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HOUSE OF REPRESENTATIVES

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GOVERNMENT INTEGRITY AND TRANSPARENCY COMMITTEE
PUBLIC HEARING

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9:00 A.M.

PRESENTATION ON COMMONWEALTH TRANSPARENCY 101:
SUNSHINE ACT, THE RIGHT-TO-KNOW LAW, THE ETHICS ACT
AND PER DIEMS, STAKEHOLDER TESTIMONY

SUBCOMMITTEE MEMBERS PRESENT:

HONORABLE PAUL SCHEMEL, COMMITTEE MAJORITY CHAIRMAN
HONORABLE LOUIS SCHMITT
HONORABLE JEFF WHEELAND

HONORABLE KRISTINE HOWARD

NON-SUBCOMMITTEE MEMBERS PRESENT:

HONORABLE SETH GROVE, MAJORITY CHAIRMAN

MEMBERS PRESENT VIRTUALLY:

HONORABLE RUSS DIAMOND
HONORABLE DAWN KEEFER
HONORABLE BRETT MILLER
HONORABLE FRANK RYAN

MEMBERS PRESENT VIRTUALLY (CONTINUED):

- HONORABLE MAUREEN MADDEN, COMMITTEE MINORITY CHAIRMAN
- HONORABLE BENJAMIN SANCHEZ
- HONORABLE JOE WEBSTER

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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 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Good
4 morning, and welcome to this public hearing of the
5 Subcommittee on Government Integrity and Transparency.
6 Today's hearing will focus generally on the topics of
7 ethics and government transparency.

8 The Subcommittee has been asked to explore the
9 topic of ethics and per diems following the public scandals
10 caused by legislators who have abused the per diem
11 reimbursement program. Although this problem may not be
12 widespread, it has involved members of both political
13 parties, and it undermines the public's faith in the
14 legislature. Today we will also make an initial inquiry
15 into the State Ethics Act and consider recommendations for
16 areas where the Act may need revision.

17 I am Representative Paul Schemel from Franklin
18 County, and I am the Majority Chair of this subcommittee.
19 I am joined virtually by the Minority Chair, Representative
20 Maureen Madden from Monroe County. Chair Madden, do you
21 have any opening remarks that you would like to make?

22 COMMITTEE MINORITY CHAIRMAN MADDEN: Yes, good
23 morning, Mr. Chairman, and thank you. Good morning,
24 everyone. Good morning to our testifiers and my colleagues
25 on both sides of the aisle. I think this is an important

1 hearing. We -- when we are elected, we are elected to be
2 good stewards of the taxpayers' dollars. And certainly, we
3 don't want to see legislators, either Democrat or
4 Republican, using per diems in such a way that it abuses
5 the public trust. And, I look forward to hearing from our
6 testifiers and exploring ways in which we can regain the
7 public trust and make sure that we are being responsible
8 with taxpayers' dollars. Thank you.

9 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you,
10 Madame Chair. We are joined by other members of the
11 Subcommittee and the State Government Committee who are
12 with us both in person and virtually. I'm going to ask
13 them to introduce themselves. I will start here on the
14 right, with Representative Wheeland, with those who are
15 here in person.

16 REPRESENTATIVE WHEELAND: Good morning, and thank
17 you, Mr. Chairman. I am Jeff Wheeland, 83rd District,
18 Lycoming County.

19 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Very well.
20 Thank you.

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

23 REPRESENTATIVE SCHMITT: Thank you, Mr. Chairman.
24 State Representative Lou Schmitt, 79th Legislative District,
25 the City of Altoona and the Townships of Logan and

1 Alleghany in Blair County.

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

4 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you.
5 And virtually, Representative Diamond?

6 REPRESENTATIVE DIAMOND: Good morning, everyone.
7 Russ Diamond, representing the 102 District in Lebanon
8 County.

9 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:
10 Representative Sanchez?

11 REPRESENTATIVE SANCHEZ: Good morning, everybody.
12 Ben Sanchez, representing the 153rd in Montgomery.

13 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:
14 Representative Miller?

15 REPRESENTATIVE MILLER: Good morning.
16 Brett Miller, 41st District, Lancaster County.

17 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:
18 Representative Ryan?

19 REPRESENTATIVE RYAN: Representative Frank Ryan
20 representing the 101st District in Lebanon County.

21 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: And,
22 Representative Keefer?

23 REPRESENTATIVE KEEFER: Good morning.
24 Representative Dawn Keefer from the 92nd District, York and
25 Cumberland County.

1 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Very well,
2 thank you. Today we will have testifiers, committee
3 members and public present in person as well as virtually.
4 Due to Sunshine Act requirements, should the virtual
5 platform experience difficulty, it will be necessary to
6 pause the proceedings until the problem can be corrected.

7 And, I understand we also have Representative
8 Webster with us.

9 REPRESENTATIVE WEBSTER: Good morning, everyone.
10 It's Joe Webster. I represent the 150th in Montgomery
11 County.

12 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Very well.

13 REPRESENTATIVE WEBSTER: Thanks, Mr. Chairman.

14 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you.
15 And, have I missed anyone who is with us virtually? Very
16 well. Thank you.

17 During our first panel, we will hear from Sister
18 Elinor Gardner. Sr. Elinor received her Ph.D. in
19 philosophy from Boston College, and she is currently an
20 assistant professor of philosophy and ethics at the
21 University of Dallas. We have asked Sister Elinor to
22 testify generally on the importance of ethics and ethical
23 standards for those serving in public office, and to give
24 some insight on improving ethics training.

25 Sr. Elinor, this panel is scheduled until 9:45.

1 The floor is yours whenever you are ready.

2 SR. GARDNER: Thank you very much, Representative
3 Schemel. And, good morning to the chairmen and
4 representatives. Thank you so much for inviting me to
5 testify today. I am -- besides being an assistant
6 professor of philosophy, I am also a Dominican Sister, as
7 you can see, and a member of the Dominican Sisters at
8 Saint Cecilia Congregation based out of Nashville,
9 Tennessee. I did my studies at Boston College, and I
10 currently, as of October 15th, also serve on the board of
11 trustees for Saint Anselm College in Manchester, New
12 Hampshire.

13 So, Representative Schemel asked me, as the Chair
14 of the Ethics Committee, if I would talk to you about some
15 ethical principles, and I am delighted to do so; honored to
16 do so. I will preface my remarks by noting that my
17 testimony, as you probably already have guessed, will be
18 rather different from the other testimonies. It will be a
19 little more philosophical, abstract, and it won't propose
20 particular modifications to the law. Rather, I want to
21 talk with you a little bit this morning about the
22 principles behind the law, so to speak, and why we might
23 make the kind of changes that you're considering making.

24 Finally, I will in the end make one concrete
25 suggestion regarding ethical training, so I'll leave that

1 for the end.

2 The first quotation on the handout details a
3 story about Winston Churchill who -- whose friend, another
4 politician, gave him a copy of Aristotle's *Ethics*. And,
5 Churchill is reported to have said that it was interesting
6 reading, but he had already thought of it, himself. And I
7 think, in fact, that's exactly how it should be, that the
8 purpose of a philosophical reflection on ethics is not to
9 reveal to us new knowledge about what we ought to do, but
10 to cause us to reflect on, to understand, to penetrate
11 better the things that in some way we already know.

12 The second quotation, and the remainder of the
13 quotations are all from a text Aristotle's *Nicomachean*
14 *Ethics* written some 2,500 years ago but still surprisingly
15 relevant. And, my comments today focus on, especially, his
16 insights about character and virtue.

17 For the second quotation, when Aristotle says
18 that the purpose of law is to make us good, that is
19 virtuous, he is giving voice to a very traditional view
20 found in the ancient and medieval worlds, but also in many
21 modern contexts as well. It might be something we don't
22 tend to emphasize in our legal system, and perhaps that's
23 rightly so. But, if we understand correctly what he is
24 meaning by this, it's hard to deny that what we want to do
25 with our legislation is to make people better in some way

1 and, in particular, how to help people to live well in
2 community, which can't be achieved unless, as Aristotle
3 notes, there is some degree of virtue.

4 The third quotation: what is virtue? So, virtue
5 in Aristotle's understanding is a kind of quality that is
6 acquired over time by habituation. So, he often compares
7 it to playing a musical instrument. We learn to play the
8 harp, he says, by playing the harp. We learn to be just by
9 doing just things. We learn to be courageous by acting
10 courageously. When we have learned over time to act justly
11 or courageously for example, we have what Aristotle calls a
12 characteristic, and this is the fourth quotation on the
13 handout.

14 So, a characteristic is a stable disposition to
15 act in a certain way. In some ways it's permanent and
16 difficult to remove. And if we're talking about a good, a
17 positive characteristic that's very desirable. It's also
18 the same with a negative characteristic; a vice is also
19 hard to remove. But, it doesn't just mean that I do the
20 right thing. I also, as Aristotle points out, do it
21 knowingly for the sake of the good and from a firm and
22 unchangeable character. There is no other way to acquire
23 that firm and unchangeable character oriented towards the
24 good except by this long and often painful process of
25 choosing the right thing over and over again in different

1 situations. Not just choosing the right thing, but for the
2 right reason, in the right way.

3 And, I already noted that, of course, there is
4 the opposite possibility that we can acquire a negative
5 disposition, a vice, by choosing in opposite ways, by
6 choosing what we ought not to choose. Vice is acquired in
7 the same way, then, as virtue is, by repeated actions of a
8 particular kind, and it's equally hard to remove it once
9 it's been established.

10 How do we know which characteristics are good and
11 which are bad? We know that the good characteristics
12 because they make us good. That is, they make us good as
13 human beings. The kind of qualities that allow us to be
14 better able to live and act together with our fellow human
15 beings; the fifth quotation on the handout. And naturally,
16 that's something that we want for ourselves, and we also
17 want it for those with whom we live.

18 The end product -- we can talk about it that way.
19 The end product of this process of habituation is our
20 character. And this is the sixth quotation. We're aiming
21 to be virtuous to have a virtuous character, and to avoid
22 viciousness. And while this is true, as also Aristotle
23 recognizes, it's also a bit of an oversimplification. Most
24 of us, I think, and most of the people we know, whether
25 it's our colleagues, for me my students, my fellow

1 religious, those who are parents, our children or, for
2 those who are elected in public office, those whom you
3 service: most of the people we know seem to be neither
4 completely vicious nor completely virtuous, but somewhere
5 in the middle.

6 So I think, just from our experience, Aristotle
7 is on pretty solid ground when he starts talking about
8 states in between virtue and vice. And, he has a whole
9 range of six states of character, the worst being, even
10 worse than vice, a kind of brutishness, and the highest or
11 the best being a kind of superhuman virtue or divine
12 virtue, he calls it; an exceptionally good person. Both of
13 those states are very rare, and so we'll focus on the more
14 common.

15 In particular, and of particular importance I
16 think for understanding legislation, are the two states he
17 identifies as between virtue and vice, right? So, if not
18 everybody, most people aren't completely virtuous or
19 completely vicious. What's in the middle? He calls those
20 moral strength and moral weakness.

21 In quotation, #7, moral strength is in some ways
22 similar to virtue. It's a positive characteristic,
23 something we ought to aim at. Aristotle describes it as
24 abiding by the results of calculation, and he's talking
25 about calculation about what we ought to do in a particular

1 circumstance.

2 So, a morally strong person thinks well about
3 what he ought to do and does, in general, what he ought to
4 do. For example, just a rather small and insignificant
5 example, but someone has decided to volunteer his Saturday
6 morning at a soup kitchen, which is an act of generosity,
7 so that the result of his calculation is that he is going
8 to get up early on Saturday and go to his soup kitchen.
9 Knowing his alarm goes off at 6:00 a.m. on Saturday, he
10 still has the results of that calculation, but he also has
11 a strong inclination to stay in bed. And, perhaps he
12 briefly debates about what to do, but in the end the
13 morally strong person is the one who gets up and gets
14 dressed and goes to the soup kitchen, because he wants to
15 abide by his decision. He wants do what he has determined
16 is the right thing.

17 Now, this might sound exactly the same as virtue,
18 but it's not, because this person still undergoes a certain
19 struggle in order to do the right thing. Now, he knows
20 what the right thing is, and he ends up doing it, but only
21 by means of a certain struggle. There's still a tension.
22 A fully virtuous person would not experience that same
23 tension, but would be moved as if by nature, a sort of
24 second nature, towards the good that he has decided on.
25 You can see from that that virtue in the full sense is

1 somewhat rare.

2 The moral -- the characteristic of moral weakness
3 is somewhat like moral strength in that this is the person
4 who knows what the right thing is to do. So, he thinks
5 well about action, but the conflict is stronger in him, and
6 he tends to, at least sometimes, perhaps often, give in to
7 do what he doesn't really want to do.

8 So in our example, this is the person who hears
9 the alarm and undergoes a brief, or maybe an extended inner
10 dialogue, a conflict within himself about whether to get up
11 and fulfill his obligation or go back to sleep. It's not
12 really that he's changed his mind. He really, in one
13 sense, does still want to go and volunteer at the soup
14 kitchen, and that -- the evidence of that is that later on,
15 if he fails to do it, he'll feel regret and probably the
16 need to make some excuse for himself. But he doesn't do
17 it, so he gives in to what we might call the more basic
18 desire of sleep and decides, I am not going to -- it's not
19 so important that I do what I had committed to do.

20 One can't help but think of St. Paul here: I do
21 not do the good that I want, but I do the evil that I do
22 not want. So, I think what St. Paul was talking about was
23 also what Aristotle would call the state of moral weakness.

24 So, most of us are morally weak. Most of us are
25 morally weak, at least in one area or another. Probably

1 not in every area, but we all have our weak spots, and
2 we're all probably morally strong in -- at least in some
3 areas.

4 So, my reason for spending some time on this
5 distinction between moral strength and moral weakness,
6 these two middle states of character, is that I think law,
7 especially in its educative role, is directed mainly to
8 such individuals who are between being completely virtuous
9 and completely vicious. The virtuous clearly, in an
10 important sense, don't need the law if they're already
11 going to do the right thing whether or not it's
12 legislative. The vicious on the other hand may respond to
13 threats of punishment, may be willing to do the right thing
14 simply out of fear of the law, but in terms of making them
15 better or educating them towards the good, law is not going
16 to have a very strong effect.

17 But, for the morally strong and especially the
18 morally weak person, the law can, so to speak, add
19 additional weight to what he already wants, right? These
20 are people who already want what's good but are also
21 inclined in the opposite direction. So the pressure of law
22 or, you might say, the consensus of the community that this
23 is indeed the right thing to do can add a certain weight to
24 that side of the scale. So, we could think of the law as
25 adding the weight of the community's judgment and tipping

1 the balance towards the good.

2 In the ninth quotation, Aristotle, in talking
3 about the morally weak character, actually assumes quite a
4 bit. This person, even the morally weak person, already
5 possesses an orientation toward the good, such that he will
6 feel bad if he doesn't do it. He'll feel guilt or perhaps
7 shame. He just lacks the moral muscle, so to speak, the
8 habituation to achieve what he wants to do.

9 Aristotle notes in the final quotation on your
10 handout that the soul of the listener must have first been
11 conditioned by habits to the right kind of likes and
12 dislikes. Otherwise words no matter how articulate they
13 are, arguments no matter how powerful, will have no effect
14 on him. And, I suppose that that includes legal words.
15 The only arguments the vicious person will understand are
16 punishments. So, the law of course does also make use of
17 force and punishments, but for the morally weak the words
18 themselves and the arguments are beneficial, because he's
19 already oriented towards the good.

20 So, this brings me to the idea of ethics
21 training. What is that? And, how can it help -- how can a
22 philosophical perspective help to inculcate the right kinds
23 of ideas through ethics training? I think of such
24 training -- and which we also have in the university
25 certain required trainings that we have to do. I think of

1 it like an extension of law, an application using words,
2 arguments to those who are already disposed to the good.
3 And certainly, penalties are important if we fail to
4 complete things. But, if we're thinking about people who
5 actually want to do the right thing, even if they sometimes
6 fail to do so, namely the morally weak character, then it
7 is important to articulate the reasons, and to do so in a
8 way that calls people to a higher standard that appeals to
9 noble aspirations, not simply to add another regulation
10 which can be perceived as a burden, which can seem like
11 just another box to check, another meeting to go to. But,
12 if instead we think about the purpose, and we think about
13 it in terms of desiring a better character both for
14 ourselves and for others, this can help, I think, to
15 motivate those who we're requiring to, say, complete an
16 ethics training.

17 It struck me that the language of transparency,
18 which is mentioned in the topic of today's meeting, is
19 really helpful, because that's a positive thing. It's not
20 simply don't do this, but do this. Seek for transparency
21 in the way that you use finances, in the way you keep
22 account of spending. It gives a positive reason for being
23 careful about the taxpayers' money, not just the negative
24 consequences that might result from a scandal, for example.

25 So, I think that's helpful when we can

1 articulate -- I don't know who first hit on the term,
2 transparency, to describe this, but I think that's helpful
3 in giving us a positive way of speaking about the goals of
4 what is admittedly more burdensome, right? Keeping more
5 careful records of spending is -- takes time and is
6 burdensome. But, if it's not just a matter of fear of
7 being caught but of wanting to be transparent, of wanting
8 to be a certain way for the sake of, well, one's own
9 goodness, but also for the sake of one's constituents, then
10 that's more motivating.

11 So my suggestion, my one concrete suggestion
12 regarding ethics training particular, is that it include
13 this aspect in some way, so that it's not just a matter of
14 regulations, of do this and don't do that, but of the
15 motivation for doing and not doing, which would allow it to
16 be even more ennobling.

17 How could that be accomplished? Well, it could
18 mean something more philosophical. But, unlike this
19 presentation this morning, it need not be explicitly
20 philosophical, but I think it cannot be simply technical
21 details, data, statistics. I've been to many meetings, and
22 charts and statistics are very helpful, but sometimes one
23 is drowning in these practical details. And, if one
24 doesn't first have the purpose, the goal in mind, then all
25 of that -- all of that detail, all of that empirical --

1 helpful empirical information just sort of washes over one.

2 If one can give a reason and a motive for acting,
3 then that will guide everything that comes from it, and
4 give it a greater impetus, a greater force, and that reason
5 we have to distinguish from two other things. Reason is
6 not the same as emotional appeal. So emotions and appeals
7 to emotion like anger and sympathy do have their place, but
8 they're not the same as giving a reason for acting. So,
9 it's important not simply to rely on appealing to people's
10 emotions which come and go, but to give them as well the
11 reason.

12 And then secondly, as I mentioned, it's not the
13 same -- giving a reason is not the same as giving data.
14 The data supports, or can support the reason, but it's not
15 the same as giving the reason.

16 So just one example. An ethics training could
17 include, for example, a presentation on the four Cardinal
18 Virtues: prudence, justice, temperance and fortitude.
19 Those qualities of character have been recognized in the
20 Western intellectual tradition for at least 2,500 years.
21 So, there's a great deal of accumulated wisdom about those
22 -- thinking about those four virtues as ways that human
23 beings excel as human beings.

24 Now, one hour of ethics training here is not
25 much, however it's something. And even an hour, one could

1 get a brief overview of those virtues. And moreover, the
2 hour could be even more effectively used if participants
3 did even just a small amount of reading in preparation
4 prior to the training. And then additional resources can
5 be provided for participants to follow up on what they
6 learned in that hour of training, to give them food for
7 ongoing reflection.

8 You know, for those who want to be good, to be
9 good servants of the public good, to be virtuous, to be
10 happy ultimately -- for those who want that, they are
11 motivated. They might just need some tools. They might
12 need help, assistance, and the training could focus on at
13 least providing the resources that could be of assistance
14 in that regard.

15 So much for my practical suggestion. I'm very
16 grateful for the opportunity to speak with you this
17 morning. Thanks for your patient attention. I realize
18 this is a rather unconventional testimony, but I am highly
19 edified by your desire to think more deeply about the good
20 and about inculcating virtue in yourselves and others, and
21 by your openness to hearing a philosophical perspective
22 from Aristotle as channeled through me on character. So, I
23 would be more than happy to address any questions if there
24 are any right now, or also later through email.

25 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Very well.

1 Thank you, Sister, for your testimony. And, thank you also
2 for the written series of quotes or testimony that you
3 provided. I do have some questions, then I think maybe
4 some other panelists do as well.

5 So to begin, you used both terms ethics and
6 morals, and I understand the two is not necessarily the
7 same. Can you please distinguish them just for the panel?

8 SR. GARDNER: Thank you for that question. It's
9 a good one. I've actually been using them interchangeably,
10 ethics and morals. So, sometimes morals is used more in
11 the context of religious ethics. Moral theology for
12 example is a phrase in the field. But in their essential
13 meaning, actually I think they refer to the same reality.
14 They just have different linguistic roots, but they both
15 refer to the reality of what kinds of actions and
16 characteristics are needed in the human being in order to
17 make him or her good as a human being.

