November 4, 2021

TESTIMONY BEFORE HOUSE STATE GOVERNMENT COMMITTEE

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

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

Today, my testimony will focus primarily on the Right-to-Know Law and Sunshine Act. There is no question that the remedial RTKL has improved transparency in the Commonwealth, but problems still exist. PNA has been working with Rep. Lou Schmitt and other stakeholders on a comprehensive update to the RTKL. Earlier this year, we noted a list of suggested amendments in testimony. We look forward to ongoing work with Rep. Schmitt, this Committee and the Legislature as the bill is introduced and moves forward. In addition, we support legislative language that will bring greater transparency to state-related universities under the RTKL.

Preliminarily, it is important to note that the ongoing pandemic further shined the light on significant existing problems for public access under the RTKL; it also created new issues, but our members rose to the unprecedented challenge. The newspaper industry serves as a consistent source of accurate information, tamping down unsubstantiated rumors and misinformation, and providing much-needed facts. Journalists faced numerous issues in the wake of the COVID disaster declaration, and in some cases agencies severely limited access to public records or refused to comply with public access laws at all.

PNA also frequently hears about issues with ancillary laws that create significant barriers to access, including the Disease Prevention and Control Law (DPCL), 35 P.S. § 521.1, *et seq*. Access issues resulting from the DPCL are not new but have been brought into focus by the pandemic and the public's need for information. The DPCL grants health agencies broad discretion to deny access to a wide array of records without a showing of need or appropriateness, and these decisions are not appealable. We believe the DPCL is inconsistent with the presumption of access enshrined as the cornerstone of Pennsylvania public access law, and we applaud this Committee and the House for passing House Bill 1893, sponsored by Rep. Craig Staats. PNA understands there may still be concerns related to personal health information and we are currently working with the Senate on amendatory language to specifically address those issues and bipartisan approval is our goal.

Vexatious Requesters

With regard to vexatious requesters, PNA does not believe this provision is in the best interest of the public or transparency; however, we understand the concerns of various stakeholders. Local government representatives have confirmed that the news media do not create the vexatious requests that have spurred the creation of these bills, and while we understand and appreciate that there may be "vexatious" requesters in rare instances, a recent Legislative Budget and Finance Committee study proved that vexatious requesters are, in fact, very rare. As agencies seek tools to manage requests, we are concerned that this kind of provision may be ripe for abuse by agencies who misunderstand or misapply it. We are also concerned that this kind of provision could inundate the Office of Open Records with petitions, leading to further delays in the RTKL process. We are also concerned that a government process that prohibits one's ability to seek information from government raises constitutional concerns and would likely be challenged in federal court on First Amendment grounds.

If these bills continue to move forward, the media must be exempt to safeguard their constitutionally protected role in the free flow of information and keeping the public informed about government operations. Any law that limits the public's ability to request information from its government must be crafted carefully to protect statutory and constitutional rights that form the foundations of our democracy.

Sunshine Act

I regularly hear about Sunshine Act issues, but I have never received so many inquiries on potential Sunshine Act violations as I have in the past year, both from our members and the public. PNA was pleased to see Act 65 of 2021, sponsored by Sen. Pat Stefano, signed into law earlier this year, providing for agendas in advance of public meetings. We also support his bill, SB 507, requiring all committee meetings and hearings to be recorded and posted online and, when technically possible, to require proceedings be livestreamed. We also have numerous other changes to the Sunshine Act we would like to address.

One of the biggest problems with the Sunshine Act is that agencies ignore it, often with impunity because enforcement is so difficult. A primary way to ease enforcement is to address the burden of proof, and we believe the burden of proof under the Sunshine Act must be consistent with the Right-to-Know Law. As the two primary public access laws, the RTKL and Sunshine Act should be consistent and encourage public rights. The text of the Sunshine Act itself is silent on burden of proof, but as a result of case law, the public bears the burden to prove a violation occurred. This makes enforcement difficult at best because when the public has been excluded from a meeting, they have little information or evidence to meet the burden of proof. The burden of proof should be on the agency because it has all the information. Shifting the burden of proof to the agency is consistent with the Right-to-Know Law and good public policy because it will ease enforcement and provide the courts with the best evidence when deciding a legal challenge.

Additionally, although the Sunshine Act currently provides for penalties for violations, civil and criminal penalties are rarely imposed, in part because of the burden of proof but also because the courts have allowed agencies to "cure" alleged violations without penalty, and they have interpreted "deliberation" in a manner that encourages noncompliance. In addition to shifting the burden of proof, we also recommend changing the definition of "deliberation" to expressly prohibit private deliberations using advanced communication technology and to discourage the practice of private "information gathering" meetings.

We have seen numerous examples of public officials conducting private deliberations via email and other means of advanced communication technology in conflict with the law. Current law prohibits private deliberations of any kind, including email, teleconference and text messages, but the law doesn't expressly say that because it was written long before current technology existed. The lack of express prohibitions on the use of technology, coupled with technology's ease of use, can cause confusion and misapplication. We believe the best way to address these issues is to tighten the language to expressly prohibit private deliberation using advanced communication technology. By doing so, we believe the law will reaffirm its foundational prohibition on private deliberations of any kind while providing clear guidance for agencies and the public. We believe these changes will encourage compliance and decrease the need for litigation.

We have also seen numerous examples of agencies excluding the public in the guise of "information gathering," relying on case law as justification. There is no "information gathering" exception to the law and there should not be. It is too easy to exclude the public in the guise of gathering information and stray into deliberation of agency business. When the public is excluded, they do not have the ability to learn about the discussion or challenge it, encouraging agencies to ignore the letter and intent of the law. Gathering information is an important part of the decision-making process, and the public should be privy to the same information as public officials so they can understand public policy proposals and provide meaningful feedback as policy takes shape.

Further, the Sunshine Act is a citizen-enforced law, with no oversight by a statewide administrative agency like the Office of Open Records. Court action is the only means of enforcement, and most

citizens do not have the means to pursue it because lawsuits are time-consuming, expensive and unlikely to be successful. This lack of enforcement encourages noncompliance and damages the public trust. We believe the law should be amended to encourage compliance and to ease enforcement. With those goals in mind, we recommend amending the attorney's fees provision to allow recovery of fees when a court finds an agency violated the law. Current law limits the recovery of attorney's fees to situations where a court finds an agency acted with willful and wanton disregard of the law, which is a high standard that has never been imposed, to the best of our knowledge. This amendment will discourage violations and encourage citizens to enforce the law by allowing litigation-related fees to be recovered more easily.

Finally, we believe that it was the legislative intent behind Section 712 of the Sunshine Act to include legislative task forces as agencies required to comply with the law. However, the Act is unclear and various bills over the years have attempted to remove task forces from the purview of the Sunshine Act. We believe it is imperative that legislative task forces be expressly covered by the Sunshine Act so that their important work is done in public, absent an applicable exception like security, and so that transparency and public accountability are guaranteed.

Thank you again for your time and consideration. We look forward to working with this committee to improve the Right-to-Know Law, Sunshine Act and transparency for all Pennsylvanians, and we are, of course, available for any questions you may have.