mail previous to the meeting and then allowing a call-in
15 option during the public comment instead of appearing in
16 person.

17 As we look back over the last year, we're happy
18 to note that with few exceptions, our membership has met
19 this challenge. In cases where a situation should be
20 handled differently, we've worked hard to continue to
21 educate and promote best practices that are both
22 transparent and provide options for public participation.
23 There remains no doubt, however, that technology capacity
24 must be addressed by the Commonwealth moving forward, if
25 we're to ensure that all Pennsylvanians have equal access

1 to these opportunities.

2 Many members have noticed -- and noted that they
3 have learned to better communicate with their
4 constituencies both proactively and through many different
5 mediums than they had before. Others have noticed
6 increased public engagement through virtual or hybrid
7 meeting arrangements, which they hope will continue. And
8 many have begun offering services digitally and accepting
9 payments electronically, for example, over this past year.

10 We, again, thank the General Assembly for Act 15
11 of 2020 to allow remote access to meetings during a
12 declared emergency. Given the overwhelming success, and in
13 many cases, expanded public access, we'd strongly encourage
14 the General Assembly to allow this option for expanded
15 access to public meetings to be extended moving forward
16 without the need for a declared emergency.

17 On another note, while PSATS strongly supports
18 the public's right to view and obtain copies of municipal
19 public documents, we must take the opportunity to note that
20 the current Right-To-Know Law places a financial burden on
21 municipalities, and therefore, the local taxpayers. And
22 this was recognized by SR 323, the report on unfunded
23 mandates.

24 Commercial interests, particularly out of state
25 businesses, are using public records about law-abiding

1 citizens and taxpayers for private gain often free of
2 charge under the existing fee schedules. In fact, a 2016
3 study found that 26 percent of all the requests for public
4 documents received that year were from outside of
5 Pennsylvania, with almost 71 percent of those being made
6 for a commercial purpose. The study also found that local
7 governments overwhelmingly complied with the law.

8 As such, PSATS supports protections for taxpayer
9 resources and thus reforms to the Right-To-Know Law should
10 number one, allow charges for staff time when fulfilling
11 requests or providing online responses. Number two,
12 additional commercial fees if a request will be for
13 information used for resale or business solicitation
14 purposes or a financial benefit, and number three,
15 prepayment for requests of copies more than 200 physical
16 pages. The current law is 400 pages. Or also if the
17 requestor owes payment from previous unpaid requests of \$50
18 or more. PSATS supports changes to protect taxpayer funds
19 from theft as well as to protect law enforcement officers
20 and employees from harassment and identify theft. To
21 protect taxpayer funds from theft, credit card numbers,
22 account numbers, usernames, and passwords must be exempted
23 from disclosure in the Act. To protect all public
24 employees from identity theft and harassment, personal
25 identification information must be protected from

1 disclosure such as personal tax information, employee home
2 addresses and dates of birth. To protect the law
3 enforcement community, inmates should be limited on what
4 types of information they may request.

5 In addition, PSATS supports an amendment to the
6 Right-To-Know Law to address abusive or harassing use of
7 this law by some requestors. It was referenced earlier as
8 the vexatious requestors. It should also include a
9 prohibition using the Right-To-Know Law to submit discovery
10 requests by attorneys.

11 With that, I want to thank you for the
12 opportunity to speak on behalf of the townships, and I'd be
13 happy to answer any questions when we're done.

14 REPRESENTATIVE SCHEMEL: Very well. Thank you,
15 Mr. Gerdes. Now Mr. Perhacs.

16 MR. PERHACS: I'd like to thank the Committee and
17 staff for the opportunity to speak to you today. I'm
18 looking at the agenda here. It appears as though I'm the
19 only person that you're going to be hearing from today who
20 actually responds to right-to-know requests. I'm the
21 person who's desk they land on who has to figure out what
22 to do, how to do it, and make sure that it gets done on
23 time. So I'll be happy to share that perspective in
24 response to any questions that you have.