18 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Okay.
19 Well, thank you for that clarification. Now, within the
20 context of sort of what rules an elected official -- for
21 that matter anybody, but in this context elected officials,
22 live by, you know, those rules are -- in terms of
23 especially, you know, those things that apply to us
24 as -- such as benefits, which is somewhat the topic of this
25 subcommittee's meeting today. We can look at those as

1 guardrails.

2 Sister, you talk about developing that habitus of
3 virtue, that if we have rules and we abide by the rules
4 that over time that helps us to sort of develop this habit
5 of virtue. So, I see those rules as guardrails. Maybe in
6 time we become truly virtuous enough that, you know, we
7 don't have to have those guardrails.

8 We have to find the sweet spot as legislators as
9 to where we put those guardrails, how those rules apply and
10 how strong they are. Really strong rules obviously are
11 going to prevent abuse, whereas loose rules invite abuse.
12 We also consider the dignity of man, and legislators as
13 elected officials whom we entrust with a great deal of both
14 authority and responsibility -- so we have to -- I think in
15 the context of our own rule making, especially those rules
16 that govern our own conduct, think about how that dignity
17 of the elected official interplays with the strictness of
18 those rules. So -- but also how we keep those rules strict
19 enough so as not to tempt us toward vice.

20 Do you have any further thoughts on that? And
21 that's really a -- sort of at the core of the difficult
22 decisions that we have to make in terms of how strong we
23 make these rules. Do we infantilize elected officials by,
24 you know, making them so strong and inflexible that there
25 are no choices? Therefore we don't fall into vice, but we

1 also have no ability to, you know, practice virtue.

2 SR. GARDNER: Thank you. That's a really
3 excellent question. So, Thomas Aquinas has some very
4 helpful things to say about this in his discussion on law
5 and the nature of human laws.

6 So, he's aware that by making laws more strict
7 one can prevent more evil, but he also thinks that this can
8 have, unintendedly, the opposite effect, right? Making
9 stronger or stricter laws can actually increase the amount
10 of evil, badness, difficulty by posing too great of a
11 burden.

12 So, you pointed out how it could infantilize
13 those whom it's desired to -- designed to help, and that's
14 true. It could also end up fighting against itself,
15 causing people to try to get around the law more often
16 because of its burdonsomeness [phonetic].

17 I mean, just to take a very -- well, example: if
18 the speed limit on a particular road is unreasonably low,
19 chances are there will be more people who will speed on
20 that road if they can.

21 So, it's a very difficult balance, and there's no
22 easy answer to where we put the guardrails. This is a work
23 of political prudence, or legislative prudence, so it makes
24 it all the more important, I think, that the legislators
25 themselves are men and women of good character, of virtue,

1 because they have to have the prudence, the understanding
2 to discern in the particular situation, well, how much can
3 people bear, and how much will actually be helpful to
4 making them better, making the community better without
5 burdening them unduly, or causing more evil than it could
6 prevent?

7 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: You know,
8 in my time as a legislator, I've certainly seen, you know,
9 colleagues that, you know, have come into the legislature
10 and you see head in a bad turn. And, I think maybe that is
11 that openness, the opportunity for viciousness leads to,
12 you know, habits of viciousness. But on the other hand, we
13 struggle with, you know, where -- sort of where we draw the
14 line on, you know, what sort of autonomy of someone
15 who's -- especially elected officials should have. I mean,
16 they're supposed to have a great deal of authority -- you
17 know, responsibility, so they shouldn't be treated as
18 a -- you know, as a child. But on the other hand, you
19 know, as you stated earlier, we depend upon virtuous
20 legislators to make virtuous law. And if we have
21 legislators who are developing habits of viciousness, then,
22 you know, we can expect a corresponding effect in terms of
23 the output of what they might -- you know, might choose.

24 And, you gave some concrete ideas in terms of our
25 ongoing continuing education, our ethics training that we

1 have. And, the ethics training that we have, for those in
2 the audience that aren't familiar with it, legislators have
3 to have training. We go -- you know, you said one hour a
4 year doesn't seem like much. You know, to a number of
5 legislators that seems like way too much. But, most of it
6 honestly is -- or candidly, is focused on just obeying the
7 law. Well, this is what you need to do to stay out of
8 jail. You know, don't take cash money in paper bags from
9 people. You know, don't misuse your accounts. Don't do
10 things that are going to get you sued. You know, very
11 practical things but, honestly, nothing that seems to in
12 any way inculcate virtue. It's more just a matter of how
13 you technically follow the rules not to fall aside of them.

14 You know, from your last answer I'm kind of
15 intrigued. And you were bringing up some thoughts from
16 Aquinas that -- you know, does that kind of training
17 actually -- you know, does that -- is it -- can it actually
18 be a negative sometimes, you know, by sort of reducing
19 ethics to nothing more than following some technical
20 provisions that keep you out of jail, which should be the
21 most minimal? I don't know if you have any additional
22 thoughts on that.

23 SR. GARDNER: Perhaps just that it could be. It
24 could be in a way detrimental. I mean, you have to do it.
25 You have to make clear the consequences of violating

1 certain ethical regulations, but it could have that
2 undesirable consequence. I think I would go back to
3 Aristotle's observation about how the person has been
4 prepared before coming to this ethics training or, if you
5 would, let's call it education, and a lot of that happens
6 long, long before a person is in office, or even before the
7 person is an adult. So much of this depends on our early
8 upbringing and the choices that we've made from the time we
9 began to reason.

10 So, those who come with a certain degree of inner
11 preparation, you know, for want -- who want to be good, not
12 to stay out of jail, it will be beneficial to think through
13 these things more carefully. But, I think there will
14 always be others for whom it will be wasted time, because
15 they -- they're not -- they don't have that same end in
16 view. They haven't become aware in the same way of the
17 importance of acting well, acting virtuously.

18 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you.
19 Any of the other panelists have questions? Oh, I'm sorry.
20 Representative Howard, please?

21 REPRESENTATIVE HOWARD: Thank you. So, the
22 paragraph here about the aim of the lawgiver, where you
23 quote that lawgivers make the citizens good by inculcating
24 good habits in them, and this is the aim of every lawgiver
25 -- well, I think our situation here is the opposite. Our

1 citizens think that we are the ones who are lacking in good
2 moral purpose. And indeed, that's the purpose of this
3 hearing, is to examine our own behavior, transparency,
4 ethics. So, could you comment on that? You know, our --
5 actually, our current political climate as it pertains to
6 this.

7 SR. GARDNER: Thank you, Representative Howard.
8 That's an excellent question, observation. So, I think
9 Aristotle was thinking there about a kind of one-way street
10 between the lawgivers and the citizens. But in fact,
11 especially in a democracy, it's really two ways, the
12 goodness of the lawgivers or the lack of goodness is going
13 to have an impact on those for whom they are legislating,
14 those whom they're serving, but also the other way around.

15 So, the character of the people themselves whom
16 the legislators represent will have an effect on the
17 legislators. And, I suppose that could be both for good or
18 for ill, that is having a disobedient flock so to speak or
19 rebellious citizens would make it more difficult to be a
20 good legislator. But also, positively, if the citizens are
21 concerned about virtue and promoting it and -- but, just
22 don't just take it for granted that correction is
23 everywhere, therefore, you know, why? Why be bothered by
24 it? But if they care enough to want to address these types
25 of problems, that's a good thing; painful and difficult,

1 but good. So, I think the goodness of the citizens, or at
2 least their desire for goodness can push on the other
3 direction, can push the legislators towards having to be
4 more accountable, more transparent.

5 REPRESENTATIVE HOWARD: Thank you.

6 SR. GARDNER: You're welcome.

7 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Do any of
8 the other panelists have any questions? Sister, we're
9 checking to see if anyone online is -- they might need to
10 wake up in the virtual world. Very good. I think that
11 you've given us a great deal to think about and
12 contemplate. And, it's an excellent introduction, I think,
13 to this subject and this hearing.

14 I know scheduling-wise, because you have classes
15 to teach, that this worked for you. But, I think having
16 you first, you know, lays, I think, a nice overlay for the
17 rest of the testimony we'll have today.

18 So, Sister, thank you very much, and we
19 appreciate your testimony. And once again, we appreciate
20 the written remarks that you provided as well. And with
21 that --

22 SR. GARDNER: You're --

23 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: -- we
24 have -- I'm sorry. Go ahead, Sister.

25 SR. GARDNER: No, you're welcome, and thank you

1 very much.

2 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Very well,
3 thank you. Our next testifier is scheduled to start in a
4 couple of minutes. I don't know if she is ready or not.

5 MS. HUTCHINSON FREEH: I'm ready.

6 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Okay, very
7 well. During our second panel we will hear from
8 Cheri Hutchinson. Ms. Hutchinson is the President and CEO
9 of Hutchinson, Gillahan & Freeh, P.C. We have asked her to
10 testify generally on the subject of per diem
11 reimbursements.

12 Ms. Hutchinson, this panel is scheduled until
13 10:00 a.m. Please feel free to begin when you are ready.

14 MS. HUTCHINSON FREEH: Okay, thank you very much.
15 I appreciate the opportunity to provide this information
16 for you.

17 As was mentioned, my name is Cheri Hutchinson
18 Freeh. I'm a certified public accountant, and I am the
19 President and CEO of Hutchinson, Gillahan & Freeh, a public
20 accounting firm located in Upper Bucks County,
21 Pennsylvania.

22 Some additional background, I do -- I am a former
23 president of the Pennsylvania Institute of CPAs. I served
24 on the governing council for the American Institute of
25 CPAs. I served a term on the Internal Revenue Service

1 Advisory Council in Washington, and I am a current member
2 of the Tax Executive Committee for the American Institute
3 of CPAs. So needless to say, I deal a lot with taxes.

4 I am here today representing the Pennsylvania
5 Institute of Certified Public Accountants and our 20,000
6 members. And, our members provide auditing and accounting
7 services to individuals, not-for-profits, employers of all
8 sizes, and we advise clients on state, Federal and
9 international tax matters, and prepare income tax returns
10 for thousands of individuals and businesses throughout
11 Pennsylvania. We -- PACPA is definitely a strategic
12 partner, and we are happy to be a resource to the
13 legislature.

14 So, today I am going to provide you with some
15 basic information about per diems. So a per diem allowance
16 -- and I apologize. I'm probably telling a lot of you some
17 information you know. I'm trying to keep this pretty basic
18 just for general public use.

19 So, a per diem allowance is a method employers
20 can use to reimburse employees for travel expenses, without
21 having the employees document all of the actual expenses.
22 There's generally no limitation on when a per diem
23 allowance can be used, and the -- and employers have the
24 option of switching between reimbursing actual expenses or
25 using a per diem allowance at any time. There's no formal

1 IRS election that has to be made to switch methods.

2 Per diem allowances are considered payments under
3 what's called an accountable plan. And, an accountable
4 plan is a plan that generally reimburses an employee for
5 actual expenses that are reported to the employer.

6 Payments to an employee under an accountable plan that meet
7 the qualifications are deductible for the employer, but
8 they are not considered taxable income to the employee.

9 Since per diems meeting certain qualifications are
10 considered as paid under an accountable plan, it allows the
11 per diem payments to be paid to employees on a non-taxable
12 basis.

13 On the other hand, non-accountable plans call for
14 flat payments to an employee with no regard to the actual
15 underlying expenses, and no required substantiation by the
16 employee. For example, if an employer gives a flat, you
17 know, \$200 a day for travel and doesn't require the
18 employee to provide the information of, you know, where
19 they were, what they were doing, you know, what the
20 business purpose was, that would be considered a
21 non-accountable plan. And, payments under non-accountable
22 plans must be included on an employee's W-2, and tax is
23 then paid by the employee on the amounts received.

24 For payments to qualify as being made under an
25 accountable plan, the allowance must be used for ordinary

1 and necessary business expenses that are incurred by the
2 employee for lodging, meals and incidental expenses in
3 connection with performing services as an employee while
4 traveling away from home. The allowance must be reasonably
5 calculated to not exceed the cost of the underlying
6 expenses. Best estimates are fine, and the requirement is
7 considered to be met if the applicable Federal per diem
8 rates are used, and the allowance is less than or equal to
9 the applicable Federal per diem rates.

10 Those rates are published. They're generally
11 published by the general -- US General Services
12 Administration. They can be found online. There's rates
13 for city -- various cities, locations. They provide quite
14 a bit of information.

15 So, payments that are in excess of these Federal
16 rates though must be treated as a payment under a
17 non-accountable plan, and have to be included as taxable
18 compensation to the employee. So for example, if the
19 Federal per diem rate for a location is \$140 a day and the
20 employer reimburses \$200 a day, the additional \$60 is
21 considered as being paid under a non-accountable plan and
22 does become taxable income to the employee.

23 So, payments that are equal to or less than the
24 Federal per diem rate, to be considered substantiated the
25 employee has to provide the business purpose, the time and

1 place of the travel, and they must report it in a timely
2 manner. Failure to provide timely substantiation can
3 jeopardize the taxability of the per diem payment. There
4 have been cases where the IRS has come in, where somebody
5 has reported -- you know, nine months later they're
6 submitting, you know, request for a payment or
7 substantiation for a payment that was made, and the IRS has
8 thrown it out and said no, taxable income. So, you have to
9 be very careful about timely reporting the substantiation.

10 If an employee regularly incurs travel expenses
11 on a trip that are above the Federal per diem rates, the
12 employee should be encouraged to submit actual travel
13 expenses for reimbursement rather than using the per diem
14 allowance. That way all the expenses can be reimbursed on
15 a tax-free basis.

16 Now, a lot of this wasn't as important prior to
17 2000 -- the 2017 Federal tax law changes, because if an
18 employee's actual expenses exceeded the employer
19 reimbursement, the excess with certain limitations could be
20 deducted on a Federal Form 2106 which was then carried to a
21 Federal Schedule A, Itemized Deductions, and it was
22 deducted as miscellaneous itemized deductions subject to 2%
23 of adjusted gross income limitation. The law change
24 however suspended that miscellaneous itemized deduction for
25 Tax Years 2018 through 2025 with some minor exceptions.

1 So, the reason it's so much more important to have payments
2 made under an accountable plan are, if it's made under an
3 accountable plan and included on a W-2, you will pay tax on
4 it.

5 So in conclusion I just want to reiterate, there
6 are two primary methods for an employer to reimburse
7 employees for work-related travel expenses, an accountable
8 plan and a non-accountable plan. An accountable plan is
9 deductible by the employer, and it's not considered taxable
10 income to the employee. A non-accountable plan is
11 deductible by the employer, but is considered taxable
12 compensation to the employee. And, if an employer chooses
13 not to reimburse employees for travel expenses, the
14 employee cannot deduct these expenses on the Federal Income
15 Tax Return under current law.

16 And, I thank you for the opportunity to provide
17 this information, and I am happy -- I think we've got a few
18 minutes left to -- that if there are any questions, I am
19 happy to answer questions. Or, Ms. Totino also has my
20 contact information if you would prefer to send me
21 questions offline.

22 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you
23 very much for your testimony. Chairman Grove, I know you
24 have a question.

25 MAJORITY CHAIRMAN GROVE: Thank you so much.

1 Within the per diem system, how do most private companies
2 do it? Do they require some form of expense from the
3 employee to give out the per diems on -- under an
4 accountable system?

5 MS. HUTCHINSON FREEH: Yes. Generally, the best
6 practices are that an employee submits an expense report
7 that would document the place, the time, the reason for the
8 travel, and then the employer would reimburse after
9 receiving that documentation. That's in a perfect world.
10 In some cases employers will provide the per diem up front,
11 so that employees don't have to front their own money for
12 travel, but then the employee is expected to provide the
13 documentation within a certain timeframe after coming back
14 from their travel. So, those are the standard practices.

15 MAJORITY CHAIRMAN GROVE: Is that -- that's not
16 under IRS law to require that? That is just a best
17 practice that companies utilize?

18 MS. HUTCHINSON FREEH: That's correct. Yeah, the
19 IRS law merely states that the substantiation for the
20 travel, for the per diem, must be provided within a timely
21 manner. They don't necessarily define timely, but some of
22 the instances I've seen are, you know, that they want to
23 have it within probably a couple of months at the latest.

24 MAJORITY CHAIRMAN GROVE: Okay. Thank you.

25 MS. HUTCHINSON FREEH: You're welcome.

1 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:

2 REPRESENTATIVE RYAN: Cheri, good to see you
3 again. As you know, I'm a CPA and a member of the PACPA,
4 former chair of the Ethics Committee.

5 I'm going to -- I'm not trying to put you on the
6 spot, and I hope I don't, because that's not my intent.
7 But, do you find that the IRS -- or that it's a common
8 perception that the IRS is pays more scrutiny to private
9 employers and those in the private sector than they do
10 government employees route of the per diems?

11 MS. HUTCHINSON FREEH: That's a tough question,
12 Frank. I would have to say, right now the IRS isn't paying
13 attention to a lot of people, because they simply don't
14 have the funding, and they don't have the staffing. There
15 is talk about increasing that funding, and we do --
16 accountants in general, as you probably know, we anticipate
17 more audits coming up.

18 Strictly in my opinion, I'm -- I find that the
19 audits are more computer generated than human being
20 generated. It -- you're more likely to draw an audit
21 based on the size of your deduction, probably.

22 REPRESENTATIVE RYAN: One of the things when I
23 first got elected -- this issue about per diem -- which I
24 live within an area where we don't take per diem and we
25 don't get them. It's typically an actual expense. But my

1 experience has been -- and I'm curious for your perspective
2 on this. If someone is overly reliant on per diem and it
3 becomes a fairly significant number, would a private-sector
4 person who is getting per diems 125 days a year be viewed
5 skeptically by the IRS? Would that put that person under a
6 greater degree of scrutiny?

7 MS. HUTCHINSON FREEH: I believe it would, yes.
8 If the per diem portion of the reimbursement is -- you
9 know, in proportion to their salary is large, there could
10 be. There could be additional scrutiny in that case.

11 Now I'll be honest. You know, the amount of
12 reporting that the IRS would get on this would be somewhat
13 limited. You know, it's not necessarily on a W-2 what your
14 per diems are, because it's a non-accountable plan. But,
15 if they were to be looking at per diems issued by a private
16 company as part of an audit, then yes, they could filter
17 down to the employee.

18 So in respect to that, your previous question
19 about whether private industry is scrutinized more than
20 government? Probably, because governments don't report to
21 the IRS.

22 REPRESENTATIVE RYAN: And the reason I bring this
23 up is because you've always -- in the years that I have
24 known you, you've always been very careful to mention that
25 ethics is both important from perception and reality. And,

1 what I get concerned when I first got elected and started
2 asking these kinds of questions -- I was surprised at
3 almost a glib response that we're not subject to these same
4 issues, and we are. And then, so that's a question I'm
5 going to ask you; my last question. Are we as government
6 employees subject to the same IRS reporting requirements as
7 the private sector citizens?

8 MS. HUTCHINSON FREEH: Yes, definitely.
9 Definitely. Legislators have the same ethical requirements
10 as every US citizen in reporting their taxes. They can be
11 audited just like anybody else, and they would have to
12 answer the same questions. So, they -- legislators need to
13 display the same amount of ethics, or they're going to
14 put -- get themselves in trouble.

15 REPRESENTATIVE RYAN: And, Cheri, I really
16 appreciate it, and it's been very helpful. And, thank you
17 so much, Mr. Chair, for letting me ask a couple of
18 questions. And, Cheri, great seeing you again.

19 MS. HUTCHINSON FREEH: Good seeing you.

20 REPRESENTATIVE RYAN: You've done a great job.
21 Thanks.

22 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:
23 Representative Miller?

24 REPRESENTATIVE MILLER: Thank you, Mr. Chairman.
25 And, thank you for your testimony. Question: do you have

1 any idea what percentage of private businesses use the
2 accountable per diem methodology versus the unaccountable?

3 MS. HUTCHINSON FREEH: Unfortunately I don't have
4 that data, and I am not sure -- I'm not sure where you
5 would find that. You know, published business statistics
6 will show business expenses, but they don't necessarily
7 break it down as to whether they're using per diems or not.
8 So, I can tell you from my own experience, I have about a
9 thousand clients, and I would say the ones that actually do
10 reimburse employees, I'd say probably a good 75% of them
11 use per diems just for the ease. It is a very common
12 practice, because otherwise employees have to hand in
13 receipts for everything. You know, the per diems can cover
14 lodging, meals and incidental expenses, which includes tips
15 to drivers, you know, tips on restaurant bills, things that
16 you may not be able to easily get a receipt for. So, it is
17 a very common practice in the industry, but I don't have
18 specific statistics.

19 REPRESENTATIVE MILLER: Okay. And I -- I'll ask
20 the question, but the answer is probably the same. Any
21 idea relative to other states, and what states use the
22 accountable versus the unaccountable method?

23 MS. HUTCHINSON FREEH: Unfortunately I don't have
24 that information. I believe someone later in the
25 presentation may be giving you some of that.

1 REPRESENTATIVE MILLER: Okay. All right, thank
2 you very much. I appreciate it.

3 MS. HUTCHINSON FREEH: You're welcome.

4 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:

5 Representative Miller, some analysis of that was provided
6 to us by the National Council of State Legislators that you
7 can take a look at later. And, we as a committee also
8 struggled with finding, you know, good solid data on, you
9 know, how broad a practice per diems are versus actual.

