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# Pennsylvania's Right-to-Know Act: How It is Used to Discourage, Delay and Deny Access to Public Documents and Why It Needs to be Changed

## INTRODUCTION

Pennsylvania's Right-to-Know Act,<sup>1</sup> (the "Right-to-Know Act" or the "Act"), was enacted in 1957 and remains virtually unchanged.<sup>2</sup> The law was designed to allow citizens access to public documents generated by the government at all levels in the Commonwealth. It gives any citizen the right to inspect and copy any public record.<sup>3</sup> The Act is frequently invoked by citizens and journalists and has been the subject of numerous civil actions and appellate court decisions, sometimes with contradictory results.

In the nearly four decades since the Right-to-Know Act was enacted, significant changes have occurred in the way information is gathered, processed and stored. Pens and typewriters have given way to computer keyboards; file folders and bound volumes have been replaced by computer disks and tapes. Such methods of record-keeping were not in general use when the Act was drafted. In addition, the number of documents generated by government at all levels has increased dramatically. Agencies which did not exist forty years ago now compile and store extensive records.

All of this has occurred during a time in which citizens have witnessed abuses of government power, ranging from the Water-

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1. PA. STAT. ANN. tit. 65, §§ 66.1-66.4 (1959 & Supp. 1994).

2. In 1971, the statute was amended to include one phrase exempting industrial health and safety reports from the category of investigative documents otherwise excluded from the definition of "public record." PA. STAT. ANN. tit. 65, § 66.1(2) (Supp. 1994). In 1978, section 66.4 was changed to simplify the procedure for appealing an agency decision denying access to documents. PA. STAT. ANN. tit. 65, § 66.4.

3. PA. STAT. ANN. tit. 65 §§ 66.2, 66.3 (1959). See notes 12-13 and accompanying text for a discussion of the definition of the term "public record" under the Act.

gate<sup>4</sup> and Iran-Contra<sup>5</sup> scandals at the federal level to a rigged lottery game<sup>6</sup> and the impeachment of a Supreme Court Justice<sup>7</sup> in Pennsylvania. Such abuses of power have resulted in a greater sense of mistrust of government. Today, more citizens and journalists frequently demand to see what is occurring inside government offices. They have turned to laws such as the Right-to-Know Act to assist them in their quest for answers.

This comment explores the history of the Right-to-Know Act in Pennsylvania, how it has been used to gain access to government files and how the appellate courts have interpreted its provisions. The comment also examines whether the law has accomplished what its original sponsors intended and whether it is still viable in light of the changes in the way government gathers and stores its records. Finally, this comment reviews a proposal to reform Pennsylvania's public records law, which the author recommends, and compares it with a similar statute in Florida.

#### BACKGROUND AND HISTORY OF THE RIGHT-TO-KNOW ACT IN PENNSYLVANIA

Pennsylvania's Right-to-Know Act does not contain a statement of legislative intent and very little legislative history exists. The only recorded debate took place in the House of Representatives on May 27, 1957, one month before the bill was approved.<sup>8</sup> Speaking in support of the legislation, known then as House Bill No. 800, Representative Stanley G. Stroup of Bedford County argued that the bill struck at the "tap roots of the liberties of the people," and said that government must be "open to the microscopic light of public scrutiny" in order to foster a free

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4. See Haynes Johnson, *Turbulent Career Summed Up in a Word: Across the Achievement and Contradiction is Taped 'Watergate'*, WASHINGTON POST, April 23, 1994, at A16.

5. See David Johnston, *Walsh Criticizes Reagan and Bush Over Iran-Contra*, NEW YORK TIMES, January 19, 1994, at A1 (describing the contents of the final report issued by Lawrence Walsh, the special counsel appointed to investigate and prosecute the Iran-Contra cases).

6. See *Commonwealth v. Katsafanas*, 464 A.2d 1270, 1273 (Pa. Super. Ct. 1983) (discussing the rigging of the Pennsylvania daily lottery game on April 24, 1980).