25 Erie County is 260-70,000 people, with a center

1 city of about 100,000, not the smallest county in
2 Pennsylvania by any means, but certainly not the largest.
3 We have limited resources like all local agencies do. I
4 could tell you that I'm privileged to work for County
5 Executive Dahlkemper whose philosophy of transparent
6 government is very well known. And I've been instructed in
7 no uncertain terms by her to treat the law with respect to
8 honor the presumptions that are in it, and to respect the
9 time limits that it provides, and we've done that in Erie
10 County, pandemic or no.

11 Most of the thrust of this hearing, I gather from
12 listening to the testimony, is related to the pandemic.
13 And I don't really have a lot to add to what you probably
14 already know about the pandemic's impact on right-to-know
15 requests. Our biggest, biggest problem we had as a result
16 of the pandemic, and we didn't generate automatic 30-day
17 extensions or anything like that. We stayed the course
18 with respect to the time limits pretty much all the way
19 through it.

20 Our biggest problem was responding to requests
21 for data that has simply not been aggregated in the form
22 that the people were asking for it. You know, we want to
23 know which nursing homes, you know, have had deaths. We
24 want to know what the infection rate is in thus and such a
25 facility, and there's no place I can go to get that

1 information locally. People expected us to answer
2 questions we couldn't answer, and I understand the angst
3 that they felt because of the health aspects of the
4 pandemic. But we spent a lot of time just trying to
5 explain to people why we can't answer their questions,
6 which was another aspect of the pandemic which was
7 problematic, which is the people not understanding the
8 Right-To-Know Law. The Joe Average person who was making a
9 request, not the media, basically would send us lists of
10 questions and interrogatories, which of course, as you
11 know, the Right-To-Know Law does not require us to answer
12 in which we have very little ability to answer. Trying to
13 explain to people why this isn't a place to send
14 questions -- informational questions. It's a place to seek
15 access to specifically identified records because that's --
16 you know, because that's what we do. We had a great deal
17 of trouble with that and a great deal of problem with
18 misdirected requests. People thinking we could answer
19 things that really only Harrisburg can answer.

20 So those were the pandemic aspects of responding
21 to right-to-know requests at street level where I am that I
22 would say attributed to the pandemic. Obviously,
23 everything slowed down, but we kept the wheels moving, I'm
24 pleased to say. And all through the pandemic, we
25 maintained something pretty close to our typical turnaround

1 time on right-to-know requests, which is about 72 hours,
2 frankly, in Erie County.

3 I'd like to spend my remaining few minutes to
4 mention two things that were actually mentioned by Mr.
5 Gerdes, and one, if I leave you with nothing else today, if
6 there's no other suggestion for legislative attention that
7 I can direct your attention toward relative to the Right-
8 to-Know Act, it would be to do something about the
9 commercial requests that we get. Requests from businesses
10 that use our resources, our time, and our staff's resources
11 to provide information that they use to make a profit, not
12 that there's anything wrong with making a profit, but it
13 imposes real financial burdens and real time burdens on
14 very, very busy public servants, particularly in the last
15 year. But we had librarians, you know, doing contact
16 tracing at the health department because we needed people
17 power up there to do it.

18 But we're getting requests from everything from,
19 you know, environmental studies to unclaimed property, bid
20 packages, five years' worth of contracts for some service,
21 unclaimed funds, tax sale data, investment performance data
22 for the pension plan all from firms -- almost none of them
23 from Pennsylvania that are going to use this money -- or
24 this information to somehow generate a profit. We don't
25 object to providing it, but I think they ought to pay for

1 it. I would urge the legislature to give attention to a
2 system whereby for-profit activities are subject to some
3 sort of a user fee or an access fee, and I don't think you
4 can do it through increasing the copy charge from 25 cents
5 to a buck-50 because most of the data that we provide is in
6 electronic form. We can't charge for that.

