



**TESTIMONY BEFORE HOUSE STATE GOVERNMENT COMMITTEE**

Good afternoon—Chairman Grove, Madame Chair Davidson and members of the House State Government Committee. Thank you for the opportunity to appear and offer testimony on the Right to Know Law (RTKL), Pennsylvania’s comprehensive public records law. My name is Melissa Melewsky, and I am media law counsel for the Pennsylvania NewsMedia Association (PNA). PNA is the statewide trade association for newspapers and online publications, and we count more than 300 print, digital and related media organizations as members. The PNA, founded in 1925, has advocated for legislation that improves public access laws in Pennsylvania for decades. The PNA was deeply involved in the legislative effort that led to the current RTKL, and we appreciate the opportunity to share our thoughts on some of the access issues facing Pennsylvanians.

As media law counsel at PNA, one of my primary job responsibilities is to answer questions received on the PNA Legal Hotline. I talk to journalists every day about their difficulties in obtaining access to records in Pennsylvania. Each year, I answer approximately 2,000 questions from journalists, over half of which deal with public access issues.

There is no question that the remedial RTKL has improved transparency in the Commonwealth, but problems still exist, and, in some instances, Pennsylvanians are worse off under the current law than under the prior, more restrictive RTKL. We have a comprehensive list of suggested amendments, but today I’m going to focus on some of the most common issues I hear from journalists.

Preliminarily, it is important to note that the ongoing pandemic has caused significant problems for public access under the RTKL, but our members rose to the unprecedented challenge. The newspaper industry serves as a consistent source of accurate information, tamping down unsubstantiated rumors and misinformation, and providing much-needed facts and analysis about how to stay safe during the pandemic. During the most chaotic and darkest days of the pandemic, citizens turned to their local newspapers across the state (and country) in record numbers, and newspapers reported diligently through their printed and online products as well as text alerts, daily newsletters and other interactive communication, and this coverage was primarily provided to the community for free.

Journalists faced numerous issues in the wake of the COVID disaster declaration, and some cases access to public records was severely limited or outright prohibited. Even today, almost a year into the disaster declaration, some agencies are still not answering RTKL requests in accordance with the law. For example, as recently as February, York County was using an automated response to

RTKL requests that said, in essence, RTKL requests will not be answered until the emergency declaration has ended. At the Commonwealth agency level, problems persist as well. PennDOT's RTKL website<sup>1</sup> currently says that any RTKL requests "received on or after March 16, 2020 will be deemed to have been received by PennDOT's Open Records Officer on the first day of the reopening of the Keystone Building," which remains closed nearly a year later. That means PennDOT takes the position that it has no legal obligation to respond to RTKL requests until the pandemic building closures end. This is obviously not acceptable and PennDOT's statement is likely inconsistent with Act 77 of 2020. Government continues to function during the pandemic, as it must, and transparency is a necessary component of government function. We understand the pandemic has created unique challenges; we face them ourselves, but York County's automated response and PennDOT's statement ignore the law as well as the nature of the request. York County's response is sent without anyone actually looking at the request, ignoring the records requested and the agency's ability to provide access. PennDOT's statement creates questions about the availability of public records under the law and this can discourage the public from seeking access. Most records requests are simple, straightforward, and easy to fill, and agencies must make reasonable efforts to provide access in accordance with the law whenever possible. PNA supported Act 77 of 2020 which stands for that proposition, and we plan to file amicus briefs in some of the first appeals involving that law to reach the Pennsylvania appellate courts.

In addition to halted RTKL processes during the pandemic, PNA also frequently hears about issues with ancillary laws that create significant barriers to access, most commonly, the Disease Prevention and Control Law (DPCL), 35 P.S. § 521.1, *et seq.* Access issues resulting from the DPCL are not new but have been brought into focus by the pandemic and the public's need for information. The DPCL grants health agencies broad discretion to deny access to a wide array of records without a showing of need or appropriateness, and these decisions are not appealable. We believe the DPCL is inconsistent with the presumption of access enshrined as the cornerstone of Pennsylvania public access law, and we urge the legislature to consider amendments that bring it in line with the letter and intent of the RTKL.

### **Criminal and Non-Criminal Investigations**

The two most frequent issues we hear about from requesters involve the investigation exemptions, and we believe the criminal and non-criminal exemptions must be narrowed. Both exemptions are extraordinarily broad, and they contain no temporal limitations. Under current law, investigatory records, including the result of an investigation, never become public, even if the investigation has been closed for a significant amount of time. Investigation records are forever shielded by law and that is simply not necessary or appropriate.

Pennsylvania's criminal investigation exemption is one of the most restrictive in the nation because it applies forever. Once a record is deemed investigatory, it is always exempt under law even if

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<sup>1</sup> <https://www.penndot.gov/ContactUs/pages/right-to-know.aspx> last visited March 8, 2021.

the crime has been solved and the case closed. The exemption's language – and the courts' interpretation of it - has made it virtually impossible to access basic law enforcement records and records related to closed cases, and we respectfully suggest this was not the legislature's intent.