7. See H. Res. 324, 178th Gen. Assem., Reg. Sess. (1994) (House resolution impeaching Justice Rolf Larsen of the Pennsylvania Supreme Court on May 24, 1994); see also Bill Moushey and Tim Reeves, *Senate Convicts Larson, Bars Him From Any Office*, PITTSBURGH POST GAZETTE, October 5, 1994, at A1.

8. LEGISLATIVE JOURNAL OF PENNSYLVANIA, 142d Gen. Assem., 1957 Sess., Vol. II, at 2185-88 (1957).

society.<sup>9</sup> Representative Stroup spoke against the growth of the bureaucracy and the accumulation of power by many appointed officials.<sup>10</sup> He further argued that passage of the bill would send a message to the citizens of Pennsylvania that they had a right to know what happens in their government, and that this right would be realized by granting citizens greater access to government under this Act.<sup>11</sup>

The bill, as it was finally approved and signed into law by the governor, contained four sections. The first section defined the terms "agency" and "public record". Under the Act, an agency is defined as any department, board or commission of the executive branch of state government or any political subdivision in the Commonwealth.<sup>12</sup> The Act defines public records as documents relating to any financial transaction of an agency, any contract entered into by an agency, or any minute, order or decision made by an agency.<sup>13</sup> There are four categories of documents specifically excluded from this definition of a public record. They include documents that: (1) involve an agency investigation; (2) would harm an individual's reputation or safety; (3) are specifically exempted by another statute or by court order; or (4) would cause the agency to lose any federal funding.<sup>14</sup>

The second section of the Act requires that every public record be made available for examination.<sup>15</sup> The third section allows individuals to copy records, subject to reasonable regulations by the agency.<sup>16</sup> The Act's final section provides that anyone denied access to documents under section 2 or section 3 may appeal that denial in court.<sup>17</sup>

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9. LEGISLATIVE JOURNAL OF PENNSYLVANIA, cited at note 8, at 2185-86.

10. *Id.* at 2186. Representative Stroup told his colleagues that some of the appointed officials in the various bureaus and departments had turned their offices into "little isolated mountains of power" and, as a result, were no longer responsible to the electorate. *Id.*

11. *Id.* at 2185-86. The major focus of the debate that day was on whether the bill would permit access to sealed adoption records. *Id.* at 2817. The bill was amended on June 5, 1957, to exempt from the definition of public record, those documents to which access was forbidden by statute or court order, or would affect a person's reputation or personal security. LEGISLATIVE JOURNAL OF PENNSYLVANIA, 142d Gen. Assem., 1957 Sess., Vol. 3, at 2603. It was further amended on June 19, 1957, when section 4 was reworded; it was passed by the House that same day. *Id.* at 3772. The bill was finally approved by the Senate on June 20, 1957. *Id.* at 3817-18. It took effect the following day. PA. STAT. ANN. tit. 65, § 66.1.

12. PA. STAT. ANN. tit. 65, § 66.1(1) (1959).

13. PA. STAT. ANN. tit. 65, § 66.1(1).

14. *Id.* at § 66.1(2).

15. *Id.* at § 66.2.

16. *Id.* at § 66.3.

17. *Id.* at § 66.4.

The Act's supporters envisioned that the Right-to-Know Act would "strike the veil of secrecy" from government,<sup>18</sup> but, in many instances, it has been used by agencies to shield their records from public view. Many officials who opposed disclosure took advantage of the vague terms and definitions in the Act to fashion their own interpretations. Within a year of passage of the Act, the Pennsylvania Supreme Court in *Wiley v. Woods*,<sup>19</sup> addressed whether the reason the document was being requested was relevant to the decision to release it.<sup>20</sup> In *Wiley*, the plaintiff requested that the City of Pittsburgh Planning Director release documents relating to a zoning matter.<sup>21</sup> The supreme court asserted that, even though the plaintiff had a personal or property interest in the zoning matter, she had the same right of access to the documents as any citizen under the Act.<sup>22</sup> The court held that the purpose for requesting the record was irrelevant.<sup>23</sup>

Over the years, many provisions of the Act have been tested in court, sometimes with seemingly contradictory results. For example, the Pennsylvania Supreme Court concluded in *Mooney v. Board of Trustees*<sup>24</sup> that the definition of agency did not apply to Temple University, even though the university received financial support from the Commonwealth.<sup>25</sup> However, in *Kegel v. Community College*,<sup>26</sup> a common pleas court held that a community college was an agency because, unlike Temple, the government provided all, rather than only a portion of the school's funding.<sup>27</sup>

The Act defines "public record" to include any account, vouch-

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18. LEGISLATIVE JOURNAL OF PENNSYLVANIA, cited at note 8, at 2186.