10 I have one follow-up, one last question. You
11 said you have about a thousand clients. Do you see any
12 trends forming? Just amongst your own client base, or from
13 what you understand within the industry, are organizations
14 moving toward actual -- toward per diems, or you don't
15 necessarily have enough data to really see any trend either
16 way?

17 MS. HUTCHINSON FREEH: Well, as I mentioned, I
18 think the trend is that employers prefer the per diem
19 because of the ease of documentation. I don't know that
20 that's been changing since per diems have been allowed. A
21 lot of times employers prefer to use per diems.

22 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: All right,
23 very good. Anyone else on the panel have a question?
24 Seeing none, thank you very much for your testimony. And,
25 thank you for the surprise of getting to ask some

1 questions. I appreciate that as well.

2 MS. HUTCHINSON FREEH: Okay, thank you.

3 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: During our
4 third panel, we will hear from three individuals serving at
5 the Pennsylvania State Ethics Commission, Executive
6 Director Robert Caruso, Chief Counsel Brian Jacisin and
7 Supervising Investigative Attorney Jeffrey Frankenburger.
8 We have asked the Commission to provide us perspectives on
9 increased transparency and proposed amendments to the
10 Ethics Act. Gentlemen, if you would like to, take a seat.
11 This panel is scheduled until 11:00 a.m. The floor is
12 yours whenever you are ready.

13 MR. CARUSO: Good morning. Good morning
14 Chairperson Grove, Subcommittee Chair Schemel and
15 Chairperson Madden and members of the Committee.

16 My name is Rob Caruso. I am the Executive
17 Director of the State Ethics Commission. I have asked the
18 Commission's Chief Counsel Brian Jacisin and my Supervising
19 Investigative Counsel Jeff Frankenburger to accompany me
20 here today pursuant to the Committee's invitation to
21 participate.

22 What we would like to do today is essentially
23 just review some of the amendments that the -- to the State
24 Ethics Act that the Commission and its staff would
25 recommend.

1 As I think maybe many of you may know, there have
2 been no substantive amendments to the State Ethics Act in
3 nearly 30 years. And over time, as a result of different
4 court cases, different rulings by our own commission, there
5 have been -- multiple loopholes have been created which
6 essentially has weakened the law and conversely has
7 affected the trust of the citizens in their government.

8 As such, we prepared a rather lengthy list of
9 proposed amendments; kind of a Christmas wish list, I
10 guess, for us in a perfect world. But, however, for
11 today's purposes, we're not going to bore you with
12 everything, but over the past several days Brian, Jeff and
13 I have come up with a list which we believe or feel might
14 close some of the more glaring loopholes in the law. And
15 those amendments, as I outlined in our statement, are
16 requirements for the online filing of statements of
17 financial interests by public officials and public
18 employees at both the state and local level.

19 Essentially, what we are suggesting or
20 recommending there is to amend the Act to require all those
21 who file that to do so electronically. And the reason why
22 we suggest that is, the Commission initiated a -- an online
23 policy roughly seven years ago. Started out, it didn't get
24 a whole lot of attention, and it was done mainly for
25 members of the General Assembly and the Executive Branch.

1 I think we had fewer than 500 the first year we put it in
2 effect. It has now grown that we had over 9,000 this past
3 year. And surprisingly, when looking at that, those
4 numbers, they were -- there were many, many more local
5 public officials who sought to use the online system. And
6 some of the reasons that we're hearing why they want to do
7 that is, many times local governments may not be as
8 organized as maybe the state governments are.

9 You can't find those forms from year to year if
10 citizens come in and ask for them. You know, and when our
11 own staff goes out and does spot compliance checks, you
12 know, the poor staff there can't find them. They'll know
13 that they -- hey, they handed them out to the members of
14 their boards at the beginning of the year, but never get
15 them back sometimes.

16 So, I think a mechanism for an online filing for
17 all public officials and public employees would help us
18 also in doing compliance reviews. We -- you know, we can
19 identify a certain municipality, go in, look at the forms,
20 identify who didn't file, and do our due diligence in
21 sending our notices out to achieve compliance, because I
22 think that's what it's all about rather than, you know,
23 chasing after someone to try to get a form.

24 In addition to that, another amendment we would
25 seek along the line of a statement of financial interest

1 issue is -- and this may not be a popular idea, but I think
2 it's -- we need to perhaps amend the penalty provisions.
3 Currently, the law provides a \$50-a-day penalty up to a max
4 of 250 for those who do not file. But, over the years we
5 find we get groups and pockets of different elected
6 officials and public employees who don't want to file, and
7 they challenge it. We've had issues with constables. It's
8 an ongoing battle with them every year.

9 And where you see some of the same people year
10 after year after year that we're chasing to get them to
11 file -- and when you get -- the expense that we run into
12 with staff expenses and getting notices out, and then
13 certified notices, and then compliance before the
14 Commonwealth Court, it can go into the hundreds, maybe
15 1,000 bucks to try to get \$250 filing back. Is it worth
16 it? And then, that even cheapens the law even more. If
17 we're not pursuing somebody because we think it's too
18 expensive to pursue, then that's going to become more
19 pervasive in my opinion of non-filing.

20 The next issue -- and this is one that we get
21 many calls about, and we get asked about a lot. Should
22 there be limitations on gifts and as well as
23 transportation, lodging and hospitality? In this day and
24 age, and what we've seen in other states, I believe that
25 the time is come to either go to ban gifts, or to put some

1 type of a limit. Maybe first-dollar reporting, or provide
2 that perhaps a public official or public employee can't
3 accept something of value maybe more than 50 bucks.
4 Because anything more -- when you start to go higher than
5 that, then the public trust starts to waver, and people
6 begin to question. Well, if they're taking -- even though
7 they're reporting a gift, if the gift is more than 250 and
8 someone reports it, they are going to wonder, well, what
9 action that they're taking as a public official, was their
10 action affected by the receipt of that gift from whoever it
11 might be?

12 Transportation, lodging and hospitality is also
13 an issue, although not as great as gifts. But, perhaps the
14 General Assembly may want to consider something to limit
15 the type of gift, or transportation, lodging and
16 hospitality a public official can receive. It must be in
17 relation to their elected position. For example, you're
18 asked to appear as a speaker at a conference or a
19 convention, and that group would pay your travel expenses.
20 I think that is permissible, but may -- but perhaps, maybe
21 a trip being provided by a lobbyist or a constituent may
22 raise a red flag. So, something like that to eliminate
23 those types of questions.

24 The third area that our staff came up with, there
25 are numerous definitions in the Ethics Act that we believe

1 could be further defined or amended to make the law a
2 little more understandable, easier to apply, easier for
3 public officials to deal with in their dealings and how
4 they act as public officials. And we went through them.
5 They're rather lengthy, and I won't get into them, but if
6 anyone has any particular questions about them, we'd be
7 more than glad to go through them.

8 Lastly, you know, I spoke about loopholes getting
9 created by court decisions or -- and there was a recent
10 ruling. It was *Civic v. the State Ethics Commission*. And
11 the issue was, the Commission found a township supervisor
12 in violation of the Act for influencing the disbanding or
13 the elimination of a township anti-nepotism policy. And
14 what that did by getting rid of that policy, it opened the
15 door for him to get his son hired. And, the remedy that
16 the Commission found -- in -- unlike in many cases that we
17 work, was not one where the individual should have been
18 prosecuted, and it's maybe something that the Sister
19 touched on as far as, you know, we lose our moral compass a
20 little bit that he -- his son was struggling; you know,
21 substance abuse problems. He was trying to get him back on
22 track by getting him a job. Couldn't get him the job
23 because of the policy, so he gets rid of the policy, the
24 son gets the job.

25 So, the remedies available to the Commission

1 currently in the Ethics Act are -- we -- they can't issue
2 fines. They can issue -- order restitution. So, the
3 amount of the gain was fairly substantial over a period of
4 time that the son received in the wages.

5 The Commission took a softer stance and ordered a
6 somewhat less penalty. Well, it gets appealed to the -- it
7 goes up through the court. Commonwealth Court upheld the
8 Commission's decision. Then it goes to the Supreme Court,
9 and the Supreme Court knocked the decision down, basically
10 saying Commission didn't have the authority to issue that
11 restitution. And, they cite that, you know -- they
12 criticize the ambiguity of the law and indicated that we
13 may have other quivers -- or arrows in our quiver.

14 And, the only other arrow would be to refer this
15 guy for prosecution. And, you know, although there are the
16 criminal penalties in the Act, in my opinion, if we can
17 deal with him administratively -- and I think that would
18 have been an appropriate remedy here. But, now it puts --
19 it can expose this individual to a prosecution.

20 So in that regard, this was one of the bigger
21 issues that's recent. It hits. It really limits the
22 Commission's ability to do its job. So, that's something
23 else I think that we would like you all to take a look at.

24 The other issue is -- and it was touched on as
25 far as education and training. We have found that we've

1 had great success with the more training programs that we
2 do. When I took over as Executive Director in 2013, I
3 think we had -- we were doing about ten a year. We're
4 doing now around 50, and we get great response. I think
5 the number of complaints that we're receiving are down.
6 They seem to be well received. In my 39-plus years working
7 for the Commission, we had very, very little action with
8 the General Assembly, and we are now dealing with the legal
9 staff of all four caucuses. In this past year we even
10 developed an online training program for members of the
11 General Assembly. So I think that that's working, and it
12 should be mandated.

13 I know that, you know, you're getting in there,
14 and you're -- and you sound -- maybe sometimes sound like
15 you're beating a dead horse, but I think if you hear it
16 enough times, I think it will sink in. It's probably not
17 going to sink in to everyone. Before I came with the
18 Commission I was a parole agent, and there are some people
19 you just never could reach. You know, and if you locked
20 them up, fined them. No matter what you did, they still
21 were back doing the same things.

22 But I think for the most part, the overwhelming
23 majority of the public officials that we deal with are good
24 and decent people. Sometimes they make lapses, and that's
25 why we're here to handle it administratively.

1 And, the last thing I would like to mention --
2 and -- over the years, where -- and it was touched on in
3 your opening, the number of public officials -- there have
4 been scandals in state government. And, there have been
5 attempts to get the Commission involved in those types of
6 things to handle some matters administratively. But the
7 way the current laws work, particularly with grand jury
8 secrecy or investigations that get initiated by Attorney
9 General, or local DAs, or state police want to refer
10 matters to the Commission, but they can't do it. And,
11 they're limited by the CHRIA, the Criminal History
12 Reporting Information Act. And if the Commission was made
13 part of CHRIA, there's -- referrals could come to us
14 that -- where they end up prosecuting criminally but maybe
15 be more appropriately handled on the administrative level.

16 So those are, in a nutshell, some of the major
17 issues that we've seen. As I said, we've outlined a pretty
18 lengthy wish list. We would now -- we thank you for the
19 opportunity to come here and appear again, and take any
20 questions that any members may have.

21 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you
22 for your testimony and your recommendations. I thought the
23 Governor's approach to the gift -- the Governor's approach
24 to gifts by just having a flat gift ban I think was bold.
25 We as legislators -- I think sometimes the public doesn't

1 always appreciate everything that can be considered a gift.
2 I have a number of volunteer fire departments in my
3 district. They all have banquets every year, and they want
4 their legislators to be there, and the local mayor and the
5 local -- whoever else. And, I don't want to say I don't
6 enjoy going to the fire dinners, or that the food isn't
7 good, but, you know, even legislators can only have so much
8 rubbery chicken in the course of a year.

9 However, if we had to -- if legislators were
10 required to pay out of their personal funds for each of
11 those, which is what the Governor's ban does for those
12 types of officials, you know, I don't know that you would
13 see legislators attending those events. It's a challenge,
14 where to sort of put the balance in place. You know, I've
15 been at events where -- and Governor's -- folks from the
16 Governor's cabinet have been there, and they can't on a hot
17 day accept a bottle of water or anything else, so things of
18 de minimis value.

19 But on the other hand, I also appreciate the
20 Governor saying, look, how do we determine what's de
21 minimis? And, any sort of a rule that we put in place,
22 people will find creative ways to get around, so we're just
23 going to ban it outright. So, it's an interesting and
24 challenging question.

25 Thank you for your testimony. I know we've got

1 some questions. We're going to begin with Representative
2 Wheeland.

3 REPRESENTATIVE WHEELAND: Thank you,
4 Mr. Chairman, and thank you, gentlemen, for your testimony
5 today and your contribution to our discussion here.

6 Just to help not only the panel but -- or the
7 representatives here, but also the audience, who comprises
8 the Ethics Commission, and what is it charged to do?

9 MR. CARUSO: The Commission is an independent
10 body. There are seven members. They're appointed, three
11 by the Governor, and only two of which can be of the same
12 political party. The Speaker of the House has an
13 appointment. The President Pro Tam and the Minority Leader
14 in the House and the Senate each have an appoint
15 [phonetic].

16 Our basic duties -- we've been added on. We have
17 responsibilities under several other laws; lobbyist --
18 lobbying law primarily. But the Commission has three main
19 functions. We administer, enforce the statement of
20 financial interest filing provisions. We issue advisory
21 opinions on prospective conduct, and we also conduct
22 investigations and issue adjudications based off those
23 investigations.

24 REPRESENTATIVE WHEELAND: Thank you. And, is
25 there anyone that in -- based on your experience that

1 should be on the Ethics Commission? In other words, are
2 you missing anybody that you could utilize? You can get
3 back to us.

4 MR. CARUSO: No, no. We're -- the
5 leadership -- the appointments that have been made over the
6 years to the Commission in my experience -- we've had
7 religious people. We've had a lot of attorneys. We've had
8 former government officials. We've had laypeople. We've
9 had a chief of police. So, I think the appointments that
10 have been made to the Commission have been pretty
11 consistent with representing the citizens of the
12 Commonwealth.

13 REPRESENTATIVE WHEELAND: Okay, thank you. And,
14 what are some of the restricted activities that are
15 outlined in the Act?

16 MR. CARUSO: Okay. There are many, but primarily
17 what we look at are the allegations of conflict of
18 interest. And, conflict of interest as it's defined in the
19 law is use of the authority of office by a public official
20 or public employee for the private pecuniary benefit of
21 themselves, a member of their immediate family or a
22 business which with either they or a member of their
23 immediate family are associated.

24 So that's kind of a mouthful, and sometimes it's
25 hard to understand about what it is. That's one of the

1 definitions that we would like looked at, is, what is use
2 of the authority of office? And for the most part it
3 is -- involving an elected official, it is a vote or
4 official action that they would take. But there -- in
5 decisions that have been issued by the Commission over the
6 years, that can -- we've looked at much -- as a broader
7 definition. It could be a recommendation.

8 We had a case that went to Commonwealth Court of
9 a individual that was a member of a borough council, and
10 his father wanted to bid on the insurance package --
11 liability insurance package for the borough. And when the
12 matter came up for a vote, he was one of two or three
13 bidders. I can't recall, but he went behind the scenes and
14 lobbied all the members of council, hey, my dad really
15 needs -- really wants and needs this job. So they awarded
16 it based on that public official's recommendation. When
17 the vote actually came before the board to award the
18 contract, he abstained. You know, he sat back, but --
19 however, in our opinion, and what we advocated as
20 prosecutors before the Commission was, that lobbying
21 constituted a use of authority of his public position. So
22 that's one example of what we look at.

23 We also look at -- we get many, many, many
24 nepotism complaints. We get other complaints of
25 contracting, awarding contracts to a family member's

1 business. Oh, God, I'm trying to think of other ones.

2 MR. JACISIN: [inaudible].

3 MR. CARUSO: Oh, yeah. We're getting more
4 complaints lately regarding honorarium. Surprise. I mean,
5 honorarium is banned, but, you know, we've looked at
6 instances where public officials have been paid for their
7 public appearances. We're looking more now -- undue
8 influence.

9 We currently have a matter -- I can't get into
10 too many of the details -- where we had public officials
11 from two different municipalities, two different
12 governmental bodies. Each of their children needed jobs,
13 so they didn't want to use their position in their district
14 to get their son or daughter a job, so they colluded
15 basically with one another; you hire my kid, and I'll hire
16 your kid. And, it looks like it's going to end up being a
17 violation. But, those are other -- those are just examples
18 of some of the types of things that we look at.

19 REPRESENTATIVE WHEELAND: That's certainly
20 creative. What are some of the methods that are employed
21 by the Commission to identify when there's an ethics
22 violation?

23 MR. CARUSO: The way the law is written,
24 anyone -- any citizen from anywhere can file a complaint
25 with the Commission alleging a violation of the Act by a

1 public official or a public employee.

2 It -- the -- it has to be on a form that the
3 Commission has on their website. It has to
4 detail -- provide some detail of why the complainant
5 believes the Act was violated, and they must have it
6 notarized.

7 And based on -- we get approximately 500 formal
8 complaints a year, maybe several hundred more that --
9 informal complaints. But if the complaint contains
10 sufficient information, alleges that, you know, Rob Caruso
11 voted to hire his son, we're bound by law to conduct at
12 least a preliminary inquiry into the matter.

13 REPRESENTATIVE WHEELAND: So the Commission,
14 basically you rely on whistle blowers?

15 MR. CARUSO: Essentially, yes.

16 REPRESENTATIVE WHEELAND: Okay.

17 MR. CARUSO: We get a lot of referrals also from
18 the State Inspector General, some from the Attorney General
19 and other local law enforcement.

20 REPRESENTATIVE WHEELAND: Okay. And,
21 Mr. Chairman, if I may, one -- couple last questions here?
22 After a potential violation has been identified, what are
23 the next steps, if you can help us --

24 MR. CARUSO: Okay. The --

25 REPRESENTATIVE WHEELAND: -- and for the

1 audience?

2 MR. CARUSO: The process is, once a complaint has
3 been identified and we're going to initiate an
4 investigation, the law provides that we can do a 60-day
5 preliminary inquiry to essentially establish a prima facie
6 case. You know, is the allegation accurate, and did this
7 guy more than likely do it?

8 Once that has been determined, after that, by the
9 60th day we send a notice of investigation to the person who
10 is the target, advising them generally of what the
11 allegations are. The law provides that we have 180 days to
12 conduct an investigation, which I think is sometimes not
13 enough time. But, we also get two 90-day extensions for
14 cause.

15 At the 360th day, the investigative division is
16 required to send a formal investigative complaint to the
17 person, the target of the investigation, which basically
18 outlines what we believe are the findings of fact.

19 The person who is the subject in the
20 investigation can then -- has 30 days to file an answer.
21 Most times they get at least a 30-day extension to respond
22 to the allegations. They then can either -- they're
23 entitled to an evidentiary hearing before the Commission,
24 or they can enter into a consent agreement with the
25 investigative staff. Then it goes to the Commission for

1 the final adjudication.

2 REPRESENTATIVE WHEELAND: And then is it referred
3 to the local DA, Attorney --

4 MR. CARUSO: They can be --

5 REPRESENTATIVE WHEELAND: -- General?

6 MR. CARUSO: -- on some cases. Most cases don't.
7 They're not. I think the penalties like I discussed with
8 the Civic matter that the Commission -- the civil remedies
9 I believe sometimes can be -- and just the fact that there
10 is an order issued is a pretty powerful detriment for some.
11 Not everyone, but for some. But, all of our orders are --
12 just as a matter of course are reviewed, or subject to
13 review by the Office of Attorney General.

14 REPRESENTATIVE WHEELAND: Okay. Thank you very
15 much.

16 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:

17 Representative Schmitt?

18 REPRESENTATIVE SCHMITT: Thank you very much,
19 Mr. Chairman. Gentlemen, thank you for coming in today.
20 I've got a -- my first question is very specific, my second
21 one is a little more general.

22 I'm looking at Section 1102 of the Act, of the
23 Ethics Act, and I'm looking at the definition of conflict
24 or conflict of interest. The first sentence I have no
25 problem with. It's pretty clear. The first time I read

1 this definition, I read the second sentence. I thought I
2 knew what it meant. Then I read it a little bit later, and
3 I thought maybe it meant something different. Now -- and
4 I'll read that to you.

5 The term, conflict or conflict of interest, does
6 not include an action having a de minimis economic impact.
7 That part I understand. That's easy. Or which affects to
8 the same degree a class consisting of the general public,
9 or a subclass consisting of an industry, occupation or
10 other group which includes the public official or public
11 employee, a member of his immediate family, or a business
12 with which he or a member of his immediate family is
13 associated.

14 I've read the Civic case, both the Commonwealth
15 Court opinion and the Supreme Court opinion. I think to a
16 certain extent the reason the Supreme Court reversed was
17 based on this -- on their interpretation of this language
18 which differed from the Commonwealth Court's interpretation
19 of this language.

20 Can you explain to us what that second sentence
21 means when it refers to classes and subclasses, and maybe
22 give us a real-world example of that?

23 MR. CARUSO: Jeff argued the case both before the
24 Commonwealth Court and the Supreme Court. I would ask him
25 to answer that question.