7 So I would urge you to do that, and I'd have --
8 and before the newspapers object and say, well, wait a
9 minute, we're for-profit businesses. It would be a fairly
10 straightforward matter, I think, to exempt newsgathering
11 organizations, media, newspapers, magazines, broadcast
12 outlets generically, and we can sort through who those are
13 and who those aren't without a whole lot of difficulty, so
14 we're not talking about that. Those people are in the
15 business of informing people, and we have no problem with
16 providing them with all the information that they're
17 entitled to, and we do it routinely. But most of the
18 things that I mentioned simply don't fall into that
19 category and are easily identifiable as -- you know, as not
20 falling into that category.

21 The other point I'd like to make in the time
22 that's left to me is, again, a point that was mentioned by
23 Mr. Gerdes on behalf of the townships, vexatious requestors
24 and a permutation on that, not just vexatious requestors
25 but unreasonable requests. I have one individual who is

1 requesting information from me who is quite frankly -- has
2 got some psychological issues, but he's a citizen and he's
3 got a computer and he knows how to send an email and he
4 knows how to fill a form out, and he uses and abuses the
5 system.

6 Unreasonable requests. There's nothing in the
7 Right-To-Know Law now that enables a local agency to object
8 meritoriously to a request on the grounds that it's simply
9 unreasonable. It extends beyond the reasonable scope of
10 anything you could've anticipated. I'll give you an
11 example. Erie County has, for many years, been pursuing a
12 project to create a community college. It's gone on
13 literally for years and years and years. It's generated an
14 awful lot of discussion and an awful lot of recordkeeping
15 and an awful lot of communications. We had one request for
16 literally every piece of paper, every document, and every
17 record of any type whatsoever related in any way to the
18 proposed college. My IT director advises me that,
19 conservatively, his estimate is that that request
20 encompasses in excess of 10,000 discreet documents --
21 electronic documents.

22 We simply don't have the ability to take a
23 request that generates 10,000 hits in our computer system
24 and examine those documents to determine, for instance,
25 which should -- which personal email addresses should be

1 redacted, which contain privileged material covered by the
2 attorney-client privilege because of all the legal activity
3 that was surrounding it and on and on. Somebody needs to
4 go and look at these documents just to call out the things
5 that were properly excluded from the response to their
6 request. We don't have the physical capacity to do it.
7 You're talking about 10,000 pieces of paper. We simply
8 can't do it. So we turned it down, and now it's in
9 litigation.

10 My point being that there needs to be some
11 attention given to some sort of ability for an agency to
12 raise, and we can do it in the court system through a
13 petition. It's the sort of thing they do all the time.
14 Call it the agency protection from abuse act. Something
15 that gives us the opportunity to seek some protection from
16 requests that are just beyond the pale of what anybody
17 would consider to be reasonable, which are clearly
18 (indiscernible - recording malfunction) government agency,
19 and that does really happen. And obviously I'm not going
20 to name any names (indiscernible - recording malfunction)
21 specifically off the record if you like to validate the
22 point that I've made.

23 I will (indiscernible - recording malfunction)
24 answer. Like I said, I'm the -- probably the only -- I'm
25 the only -- I'm sure I'm the only person testifying today

1 who actually opens -- you know, who actually opens the
2 emails and says here's a request, I have to respond to this
3 because it's my responsibility to do it. So if you want
4 something -- information from me from that perspective,
5 I'll be happy to provide that as well. Thank you.

6 REPRESENTATIVE SCHEMEL: Very well. Thank you,
7 Mr. Perhacs. Our first question today is from
8 Representative Ortitay.

9 REPRESENTATIVE ORTITAY: Thank you, Mr. Chairman,
10 and thank you both for being here. And I'll open this up
11 to both of you. Either or both can answer. I have a
12 couple quick questions. How do or does the right-to-know
13 process differ at the local level versus the state level,
14 and are their informational needs different?

15 MR. PERHACS: I'll take a quick run at that. I
16 think the local level is -- from what I sense about the
17 state responses, the local level is more responsive. I
18 think we're more interpersonal. I mean, it's a lot easier
19 for me to call somebody and say I don't understand your
20 request, or I can't give you what you need, here's why, do
21 you understand that because we really do try to explain
22 ourselves. The local level is a lot more hands-on, I think
23 with respect to the requestors, and at least in my
24 experience, and I -- and speaking to other county open
25 records officers, I think it's consistent. It's just a lot

1 more accessible to the average person making the request,
2 and I would assume to the news media as well than the state
3 would be.