19. 141 A.2d 844 (Pa. 1958). In a footnote to the opinion, Justice Benjamin R. Jones provided a summary of the law regarding a citizen's right of access to public documents prior to the enactment of the Right-to-Know Act in 1957. *Wiley*, 141 A.2d at 848-49 n.8. It is a right which Justice Jones determined to be "the subject of some confusion" prior to the 1957 law. *Id.* at 848.

20. *Wiley*, 141 A.2d at 848-49.

21. *Id.* at 846.

22. *Id.* at 848.

23. *Id.*

24. 292 A.2d 395 (Pa. 1972). In *Mooney*, members of the student body and faculty sought detailed financial information and records of meetings of the schools board of trustees. *Mooney*, 292 A.2d at 396.

25. *Mooney*, 292 A.2d at 400-01. See also *Roy v. Pennsylvania State University Board*, 568 A.2d 751, 754 (Pa. Commw. Ct. 1990) (holding that Pennsylvania State University was structurally the same as Temple University and therefore was also not considered an agency under the Act).

26. 55 Pa. D. & C.2d 220 (Beaver Cty. 1972). In *Kegel*, a newspaper sought salary information concerning college employees. *Kegel*, 55 Pa. D. & C.2d at 220.

27. *Kegel*, 55 Pa. D. & C.2d at 226-27.

er or contract dealing with the receipt or disbursement of funds.<sup>28</sup> In *Carbondale Township v. Murray*,<sup>29</sup> the Commonwealth Court of Pennsylvania addressed the question of whether a record was still public and subject to disclosure under the Act if it was no longer under the control of the agency.<sup>30</sup> Part of the dispute in *Murray* concerned the fact that the records sought were cancelled checks, which were in the possession of the bank and not the township.<sup>31</sup> The court held that the township had the power to authorize the bank to release the cancelled checks, and ultimately ordered it to do so.<sup>32</sup>

The Act also requires that agencies make public records available for examination at "reasonable times."<sup>33</sup> In *Lyons v. Kresge*,<sup>34</sup> the court held that citizens had to be given access to the minute books for township supervisors' meetings more often than once a month before the regular monthly board meetings.<sup>35</sup> Beyond this decision, however, there has been no further clarification of what constitutes a "reasonable time" for making documents available under the Act.<sup>36</sup>

The Act also allows agencies to enforce reasonable rules concerning the copying of public records.<sup>37</sup> In *Township of Shenango v. West Middlesex Area School District*,<sup>38</sup> the court asserted that a school district could refuse to provide six hundred photocopies of documents, even though the citizen requesting them agreed to pay for the copies.<sup>39</sup> The lower court ruled, however, that the citizen was permitted to bring his own copy machine to the district offices in order to make the copies.<sup>40</sup>

The Right-to-Know Act does not require officials or employees of any agency covered by the Act to assist a citizen in compiling or assembling the information sought. In *Mergenthaler v. Com-*

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28. PA. STAT. ANN. tit. 65, § 66.1(2) (1959).

29. 440 A.2d 1273 (Pa. Commw. Ct. 1982).

30. *Murray*, 440 A.2d at 1274-75.

31. *Id.* at 1275.

32. *Id.*

33. PA. STAT. ANN. tit. 65, § 66.2.

34. 66 D. & C.2d 43 (Luzerne Cty. 1974). In *Lyons*, the plaintiff sought to review minute books of the Buck Township Board of Supervisors' meetings for the years 1972-74. *Lyons*, 66 D. & C.2d at 44.