1 MR. FRANKENBURGER: Thank you, Representative
2 Schmitt. I think that is -- when Brian and I go and give
3 ethics presentations to local municipalities, too -- we've
4 done one in front of Septa with 900 employees. That's
5 probably the number-one question that we get. I think the
6 courts really don't understand it quite as well as we would
7 hope they would. And it is difficult, when you read it, to
8 make sense of it.

9 The best way that I describe it to people -- and
10 I use a real-world example -- is that we -- the General
11 Assembly, when they created this law, understood that
12 public officials reside in the communities that they are
13 working to help, and that help sometimes is financial. And
14 so, if they were to make some kind of action, use their
15 office that financially benefits everyone who lives in
16 their community, they are also going to be financially
17 benefited, themselves. And so an exception to that should
18 be created, because we don't want public officials to not
19 benefit everybody just because they themselves might also
20 be benefited.

21 One example I use is for a school board, if a
22 school board president has a daughter who is a teacher at
23 the school board. Now, assuming they didn't use their
24 position to get the daughter the job in the first place,
25 let's imagine that all the teachers are going to be getting

1 a raise. By voting to give all the teachers, that would
2 financially impact his daughter, and we don't want the
3 school board president to not give everyone a raise just
4 because he can't give his daughter a raise.

5 So, that would be the subclass exception of the
6 occupation group. That's the best way that I can use to
7 describe it. Obviously I argued the Civic case, and I
8 don't necessarily agree with what the decision was in that;
9 however, I understand, and I think the Supreme Court did
10 the difficult job of doing the best they could with the way
11 that that law is written.

12 REPRESENTATIVE SCHMITT: Do you think it can be
13 drafted in a better manner, a clearer manner than it is
14 presently? Because I struggled with it. I know -- and
15 when you've got the Commonwealth Court looking at it and
16 saying it means one thing. I think you argued it was a
17 class of one with the son in the Civic case. And you've
18 got the Supreme Court looking at it and saying it means
19 something different. The language there is problematic.

20 MR. FRANKENBURGER: You're right. You know, I
21 think that it could be crafted with a little more nuance as
22 to exactly what a class is. Because it talks about classes
23 and subclasses, but it doesn't define what they are.

24 REPRESENTATIVE SCHMITT: Correct.

25 MR. FRANKENBURGER: So, defining that class as

1 maybe having a minimum number of members, or something that
2 ties the group together in a way that the law could
3 recognize, I think that would be very helpful, both for us
4 in an enforcement sense, and for the courts in an
5 adjudicatory sense as well.

6 REPRESENTATIVE SCHMITT: Yeah. Well, we'll see
7 what we can do. The second question is more general.
8 We've all heard stories of these bad-actor councils and
9 other bodies that have voted on projects, or have
10 discussions behind closed doors.

11 Just in general, if you could, tell us what some
12 of the enforcement mechanisms the Commission uses to ensure
13 compliance and how these bad actors are dealt with.

14 MR. CARUSO: Well, essentially, as I responded to
15 Representative Wheeland, that we are -- the Commission's
16 reactionary. We don't go out proactively looking for
17 cases. We have to look at if something is filed with us.
18 Once it is filed -- once a complaint is filed or the
19 Commission becomes aware of it, we can then initiate some
20 -- an inquiry to try to determine, was there a conflict
21 with one or more members of a board taking action, and did
22 they get a gain out of it?

23 The big thing that we look at -- you know, we
24 have the two prong. We have to show that there was the use
25 of office, and then did the public official or family

1 member benefit financially from it?

2 REPRESENTATIVE SCHMITT: Thank you very much. I
3 appreciate that. Thank you, Mr. Chairman.

4 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you.
5 Representative Diamond?

6 REPRESENTATIVE DIAMOND: Thank you, Mr. Chairman.
7 And, thank you, Mr. Caruso, for coming before the Committee
8 to provide us with an education and some more information
9 about how the Commission operates.

10 Every year, I along with all my colleagues have
11 to file a statement of financial interests which divulges
12 our outside income to some extent, our debts, our property
13 transfers that we made, and gifts that we may have
14 received. And, the Commission has developed a pretty
15 user-friendly online searchable function where anybody in
16 the public can go and look at what those statements of
17 financial interests actually say.

18 However -- and I don't recall. Those -- it was
19 over a year ago. I did -- I do have one constituent -- and
20 as you know, Mr. Caruso, transparency means nothing unless
21 somebody is actually looking at what's being transparent.
22 I have a constituent who is very active in searching these
23 forms, that sort of thing, and he had expressed a
24 frustration to me that the Commission's own system only
25 goes back five years when you can look for those things

1 online.

2 Can you speak to the Commission's decision-making
3 process on how much -- how many of those forms are actually
4 kept online, how far back in history they go? And, could
5 you also comment on -- there's been some talk as to the
6 Commission being a centralized repository for all these
7 statements from officials who aren't even state officials
8 across the state, to have them file it in one place rather
9 than with, like the county or the township, or whatever
10 authority the individuals work for.

11 So, two questions there, one on the policy on how
12 far back you can search on your online portal, and whether
13 there is issues considering the Ethics Commission being a
14 central repository for those kind of statements for people
15 across the state.

16 MR. CARUSO: Certainly. There is a five-year
17 statute of limitations in the Ethics Act. So, we're
18 required to keep them at least for five years. However,
19 with the online filing system that we started in 2014, if
20 someone has been in office 2014 or earlier, and those forms
21 were filed electronically, they're still on our system.

22 You can go -- I mean, I'm trying to think of a
23 recent one that I did, because we get requests for forms.
24 We get right-to-knowed [phonetic]. We -- you know, even
25 though they're available online; that we pull forms off

1 that go back seven, eight, nine years.

2 MR. JACISIN: [inaudible].

3 REPRESENTATIVE DIAMOND: Okay.

4 MR. CARUSO: Okay.

5 REPRESENTATIVE DIAMOND: And, I mean, that was
6 just an issue of clarity for me, because -- I know --

7 MR. CARUSO: Yeah.

8 REPRESENTATIVE DIAMOND: -- because, I mean --

9 MR. CARUSO: Yeah.

10 REPRESENTATIVE DIAMOND: -- storing physical
11 records is far different than storing digital records as
12 far as, you know, space and that sort of thing. So I just
13 wanted a little clarity on that.

14 MR. CARUSO: Yeah, and --

15 REPRESENTATIVE DIAMOND: Can you --

16 MR. CARUSO: -- Brian just reminded me that the
17 Commission does have a seven-year record retention policy,
18 but we do -- anything filed electronically is going to be
19 on there forever.

20 One problem that if this person is searching and
21 not finding some records is, many -- sometimes a public
22 official one year may file as James Smith, and then the
23 next year file as Jimmy Smith. So if you type in James
24 Smith, you're only going to get the ones that are listed or
25 filed under James Smith. You'll have to go back in and

1 type in Jimmy Smith, then you'll get everything that a
2 public official files.

3 REPRESENTATIVE DIAMOND: Okay. So, can you
4 clarify, then? If somebody files a paper form, it is not
5 stored indefinitely as opposed to filing electronically?

6 MR. CARUSO: They are now. Once we started the
7 electronic system, they're scanned into our system, and
8 they are stored electronically as all of the e-files that
9 are made.

10 REPRESENTATIVE DIAMOND: Okay. And then, can you
11 speak to the notion of using the Commission as a central
12 repository for all these documents across the state?

13 MR. CARUSO: That was one of our recommendations.
14 I believe, in my opinion, that that should be done. And
15 one of the reasons why I believe that is, we get requests
16 repeatedly from the public, can you get me forms from X, Y,
17 Z Township? I filed a right-to-know request to look at the
18 public officials forms. They -- you know, they take first
19 the five days to respond, then they take another 30 days.
20 And we've been involved in actions where public officials
21 are tied up before the Office of Open Records in appeals
22 that end up in Commonwealth Court. So, and there is a
23 provision in the Act that the law requires that those forms
24 be made available for public inspection and copying. So,
25 maybe it's lack of information, lack of knowledge, but some

1 local governments aren't providing them. That's one thing.

2 And also, the other reason, as I stated earlier,
3 is to have -- to be a safe repository for these forms, that
4 if someone wants to see them, they're there. There on our
5 system. I believe everyone should file with the
6 Commission. You know, showing my years and dating myself
7 quite -- the first Ethics Act in 1978 required everyone to
8 file locally -- or file -- I'm sorry -- with the
9 Commission.

10 When the Commission was going through the Sunset
11 process in 1989, one of the concerns was that, why should
12 the forms be in Harrisburg -- that's when there was all
13 paper filings -- when the people -- the local people have
14 to, you know, go to Harrisburg to see a form?

15 So the General Assembly, when they recreated the
16 Commission, had local people file local, state-level people
17 file with the Commission.

18 REPRESENTATIVE DIAMOND: All right. Well, thank
19 you. And, given that that is in fact your recommendation,
20 and it seems in this digital age to just be common sense,
21 if you need any legislative assistance in making that
22 happen, don't hesitate to reach out to my office. I'd be
23 glad to assist with that. Thank you so much, Mr. Chairman,
24 and thank you, Mr. Caruso.

25 MR. CARUSO: Thank you.

1 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you,
2 Representative Diamond. Perhaps the Unemployment Comp
3 system could give us a program for that. That's a joke.
4 Representative Grove.

5 MAJORITY CHAIRMAN GROVE: Thank you so much.
6 Gentlemen, thank you so much for your time. And hopefully,
7 you know, with this hearing and your further testimony from
8 previous hearings, we can help you out on updating a law
9 that is 30 years in the making. Although sometimes I find
10 it ironic. I'm over 40, and sometimes laws haven't been
11 updated longer than I've been alive. So, you're underneath
12 that at least, right?

13 MR. CARUSO: Yeah.

14 MAJORITY CHAIRMAN GROVE: Appreciate your time.
15 One of the bills we did pass within Lobbying Disclosure was
16 switching the equity reporting from, kind of like an
17 archaic system that is going on now with Department of
18 State over to statement of financial interests. Obviously,
19 you're going to have a lot more people filing. Any issues
20 with bandwidth on that from your end, as far as people
21 filing electronically, ID concerns or anything?

22 MR. CARUSO: No. Jeff deals with Department of
23 State on the electronic filings, and I don't believe we've
24 had any issues.

25 MR. FRANKENBURGER: No. The -- we've dealt with

1 new large groups of people having to file somewhat in the
2 recent past. There was a Quaglia decision from the court
3 system that had all income maintenance caseworkers have to
4 file with us, where they previously weren't. So, I think
5 that was in, what, 2011? 2011. So, we are somewhat
6 practiced in having new groups of people have to file with
7 us, and we believe that we can handle that.

8 Lobbyists typically are much better at filing
9 things than general run-of-the-mill public employees or
10 local government officials, so we don't expect there to be
11 too great of a concern with that.

12 MAJORITY CHAIRMAN GROVE: Got you. The Ethics
13 Act, does that cover -- obviously it covers the General
14 Assembly executive offices, and then we have independent
15 agencies, and then we have quasi-governmental entities.
16 So, like Public Utilities Commission, covered under Ethics
17 Act?

18 MR. CARUSO: Yes.

19 MAJORITY CHAIRMAN GROVE: So all those
20 independent pension systems, they're covered? Sometimes
21 Penn State claims they're state related, sometimes,
22 depending on what's happening up here. Those
23 state-connected universities, kind of non-preferred, would
24 they be under the Ethics Act?

25 MR. CARUSO: No.

1 MAJORITY CHAIRMAN GROVE: No?

2 MR. CARUSO: Penn State, Pitt, Temple and Cheyene
3 are not covered.

4 MAJORITY CHAIRMAN GROVE: Okay.

5 MR. CARUSO: As --

6 MAJORITY CHAIRMAN GROVE: State system --

7 MR. CARUSO: As being state related.

8 MAJORITY CHAIRMAN GROVE: Okay.

9 MR. CARUSO: The -- all of the universities
10 within the state system of higher education are covered.

11 MAJORITY CHAIRMAN GROVE: Okay.

12 MR. CARUSO: In my opinion, Penn State should --
13 I'm a Penn State grad. Penn State should be covered, as
14 should all of the other. They have received substantial
15 public funding.

16 MAJORITY CHAIRMAN GROVE: All right. Okay.

17 MR. CARUSO: The Commission did issue a ruling,
18 and they were exempted years ago, probably back in the
19 year -- early to mid-1980s. And -- but that's not -- and
20 that was kind of a split decision. And -- but looking
21 at -- in my opinion. I'm not speaking for the Commission.
22 They may disagree with me, but that -- I think anyone that
23 receives the substantial amount of public funding that
24 these universities receive, they should be covered.

25 MAJORITY CHAIRMAN GROVE: Got you. And then we

1 have these -- how do I want to phrase it? Like the
2 Susquehanna River Basin Commission, right? So, we have
3 these entities that are government constructs. They're, I
4 guess, kind of federalized, but we give them state dollars.
5 And then we have, you know, like School Boards
6 Associations, or Boroughs Association which are funded by
7 local tax dollars going in as in associations. Any opinion
8 on those entities as far as being kind of under the Ethics
9 Act since they are heavily funded by taxpayer dollars?

10 MR. CARUSO: Most of the associations like the
11 government-type associations, PMAA, PSAT, some of those,
12 primarily they consist of public officials who are already
13 filing in some form. Some of the other agencies we've got
14 involved with -- was it the -- Brian, the Delaware River
15 Port --

16 MR. JACISIN: Yeah.

17 MR. CARUSO: -- Authority --

18 MAJORITY CHAIRMAN GROVE: Got you.

19 MR. CARUSO: -- where some members -- they come
20 from different jurisdictions, so we can't require that
21 someone from New Jersey would file with Pennsylvania.

22 MAJORITY CHAIRMAN GROVE: Got you. But, the
23 connection with the members of the board who are
24 Pennsylvania --

25 MR. CARUSO: Yes.

1 MAJORITY CHAIRMAN GROVE: -- would fall under our
2 ethics? Okay.

3 MR. CARUSO: Yes.

4 MAJORITY CHAIRMAN GROVE: Good. And then, your
5 online filing system has been great. I use it. Very well
6 done. Is there any way to kind of create accounts so you
7 can just repopulate your stuff over and over again?

8 MR. CARUSO: We have been talking about doing
9 that. We just had a meeting about this the other day that
10 we could. And when we were first putting this together, we
11 wanted to do that, that you would -- filers would need to
12 be assigned, like a number.

13 MAJORITY CHAIRMAN GROVE: Uh-huh.

14 MR. CARUSO: And then you could go in, and
15 if -- say that you wanted to -- you filed in 2020, and then
16 you're filing again in 2021, you could just pull up the
17 form, and it would prepopulate all of -- the top section of
18 the form, and that it would even give you -- we would
19 propose that you have a dropdown; you know, did your income
20 sources change?

21 MAJORITY CHAIRMAN GROVE: Right.

22 MR. CARUSO: You just put no, boom, and it would
23 populate up from what you had the previous year. We would
24 like to do that. That would take a little bit more of a
25 financial commitment. But there seemed to be -- when we

1 first came up with this filing plan, there was a reluctance
2 to want people to sign on, because one of the things that
3 we were doing -- thinking of doing was using the last four
4 digits of one -- a person's Soc [phonetic] to assign that
5 as being their unique identifier.

6 MAJORITY CHAIRMAN GROVE: Right.

7 MR. CARUSO: And when you start fooling with that
8 kind of information there's -- there was a little bit of a
9 hesitancy.

10 MAJORITY CHAIRMAN GROVE: Yeah. Well, as we are
11 developing a budget, give us a number, because I'm --

12 MR. CARUSO: Okay.

13 MAJORITY CHAIRMAN GROVE: -- pretty sure those of
14 us who file that also do budgeting and would greatly
15 appreciate that.

16 MR. CARUSO: Sure.

17 MAJORITY CHAIRMAN GROVE: Yeah.

18 MR. CARUSO: Sure.

19 MAJORITY CHAIRMAN GROVE: That's all the
20 questions. Thank you, gentlemen.

21 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Whatever
22 the cost on that, I think we'll be happy to pay. In your
23 written testimony you explained one of the reasons for
24 having, you know, the online database, to make it more
25 easily searchable, I guess across the state. So there, I

1 think that -- I don't recall that in your spoken testimony,
2 but for those attending, I think that that's true, make it
3 easier for people to do a search on any of those components
4 that would be on that disclosure.

5 With regard to the burden of proof, we've had
6 some individuals contact us saying that the burden of proof
7 on Sunshine Act requests, being with the -- you know, with
8 the person seeking the information is too burdensome. Do
9 you have any opinion as to whether the burden of proof
10 should be shifted on the Sunshine Act, on any request
11 there?

12 MR. CARUSO: Boy, I don't, because we don't
13 really deal much with the Sunshine Act.

14 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Okay.

15 MR. CARUSO: The only time we get involved is
16 when there is an allegation that a public official used
17 their position, and then they also didn't follow the
18 Sunshine Law. I don't know if either Brian or Jeff would
19 have an opinion on that.

20 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Okay.

21 MR. FRANKENBURGER: The biggest thing --

22 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Wait.
23 Speak into the microphone so --

24 MR. FRANKENBURGER: Oh, I apologize.

25 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: -- the

1 virtual people can hear you.

2 MR. FRANKENBURGER: The most that I have to do
3 with the Sunshine Act is, we probably get five phone calls
4 a day with members of the general public saying, you know,
5 there's voting that's happening, and we can't see what it
6 is, because it's not in a meeting. You know, what can the
7 Ethics Commission do about it? And I have to tell them,
8 nothing. It's not part of our restricted activities. It's
9 not -- I don't have any jurisdiction. And then they say,
10 well, who do I call? And I say, well, it's technically
11 enforced by the local District Attorney's office. And they
12 say, well, I've contacted them, and they -- you know, they
13 told me to call you.

14 And so I think -- and I don't want to steal the
15 valor of the Office of Open Records who is coming, and
16 they're probably going to talk to you more about that,
17 because I read their remarks. But I think that is an
18 important topic, is the enforcement of violations of the
19 Open Records Law.

20 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Okay, thank
21 you. Anyone on the panel have any further questions?
22 Representative Schmitt?

23 REPRESENTATIVE SCHMITT: Thank you, Mr. Chairman.
24 I was going through the list that you had submitted, what
25 you referred to, I think, as the wish list or the Christmas

1 list. There was one thing that caught my eye, and I gave
2 it some consideration, and that is the proposed amendment
3 of Section 110714 with regard to subpoenas and enforcement
4 of subpoenas.

5 My personal political philosophy is that we here
6 in the legislature are elected -- directly elected by the
7 people and answerable to and accountable to the people.
8 The Ethics Commission is not. One of the things you are
9 asking us to do is to expand, I assume, your ability to
10 issue subpoenas and, if necessary, coerce responses to
11 those subpoenas. That power of coercion I believe should
12 only be placed upon the people when it's absolutely
13 necessary, and the touch of that should be as light as
14 possible.

15 Would you please explain to us presently what
16 powers, subpoena power, coercive power the Commission has,
17 and what it is proposed for us to grant it in terms of
18 additional power or expanded power?

19 MR. CARUSO: Okay. First I'll explain a little
20 bit what our subpoena process is, what we do. Once -- the
21 Commission can -- we only are authorized to seek subpoenas
22 once a case is opened as a full investigation. Can't do it
23 during the preliminary level. What happens is, if a --
24 when we're trying to establish financial gain that a public
25 official gained, so you may need to look at financial

1 records. So, the assigned investigator will do a subpoena
2 request. It works its way through the system. The
3 attorneys look at it. It comes to me for approval, then it
4 gets submitted to the office of Chief Counsel, and then the
5 subpoenas are approved by the Commission.

6 Once the Commission -- once we receive the
7 subpoena, it gets served on the individual or corporation,
8 whoever it is that we're trying to obtain documentation
9 from. And if -- 95% compliance, there isn't usually a
10 problem. And the records we primarily subpoena are bank
11 records, some business records. We do issue subpoenas to
12 appear for testimony. Many times, when you get into a
13 situation -- when you're -- particularly in a local
14 government where you need to interview employees, and an
15 employee will say, yeah, I'll talk to you, but give me a
16 subpoena. And that's what occurs. They want some type of
17 protection that their might not be a repercussion to them
18 if they come in and give honest testimony.

19 So, I think accountability -- there is a remedy
20 if someone doesn't want to comply. You know, the mechanism
21 for achieving compliance is one of the issues that we're
22 seeking to improve here; is that we've had cases where, you
23 know, I'm not going to comply. And the Commission has not
24 taken -- you know, they take note of it when the case goes
25 to -- if the case would go to trial, and we would need the

1 information. The Commission would take note of that as far
2 as maybe when they would adjudicate the case or determine
3 credibility of witnesses. But, what we're looking at
4 is -- a court would be -- decide on an enforcement issue.
5 That's basically what we're asking, that if we issue a
6 subpoena, and there isn't compliance and someone balks at
7 it, we can go to the Commonwealth Court for example to seek
8 enforcement, and there it could be debated before the court
9 whether or not that subpoena was legitimate or valid.