4 The state is a state, and it's a little more
5 difficult to get your arms around it, you know. So that
6 would be the principal difference, I think. Probably -- I
7 just -- I would not want to be the open records officer for
8 the Commonwealth of Pennsylvania or any major part of it.
9 Thank you.

10 MR. GERDES: And just to jump on that, I think,
11 you know, one of big things for us at the township level
12 is -- I think Mr. Perhacs mentioned earlier is the ability
13 to answer these requests when they're on a larger
14 (indiscernible) just the staff level. The open records
15 officer, I'm going to go out on a limb, is primarily going
16 to be a township secretary or a township manager, and their
17 ability to balance the amount of time that they need to
18 handle some of these requests is going to preclude them
19 from doing other township responsibilities.

20 REPRESENTATIVE ORTITAY: Well, thank you both. I
21 had an instance in my district from a constituent, and I'll
22 be real quick about this, who had requested a Power Point
23 presentation from a local township that was presented in a
24 public meeting. He filed the right-to-know request. They
25 responded and said they need the full 30 days to respond

1 after the 5 days, which didn't seem to make a lot of sense
2 to me, but after hearing both of you talk, it seems like
3 they could be inundated or just not have enough staff to
4 get that out quickly because they may be filling other
5 requests as well. Does that sound accurate?

6 MR. GERDES: I believe so. Yes.

7 MR. PERHACS: Yeah. That would be a particularly
8 acute problem in a township, I think, because township
9 administrative resources are far different than a county,
10 for instance. Any county, and particularly in a place
11 like Erie, which is relatively large: 1,200 employees.

12 REPRESENTATIVE ORTITAY: Okay. Thank you both,
13 and thank you Mr. Chairman.

14 REPRESENTATIVE SCHEMEL: Thank you,
15 Representative Ortitay. Next Chairman Grove.

16 MAJORITY CHAIRMAN GROVE: Thank you. Thank you
17 both for your testimony. And I know you brought up the
18 Sunshine Act, which got me thinking we probably need to do
19 a follow-up with that, particularly how the COVID
20 provisions allowed you to operate over this time and maybe
21 have a conversation of what those advancements have done
22 increasing public participation, and maybe we want to,
23 maybe, permanently codify some of those provisions moving
24 forward, but that may be for a later date.

25 I want to bring up, kind of, Act 77 of 2020.

1 What have your members experienced with right-to-know
2 requests change at all since that act took effect? Was the
3 direction from Office of Open Records, their guidance on
4 when and how to open, was it helpful for you? And then
5 further, there was some discussion -- and maybe Mr.
6 Perhacs, you can discuss this, some frustration about
7 agencies -- particularly at the state level that's been our
8 experience of you know, agencies will wait the 5 days and
9 then automatically slap a 30-day extension. There's been a
10 level of frustration with that practice because it's almost
11 ends up being an automatic 35 days.

12 Kind of -- can you address, maybe from your
13 experience, is that a normal process at the local level and
14 then maybe some thoughts off the top of your head on maybe
15 having to, maybe, address that issue whether it's a longer
16 first, kind of, five days or how to address that maybe in a
17 more rational reasonable way? So thank you.

18 MR. PERHACS: We took -- in Erie County we took
19 very few 30-day extensions as a result of the pandemic.
20 When we did take them, we never used the whole 30 days
21 because you don't have to. It simply gives you a window
22 within which to respond. Vast majority of our requests
23 were done within 5 business days or 7 calendar days, and a
24 couple of the 30-day extensions had nothing to do with the
25 pandemic. They just had to do with the fact that somebody

1 who needed to get data for me was on vacation and isn't
2 there for a couple of weeks, so what are you going to do.
3 That sort of thing.