35. *Lyons*, 66 D. & C.2d at 48.

36. See notes 55-58 and accompanying text for more recent examples of restrictions of this type.

37. PA. STAT. ANN. tit. 65, § 66.3.

38. 33 D. & C.3d 515 (Mercer Cty. 1984). A township supervisor requested certain financial documents from a school district, which were deemed to be public documents. *Township of Shenango*, 33 D. & C.3d at 517.

39. *Township of Shenango*, 33 D. & C.3d at 517, 520.

40. *Id.* at 517.

monwealth, *State Employees' Retirement Board*,<sup>41</sup> the commonwealth court held that the State Employees' Retirement Board (the "Board") had to make its files available to an association representing retirees, but found no duty on the part of the Board to furnish a list of members.<sup>42</sup> The court also asserted that if the Board had to remove any confidential information from the files to prepare them for inspection, the association requesting the information would have to pay the Board to perform this task.<sup>43</sup>

Citizens who have been denied access to public records have the right to appeal, but an unusual loophole exists due to the 1982 commonwealth court decision in *Lewis v. Thornburgh*.<sup>44</sup> In *Lewis*, a state senator made several requests to cabinet secretaries, agency directors and, ultimately, the governor's office for salary information concerning certain state employees.<sup>45</sup> After receiving no reply to his requests, the senator sought assistance from the commonwealth court.<sup>46</sup> Specifically, he requested that the court order the governor and his staff to turn over these documents, which were public records and, therefore, subject to the Right-to-Know Act.<sup>47</sup> However, a five-member panel of the court ruled that, because the governor's office never actually refused his requests, Lewis had not been denied any rights under the Act and, therefore, could not avail himself of any right to appeal accorded by the Act.<sup>48</sup> The court concluded that it lacked jurisdiction to order the release of the records.<sup>49</sup>

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41. 372 A.2d 944 (Pa. Commw. Ct. 1977). In *Mergenthaler*, the appellant, president of the Pennsylvania Association of Retired State Employees requested that the State Employers' Retirement Board provide him with a list containing the names and addresses of retired state workers. *Mergenthaler*, 372 A.2d at 945. The appellant offered to pay reasonable expenses, but was still refused. *Id.* An attorney for the board said that such a list did not exist. *Id.* at 948.

42. *Mergenthaler*, 372 A.2d at 948.

43. *Id.*

44. 448 A.2d 680 (Pa. Commw. Ct. 1982). In *Lewis*, the petitioner submitted a petition for review to the original jurisdiction of the commonwealth court. *Lewis*, 448 A.2d at 681.

45. *Lewis*, 448 A.2d at 681-82.

46. *Id.* at 681.

47. *Id.*

48. *Id.* at 682. The court noted that the Act affords citizens the right to inspect and copy public records, but gives no one the right to demand that they be assembled and transmitted. *Id.*

49. *Id.*

## ANALYSIS

Decisions such as *Lewis*, *Mergenthaler*, and *Township of Shenango* have allowed government agencies throughout Pennsylvania to thwart the original intent of the Right-to-Know Act. The Pennsylvania Newspaper Publishers' Association reports dozens of examples of access to documents being denied, mostly to reporters from its member newspapers. Often, these denials take advantage of the Act's vagueness and the loopholes created by the court's inconsistent interpretations.

Because the Act contains no penalty for those who disregard it, custodians of public records have little incentive to follow its directives or the appellate court rulings which have interpreted it. For example, even though the Pennsylvania Supreme Court held in *Wiley v. Woods*,<sup>50</sup> that a citizen's reason for requesting a document was irrelevant, an official in Northampton County demanded that newspaper reporters explain why they wanted voter registration records and describe how they planned to use them before the official would authorize their release.<sup>51</sup> State and county solicitors have also ignored and misinterpreted the court's holding on this point. The solicitor for Clarks Summit Borough in Lackawanna County refused to permit a resident to view certain public records because he feared that the citizen might use those records in his pending lawsuit against the borough.<sup>52</sup> A five-judge panel, noting that the possible use of the documents was irrelevant, ordered that the documents be turned over to the citizen.<sup>53</sup> In another instance, a solicitor representing Saucon Township in Northampton County, refused to release copies of his itemized bills to the Easton Express-Times because he feared that the newspaper's reporting of them would be inaccurate.<sup>54</sup>

Government officials have also tested the Act's requirement of reasonable access and reasonable rules for copying. In Bullskin Township, officials established a policy that required written requests to be submitted to the officials before access to documents would be granted. After receiving the requests, the town-

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50. See notes 19-23 and accompanying text for a discussion of *Wiley*.