10 MR. FRANKENBURGER: And if I could just add one
11 thing, is that -- and if you're talking about Paragraph 18
12 of our submission, is that I don't think that what we are
13 asking for in this is an expansion of any kind of subpoena
14 power they have -- that we have. I think it's more of a
15 clarification in this 30-year-old law to more accurately
16 depict the way that our subpoena power now currently works.
17 And to match what I think is actually pretty -- and what we
18 think is very clear language that was found in the
19 Inspector General bill that went through. And it's just to
20 match that, not to give us anything more or different, but
21 to just make it clear. And then that helps earlier in the
22 process so you don't get to the courts. Because, when you
23 give someone a subpoena, and then they look at your law,
24 and the law isn't very clear on what the subpoena actually
25 means, with this language in the law, we think that it

1 would be more clear, and it would avoid further litigation
2 down the line, and may even reduce the need for subpoenas
3 in the first place.

4 REPRESENTATIVE SCHMITT: Would this change in the
5 law allow you to issue subpoenas earlier in the
6 investigative process than you presently do?

7 MR. CARUSO: No. No, it would not.

8 REPRESENTATIVE SCHMITT: So it would just clean
9 up the -- it would clear up any ambiguities in your power
10 to issue these subpoenas and enforce them?

11 MR. CARUSO: Exactly.

12 REPRESENTATIVE SCHMITT: Okay. Thank you,
13 gentlemen.

14 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Are there
15 any other questions from members of the panel? With that,
16 gentlemen, thank you very much for your testimony this
17 morning.

18 MR. CARUSO: Thank you.

19 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: During our
20 fourth panel, we will hear from two individuals
21 representing the news media industry, Counsel at the
22 Pennsylvania News Media Association, Melissa Melewsy, and
23 Pennsylvania State Editor of USA Today Network, Shane
24 Fitzgerald.

25 We have asked these individuals to provide the

1 perspective of the press on the Right-to-Know Law. The
2 panel is scheduled until 12:00 noon. Please begin whenever
3 you are ready.

4 MS. MELEWSKY: Thank you. [inaudible].

5 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Yeah.

6 MS. MELEWSKY: Thank you. Thank you,
7 Chairman Schemel, Chairman Grove, Chairman Conklin. We
8 appreciate the opportunity to be here before the Committee
9 today and offer testimony. I'm joined by Shane Fitzgerald
10 with USA Today Network. He is going to offer testimony
11 when I am finished. We're both happy to answer any of your
12 questions to the best of our abilities, or get back to you
13 if we can't answer your questions today.

14 And I want to say, first of all, that it is a
15 privilege to bring these issues to your attention on behalf
16 of media organizations across the Commonwealth, as well as
17 the citizens that they represent.

18 As many of you already know, Pennsylvania News
19 Media Association is the statewide trade association for
20 print, digital and other news media organizations in the
21 Commonwealth. There are over 300 of them, and they
22 represent the eyes and the ears of the local communities
23 that they serve, and that is their primary role.

24 PNA was heavily involved in the Right-to-Know Law
25 rewrite in 2008, and we've been involved legislatively with

1 proposed updates to that law as well as other transparency
2 laws including the Sunshine Act that we're going to talk
3 about today as well. And, for decades we've worked with
4 legislators to improve transparency and public access
5 throughout the Commonwealth.

6 My role with PNA is Media Law Counsel, and I've
7 been in that role for a little over 15 years now.

8 My -- one of my primary duties is to staff the legal
9 hotline, which is our -- it is a member benefit that
10 journalists can call me, or email me, or contact me some
11 other way and get legal advice on matters of transparency,
12 anything that really impacts how they do their job, how
13 they gather information, whether or not a particular piece
14 of information might present risk to them. They can
15 contact me, and I'll give them legal advice. We don't
16 litigate on their behalf. I'm not a litigator. I strictly
17 give legal advice and send them to a litigator if they need
18 to litigate.

19 I get around 2,000 inquiries a year, give or
20 take. It's been a lot busier in the past 18 months. Of
21 those 2,000 a year, approximately 1,000 of those deal with
22 public access issues, primarily Right-to-Know Law and
23 Sunshine Act issues. There are also -- with regard to
24 transparency, I also deal with 1st Amendment and
25 constitutional access to court issues as well.

1 So like I said, the past 18 months have been some
2 of the busiest, with above average numbers of inquiries
3 from both members of the media as well as the general
4 public. And like the Ethics Commission just testified, I
5 have seen a marked increase in contact from the general
6 public. I would say prior to 2019 I got maybe a hundred or
7 so calls from the general public every year, usually
8 Sunshine Act and Right-to-Know Law, because, you know, if
9 you, you know, search on your computer for Sunshine Act,
10 Right-to-Know Law and violations, you're going to find me.
11 You're going to find our hotline. You're going to find
12 coverage by our members. And, folks are desperate for
13 information from their government, and they are desperate
14 to find out what the law says, what it means, how they can
15 use it, why it's not working for them. You know, you name
16 it, I have heard it from members of the public in the past
17 18 months.

18 And what I think the past 18 months has shown us
19 is that there are great strength in Pennsylvania law, but
20 there are also some weaknesses that need to be addressed.
21 And, many of those weaknesses that need to be addressed,
22 and many of those weaknesses are not COVID related.
23 They're not related to the pandemic. They are systemic,
24 and they've been there for a long time. So, I'm excited
25 today to bring some of those issues to your attention.

1 I submitted detailed written testimony that
2 is -- I'm not going to belabor that today. We all know how
3 to read. I will hit some highlights on Right-to-Know Law
4 and Sunshine Act. And as you know, they are Pennsylvania's
5 primary public access laws. In the absence of more
6 specific law, these are the two laws that Pennsylvanians
7 will look to to govern access to government information, or
8 information in possession of the government.

9 We have a few -- like the Ethics Commission, we
10 have a wish list, Christmas list if you will, for
11 Right-to-Know Law changes, and we are working with
12 Representative Schmitt on a comprehensive Right-to-Know Law
13 rewrite. We submitted a list earlier this year to this
14 committee and others -- legislators. So I won't talk about
15 that long list today, but we are looking forward to the
16 ongoing work of a comprehensive Right-to-Know Law rewrite.
17 We also support legislation that would bring greater
18 transparency to the state-related institutions: Penn State,
19 Pitt, Temple, Lincoln, Cheyney, and we're working -- there
20 have -- some -- there have been some bills in prior
21 legislative sessions by Representative Benninghoff. We're
22 working with Representative Staats currently.

23 One of the issues I do want to talk about
24 specifically today, because it's not really addressed in
25 the comprehensive rewrite is the issue of vexatious

1 requesters. And, we've heard complaints from local
2 agencies about people they consider vexatious, people
3 they -- that they believe are causing problems for the
4 agency's function, because of the number or the type of
5 requests that they submit. And, we understand the concerns
6 of the various stakeholders, but we don't believe this kind
7 of provision that would prohibit someone from filing a
8 Right-to-Know Law request is in the public interest. And
9 we also think that the facts bear that out.

10 There was a fairly recent study by the
11 Legislative Budget and Finance Committee that showed that
12 vexatious requesters are in fact quite rare. So, the --
13 you know, the -- a legislative push to address something
14 that is quite rare is a potentially slippery slope that we
15 might be heading down here.

16 We have concerns about these -- about the types
17 of vexatious requester bills that we've seen, the proposals
18 that we've seen, because they may be ripe for abuse by
19 agencies who either misunderstand them or misapply them.
20 In the informal conversations that I have had with elected
21 officials and their representatives, the concept of
22 vexatious requesters, when I hear from them, it sounds more
23 like they're talking about burden rather than vexatiousness
24 [phonetic], and those are two completely different
25 concepts, from both a legal and a practical perspective.

1 Just because a request may mean a lot of work doesn't
2 necessarily mean it is vexatious, right, and should be
3 subject to limitations. So, we have concerns that there
4 may be misapplication of a vexatious requester provision.

5 In that same vein, we are also concerned that the
6 vexatious requester bills that we've seen could inundate
7 the Office of Open Records who is already understaffed, I
8 believe. I'm not going to -- you know, they're here next,
9 so I will let them speak for themselves. But, I think the
10 Office of Open Records may not have the tools that they
11 need to address this kind of process. And I think the
12 bills that we've seen are based on laws from other states
13 that are really kind of apples and oranges. For example,
14 one of the bills we've seen is based on a provision of
15 Connecticut law. I'm not an expert on Connecticut, but
16 just -- you know, some quick research tells me that they
17 have a completely different municipal system than we do
18 here in Pennsylvania.

19 In Pennsylvania [inaudible] you know, we have
20 almost 3,000 local municipalities, each with their own
21 Right-to-Know Law official, plus over 500 public school
22 districts and charter schools subject to the law, plus all
23 the Commonwealth-level agencies. That's several thousand
24 potential petitions for vexatious requesters that could be
25 possible at any one time. Connecticut has 170

1 municipalities, including schools. So, I think when we
2 look at these provisions, we need to think about, in
3 practice, what would this actually mean? There are some
4 significant issues with the proposals that we've seen.

5 And we also have concerns about
6 constitutionality, because filing a Right-to-Know Law
7 request is a petition to your government. It is protected
8 speech under the 1st Amendment of the United States
9 Constitution. So, any time we set up a process by which
10 the government says and determines you cannot petition your
11 government for whatever reason, it raises constitutional
12 concerns. And we believe that the proposals, that we've
13 seen anyway, could be challenged on constitutional 1st
14 Amendment grounds in Federal Court. I don't think that's a
15 clear issue, but I think it's one that exists and needs to
16 be considered as the legislature moves forward, if the
17 legislature moves forward.

18 In our discussions with local government
19 representatives, we have also learned that vexatious
20 requesters do not include the media. They're not our
21 members. So, if these bills continue to move forward, the
22 media has to be exempt from any vexatious requester
23 process, to safeguard their constitutionally protected role
24 of -- in the free flow of information from and about the
25 government. So, that's something that we think deserves a

1 lot more scrutiny as the legislature moves forward, if it
2 decides to move forward on this vexatious requester
3 concept.

4 We also regularly hear about other laws that
5 create barriers to access. One of the ones that I have
6 heard about most commonly in the past year and a half has
7 been the Disease Prevention and Control Law. There are
8 problems with this law, because it's -- it grants broad
9 discretion to the Department of Health to deny access to
10 health information without justification, and without
11 review, which is very different than the cornerstones
12 public of -- the cornerstones of public access that are
13 really enshrined in Pennsylvania law.

14 Just a few examples of things that are non-COVID
15 related that have caused issues under the Disease
16 Prevention and Control Law. So for example, in one case
17 the CDC identified a case of E. coli in Pennsylvania from
18 an outbreak spanning two months. So a requester, one of
19 our members, sought records that would show what county the
20 case was located in, if any cases were reported in specific
21 counties, and whether E. coli was the cause of death in
22 2017, and if so, how many? That's all aggregated data.
23 We're not talking about information to -- specific to a
24 particular person. The Department of Health denied access.

25 In another case in 2018, a journalist sought

1 records related to investigations into -- in the recall of
2 a particular syringe that diabetics had used and gotten
3 infections. The Department of Health denied access.
4 Again, nobody was seeking specific information about
5 people. They were seeking information about the Department
6 of Health's actions and what was being done to keep
7 Pennsylvanians safe, and the Department of Health denied
8 access because the DPCL allowed them to.

9 Again, a requester sought reports regarding an
10 outbreak of legionnaire's disease at a particular hospital.
11 Again, we wanted information about where, when, what, not
12 who. And again, access was denied. Finally, a USA Today
13 reporter sought lead blood test levels for children under
14 the age of eight in an aggregated form. They just wanted
15 raw numbers: how many kids are getting lead poisoning in
16 Pennsylvania. Department of Health denied access. We
17 don't believe those denials were appropriate, but they were
18 allowed under the DPCL.

19 There are important health situations the public
20 has a right to know about and to gauge Department of
21 Health's response to them, because it's their job to keep
22 us safe. So they have to be accountable to the public that
23 they serve. We believe that's a fundamental function of
24 all government agencies, not just the Department of Health.

25 We believe the DPCL's access provision is

1 inconsistent with the presumption of access that forms the
2 cornerstone of Pennsylvania law, and we applaud this
3 committee and the House for passing HB 1893. We understand
4 there may be still concerns about access to personal
5 medical information. That is not what this -- that is not
6 what HB 1893 is about. No one is seeking access to it. We
7 continue to work with the Senate to include amendatory
8 language that makes that clear. We are not looking for
9 anyone's personally identifiable information. We're
10 looking for aggregated data and records that would show
11 whether or not health departments are responding
12 appropriately to disease outbreaks in their communities.

13 Again, we are working with the Senate on
14 amendatory language to make that clear, and bipartisan
15 approval is our goal. And I think we can get there.

16 With regard to the Sunshine Act, which is
17 Pennsylvania's public meetings law -- that's the law that
18 says any time a quorum of an agency discusses agency
19 business, it has to do so at a public meeting, unless -- a
20 few limited exceptions apply.

21 So, we were excited to see Act 65 of 2021
22 sponsored by Senator Pat Stefano that was signed into law
23 earlier this year that provides for agendas in advance.
24 Prior to this law, folks really had no clue what was on the
25 agenda for an upcoming meeting, because the law didn't

1 require them to -- didn't require agencies to tell us. Now
2 agencies tell us what is on the agenda for a particular
3 meeting. Members of the press, members of the public can
4 plan to attend if the meeting sounds like something they
5 have a direct interest in, or they are particularly
6 informed about. It's pro transparency, and it's a way to
7 foster public participation at public meetings, which leads
8 to an informed and actively involved citizenry. And that's
9 the goal of government transparency, you know, at its base
10 level. So those are good things, and we were, you know,
11 excited to see that happen.

12 We also support Senator Stefano's Senate Bill 507
13 which would require all committee meetings and hearings to
14 be recorded and posted online, and if technically possible
15 to require the proceedings to be live streamed. Again,
16 anything the -- anything that legislature can do to expand
17 access or make public meetings more accessible is
18 wonderful.

19 I've seen -- you know, if there is any silver
20 lining to the pandemic, it's that it has shown the
21 government's flexibility and capability to bring more
22 people into the decision-making process. And when
23 they -- when I have spoken with local agency
24 representatives, they said, you know, they have had more
25 interest and more activity when they, you know, make a

1 conference call line open, stream their meetings. You
2 know, those are all things that affirmatively help the
3 people participate in their government, so those are all
4 good things.

5 I wish I could say the Sunshine Act works great
6 all the time. Unfortunately it does not. Enforcement is
7 one of the biggest problems with the Act, because agencies
8 can ignore it within impunity, and that's been the case as
9 long as I have been in this job, and for decades before.
10 It's very difficult to enforce, and this is due to a few
11 different reasons. It's not all -- I don't think there's
12 a -- one fix -- one easy fix that can get at all of the
13 enforcement issues.

14 But, one of the biggest issues is the burden of
15 proof. And you touched on that earlier in your questions.
16 The burden of proof -- the text of the law itself is silent
17 on burden of proof, but the courts have determined that the
18 burden of proof lies with the public who has been excluded
19 and has no information upon which to make a showing in a
20 court, because you weren't at the meeting, right? They
21 held it without you. So, that makes it impractical at best
22 to meet a burden of proof.

23 It's also inconsistent with the burden of proof
24 that was enshrined in the Right-to-Know Law. The
25 Right-to-Know Law, because the government has all of the

1 information about the records, the government also has the
2 burden of proof in any legal challenge. And that's
3 consistent in -- with most states on public access and
4 transparency laws. The party with the access to the most
5 information should bear the burden of proof. We believe
6 the Sunshine Act should reflect that and be consistent with
7 the Right-to-Know Law.

8 Deliberation: if you look at the law itself, it
9 defines deliberation pretty expansively. It's the
10 discussion of agency business held for the purpose of
11 making a meeting -- or held for the purpose of making a
12 decision. I think the problem comes in there, because the
13 Act prohibits any quorum deliberation outside a public
14 meeting, but it doesn't specifically list or prohibit
15 practices.

16 And, in the past, I'd say, four or five years
17 we've seen regular examples of agencies using advanced
18 communication technologies like group texts, group emails,
19 conference call lines, where they're having quorum
20 deliberation of agency business, and in some cases even
21 making decisions using this type of technology. It's very
22 easy to use for most folks who are elected officials, and I
23 think amending the Act to expressly prohibit the use of
24 advanced communication technologies for deliberation would
25 go a long way in enforcement, and at least clear up some

1 questions about whether or not it's actually allowed.

2 Penalties: the penalties were increased
3 significantly in 2012. As far as I am aware of, they have
4 not been imposed in that time, again, because enforcement
5 is so difficult, for a number of reasons. We believe that
6 one of the problems is there is no statewide administrative
7 agency that oversees Sunshine Act compliance.

8 When I get a call from a member of the public, I
9 -- my first action is to say you need to contact the Office
10 of Open Records, because they don't enforce the law, but
11 they train on it, and they have wonderful resources on it.
12 So I say contact the open -- the Office of Open Records for
13 more information, but then I also say the Sunshine Act is a
14 citizen-enforced law, at least the civil aspects of it.
15 So, if you want to challenge your agency's alleged
16 violation -- you know, they voted on a contract outside of
17 public meeting, and you think that deserves an injunction,
18 or it deserves to be thrown out, your only option as a
19 citizen is to file a lawsuit. Litigation is time
20 consuming, costly and intimidating for most people. It's
21 just not an effective -- it's not an effective enforcement
22 mechanism.

23 And, one of the reasons that there's not a lot of
24 incentive for attorneys to take those cases on a
25 contingency-fee basis is because the penalties themselves

1 can only be awarded when an agency is found to be in
2 willful and wanton violation of the law. That is a very
3 high standard. As far as we are aware, that's never been
4 imposed in the law's, you know, 60-year history.

5 We believe that it would ease enforcement and
6 encourage compliance if courts could award damages whenever
7 they found a violation. And I say could, not shall,
8 because that's an important distinction. We recommend
9 amending the law to allow a court to impose -- impose legal
10 fees or a proportionate section thereof any time a court
11 finds a violation has occurred. That would encourage both
12 legal -- skilled legal practitioners to take cases, because
13 they are more likely to recover their fees, and it would
14 discourage agencies who are fearful of, you know, violating
15 the law and possibly being sued.

16 The other issue from a Sunshine Act perspective
17 are legislative task forces. Legislative -- these
18 legislative bodies are not expressly addressed in the text
19 of the Act, and there is -- we see bills again and again
20 and again that either seek to put them in or take them out.
21 So, there is some ambiguity about whether these legislative
22 task forces are actually covered by the law. We believe
23 that they are. Many public officials believe that as well,
24 but the law is a little bit ambiguous. So, we would
25 recommend that the important work of these task forces

1 should be conducted in public, subject to the public
2 meeting requirements of the law, as well as any applicable
3 exemptions that would allow certain sensitive subjects to
4 be discussed behind closed doors; security for example.

5 With regard to virtual public meetings, we have
6 seen a few proposals about allowing agencies to have a
7 virtual meeting either in emergency situations or whenever
8 they choose. We think virtual technology can be a good
9 complement to a traditional in-person public meeting, but
10 they cannot take the place of sharing space with your
11 elected officials. It's just not the same thing.

12 I mentioned earlier that I've heard anecdotal
13 evidence from elected officials and their representatives
14 that say they've had better participation when they put up
15 a live stream, or when they, you know, allow people to call
16 in on a conference line. Anything that increases public
17 participation, makes it easier for the public to
18 participate, is a good thing from a transparency
19 perspective. So, we believe that virtual meetings are a
20 good complement to in-person meetings, but we don't believe
21 they should take the place of a traditional in-person forum
22 between elected officials and the people they represent.

23 And I'm going to turn it over to Shane now who is
24 going to talk a little bit about his perspective, and then
25 we'll be happy to answer your questions.

1 MR. FITZGERALD: Thank you, Melissa. Good
2 morning, Chairman Grove, Chairman Conklin,
3 Sub-Chair Schemel and members of the House State Government
4 Committee. I'm Shane Fitzgerald, and I'm honored to
5 testify in front of you today.

6 Our company, Gannett, represents more than 260
7 daily newspapers across the country in 46 states and 400
8 weeklies. And, the 14 publications I oversee in
9 Pennsylvania stretch all through the state, from Erie to
10 Bucks County, from Honesdale to Somerset and several places
11 in between, including York County.

12 I've been Executive Editor in Pennsylvania, in
13 Beaver and Bucks County since 2013, and I have extensive
14 experience in Texas, Colorado and New Jersey in my
15 long -- my getting-to-be-long career in journalism.

16 In the states I've work in and done this kind of
17 work for a long time now, Pennsylvania is one of the more
18 difficult states in which to get public information. Our
19 papers routinely run into various legal processes that
20 provide -- that we have to overcome access denials. For
21 example, one of our papers, *The York Daily Record*, has been
22 heavily involved in a quest for access from the York County
23 Clerk of Courts by denying free access to judicial records.

