June 9, 2022

On behalf of the undersigned local government associations, we are writing to express our **opposition to Amendment A04480 to House Bill 2524 (Schmitt) as well as the underlying bill (PN 3058)** and encourage a NO vote on both the amendment and the underlying bill. The amendment as well as the underlying bill do not provide the desperately needed relief long requested by local agencies, and in some cases creates new concerns with the law. Our associations have been working for years to amend the Right-to-Know law to provide our collective memberships with relief from vexatious requesters who abuse the processes in the law and to create the ability to recover some of the costs incurred by the agency associated with responding to requests for records made for a commercial purpose.

At the time of its passage in 2008, Pennsylvania's Right-to-Know law (RtK) was a dramatic shift in granting citizens and taxpayers with access to government records. The purpose of the new RtK law was to promote access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions. While the new RtK ushered in a new era of public access to governmental information, it also brought on several unintended consequences which fall outside of the RtK's stated purpose.

One of those consequences has been the ability of commercial enterprises to use taxpayer resources through the RtK process to obtain information they then use to develop leads for solicitation, obtain information that is then sold (both directly and to subscribers as part of a fee-based service), or otherwise generate revenue. The current RtK prohibits agencies from inquiring about a requester's intended use of the records or from charging fees associated with the search, retrieval, redaction, or other steps necessary to comply with the request.

Although not the most significant expense in agency budgets, agency finances are nonetheless negatively impacted by being required to comply with commercial requests. Agencies must allocate staff to reviewing and responding to commercial requests which include searching, retrieving, reviewing, redacting and duplicating responsive records. Depending on the volume of commercial requests received by the agency, they may be forced to hire additional staff to assist in responding to requests. And, all of this is done at taxpayer expense for purposes other than governmental transparency.

Amendment A04480 and the underlying House Bill 2524 attempt to address this issue but leave significant gaps which would allow a wide array of commercial requesters to be exempt from the very provisions intended to preserve taxpayer resources. Specifically, the current version of HB 2524 only applies to requests for records which will then be used for commercial solicitation. Although amendment A04480 would expand the purposes which would be considered commercial to now include the sale or resale of a record, it does not include a provision which would capture the myriad of other commercial purposes for which records are requested and adds two broad and vague exceptions that would create substantial loopholes rendering the commercial requester provisions virtually useless.

Another unintended consequence of the new RtK law has been the use of the rights and processes in the law in a way which is vexatious to local agencies. All of our collective memberships have not only experienced instances where a requester has submitted RtK requests in order to punish or harass the agency for a decision they did not like or to elicit a response from the agency on an unrelated matter, but also instances where the sheer volume of requests (or information requested) from a single requester has substantially disrupted operations or placed an unreasonable administrative and financial burden on the agency and therefore our taxpayers.
Amendment A04480 and the underlying House Bill 2524 also attempt to address this issue but the manner in which they are addressed would render the provisions all but impossible for a local agency to use. In both the amendment and the underlying bill, an agency alleging vexatiousness would be required to prove what a requester's intent was in filing a request. Section 703 of the current RtK law expressly states that a "request need not include any explanation of the requester's reason for requesting or intended use of the records unless otherwise required by law." The RtK law (as well as the amendment and bill) also contains no provisions which would allow an agency alleging vexatiousness to collect any additional evidence which might be relevant to a requester's intent. Agencies would not be able to issue subpoenas, require depositions, or avail themselves of any other tool in the usual civil discovery process. Absent some other evidence volunteered by a requester, we are not sure how an agency would ever be able to successfully prove that a request was made with the specific intent to harass rather than promote governmental transparency. Proof in this process should be limited to the objective nature of a requester's actions, not the subjective nature of their hidden intent.

Further, the definition of vexatious requester is incomplete in that only one of the factors in section 906(a)(3) of the bill (the factors which an agency can use to allege vexatiousness) relates to the harassment of the agency. Instead, many of the other factors in section 906 focus on the effect that a request or series of requests have on the agency. Despite a requester's intent in submitting requests, the effect of those requests can have a severe impact on the ability of a local agency to fulfill its normal day-to-day responsibilities. An excellent analogy would be denial of service attacks (which we have experienced before). Since section 901 of the RtK law only gives agencies 5 days to provide a response, the sheer number/volume of requests an agency receives could have the effect of preventing an agency from fulfilling its regular responsibilities. Even if an extension is taken under section 902, a significant amount of time and public resources would be directed away from day-to-day responsibilities and toward complying with the number/volume of requests.

Our final concern relates to the changes made to the current RtK provisions related to court costs and attorney fees. Amendment A04480 would allow the Office of Open Records (OOR) to award court costs and attorney fees to requesters as opposed to the current law which restricts the awarding of costs/fees to a court of law. Our associations are vehemently opposed to allowing OOR to award court costs and attorney fees to requesters in any situation and believe that this remedy should be reserved exclusively for courts.

Our organizations appreciate the efforts of Representative Schmitt to acknowledge and address the longstanding concerns of our memberships with regard to commercial and vexatious requesters. However, due to the significant concerns we have outlined we believe that the bill and amendment require additional work, and we ask for opposition to the current proposals and an opportunity to work together with the Legislature to accomplish these needed RtK reforms.

County Commissioners Association of Pennsylvania
Pennsylvania Municipal League
Pennsylvania Municipal Authorities Association
Pennsylvania Association of Boroughs
Pennsylvania State Association of Township Commissioners
Pennsylvania State Association of Township Supervisors
Pennsylvania School Boards Association