51. Dave Herzog, *Opening the Computer Records: No Brave New World for Bureaucrats*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), October 26, 1993, at 1.

52. *Judges Favor Public Access*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), Feb 2, 1993, at 1.

53. *Judges Favor Public Access*, cited at note 52, at 1.

54. *Sunshine in Pa.*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), December 4, 1992, at 1.



ship had ten days to schedule an appointment.<sup>55</sup> In Wharton Township, supervisors approved a new policy requiring citizens to schedule an appointment to copy records.<sup>56</sup> Appointment times were, however, restricted to only two hours per day.<sup>57</sup> While two hours per day is more frequent access than the once per month limited viewing of records which was struck down as too restrictive in *Lyons v. Kresge*,<sup>58</sup> arguably this limitation is unreasonable.

In addition, charges for researching and photocopying can be unreasonable and inconsistent. In *Lyons*, the township enacted fees of up to twelve dollars per hour for any research done by its employees in complying with a request to view documents, and charged up to fifty cents per page for copying.<sup>59</sup> According to a recent survey, the amount each agency charges for copies varies from ten cents to five dollars.<sup>60</sup> Rates that exceed the municipality's cost are excessive, and should not satisfy the Act's requirement of reasonable charges.

Municipalities have obstructed attempts to obtain public records under the Act. In a scenario strikingly similar to the case of *Township of Shenango*,<sup>61</sup> two citizens of Wolf Township, near Williamsport, were forced to bring their own photocopy machines to township offices so that they could make copies of certain records.<sup>62</sup> In addition to copying various financial records, the citizens also made copies of the township's official policy which prohibited the use of township equipment to make copies for citizens requesting public documents.<sup>63</sup> While the citizens made their copies, the township secretary took photographs of them and recorded their activities on audio tape.<sup>64</sup>

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55. *Sunshine in Pa.*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), Jul. 6, 1993, at 3.

56. *Sunshine in Pa.*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), April 26, 1994, at 1.

57. *Sunshine in Pa.*, cited at note 56, at 1.

58. *Lyons*, 66 D. & C.2d at 48. See notes 34-36 and accompanying text for a discussion of *Lyons*.

59. *Lyons*, 66 D. & C.2d at 48.

60. See Scott Dodd, *Pa. Public Records Amount to Paper Chase*, PITTSBURGH POST GAZETTE, July 5, 1994, at B1. The newspaper published a table, listing the costs charged by some state agencies. The report noted that the Bureau of Elections charges ten cents per page, the Ethics Commission twenty-five cents, Commonwealth Court one dollar and the Department of Transportation five dollars. *Id.*

61. See notes 38-40 and accompanying text for a discussion of *Township of Shenango*.

62. *Armed With Copiers, Citizens Beat Twp.*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), October 13, 1992, at 1.

63. *Armed With Copiers, Citizens Beat Twp.*, cited at note 62, at 6.

64. *Id.* at 1.

Because the Right-to-Know Act was enacted before computer record-keeping became practical or popular, it does not address access to records via computer. As a result, some officials refuse to provide information on computer disk or tape, while others make computer access difficult and costly.<sup>65</sup> A resident of Tarentum, in Allegheny County, was denied access to certain borough records because they were kept in computer files and were classified as "raw data."<sup>66</sup> In Lehigh County, officials were willing to provide computerized tax records to the Allentown Morning Call, but they wanted the newspaper to pay a fee of \$5,000.<sup>67</sup> Meanwhile, the newspaper requested the same type of computerized records from Northampton County, and was told the charge would be only \$150.<sup>68</sup> The Philadelphia Daily News filed suit in an attempt to gain access to state government records on computer disk.<sup>69</sup> The governor's office turned down the newspaper's request for computerized information regarding state employees, asserting that only printouts could be turned over.<sup>70</sup> The newspaper argued that access to the information on disk was reasonable and more efficient.<sup>71</sup>