4 In my experience, I mean, we never just took a
5 30-day extension for a request. (Indiscernible - recording
6 malfunction) Do have a (indiscernible - recording
7 malfunction)

8 UNIDENTIFIED VOICE: Looks like he froze. Joe
9 maybe you can come -- so --

10 MR. PERHACS: Oh, there we go.

11 UNIDENTIFIED VOICE: There we go.

12 MR. PERHACS: Yeah. I'm -- I have a slightly
13 unstable internet connection. Anyhow, what I was saying
14 was that in talking to my colleagues, I think it was -- I
15 don't think very many, if any, of the counties just sort of
16 automatically and reflexively took 30 days. We certainly
17 never did, and I don't think we're particularly unique in
18 that respect. Apparently, Bucks or some other counties
19 have done that. It's the first I've heard of that. There
20 would've had to been a very peculiar justification for that
21 in my opinion.

22 MR. GERDES: Mr. Chairman, I'm -- this is Joe.
23 I'm not sure that I'm familiar with specific cases where
24 our townships were doing automatic 30-day extensions
25 either.

1 MAJORITY CHAIRMAN GROVE: Okay. That's very
2 helpful. And then maybe can you address Act 77 and the
3 guidance from Office of Open Records. Did you as local
4 government entities feel that was beneficial in trying to
5 weigh dealing with a pandemic as well as trying to be
6 responsive to obviously citizens' requests?

7 MR. GERDES: The Office of Open Records, Mr.
8 Chairman, we worked hand in hand with them to provide the
9 guidance to our members. So I think that was a -- you
10 know, there was a lot of Zoom calls and telephone calls
11 between the offices and here at PSATS in Enola and with
12 Liz's predecessor and Nate and working with them to
13 clarify. I think there were a lot of questions that our
14 members had initially, particularly around COVID that we
15 were able to iron out very quickly with the office, so I
16 have to give kudos where kudos are deserved, and the Office
17 did work very well with us.

18 MR. PERHACS: I would say the same on behalf of
19 the counties.

20 MAJORITY CHAIRMAN GROVE: Excellent. Thank you
21 both.

22 REPRESENTATIVE SCHEMEL: Thank you, Mr. Chairman.
23 Representative Lewis.

24 REPRESENTATIVE LEWIS: Thank you, Mr. Chairman.
25 Gentlemen, good to have you here, and thank you for your

1 testimony today. I kind of want to switch topics a little
2 bit here and talk about right-to-know requests related to
3 county jails. And this is something that's been referenced
4 both from a pandemic and then litigation related increases
5 in right-to-know requests related to county jails. And I
6 was wondering if you can elaborate a little bit on the
7 county's experience with this issue over the past year?

8 MR. PERHACS: We get a lot of requests related to
9 the jails. Some of them pandemic related. That just added
10 to it. But it -- they were -- it was a high-volume area of
11 subject matter beforehand, and it still is. A lot of them
12 come from inmates, you know, who have the ability to make
13 those requests and have plenty of time to figure out what
14 it is they want to ask us, and they do, and some on behalf
15 of advocacy groups who advocate for the interests of
16 incarcerated people. It's a very, very high -- it's second
17 only to commercial requests. Single biggest source of
18 requests are the people who want to make money off of
19 public information. That's clearly the most numerous
20 single category. Requests relating to inmates and
21 incarceration policies and practices is clearly number 2.
22 There's no question about that, so it's a lot.

23 And we don't philosophic -- I mean, you know,
24 it's an essential function of county government. It
25 matters. It's an important thing. Obviously, you're

1 dealing with deprivations of liberty and the living
2 conditions of people, and their health conditions and so
3 forth. Very legitimate concerns both by individuals and by
4 their advocacy groups that support them and family members.
5 No question about it. We don't resent the fact that those
6 requests come in for those, although the ones from the
7 prisoners, as you might imagine, tend to be a little off
8 the wall and tend to be in need of some more time to
9 respond. They don't understand, you know, the system and
10 what's available, what's not, how to request it and how
11 not, it's not what we're obligated to do, what we're not
12 obligated to do. So we tend to devote more resources to
13 the response sometimes than you would with -- I mean,
14 newspaper reporters know exactly what to ask for and how to
15 ask for it. They know the system, they know how it works.
16 But a layman -- the worst kind of layman to make a request
17 is typically an incarcerated person because they're -- they
18 tend to be very unsophisticated and not understanding it.
19 So if that helps you understand it a bit -- but it's a
20 lot -- it's a major source of requests. No question about
21 it.