24 Citizens have a right to look at the criminal
25 files without paying fees for them, and without significant

1 delays. Our reporters are regularly involved in Right-to-
2 Know Law appeals with the Office of Open Records, in many
3 cases where agencies denied access only to have OOR agree
4 with our journalists in finding the records public, and
5 they must be provided.

6 In addition to the legal process, one of the most
7 common barriers my staff of journalists face is delays,
8 often unnecessary and administrative procedures that waste
9 our time and the agency's resources as well. My colleague
10 from *The Altoona Mirror*, Kay Stephens, noted that the
11 Right-to-Know Law should include explicit language that
12 governing bodies are free to provide public documents
13 without it requiring a formal Right-to-Know request. The
14 State Office of Open Records has long taken this position,
15 and the OOR includes this language in its educational
16 training.

17 While some local agencies are accommodating,
18 others get very nervous about giving us anything at all of
19 any kind of documentation. And due to this hesitation,
20 they require Right-to-Know requests to be submitted, and
21 then they take five days to respond. That's frustrating
22 and unnecessary when you're asking for a document that
23 should be easily recognized as a public record, or just
24 need some information that can be found with -- on a single
25 public document. Requiring a formal Right-to-Know requests

1 for clearly public records just wastes time, energy and
2 money.

3 The Right-to-Know process is there for times when
4 there is some doubt about whether the record is public. It
5 is not necessary or appropriate when the records are
6 clearly public and accessible.

7 In addition to those barriers that delay access,
8 many agencies misapply or overuse the time extension
9 provision in the Right-to-Know Law. Every day, it seems,
10 one of our editors is dealing with this. Some agencies
11 routinely take the maximum amount of time to even respond
12 to a request and then ask for a 30-day extension over and
13 over again. And I've seen them gone on as long as 16
14 months in my career, stalling things out, filing with the
15 courts -- it -- for records that are clearly public.

16 Understandably, this has been made worse with the
17 pandemic, and it's been -- but it's been an ongoing problem
18 since before COVID came around. Right-to-Know Law requires
19 agencies to respond to requests as prompt -- quote, as
20 promptly as possible under the circumstances, but not
21 longer than five business days. And then that 30 day --
22 that 30 day -- excuse me. That 30-day calendar days is
23 limited circumstances. Well, there -- it doesn't seem to
24 be limited. We have entities that will go -- keep going
25 back to. We've had one over and over and over again, and I

1 call her every time that we need -- or email her.

2 *The Bucks County Courier Times* were -- that's my
3 main paper I oversee -- has experienced numerous access
4 issues, and the most recent denials have been result of
5 disease prevention and control to become an impenetrable
6 barrier that blocks public access and accountability in
7 related infectious diseases and other common community
8 health issues.

9 We heartily support House Bill 1893, which was
10 sponsored by Bucks County Representative Craig Staats,
11 which replaces Section 15 of the DPCL, the provision that
12 disease information under the Act is subject to the
13 Right-to-Know Law. We're grateful to the Committee and to
14 the House for the work on that bill.

15 On to the Sunshine Act. I won't belabor that too
16 much, because Melissa really laid that out well. But,
17 we're seeing violations of -- very often, much like she
18 said and you had heard earlier in testimony awarding
19 contracts to family members, to businesses without bidding
20 processes, taking votes over the phone and email without
21 public input or oversight, shutting the public out of
22 meetings when -- and then -- and conducting business
23 in -- and misusing executive sessions in particular.

24 *The Beaver County Times*, one of the papers in my
25 network, and a former paper of which I was an editor, has

1 seen numerous alleged open meetings violations recently. A
2 recent letter to the editor even said, quote, the lack of
3 borough transparency is egregious and unlawful, and there
4 are other examples in -- outside of Beaver County.

5 Another one of my colleagues from *The Sharon*
6 *Herald* has reported on numerous Sunshine Act concerns.
7 West Middlesex Borough council members took official action
8 in virtual secrecy by voting by phone and by email. The
9 council's actions appear to be a glaring violation of the
10 State Meetings Law. The apparent violations uncovered in a
11 June report by the State Ethics Commission show council
12 members voting on street projects through individual phone
13 calls in 2018.

14 West Middlesex Borough Council faces another
15 allegation of an Open Meetings Law violation, this time in
16 2020 for apparently failing to hire a contractor in a
17 public meeting.

18 In a recent editorial, a colleague noted, quote,
19 local government in Western Pennsylvania is often sloppy
20 and secretive. It frequently violates the spirit if not
21 the letter of the state Right-to-Know Law and Open Meetings
22 Laws. This newspaper, like any newspaper, encounters
23 almost daily barriers, big and small, erected by public
24 officials. They help subvert the intent of the law and
25 thus democracy itself by phoning votes, concealing a labor

1 contract, withholding information on an executive session,
2 or concealing how government operates in a zillion other
3 ways.

4 *The Pittsburgh Tribune Review* reports that a
5 Monessen Council's January 6th, 2020 meeting, the Mayor
6 utilized the majority of council votes to fire a city
7 solicitor and a city administrator, changed the date and
8 time of council meetings without asking other council
9 members, appointed committee members of a -- as a single
10 motion and adjourned the meeting without allowing public
11 comment, along with five other administrative moves that
12 came with no public explanation other than saying, we're
13 moving in a new direction.

14 The -- in late 2020, *Erie Times News* reported
15 that in only its second meeting the Erie County's new
16 community college board of trustees voted by secret ballot
17 to name a board chairman, running afoul of the Sunshine
18 Act's requirement that all votes be cast publicly.

19 We hear about these issues consistently and
20 believe the law should be amended to encourage compliance
21 and ease enforcement.

22 Another issue we've encountered is virtual
23 meetings, which we do not -- as Melissa noted, we don't
24 support as replacement for in-person meetings. We support
25 virtual meetings as a complement to traditional in-person

1 meetings, but only when they are transparent and allow
2 public to fully participate.

3 We held correctly in tandem -- when held
4 correctly in tandem with in-person meetings, virtual
5 meetings do allow for citizens to access and participate in
6 local government proceedings, and that's good public
7 policy. Journal is certainly appreciated as our ranks have
8 diminished, being able to be flexible for virtual meetings.
9 The Agenda Law is another one that's just been very helpful
10 for us covering government, because we cover so many
11 meetings in our coverage areas, the 500 -- the school
12 districts and the thousands of municipalities. So, making
13 those meetings more accessible to the press and to the
14 public -- anything that would jeopardize public access to
15 and engagement in those meetings really should be noted and
16 avoided.

17 We do have to recognize that in many places in
18 Pennsylvania there is a lack of internet access, and makes
19 virtual participation a nonstarter in some places in our
20 state still, and for many of our communities in Rural
21 Pennsylvania. With the exception of technical challenges
22 to be addressed, resolved and management, government and
23 its citizens benefit most from the hybrid public meeting
24 option. And -- a required in-person meeting that requires
25 public officials to be physically present to constitute a

1 quorum at locations that remain physically accessible to
2 the public, and along with a live stream and conference
3 call options for those who cannot or choose not to attend
4 in person, that will maximize transparency and foster
5 public participation.

6 At the end of my written testimony, we've given
7 you examples of 43 instances of egregious or semi-egregious
8 examples of the kinds of things we're talking about here.
9 I invite you to look at the volume of that and understand
10 that there certainly are issues here that need to be
11 addressed. And, we really will encourage your support in
12 any legislative efforts to improve the Right-to-Know Law,
13 the Sunshine Act, and I am happy to answer any questions
14 that you all may have now.

15 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you.
16 And yes, I saw the long list of examples. That actually is
17 very helpful to kind of give us --

18 MR. FITZGERALD: Yeah.

19 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: -- you
20 know --

21 MR. FITZGERALD: I'll --

22 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: -- concrete
23 ideas of what --

24 MR. FITZGERALD: I'll thank the PNA --

25 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: -- should

1 fix --

2 MR. FITZGERALD: -- and my colleagues across the
3 state. Being part of those groups, we talk a lot about
4 these issues.

5 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Great.
6 Thank you. Representative Wheeland?

7 REPRESENTATIVE WHEELAND: Thank you both so very
8 much for your testimony today. How has the manner in which
9 you and your colleagues conducted business -- how was it
10 affected during the state of emergency during the pandemic?

11 MR. FITZGERALD: I'll take that one. Greatly, of
12 course. You know, we weren't able to wander into meetings
13 and have the day-to-day contact we would have with every --
14 representatives, with people in the community. So much was
15 done virtually. We've really had to adapt.

16 And I would offer to you that some of the changes
17 with the agenda and the public meetings has really,
18 actually been helpful. I find very little positive about
19 COVID-19 and the pandemic, but being able to expand our
20 coverage area and reach, you know, through these virtual
21 meetings and through that, the technology part of it, I
22 think that's been transformative in many ways for
23 journalists.

24 REPRESENTATIVE WHEELAND: And now that the
25 emergency declaration has been rescinded, what's your

1 experience now?

2 MR. FITZGERALD: There's still a lot of anxiety
3 in the community and, frankly, among some of our
4 journalists, too. They're not a hundred -- you know, not
5 all of them are, you know, 100% back to where we were. I
6 think for us, we've become more efficient and smarter about
7 where we go and what we do. We're better prepared. We
8 don't just show up. We're making sure we're contacting
9 folks. It used to be you drop in, and you stop by and see
10 one of you guys, or -- and that doesn't happen nearly as
11 much anymore in any of those local entities. But we --
12 we're getting in a better routine about that now.

13 REPRESENTATIVE WHEELAND: So, to be a little bit
14 more specific, how is your ability to receive information
15 from state agencies right now?

16 MR. FITZGERALD: It's been pretty good, honestly.
17 Many state agencies are -- you know, we're on all the
18 mailing lists. We actively go out if we're missing
19 something that -- you know, most state entities actually
20 are quite good about at least providing basic information.
21 It's the follow-up and -- you know, if they -- when we
22 start asking tough questions, that part of it hasn't
23 changed.

24 MS. MELEWSKY: As far as the Right-to-Know Law
25 process goes, I've heard from members across the state that

1 it's a kind of a -- bit of a mixed bag at this point from a
2 Right-to-Know Law perspective. I mean, Shane talked about
3 the overuse or misuse of the 30-day extension. With most
4 state-level agencies it's routine. It's -- and that's not
5 particular to COVID. They always take five business days
6 and 30 calendar days as a matter of course. That has not
7 changed. That didn't change during the pandemic other than
8 to say some agencies stopped responding to requests all
9 together. I think they've all started to respond to
10 requests, but they still routinely take the 30 -- the --
11 you know, the five business and 30 calendar days.

12 At the local level, there is still probably a bit
13 of a backlog, where people are taking the 30-day extension
14 either as a routine matter where it's not necessary, or
15 just because they -- you know --

16 MR. FITZGERALD: At -- particular in the middle
17 of last year, it was very difficult to get any response to
18 Right-to-Know Laws. That has improved substantially, but
19 we're not 100% there. And the 30-day extension is quite
20 frustrating for our journalists, because that happens far
21 more than the law would seem to have intended it.

22 REPRESENTATIVE WHEELAND: Are there any
23 other -- currently any other areas that you're struggling
24 to get information, you know --

25 MR. FITZGERALD: It --

1 REPRESENTATIVE WHEELAND: -- separate from the
2 Right-to-Know --

3 MR. FITZGERALD: It's hit and miss of small --
4 smaller entities can be very difficult to get information
5 from. The larger state agencies less so. You know, it
6 really varies from community to community, from entity to
7 entity.

8 MS. MELEWSKY: And we've --

9 MR. FITZGERALD: We have --

10 MS. MELEWSKY: We've already -- we've discussed
11 the Disease Prevention and Control Law and the barrier to
12 access that that creates. That obviously has not improved.
13 It's been a problem for a long time, but the -- you know,
14 the COVID pandemic has highlighted why it's such a
15 significant problem for health records as a general matter.

16 There are other -- many other laws and
17 regulations, and even court orders in some cases, that will
18 supersede the Right-to-Know Law and its presumption of
19 access. So, we hear about those pretty regularly.

20 MR. FITZGERALD: One office that we consistently
21 have a problem with, coroners' offices, and getting
22 information that we would need, and that's been a
23 longstanding problem as well. So, they don't seem --
24 that's probably the most difficult office in any of our --
25 in general to get any information out of.

1 REPRESENTATIVE WHEELAND: And in defense of the
2 coroners, they're having trouble getting information
3 from --

4 MR. FITZGERALD: That -- well --

5 REPRESENTATIVE WHEELAND: -- the state --

6 MR. FITZGERALD: -- that is true.

7 REPRESENTATIVE WHEELAND: And access to --

8 MR. FITZGERALD: At times.

9 REPRESENTATIVE WHEELAND: Right. Well, that kind
10 of leads right into -- speaking of the DPCL, is there
11 anything that we've forgotten? Anything that -- I mean,
12 obviously there was a lot of problems with you folks not
13 being able to get information under the guise of that. Is
14 there anything that we've forgotten or we should look at?

15 MS. MELEWSKY: The only thing that we're dealing
16 with, at least on the Senate side at this point, is
17 the -- I think there's a misunderstanding that these
18 efforts to bring these records under the umbrella of the
19 Right-to-Know Law somehow means that personal medical
20 information would be public. I mean, we've seen that in
21 editorials in our own member newspapers. That's just not
22 the case. I mean, the Right-to-Know Law itself has a
23 robust exemption that makes personal medical information,
24 individually identifiable medical information, exempt from
25 public access. And the legislature had detailed

1 conversations about that during the Right-to-Know Law's
2 legislative process. That's not what this change is about.
3 This change is about access to things like aggregated data,
4 numbers, the Department of Health's response to an
5 infectious disease outbreak. Those are the records that I
6 think should be public in many circumstances. No one's
7 asking for, you know, your medical history. No one's
8 asking for Representative Schemel's diagnosis. That's not
9 what this is about.

10 So, I think the thing that we're trying to
11 address, on the Senate side at least, is inserting language
12 that makes that even more clear than we think the
13 Right-to-Know Law already makes it. Just so everyone's
14 comfortable.

15 MR. FITZGERALD: You had asked earlier, just
16 what's changed? And, one of the things we really pivoted
17 to is very data driven, factual information that we can
18 garner and that aggregated data. We're not looking to, you
19 know, out your dad or your grandmother and that because he
20 or she had COVID. We just want the aggregated data to find
21 out what the impact was at the nursing home tragedy,
22 frankly, in the state, and be able to find information like
23 that. We're not looking for names. We're looking for, you
24 know, what really happened here as a prime example.

25 REPRESENTATIVE WHEELAND: Well, I remember when

1 that argument was first made. And I was scratching my
2 head, and I could never quite understand or grasp what the
3 issue was, because you weren't going to, you know, get down
4 into Social Security numbers and --

5 MR. FITZGERALD: No.

6 REPRESENTATIVE WHEELAND: -- medical records,
7 and --

8 MR. FITZGERALD: Yeah, demographics and volume,
9 frankly.

10 REPRESENTATIVE WHEELAND: And, you know, that's
11 been one of my complaints since day one, the start of this
12 pandemic, is, you know, the people need to know.

13 MR. FITZGERALD: Right.

14 REPRESENTATIVE WHEELAND: And the data points are
15 not being provided, in my humble opinion, that would be
16 helpful to the citizens of Pennsylvania. So --

17 MR. FITZGERALD: Good, bad or indifferent, at
18 least you know what's going on. And you need that data to
19 determine that.

20 REPRESENTATIVE WHEELAND: Correct. So again,
21 thank you very much for your testimony. Thank you --

22 MS. MELEWSKY: Sure.

23 REPRESENTATIVE WHEELAND: -- Mr. Chairman.

24 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you.

25 Representative Grove?

1 MAJORITY CHAIRMAN GROVE: Thank you. I echo your
2 concerns with the Disease Prevention Control Act. I mean,
3 I think it's a timing issue. That law was written in 1955,
4 before we had -- or actually any of us were alive today,
5 but also a time where the RTK laws, government transparency
6 laws were not available. So, they put a provision in there
7 to allow some data access. Today, we know -- well aware of
8 all the provisions and RTK. And I think it's an issue of
9 individuals not actually reading the actual RTK law, the
10 protections built into that and just assume it's a wide
11 open net. So, hopefully we can kind of correct the
12 education around that.

13 You hit on a pet peeve of mine: 30-day
14 extensions. From what I've seen with local government
15 school districts, some may do an extension, but they never
16 take the full 30. Like they say, okay, I can't get it
17 within the five days. Here's ten, 15 days. Here's your
18 information. State agencies use a blanket automatic 30
19 days, and they take their full 30 days to provide stuff,
20 some of which they had available.

21 Other things we may be seeing are individual --
22 are state agencies denying it, then magically providing it
23 on appeals, which begs the question, did they have it to
24 begin with, and why are you putting taxpayers and residents
25 through an RTK appeals process when you probably had it in

1 the first place? Is that view correct on state agencies
2 versus local? We don't deal with those locals on RTKs a
3 lot, but can you give -- kind of give that perspective of
4 those?

5 MR. FITZGERALD: I've seen it on the local level,
6 too. I --

7 MAJORITY CHAIRMAN GROVE: Too? Okay.

8 MR. FITZGERALD: I think it can be just like if a
9 reporter, for instance -- you know? We have one reporter
10 who -- she's tough. And when, you know, you get a phone
11 call from her or an email from her, you know, they're
12 afraid of her, and they'll hold it. You know, they'll hold
13 things and make it difficult. And --

14 MS. MELEWSKY: I mean, what I hear from our
15 members on our hotline is that the state agencies routinely
16 take the 30-day extension. And sometimes that's because of
17 volume. I don't know that that's one of the reasons the
18 Right-to-Know Law -- there's an extension provision that
19 says, you know, staffing limitations allow extra time.
20 There's no way for us to actually gauge whether that's
21 actually happening behind the scenes or not, but the law
22 presumes agencies act in good faith, so we presume they act
23 in good faith as well.

24 But it is a problem, and it's not -- it is
25 absolutely happening as a routine matter at the

1 Commonwealth agency level, but it also is a significant
2 problem at the local level as well.

3 MAJORITY CHAIRMAN GROVE: Okay.

4 MR. FITZGERALD: We've gotten to the point where
5 we just mark the 30th day on the calendar, and that's when
6 you go check back on it. That's how -- I mean, it
7 shouldn't be that routine. You -- it -- you know, that's
8 not the spirit of the law at all.

9 MAJORITY CHAIRMAN GROVE: Right. Mr. Fitzgerald,
10 in your written testimony you mentioned the reluctance
11 [phonetic] of local agencies to give out any sort of
12 documents which forces the need for RTK requests. Do you
13 believe -- what do you believe is causing this hesitation?
14 Is there something that you have seen in other states that
15 they have worked on to try to correct that?

16 MR. FITZGERALD: I think it's fear. I think it's
17 local people. They're afraid of doing something wrong and
18 getting in trouble. I think it has to do as much with that
19 as anything else. They all -- the Open Records officers
20 usually report up to somebody. They're waiting to make
21 sure that it's okay to give it, even if it is really
22 public. You know, I think that's why really making clear,
23 you know, the -- you know, things that are obviously
24 public, budgets, you know, salaries, that kind of thing,
25 that there shouldn't be a 30-day extension for things like

1 that, or even a five day. They should be -- in Texas the
2 law was rewritten to within a -- you know, with -- I think
3 it -- something to where you basically had 48 hours to turn
4 it over or --

5 MAJORITY CHAIRMAN GROVE: Right.

6 MR. FITZGERALD: -- turn it around. It -- I'd
7 have to go back and look at the law, but that was what
8 changed there that was significantly different than what's
9 here in Pennsylvania.

10 MS. MELEWSKY: And one of the --

11 MAJORITY CHAIRMAN GROVE: Got you.

12 MS. MELEWSKY: One of the things -- I'm sorry to
13 interrupt.

14 MR. FITZGERALD: No.

15 MAJORITY CHAIRMAN GROVE: No, go ahead.

16 MS. MELEWSKY: One of the things that I think
17 that -- I think that's the result of a lack of
18 understanding of the law. I mean, if you read the
19 Right-to-Know Law, it's lengthy, and it's complex, and
20 there's a -- literally thousands of cases have been decided
21 since it was implemented in 2009.

22 Now, the Office of Open Records is required to
23 give annual training, but the agencies are not required to
24 take it. And, there's a high amount of turnover at both
25 the local and state level for Right-to-Know Law officials.

1 I mean, who is the Right-to-Know Law official today might
2 be different two weeks from now. So I think a better
3 understanding of the law, its purpose, its foundation would
4 go a long way in easing some of those fears. If they
5 really were comfortable with the way the law works, they
6 might not be so hesitant to say, oh, here's a copy of that
7 budget. You don't need to file a formal written request
8 and wait 37 days.

9 So, I think education can play a big part in
10 addressing that issue, but it's not -- education is not
11 mandatory --

12 MR. FITZGERALD: There are states that require
13 Open Records trainings, whether it's annually or
14 biannually, of all of its government employees.

15 MAJORITY CHAIRMAN GROVE: Got you. I know. OR
16 is next, and they do wonderful job of web -- constantly
17 doing web training for individuals of providing that.