#### A PROPOSED SOLUTION: A PENNSYLVANIA FREEDOM OF INFORMATION ACT

The problems associated with the application and interpretation of Pennsylvania's Right-to-Know Act would be resolved by the current effort to repeal the Act and replace it with the Penn-

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65. See Dodd, cited at note 60, at B1, B4.

66. *Sunshine in Pa.*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), July 6, 1993, at 3.

67. Dave Herzog, *Opening the Computer Records: No Brave New World for Bureaucrats*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), October 26, 1993, at 1.

68. Herzog, cited at note 67, at 6. Although Northampton County's fee was far more reasonable, county officials did initially attach some strings to the deal that appeared to be beyond the scope of the Right-to-Know Act. They wanted to know what the newspaper was going to do with the information and they also wanted some assurances that the computer records would not be used for solicitation. *Id.* Eventually, the records were released with no strings attached, but with an understanding that the paper was going to use the information primarily in its political coverage. *Id.*

69. *Philadelphia Daily News Sues for Computerized Information*, NEWSROOM LEGAL UPDATE (Pa. Newspaper Publishers' Ass'n, Harrisburg, Pa.), June 21, 1994, at 3.

70. *Philadelphia Daily News Sues for Computerized Information*, cited at note 69, at 3.

71. *Id.* See also *Access Denied, The State Won't Release Documents In Computerized Form*, PITTSBURGH POST-GAZETTE, July 15, 1994, at B2 (discussing the controversy concerning the *Philadelphia Daily News* lawsuit).

sylvania Freedom of Information Bill (the "Bill").<sup>72</sup> The proposed legislation would provide clearer definitions than the current law, establish specific procedures for responding to requests for access to and copying of public records, place legal duties upon custodians of public records and set forth penalties for failure to comply.

The Freedom of Information Bill declares that all citizens of the Commonwealth have a right to know what is taking place in their government and are entitled to gain access to public records in the exercise of that right.<sup>73</sup> While this declaration of policy sounds similar to the remarks of Representative Stroup during the floor debate of the current Act,<sup>74</sup> the difference is that the Bill provides a framework for exercising this right and eliminates the vague and non-specific language which many public officials and bureaucrats have been using to delay or deny requests.<sup>75</sup>

First, the legislation applies to any public office, a term which would encompass more than is covered by the definition of agency in the current Act.<sup>76</sup> In addition, the definition of public record under the Bill includes "any information" kept by a public office.<sup>77</sup> This is a far more inclusive definition of public record than the one in the current statute, and it eliminates the possibility that requests for records will be denied because of disputes over what constitutes an "account, voucher or contract" or a "minute, order or decision," the language of the current statute. The Bill, like the current Act, excludes from the definition of public record any document which is part of an on-going investigation, but creates a presumption that the investigation will be concluded within three years after it has begun.<sup>78</sup> This would prevent a public official from denying release of important information indefinitely, under the guise of an investigation.<sup>79</sup> Un-

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72. S. 1631, 178th Reg. Sess., Gen. Assem. (1994). Senate Bill 1631 is sponsored by Senators Greenleaf, Reibman, Hart, Heckler, Helfrick and Rhoades and was introduced March 22, 1994.

73. S. 1631 at § 2.

74. See notes 8-11 and accompanying text for a discussion of the floor debate concerning the Right-to-Know Act on May 27, 1957.

75. See notes 50-71 and accompanying text for examples.

76. S. 1631 at § 3. Under Senate Bill 1631, section 3, "public office" would be defined as any "public institution, political subdivision . . . organized body, office, agency institution or entity established by the laws of this Commonwealth for the exercise of any function of government." S. 1631 at § 3. See note 12 and accompanying text for the definition of "agency" under the current Act.