22 And we would not advocate curtailing anybody's
23 access to legitimate information, including people who are
24 incarcerated. But the problems raised by vexatious or
25 unreasonable requests, that I alluded to earlier, are

1 particularly acute with respect to requests regarding
2 prisons.

3 REPRESENTATIVE LEWIS: Okay. No. That helps.
4 And this is something we've been hearing about, and we just
5 wanted to hear from you directly how it's affecting you and
6 the increase in these requests so that does help answer it
7 and for my clarity, so I appreciate it, sir. Thank you.

8 MR. PERHACS: Yeah. And a lot of inmates are
9 thinking litigation, and they're representing themselves,
10 and they think this is their -- you know, this is how
11 they're going to build their lawsuit through the --

12 REPRESENTATIVE LEWIS: I see.

13 MR. PERHACS: -- Right-to-Know Act. That's a lot
14 of what's motivating it behind the curtain, if you read the
15 requests.

16 REPRESENTATIVE LEWIS: I see. Thank you.

17 MR. PERHACS: Sure.

18 REPRESENTATIVE LEWIS: Thank you, Mr. Chairman.

19 REPRESENTATIVE SCHEMEL: Thank you,
20 Representative Lewis.

21 No other questions. I just have one follow-up
22 question. I know that you've already indicated a few items
23 that you think would be good for the Committee's
24 consideration. Is there anything else, before we leave
25 this panel, that you'd like to add for the Committee's

1 recommendation and ways to make the Right-to-Know Act
2 better?

3 MR. GERDES: Mr. Chairman, I -- again very much
4 appreciate the opportunity to address the Committee and --
5 you know, the townships of the second class, we look
6 forward to working with you all on these issues, you
7 know -- I know a lot of them have been around for a while.
8 But you know, the pandemic has highlighted some of our
9 weaknesses and also some of our strengths, and hopefully we
10 can work together to make sure that transparency is there
11 and we do it in a way that protects the Pennsylvania
12 taxpayer.

13 MR. PERHACS: On behalf of the County
14 Commissioners Association of Pennsylvania, I would
15 represent to the Committee that we think that,
16 fundamentally, the Right-to-Know Act is sound, but I think
17 we have to understand that it's also a work in progress.
18 Even though it's been around for a while, life keeps
19 throwing challenges at us that we didn't anticipate, the
20 pandemic being probably the most glaring example of that.
21 And we need to be legislatively nimble, I think would be
22 the way I'd put it. You folks that pass the statutory
23 amendments need to just pay attention to the problems that
24 emerge and again, can be identified as time goes on. And I
25 think we've talked about several significant ones from our

1 point of view today, and I think the news media had their
2 concerns as well.

3 So I would say keep an open mind toward the
4 statute. This is an area that's evolving, and we're
5 learning more and more about the practicalities of
6 responding to these requests, and I think if the
7 legislators simply pay attention to all of that, they'll do
8 the right -- they'll do right by the citizens and by the
9 local agencies that actually have to execute the law.

10 REPRESENTATIVE SCHEMEL: Very good. Thank you,
11 gentlemen, both, very much for testifying this afternoon.

12 MR. PERHACS: Thank you.

13 MR. GERDES: Thank you, Mr. Chairman.

14 REPRESENTATIVE SCHEMEL: Today's three panels
15 have reviewed their right-to-know requests particularly in
16 light of the recent pandemic and other incidents regarding
17 the law. So we certainly have learned that right-to-know
18 requests are not an interruption from government workings
19 but rather a function of them and maintaining that freedom
20 of access is important to citizens' interests, and
21 certainly, the interest of the Commonwealth at large. The
22 Committee certainly looks forward to having additional
23 hearings on this subject. We thank you for your time and
24 attention this afternoon. With that, the Committee stands
25 adjourned.

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C E R T I F I C A T E

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