18 Last question: we do have this issue of vexatious
19 requesters, and then we have this other issue on -- we'll
20 call it like business requesters, right? Going to go into
21 local agencies, ask for all your contracts, see if I can
22 get a lower bid on the next round of contracts and stuff.

23 I view that as almost one and the same, but we
24 happen to handle that as other policies. In your
25 view -- and we do have the study kind of looking at the

1 vexatious requesters, and there weren't a lot of them. If
2 you handle, kind of, the business request end, do you think
3 that would limit the scope of the whole vexatious requester
4 issue? Or are they, like, basically one and the same, and
5 we're trying to capture those same people in that?

6 MS. MELEWSKY: I think it depends on the
7 Right-to-Know Law official and the agency you're dealing
8 with. I think vexatious is someone using the law for --
9 you know, for bad purposes; is a bad actor, right? That's
10 rare and inappropriate. You know, there's no question,
11 that's not what people should be doing. The problem is
12 whether or not the officials who are applying that
13 vexatious standard are applying their own subjective
14 understanding of what that actually means. Is it vexatious
15 because it means I have to do 15 hours of work this week?
16 That's not vexatious. That may be burdensome, but that's
17 not vexatious.

18 So I think if you address commercial
19 requesters -- and I think the -- some of the bills we've
20 seen have attempted to do that by charging fees to allow
21 those people who have to work 15 hours to recoup costs
22 associated with that from commercial oppressors who will
23 use public records. They'll take it, and they'll sell it,
24 right? That's a commercial request. I think that may help
25 illustrate the dichotomy that exists between those two

1 concepts, or at least give a differentiation for the people
2 who are thinking about those issues.

3 I think the -- it may mean that agencies would
4 use -- if there's a commercial requester provision where
5 there's fees for commercial requests, it may mean they're
6 less likely to think of someone as vexatious. But again,
7 it's really a subjective -- it's really a subjective
8 determination based on the agency itself and its own
9 understanding of how those provisions would apply. I think
10 commercial requesters -- you know, it's -- that's a clear
11 standard. Are you going to use this, or are you going to
12 resell it, right? I mean, they have to swear under penalty
13 of law. That's very different than this concept of
14 vexatiousness. And I think commercial is easier to apply
15 in practice than this concept of vexatiousness.

16 MAJORITY CHAIRMAN GROVE: Thank you, both.
17 Really appreciate your time and your constant vigil watch.
18 Thank you.

19 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:
20 Representative Ryan?

21 REPRESENTATIVE RYAN: Thank you so much. I took
22 a couple seconds to get the video turned back on. First of
23 all, I really appreciate this testimony. I think it's very
24 helpful. And I've been on both -- kind of both sides of
25 the aisle of the Right-to-Know issues in the past, and I

1 truly appreciate your support of my litigation that was
2 related to Act 77 of 2020 from Representative Grove, where
3 the Governor let that lapse into law, and it was related
4 to -- issues related to the pandemic. So, I truly
5 appreciate that.

6 The question I have for you -- as I agree with
7 you that there -- with vexatious folks it's -- they're
8 probably few and far between. The same thing is probably
9 true in government, where the bad actors within government
10 hopefully is equally as few and far between, as someone who
11 is relatively new on the legislative side.

12 Do you see any situations where we need to
13 strength the law for the protection of the public as well,
14 as it relates to confidentiality of certain issues that are
15 going on? As an example, there is a -- an inherent right
16 in the Pennsylvania Constitution about protection of libel.
17 And so when you talk about the training, does it make sense
18 to have training not only of those in government, but also
19 those in the legal profession, so that they're clear? I
20 would -- from my experience, if you ask six different
21 attorneys a question on Right-to-Know, you'll get six
22 different answers. And so if someone is working either in
23 government, or if someone is requesting the information,
24 they're getting quite different opinions about what is
25 appropriate, what is not, which leaves those of us who are

1 not attorneys between a rock and a hard place.

2 How would you address that? Unless you don't
3 think it's a problem at all.

4 MS. MELEWSKY: Well, I -- as an attorney, I mean,
5 we are required to take 12 credits of continuing legal
6 education every year, two of which are ethics based.. I
7 train other attorneys along with folks from the Office of
8 Open Records, from PSATS, from the Boroughs Association.
9 You know, we work cooperatively with these local agencies
10 and the Office of Open Records to give the attorneys who
11 choose to take these trainings a broad perspective of what
12 the law requires, some of the nuances that exist. I don't
13 know that you'll ever get six lawyers to agree to the same
14 opinion on a particular piece of law, but the training is
15 there and available, and I think attorneys are generally
16 pretty smart people. And if they're going to operate in
17 the Right-to-Know Law context, I think they realize that
18 taking a training on an annual basis or semiannually is
19 only to their benefit and their clients' benefit.

20 So, I don't know that -- training is mandated. I
21 don't know that you can actually -- I don't know that there
22 are any other subjects that are -- like for example, I
23 don't know that attorneys have to take a certain number of
24 specific substantive credits. They have to take at least
25 two ethics and then any other ten substantive. I think

1 there's flexibility there. But, I think the resources are
2 available to them.

3 REPRESENTATIVE RYAN: We've heard testimony
4 earlier today, and I'm a former instructor and author of
5 texts for CPE, for CPAs, many of which counted also for
6 CLE. And so I appreciate your comment on that, but you and
7 I both know the measure of effectiveness for those hours is
8 if the student is in the room when the material is being
9 taught that they get the credit for those hours.

10 MS. MELEWSKY: Uh-huh.

11 REPRESENTATIVE RYAN: And my concern is for the
12 99% -- and I'm making up a number, obviously -- of people
13 who wish to try to comply with this with all good faith
14 getting disparate information about what it actually covers
15 on both sides of the issue. What is being requested versus
16 the information that has to be provided, you'll get --
17 frequently will you get a -- at least from my experience.
18 Frequently, you will not get a black-and-white answer.
19 You'll get a gray answer. And for those that are in good
20 faith attempting to comply with the Right-to-Know
21 information, Right-to-Know request, I'm wondering if there
22 is a better way to provide that type of ability to
23 reconcile it before it gets into a litigation effect.

24 In the world -- I do bankruptcy. I used to do
25 bankruptcy for a living; help keep companies out of

1 bankruptcy. We would have a mediation process to where
2 someone could possibly review it without going to all the
3 expense and the headache and, candidly, the delay of a
4 Right-to-Know request. I think in my case we did the
5 Right-to-Know request and got the information after it was
6 going to be in a -- we wanted the right to open records,
7 and we had to go to Commonwealth Court. And then, before
8 going to Commonwealth Court, the Governor's office settled
9 with us, and we got the information. And that was probably
10 -- and I don't remember exactly -- about eight months
11 afterwards. At that point in time the significance of the
12 information was significantly dissipated.

13 So, I'm just trying to find, as we look at
14 restructuring these issues, how could we balance out the
15 multitude of issues of being transparent, at the same time
16 provide for the ability for people to have open dialogue
17 and deliberations about what the issues are within
18 government, so that we're not making, you know, snap
19 decisions. As an example, someone who has spent a lifetime
20 in the Marine Corps, I would hate, like, to have to be in
21 the middle of a combat operation, planning an evacuation of
22 Afghanistan and get hit with Right-to-Know requests while
23 that's going on.

24 You know, if -- so, like as an example, in the
25 pandemic we recommended creating a -- Representative

1 Joe Webster and myself had this discussion, almost like a
2 crisis action center which included the legislature, and
3 the executive branch, and Department of Health and others,
4 so we could start to be able to get a handle on this, so we
5 could avoid the very type of issues that we have now.

6 So, my concern would be, is how do we do that?
7 Because I -- most of the reports I have dealt with have
8 been working in absolute good faith to try to get access to
9 information. And I applaud you for that, but I want to
10 make sure we don't have an unintended impact of it, to
11 where -- I will give you an example. In California, there
12 was an issue related to the chief investment officers'
13 requirements to put all of their assets in a blind trust.
14 Because of that, now, as an example, for the purposes of
15 transparency and openness, they can't fill the position.
16 And, that's an unintended consequence.

17 So, I want to make sure on the Right-to-Know
18 request -- because -- which I think is critical to the
19 citizens and to good transparent government. How do -- how
20 can we have a robust enough system to deal with these
21 issues that, while they might be peripheral issues, they
22 might be significant enough that it could have a negative
23 consequence? And, do you have any recommendations on that,
24 if you even think it's a problem?

25 MS. MELEWSKY: Well, I mean, I think we've

1 touched on it earlier, when we talked about education. I
2 mean, if we're talking about educating -- maybe not the
3 attorney -- well, I mean, any attorney who happens to be a
4 public employee who is applying the Right-to-Know Law, I
5 think that would be beneficial for them. Whether it's
6 training through the Office of Open Records or through a
7 CLE provider is going to be a step in the right direction.
8 And, the Office of Open Records already makes their
9 trainings available to the general public.

10 But, it also sounds like you're hitting on the
11 issue that Shane talked about with the -- you know, the
12 formalities of the requirement. There's nothing in the law
13 that requires a formal process. Citizens and journalists
14 often do this. They'll sit down with the public officials
15 and say, okay, here's what I'm looking for, and it's a
16 dialogue back and forth.

17 I think anything that we can do to foster that
18 kind of informal process is a good thing. Education is
19 part of it, but also maybe tweaking the law to make clear
20 that informal negotiations are appropriate in most
21 circumstances, and certainly not forbidden.

22 MR. FITZGERALD: I would add to that, that that
23 actually happens quite a bit. We'll -- we may have a
24 request that's too broad, and we've got, you know, folks
25 who have been doing this well who are educated, and we'll

1 say, hey, what are you really looking for here? Let me see
2 if I can help you narrow that down. And that kind of
3 dialogue is really good, and that does happen when it's
4 informal. It gets back to what Melissa was just saying.
5 That's only with those who have been dealing with it for a
6 while, it seems.

7 So, I think the other thing you could do to help
8 it in the whole process is put a little teeth behind
9 blatantly, you know, taking 30 days or longer and
10 continuing to extend it. I think there isn't really any
11 repercussions for stalling out anything in the law. And I
12 think maybe, even if it's just some sort of at least wrist
13 slap to -- you know, if you're going to take this and
14 then -- you know, what was the example you used? Like 37
15 days later you finally get it. Well, you know, why were
16 you holding onto that for that long when you had it pretty
17 easily? Those are the things that waste time on the
18 journalist's side, waste time on the government side.

19 REPRESENTATIVE RYAN: Fantastic. Thank you very
20 much. Mr. Chairman, that's the last question I have.

21 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you.
22 Representative Schmitt?

23 REPRESENTATIVE SCHMITT: Thank you, Mr. Chairman.
24 I know Kay Stephens of *The Altoona Mirror*, and Bill Kibler,
25 and the Managing Editor, Neil Rudel. I've known Neil for

1 more than 40 years. I know all these folks.

2 MR. FITZGERALD: Good.

3 REPRESENTATIVE SCHMITT: And have a great deal of
4 respect for them. They're conscientious, and they do a
5 good job. And, if Kay were sitting in that chair right
6 next to you, and she suggested that the Right-to-Know Law
7 should include explicit language that governing bodies are
8 free to provide public documents without requiring a formal
9 written Right-to-Know request, I would say, Kay, I hear
10 where you're coming from. I understand, but what if you go
11 to a county commissioner meeting, and after the meeting you
12 approach the county administrator and say, I'd like you to
13 produce this, this and this, and the county administrator
14 says okay and walks away, and lo and behold you don't get
15 anything? Where do you go from there? You don't have a
16 written request. How do you enforce the request?

17 Or if there's a miscommunication? Let's say they
18 do produce documents, but the document production is viewed
19 by Kay to be insufficient or nonresponsive. I don't know
20 where you go from there. I assume you would have to make
21 then a formal written request, and then start the process
22 in that way.

23 MR. FITZGERALD: And that happens. That
24 certainly happens. So you go file a request then if you
25 didn't get it even though --

1 REPRESENTATIVE SCHMITT: Right.

2 MR. FITZGERALD: It's really the very -- public
3 documents, the basic budget stuff, the stuff that's so
4 super public, if you will; super-public documents that
5 there really is no question from anybody that's at all
6 informed about it should be handing over. That's the -- I
7 think that's the stuff to which Kay is referring.

8 REPRESENTATIVE SCHMITT: Yeah. Well, and if I
9 look at it from the other side -- if you were the -- you
10 know, the county administrator or the Right-to-Know Law
11 officer, I would think there would be some concern you
12 might inadvertently produce something you shouldn't have
13 produced, maybe something even that has medical information
14 about a county employee. I --

15 MR. FITZGERALD: And that's the fear I'm -- I've
16 alluded to. I think that -- you hit the nail on the head;
17 often what delays, you know, fulfilling requests.

18 REPRESENTATIVE SCHMITT: I think that it's not a
19 bad idea. I -- and I think it can -- I think the law could
20 be changed to allow that sort of informal production. By
21 the way, is that done now, routinely? Are there informal
22 productions without agencies request -- or requiring a
23 formal Right-to-Know request?

24 MR. FITZGERALD: It certainly does happen. And
25 again, you get back to entities that are used to dealing

1 with Open Records requests, and they understand that it's
2 real public -- I wouldn't say it happens often, but I think
3 it happens. And, you know, really, the relationship
4 between reporter and the officer, you know, has a lot to do
5 with that.

6 REPRESENTATIVE SCHMITT: And I -- there's
7 no -- certainly nothing in the law that prohibits that sort
8 of informal production. So I -- if that's already
9 happening. I just think that if we -- I think we can
10 certainly make that more explicit in the law. I don't know
11 that you'll get a whole lot more voluntary cooperation than
12 you are getting at present.

13 MR. FITZGERALD: I don't know that either, but I
14 think it would help to be more -- and I think Melissa
15 alluded to that, just being more explicit about that it is
16 okay; you know, that people are very literal about that
17 kind of thing. I think it would help some understand it.

18 REPRESENTATIVE SCHMITT: But it might also lead
19 them to believe that they would have a little more
20 protection if they did it informally.

21 MR. FITZGERALD: Correct.

22 REPRESENTATIVE SCHMITT: Okay. Thank you.

23 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: I know from
24 my own experience, having been a solicitor for a lot of
25 municipalities that I think on the part of a lot of

1 government officials in those capacities, they don't want
2 to -- you know, they don't think they should provide it.
3 You know, and as a solicitor I get, you know, questioned --
4 well, I got a request for this information. You know, what
5 do I -- how do I not do it? Say, well, it's -- you know,
6 they want to know how much that lawnmower costs. Just tell
7 them. I mean, why are you -- why do you not want to tell
8 them? Is it a secret? Well, no. You know? So I think
9 there's a cultural element there.

10 MR. FITZGERALD: Yeah.

11 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: That's not
12 a bad -- maybe it's understandable, because it's outside of
13 what they normally do. And also on that point, we have so
14 many Pennsylvania -- and having practiced both in
15 Pennsylvania and Maryland, because I live near the border,
16 Pennsylvania has so many municipal entities. You know,
17 we're going to get a lot more requests, therefore we're
18 going to get a lot more problems.

19 MR. FITZGERALD: Yeah.

20 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: So, an
21 agency like yours will probably, I would assume, get more
22 complaints than a corresponding agency in another state.
23 But, some of those municipalities or municipal entities are
24 so small that if we make the request time -- the response
25 time too short, they reasonably can't do it. You know, it

1 might be a township office that is only open once a week,
2 something like that.

3 MR. FITZGERALD: That happens. And I
4 think -- but that was an issue in Texas, too, when we
5 addressed this when I worked there. And, it was the
6 requirement of the Open Records training that really did
7 move the needle some, and it had to be done annually. And
8 they would just sit in a big room. And I would present at
9 times. And, you know, you just go over an hour of training
10 there, and it just seemed to help with that over the course
11 of a couple years. That single thing helped more than
12 anything down there.

13 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Yeah.
14 Representative Miller?

15 REPRESENTATIVE MILLER: Thank you, Mr. Chairman.
16 And, thank you to the testifiers. I want to follow up on
17 Representative Grove's questions, particularly about those
18 that are -- we talk about vexatious requesters. Perhaps a
19 new term, vexatious deniers, those that take the automatic
20 extensions of 30 days which can turn into 37 days.

21 My question, besides the training, what
22 suggestions do you have for changes in the law, specific
23 suggestions that might be able to help with the denial
24 besides the training? I heard that loud and clear. Any
25 suggestions you have?

1 MS. MELEWSKY: One of the suggestions that I
2 don't mention, I didn't mention today, and it's not in my
3 written testimony, are the penalty provisions for the
4 Right-to-Know Law. Right now they are not mandatory
5 penalty provisions. Under Pennsylvania law, a court may
6 aware penalties if an agency denies in bad faith, or based
7 on an unreasonable interpretation of the law, but they
8 typically don't. I mean, I can count on one hand the
9 number of times the penalties have been imposed in the
10 forms of attorneys' fees here in Pennsylvania in the past
11 12 years.

12 So it's -- that's a significant barrier to both
13 enforcement, and it discourages compliance, because, you
14 know, there's -- what are the -- what's the teeth of the
15 law? I mean, there have been some really significant fee
16 awards in the past two to three years, but again it -- I'm
17 counting them on one hand. So, taking that fee provision
18 from a may to a shall we believe would have a significant
19 impact. And, many other states already are -- have a
20 mandatory fee provision. So, when an agency denies in bad
21 faith -- and that's a high burden in itself. When an
22 agency denies in bad faith, a court shall award attorneys'
23 fees and costs rather than may award them in their
24 discretion.

25 REPRESENTATIVE MILLER: Do you hold up a

1 particular state that would perhaps be a model?

2 MS. MELEWSKY: I could -- I would like to get
3 back to you on that.

4 MR. FITZGERALD: Yeah.

5 MS. MELEWSKY: Because there are a few that come
6 to mind, but I'd like to get back to you on that, if I
7 could.

8 REPRESENTATIVE MILLER: Okay. I want to just
9 follow up another quick question. In the local government
10 world, if a developer or someone comes in with a plan, and
11 they want to go through the process, the municipality has
12 to act within so many days, or it's a deemed approval.
13 What would you think about instead of the 30-day extension?
14 Instead of it -- we implement something that would be like
15 a deemed approval scenario if not responded to?

16 MR. FITZGERALD: Interesting.

17 MS. MELEWSKY: It is an interesting concept, and
18 one I've not heard before. I mean, we already have the law
19 that deems a request denied, which gives you a right to
20 pursue an appeal. I mean, I can't imagine the folks we
21 work with on the other side of the aisle at the local
22 government level ever going for something like that, but I
23 think it's a good concept.

24 I think, we already kind of have that in the
25 context of the appeal process anyway. Because, if an

1 agency doesn't participate in an appeal before the Office
2 of Open Records, that's it. That's their chance to make
3 their case. And if they don't make their case, they don't
4 participate, the records are deemed to be public. And then
5 they have to litigate in order to not comply with the
6 order.

7 So, that concept already kind of exists at the
8 appellate level. I think it's an interesting thing to
9 think about it at the local level. I'd need to think about
10 it a little bit more, but, I mean, I like the idea. I
11 think it's already kind of there in the law at the
12 administrative appeal level, anyway.

13 MR. FITZGERALD: I -- it's interesting earlier in
14 the process. That -- you know, that's -- that is something
15 to think about.

16 MS. MELEWSKY: Yeah.

17 MR. FITZGERALD: I hadn't thought of that. I
18 hadn't thought of that.

19 REPRESENTATIVE MILLER: Yeah. I've been kicking
20 that idea around for a while and contemplating implement --
21 introducing legislation to that effect. Because, it
22 switches the burden around, and I think it is incumbent
23 upon governments to release the information. And -- but
24 recognizing there are time limitations, particular small
25 municipalities, or if they're getting hammered with

1 something, they have a legitimate excuse. You know, I'm
2 full of grace about that sort of thing. But as I said at
3 the start my comments, we do have a situation where we have
4 vexatious deniers, so to speak, which you have itemized in
5 your testimony earlier.

6 And, so I would welcome your feedback about
7 states that are perhaps models in this regard, and also
8 your feedback about the deemed approval idea.

9 MR. FITZGERALD: Okay.

10 MS. MELEWSKY: Gladly.

11 REPRESENTATIVE MILLER: And with that, thank you.
12 Thank you very much.

13 MR. FITZGERALD: Thank you.

14 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Thank you.
15 Representative Grove? Any other panelists have any
16 questions? With that, earlier I said, I think there needs
17 to be a cultural shift in the way government functionaries,
18 you know, handle these requests. And, I look at all public
19 information -- it belongs to the public just as much as a
20 road or a park belongs to the public. And just as much as,
21 you know, your local borough may have to open the gates to
22 the park in the morning to let people in -- it doesn't
23 question why people want to go in. It's a public space.

24 MR. FITZGERALD: Yeah.

25 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: And so too

1 is this information public information. So, I think it
2 will take time, but hopefully in time we can actually reach
3 a real cultural shift on the part of government
4 functionaries, where they don't see these requests as a
5 pain, as something outside of their job that they have to
6 do. It's part of their job, just like every other
7 component. With that, thank you very much for your
8 testimony.