Public access to criminal incident reports is one area where the public's rights are demonstrably worse under current law. Under the prior RTKL, law enforcement agencies were required to provide access to criminal incident reports, but the courts have interpreted the current law in a manner that renders incident reports non-public. We appreciate the need to keep some investigative records non-public, but there must be a minimum level of access to records that illustrate law enforcement activity in the community. Criminal incident reports include basic information about police interaction with citizens, the same information you would see if you were standing on the street watching an incident unfold, yet the law, as it has been interpreted by the courts, categorically denies access to this information. The RTKL makes "blotters" - a chronological listing of arrests – public records, but many police agencies, including the Pennsylvania State Police, maintain that they do not keep a blotter and are not required to create one in response to RTKL requests.

In the absence of a blotter and as a result of the criminal investigation exemption, Pennsylvanians are left without meaningful access to basic information about criminal activity and law enforcement response in their community. If police respond to a suspected burglary, the community has a right to know about it so they can take steps to keep themselves and their property safe. Likewise, if police respond to a suspected child abduction at the local park, the public has a right to know so they can take steps to protect themselves and their family until a suspect is apprehended. Public access also allows the public to assist police as they work to solve crimes, it combats misinformation, which can run rampant in today's technological world, and it serves as a necessary and appropriate measure of accountability for law enforcement agencies. However, under the RTKL, law enforcement agencies have no affirmative legal duty to provide this kind of information to the communities they serve.

The public has a right to know about crimes that are happening in their community and to scrutinize law enforcement's response. The PNA is not suggesting unfettered access to criminal investigatory records, but we believe there must be a statutory mechanism to access basic information about police activity in the community and investigations that have been closed. We believe legislative action is necessary to bring the law back in line with its legislative intent and to restore Pennsylvanians the right to access basic law enforcement records, like criminal incident reports and records that shed light on criminal investigations that have been closed.

With regard to the non-criminal investigation exemption, again, its broad language – and the courts' interpretation of it – has made assessing agency function difficult, at best. In addition to the unlimited time aspect of the exemption mentioned above, it has been interpreted to prohibit access to any inquiry conducted as part of an agency's statutory duties. That's potentially everything an agency does, and this exemption has the potential to nullify the general presumption

of access. A few examples of records that have been denied pursuant to this exemption include daycare inspection summaries, nursing home inspection reports, and gas drilling inspection reports that determine whether drillers are in compliance with state and federal laws designed to protect the public. We respectfully suggest that prohibiting public access to information that allows citizens to make informed decisions about their welfare and the welfare of their children and elderly loved ones was not intended by the General Assembly.

The results of non-criminal investigations reflect agency decisions and often involve the spending of a significant amount of public funds. To that end, we believe the non-criminal investigation exemption must be amended to, at a minimum, make clear that the result of a non-criminal investigation is public. We urge you to consider narrowing the exemption so that the public can understand and scrutinize agency function.

### **Format of Records**

Another common issue negatively impacting access involves access to records in specific formats. Under current law, many agencies provide static .pdf copies of electronic records, when the agency maintains and uses the information as part of a dynamic database. For example, it is not unusual for an agency to convert a dynamic Excel database into a static .pdf copy thereby removing the public's ability to use and understand the information in the same manner as the agency. If an agency uses a database in a functional, dynamic format, the law must enable public access in the same format utilized by the agency. We suggest language that clarifies that information is to be provided in the file format used by an agency unless otherwise specified by the requester.

### **Emergency Time Response Logs**

We believe the law should be amended to define the minimum content requirements of emergency time response logs. Emergency time response logs track calls to and responses by all first responders including police, fire and EMS. The law guarantees public access to emergency time response logs, but it does not define the term. As a result, agencies have denied access to various aspects of time response logs including response location and nature of the emergency. These denials interfere with the public's ability to understand emergency responses in their community and to seek policy changes where needed. The public must be able to determine whether emergency response agencies are responding appropriately to various types of incidents. For example, are suspected overdoses responded to in the same manner city-wide or do these incidents have better – or worse – response times in different neighborhoods? The public cannot answer that question without access to certain basic information about an emergency response and once again, this can lead to misinformation in the community. We respectfully suggest the law should be amended to expressly define emergency time response logs to guarantee public access to, among other things, response location and the nature of the emergency.

### **Pre-decisional, deliberative exemption**

March 9, 2021

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

### **Response Time**

Finally, we consistently hear about problems with delayed access under the law. Understandably, this issue has been made worse by the pandemic, but it has been an ongoing problem for years before the COVID-19 disaster exacerbated the issue. The RTKL requires agencies to respond to requests "as promptly as possible under the circumstances" but not longer than 5 business days. The law allows an agency to take an additional 30 calendar days in limited circumstances; however, many agencies misapply or overuse the extension provision. Some agencies routinely take the maximum amount of time to respond regardless of the need or appropriateness of such an extension. For example, it is not unusual for journalists to receive extension letters for records that are undeniably public and easily accessible such as meeting minutes and salary records. The RTKL was intended to facilitate access quickly except in rare circumstances. The plain language of the RTKL makes this clear, but the law lacks a mechanism for oversight of the extension provision, the ability to challenge its application or a penalty for its misuse. We respectfully request this committee considers amendments that limit an agency's ability to take unwarranted extensions of time.

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