9 MR. FITZGERALD: Thank you very much.

10 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: During our
11 fifth and final panel, we will hear from two individuals
12 serving at the Pennsylvania Office of Open Records,
13 Executive Director Liz Wagenseller, and the Chief of
14 Outreach and Training -- sorry -- Chief of Outreach and
15 Training, George Spiess.

16 We have asked the OOR to provide its feedback on
17 the status of the Right-to-Know Law, and to outline any
18 shortcomings and improvements which we should consider.
19 This panel is scheduled until 1:00 p.m. Please feel free
20 to begin whenever you are ready.

21 MS. WAGENSELLER: Thank you, Chairman. Thank you
22 for having us. I am joined, as you mentioned, by our Chief
23 of Outreach and Training, George Spiess. I submitted
24 written testimony. I'm just going to give a brief summary
25 in the interest of time.

1 So, first things first. The Right-to-Know Law
2 provides that the Office of Open Records, the OOR, serve as
3 a quasi-judicial independent agency that hears appeals when
4 a request for a government record is denied by a state or
5 local agency. We also are mandated to provide training on
6 the Sunshine Act, which as you've heard dictates open
7 meetings rules.

8 Unlike -- like everything in the world, Open
9 Records and Public Meetings did not escape the impact of
10 the COVID-19 pandemic. As government operations have
11 returned to normal, this is a really great time to have
12 this discussion, so I'm glad we're having it.

13 One of the biggest things that the COVID-19
14 pandemic did, it put the decisions of state and local
15 governments in the forefront like never before. I don't
16 think the citizens have ever paid such close attention to
17 meetings about decisions that impact their everyday lives.

18 And, that impact has been felt, you know, in our
19 office. Over five years we -- since five -- coming to five
20 years ago, we had a 41% increase in appeals that we have
21 heard. The biggest increases were Department of Health,
22 State Police, local police departments and school
23 districts.

24 And one thing I'll note about that, we had a 41%
25 increase, and we only see the appeals, and we estimate

1 about 3% of Right-to-Know requests are appeals --
2 Right-to-Know requests are appeals. So if we just see that
3 small piece, you can imagine that magnified at all the
4 agencies by a pretty big number.

5 You know, in terms of what's going well, the
6 Right-to-Know Law continues to be an amazing tool for
7 impacting policies and highlighting changes that need to be
8 made. One example I will mention is, a member of the media
9 did a Right-to-Know request and found that the new
10 toll-by-plate program that the Turnpike did was not working
11 so well, and about \$104 million in tolls were uncollected.
12 That's just one example that happened this past year.

13 Another good development which the previous
14 testifiers mentioned is the concept of bad faith. There
15 were two significant cases where the courts made
16 significant fines against agencies for acting in bad faith
17 in response to Right-to-Know response -- Right-to-Know
18 requests. So, that was another positive development.

19 In terms of challenges there are many. The most
20 imminent challenge that we see is just the capacity issue.
21 For us to meet our statutory duties which say we have to
22 hear the appeals in 30 days, it's a crushing increase of
23 these appeals, and our current staffing levels are just not
24 really sufficient to meet that. It's very unsustainable at
25 this point.

1 And what happens, if we don't hear an appeal it
2 has to go to the court, so that forces the requester to
3 incur fees and deal with the court system. So at this
4 point if -- you know, if we don't receive additional
5 funding to hire some more appeals officers, you know, that
6 is going to happen eventually. So, that's one of the
7 biggest challenges we see [phonetic].

8 Another one we see are delayed access to records
9 due to lengthy court appeals process. Two of your
10 colleagues, Representative Burns and Ryan, can speak
11 firsthand to some of the challenges they experienced in a
12 lengthy court process before receiving the wanted records,
13 ultimately.

14 Another thing that we see, again, speaking of
15 trainings that were discussed earlier, we still continue to
16 see some shortcomings in how agencies respond to
17 Right-to-Know requests. These shortcoming can result in a
18 lot of unnecessary, as well as us granting documents. You
19 know, as we talked about, the burden of proof is on the
20 agency, and if they don't meet the burden of proof, even if
21 it seems unlikely they have those documents, those records,
22 we have to grant. So, there's a lot of areas of growth, I
23 will say, for some agencies in learning how to properly
24 respond to appeal so that it saves everyone a lot of time.

25 And, you know, another area that I think that

1 could be improved upon is sitting down and talking to the
2 requester. I think a lot of agencies feel like it has to
3 be on paper, it has to be on email we're not going to call
4 them. But sometimes, if you get a lengthy request, and you
5 just pick up the phone and call them and say, so, it seems
6 like you're trying to really get to this, is that right,
7 and they say, yes, that's what I'm looking for. It can
8 save tons of time and work for a lot of people if you just
9 have a conversation with the person.

10 Another thing we hear about is the commercial
11 requester issue. We don't see a lot of appeals from
12 commercial requesters, but it's important that -- we hear
13 this a lot, that they feel like a lot of agencies,
14 especially local agencies, feel like they are spending tons
15 of hours fulfilling requests that an entity then turns
16 around and sells for a profit. So, I know there is some
17 legislation to address that, but that is something that we
18 hear a lot of complaints about. So, that's the
19 Right-to-Know Act -- Right-to-Know Law.

20 So, the Sunshine Act. So, we just provide
21 training. We have no other statutory authority. We just
22 provide training, but because we do that, people often turn
23 to us, weekly, daily, with questions about the Sunshine
24 Act, because there's nowhere else for them to go. And so
25 we can offer guidance, but we can't offer firm

1 decision-making opinions, this is what you shall do. And
2 what happens if you believe there's a violation of the
3 Sunshine Act, is it has to be taken to the court, or a
4 district attorney may choose to investigate if they wish.

5 What we are hoping that the General Assembly can
6 do is undertake a discussion exploration of how to maybe
7 put more teeth into this, so that there's more time
8 sensitive and less costly review of alleged violations.
9 It's kind of like how the Right-to-Know Law was before the
10 change back in 2008 when the burden was on the citizen to
11 file a court case, to make argument. That's the way the
12 Sunshine Act is right now, is that they are -- the citizen
13 is forced to take it to court, incur fees, perhaps hire an
14 attorney and wait for that to go through the system.

15 And, one idea we've talked about is creating an
16 agency that can do this. The Ethics Commission has
17 something called the Investigations Enforcement Council,
18 which is sort of a similar concept, allowing citizens to
19 challenge an alleged violation without doing those steps
20 that I talk about. It's something that needs a lot of
21 discussion and dialogue before anything is formalized, but
22 I think it's something worth exploring.

23 So, with that I am going to just take questions.
24 Thank you very much.

25 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Very good.

1 Thank you for your testimony.

2 MS. WAGENSELLER: Uh-huh.

3 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:

4 Representative Wheeland?

5 REPRESENTATIVE WHEELAND: Thank you so much for
6 your testimony and your provided written testimony. During
7 the pandemic -- changed the way many institutions,
8 obviously, held meetings. And this of course affected the
9 way public meetings were held as well. How did agencies
10 comply with the Sunshine Law during this period?

11 MS. WAGENSELLER: Well, fortunately the General
12 Assembly passed an act allowing remote meetings to be held.
13 So, that allowed some flexibility during that time. I was
14 not in the Office of Open Records at that time, but George
15 handled a lot of those questions, so he can talk a little
16 bit about how they did.

17 MR. SPIESS: Sure. Initially there wasn't a lot
18 of guidance, but given our role, people turned to us. So
19 honestly, some of it we just winged it, but we also took a
20 look at what laws were out there and reached the conclusion
21 that virtual meetings were certainly a resource available,
22 or an avenue available, so we encouraged that.

23 I remember, you know, initially the guidance was,
24 everything was going to close for two weeks. So, we put it
25 out there: well, do you really even need to have the

1 meeting? Can it be delayed a month? And then one thing
2 led to another, and we started looking at, okay, what are
3 the technological resources that may be available to some
4 municipalities to conduct public meetings? And we
5 encouraged that, but at the same time we recognize that
6 there are some municipalities that don't have either the
7 knowledge or the infrastructure to conduct online meetings.

8 So, we tried to come up with imaginative
9 workarounds that were at the very least in the spirit of the
10 Sunshine Act to encourage public participation. And we
11 established a -- you know, a couple thresholds, that you
12 can do what you need to do, but you must ensure, you know,
13 public notification, that they know you're having a
14 meeting, advanced advertising, you know, so that there's
15 enough time for the public to get to these meetings or
16 participate in some way. And then finally means for public
17 comment. You know, those were the three deal breakers. If
18 an agency could meet those three standards, then we felt
19 that they were probably being in compliance with the Act at
20 that point.

21 REPRESENTATIVE WHEELAND: Hindsight, you know,
22 always being 20/20, what would you do differently, or what
23 would you recommend, going forward? Is there any fixes?

24 MR. SPIESS: Not much at this point. You know, I
25 think that -- I think we did the best we could with the

1 knowledge that we had at the time. It wasn't that long
2 before Act 15 was passed that memorialized the ability of
3 municipalities to have online meetings during the emergency
4 declaration. And I think that adequately addressed most of
5 the questions that were out there.

6 We still received a lot of questions. We
7 immediately took to the internet with webinars, and
8 honestly sometimes we just couldn't answer questions,
9 because we were in uncharted territory. Nobody knew, but
10 we kept putting it out there that, look, do the best you
11 can with those three standards in mind, and we think you'll
12 come out of this okay.

13 Now that we've been through it, in hindsight,
14 yeah, I think that there probably are little things that
15 would -- you know, could be tweaked, but overall I wouldn't
16 change how it was addressed.

17 REPRESENTATIVE WHEELAND: Well, again, I'm
18 looking for if there is any, like you said, tweaks --

19 MR. SPIESS: Okay.

20 REPRESENTATIVE WHEELAND: -- you know, to the
21 law. It would be helpful if you could provide --

22 MR. SPIESS: Yeah.

23 REPRESENTATIVE WHEELAND: -- those.

24 MR. SPIESS: Yeah. The single greatest benefit
25 that I think we all have seen coming out of COVID as it

1 relates to governance is embracing technology to get the
2 word out about what our government is doing. I think that
3 there is an ever growing segment of the population that
4 really appreciates that and embraces it. But at the same
5 time, we cannot leave those people behind that do not have
6 access to the internet as well as other areas of the
7 Commonwealth do. So I think it's somewhat of a balancing
8 act. There is a good segment of the public that would like
9 to see everything virtual. There's others that don't want
10 to go there at all. They want to continue to have that
11 face-to-face interaction with their public officials, and I
12 think, you know, we've got to come up with a way for doing
13 that effectively.

14 MS. WAGENSELLER: Yeah. I would add, I think
15 that we still -- once the emergency declaration ended, we
16 got tons of questions. What does that mean? Can we do
17 online meetings? And the Sunshine Act was written before
18 remote meetings were even a concept. And so the guidance
19 we have given is you still -- we believe that the Sunshine
20 Act says you still must have a physical component. You
21 have to offer in-person meetings. You can add on remotes,
22 but you must have that.

23 But we do think it's important that that be
24 clarified soon, because there is a lot of ambiguity and a
25 lot of questions we get, and some agencies take a different

1 approach than we take in terms of their interpretation of
2 the Sunshine Act. But, answering that question and
3 providing something -- some guidance to them I think is
4 helpful.

5 REPRESENTATIVE WHEELAND: Okay. Thank you so
6 very much.

7 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:
8 Representative Schmitt?

9 REPRESENTATIVE SCHMITT: Ms. Wagenseller, you had
10 testified that the Office of Open Records saw a 41%
11 increase in appeals. That is a significant number. How
12 did you deal with that?

13 MS. WAGENSELLER: Well, fortunately I have
14 incredibly dedicated staff who works late at night and on
15 weekends to get everything completed. It's been an amazing
16 accomplishment that they have done. And, we have just
17 found new ways to do more. You know, I changed some
18 positions in order to have more appeals officers. I found
19 a little bit of money here to hire a few more, but it's
20 been a real challenge, and it's not sustainable in the long
21 run.

22 You know, we typically like to have our appeals
23 officers have maybe 30 cases at a time, and they're
24 averaging above 60 right now. So, it creates just a lot of
25 time crunch. Some requesters are kind and give us an

1 extension. We can ask for an extension, but not all do.
2 It's a real problem. It's a real challenge.

3 REPRESENTATIVE SCHMITT: Did the -- did that
4 significantly increase demand expose any legislative issues
5 that we could help you address? I know you said it's not
6 sustainable in the long run. Is that just a resource
7 based --

8 MS. WAGENSELLER: Yes.

9 REPRESENTATIVE SCHMITT: -- opinion?

10 MS. WAGENSELLER: Yes. You know, if we were able
11 to hire two more appeals officers, we feel like we'd be in
12 a much more solid position to handle this, because we think
13 this is the new normal. I don't think people are going to
14 go back to not paying attention to their school districts,
15 or their local agency -- their local governments. I think
16 this is what's going to be staying. So, having just a
17 little bit of money to hire an additional appeals officers
18 I think would go a long way.

19 REPRESENTATIVE SCHMITT: So, other than the
20 resource, your process held up pretty well?

21 MS. WAGENSELLER: Yes. Yes. Fortunately, we
22 were already prepared to do things remotely. It was
23 something that my predecessor did a great job in
24 establishing. So, we were able to move seamlessly to
25 remote working.

1 There were some reports I think it was confused
2 with some agencies. We were never closed. You know, we
3 answered questions. We processed appeals without missing a
4 beat. But really, for us it's just, you know, we need more
5 staff to handle the appeals.

6 REPRESENTATIVE SCHMITT: I think one thing that
7 people don't realize is that there's kind of -- there are
8 different Right-to-Know paths. If you make a Right-to-Know
9 request to a -- let's say a county administrator. It goes
10 through one process, but if you make it to the District
11 Attorney, they have their own separate process.

12 MS. WAGENSELLER: Yes.

13 REPRESENTATIVE SCHMITT: Could you just explain
14 to everyone what that is?

15 MS. WAGENSELLER: I'm -- you know about the
16 District Attorney process probably more than I do.

17 MR. SPIESS: Okay. Well, District Attorney is
18 considered a judicial agency. And, they're not responsible
19 for providing, really, anything other than financial
20 records. Court records under Pennsylvania common law are
21 pretty much accessible through what they call their Rule
22 509 process. So, a lot of the calls that we get to our
23 office are, hey, I'm looking for court records, what do I
24 do, and we explain all that.

25 Also then, when you're talking about District

1 Attorneys, we're kind of bringing in the criminal
2 investigatory records as well, where if you are denied
3 access to those records, you don't appeal to the Office of
4 Open Records. Rather, you appeal to the county District
5 Attorney who has their own assistant or deputy DA assigned
6 as an appeals officer. And, while the process somewhat
7 mirrors what we deal with, every county is different. And
8 fortunately, I think starting this year, they've been
9 sending their decisions to us, and we're posting them on
10 our website, so you can kind of see those nuances. But
11 yeah, there are several different tracks that you can take
12 depending on the nature of your request and the documents
13 that you're requesting.

14 REPRESENTATIVE SCHMITT: And I assume that those
15 requests go to the District Attorney because you have that
16 criminal investigation exception. And they --

17 MR. SPIESS: Correct.

18 REPRESENTATIVE SCHMITT: -- they are, I guess,
19 best placed to deal with that, making decisions regarding
20 that.

21 MR. SPIESS: You're absolutely right.

22 REPRESENTATIVE SCHMITT: Thank you.

23 COMMITTEE MAJORITY CHAIRMAN SCHEMEL:

24 Chairman Grove?

25 MAJORITY CHAIRMAN GROVE: Thank you both so much.

1 I notice -- I was joking earlier about all the training you
2 do. OOR has been doing webinars for training, both for
3 elected officials and general public. What has been your
4 turnout and discourse? And what have you seen with that
5 online kind of training?

6 MS. WAGENSELLER: That's been one of those silver
7 linings. You know, George used to travel to all corners of
8 the state to provide trainings, and now every Wednesday at
9 10:00 he jumps online and has different topics. And we
10 also do custom trainings for legislative offices or certain
11 agencies. And the response has been really great. I think
12 that you have 70 people, probably, a week on average,
13 depending on the topic.

14 MR. SPIESS: Depending on the topic. It varies
15 from, lately, 40 to over 100.

16 MS. WAGENSELLER: And when we ever have -- like
17 when the new law that you all -- that was passed about
18 providing --

19 MR. SPIESS: Oh, yeah.

20 MS. WAGENSELLER: -- an agenda, we maxed out. We
21 had to have multiple ones, because our account didn't allow
22 as many participants. So, it's really easy to access.
23 George is fantastic at it, and he stays on and answers
24 questions, and it's always there for people to access when
25 they want.

1 MAJORITY CHAIRMAN GROVE: Good. One aspect about
2 RTK is the presumption that documents are public records.
3 Trade secrets and propriety information, when they are
4 created in part or whole by nature, would they be falling
5 under the RTK law?

6 MS. WAGENSELLER: Well, it depends if it's a
7 government agency who is claiming that or a third-party
8 contractor. And there was a high-profile case involving
9 the City of Pittsburgh's -- City of Pittsburgh, Alleghany
10 County. I think it was City of Pittsburgh's bid to have
11 Amazon Headquarters move there. And, we -- they claimed
12 trade secrets in terms of their pitch to Amazon, and the
13 Office of Open Records found that a government agency
14 cannot have trade secrets, and the courts ultimately agreed
15 with us. And so that's something that was a recent ruling
16 on that issue.

17 MAJORITY CHAIRMAN GROVE: Got you. But, a
18 private contractor would have protections for the trade
19 secrets?

20 MS. WAGENSELLER: Yes.

21 MAJORITY CHAIRMAN GROVE: Okay.

22 MS. WAGENSELLER: Yes.

23 MAJORITY CHAIRMAN GROVE: All right. And then,
24 the entire enforcement of the Sunshine Law fascinates me.
25 I had a local township that decided to do email votes. It

1 was taken to court, and the judge said, meh, no harm, no
2 foul. It was unanimous. So, whether it was by email or in
3 person, the result would have been the same, and there is
4 no harm in doing that.

5 And, you know, you mentioned Ethics, and you have
6 OOR, and, kind of, who is best to handle that? So Ethics,
7 you kind of have -- maybe viewed as jail time, fines and
8 penalties. OOR, your -- I think your model is more of a
9 mediation, let's work through it, and here is your
10 determination. I assume if there's a violation of the
11 Sunshine, there's probably going to be penalties imposed.
12 So, I guess from your perspective, do you want to be in the
13 penalty business --

14 MS. WAGENSELLER: I think that --

15 MAJORITY CHAIRMAN GROVE: -- versus Ethics? Can
16 you kind of weigh who --

17 MS. WAGENSELLER: Sure.

18 MAJORITY CHAIRMAN GROVE: -- maybe should be
19 doing that kind of enforcement?

20 MS. WAGENSELLER: Yeah. We've had talks about
21 that, and we think it could be set up very similar to how
22 we do appeals, where, you know, in our office, Office of
23 Open Records, since we have the knowledge about a lot of
24 these issues, we hear both sides, and we make a final order
25 that says the Sunshine Act was violated, it was not. And,

1 I think that us imposing fees is a whole other level that I
2 don't think that is appropriate for us to do. Perhaps the
3 courts could handle that, or perhaps these could not be
4 necessarily a binding legal, thou shalt pay fees, but more
5 of a finding that, hey, this township violated on the
6 Sunshine Act. And at least there's a record and a
7 definitive entity that proclaimed that they did violate it
8 versus imposing specific fines, but having a public way to
9 review the issue.

10 MAJORITY CHAIRMAN GROVE: Got you. Okay. Thank
11 you. That's all I have.

12 COMMITTEE MAJORITY CHAIRMAN SCHEMEL: Any other
13 questions from the panelists? Maybe then to bring this
14 testimony back to the very beginning of the day, we need to
15 help encourage government entities to develop a habituation
16 of virtue, then they will naturally want to fill these
17 requests.

18 Thank you very much for your testimony. We thank
19 all of today's panelists for their testimony. We would
20 also like to acknowledge the National Council of State
21 Legislators who, although unable to provide a testifier
22 today, has provided the Subcommittee with a comparison of
23 legislative per diem reimbursement benefits offered by all
24 50 states, as well as additional written testimony.

25 We are committed to holding elected officials to

1 the highest ethical standards. This being a primary
2 concern for preserving the public's trust in their
3 government, we are also committed to ensuring the public
4 has reasonable and meaningful access to public documents
5 and information. After all, these resources belong to the
6 public.

7 Madame Chair Madden, do you have any additional
8 closing remarks before we finish out the day? I may have
9 caught her off guard. With that -- okay. All right, very
10 well. With that the Subcommittee now stands adjourned.

11
12 (The hearing concluded at 12:16 p.m.)

1 I hereby certify that the foregoing proceedings
2 are a true and accurate transcription produced from audio
3 on the said proceedings and that this is a correct
4 transcript of the same.

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