77. S. 1631 at § 3.

78. *Id.*

79. *Id.* The bill does allow the public office to rebut the presumption that the investigation is closed. *Id.* The public official would have to demonstrate that, de-

der the proposed legislation, disclosure would continue to be prevented if prohibited by state law or if it could result in the loss of federal funding; however, there would no longer be an exemption for records which, if released, would affect a person's reputation or security.<sup>80</sup>

The Bill also brings the right of public access into the computer age. The definition of public record includes information "recorded on any tangible medium of expression, regardless of the physical form."<sup>81</sup> This would include records kept on computer tape or disk. The Bill further places a duty upon records custodians to make the medium for viewing the record as well as the record itself available.<sup>82</sup> This would require public offices, which keep records on computer disks, to make a computer available to citizens who wish to view the data contained on the disk. In addition to permitting access to computerized information, the requesting citizen would also have the right to get copies of the records on any medium upon which the data is kept, depending upon the capability of the agency.<sup>83</sup> Thus, the records custodian would be required to issue copies on computer disk or tape if possible.

While the definitions under the Bill are clearer, more inclusive and favor greater access, the proposed law also places the burden of compliance with the public officials who have custody of the records. Section 4 of the legislation imposes duties on custodians of all public documents and section 7 provides a procedure for requesting the information and ensuring that those duties are carried out.<sup>84</sup> The first duty is to make all records available upon request.<sup>85</sup> Requests under the proposed law could come in two ways: in-person or by mail.<sup>86</sup> An in-person request could be made on any business day, during normal business hours, and the office would be required to furnish the requested records that same day or "promptly thereafter."<sup>87</sup> This would eliminate the restrictive regulations currently imposed by

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spite the passage of time, the investigation will be irreparably harmed if the requested information is made public. *Id.*

80. *Id.*

81. *Id.*

82. S. 1631 at § 4(d).

83. *Id.* at § 4(e). Additionally, Bill 1631 would require that any medium chosen by a public office for record-keeping purposes be capable of producing copies of those records in printed form, and any citizen requesting public documents would be able to choose paper or computer transmission. *Id.*

84. *Id.* at §§ 4, 7.

85. *Id.* at § 4(a).

86. *Id.* at §§ 4(a), 4(g), 7(a), 7(b).

87. S. 1631 at § 7(a).

some agencies which limit access to certain hours or certain days. In addition, a public office would have twenty days to mail requested documents.<sup>88</sup> The proposed act also prohibits delay by requiring public officials to resolve any logistical problems preventing prompt access to documents.<sup>89</sup> Delays would trigger statutory damages of up to \$250 for each business day.<sup>90</sup> Additionally, public officials could not inquire as to the identity of the person requesting documents, the reason for seeking them, or their intended use.<sup>91</sup> The office could charge for the actual cost of making the copies, but it would not be permitted to charge any additional fees.<sup>92</sup>

Another feature of the Bill is that it permits legal action to enforce its provisions when requests are denied by a public office.<sup>93</sup> The procedures allow for an expedited hearing and determination.<sup>94</sup> The Bill also places the burden upon the records custodian to prove his denial of the requested material was lawful.<sup>95</sup> A reviewing court is also given discretion to determine whether disclosure should be ordered through granting awards or settlements.<sup>96</sup> While the public's access to the legal system is considerable under the Bill, a public office is prohibited from commencing any action for either a declaratory judgment or an injunction against a person seeking access to documents.<sup>97</sup> Further, the Bill limits the rights of records custodians to appeal court decisions ordering that records be made available.<sup>98</sup>

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88. *Id.* at § 7(b).

89. *Id.* at §§ 7(c)-(e). The bill would only allow delay where the public office could demonstrate that the full period of the delay is due to logistical problems. *Id.* at § 7(c). The office would also be required to explain the delay in writing, if requested to do so. *Id.* at § 7(e).

90. *Id.* at § 7(g). The fines would start accumulating on the 11th business day after the request for the documents was made for an in-person inspection, or on the 21st business day in the case of a request for documents to be shipped by mail. *Id.*

91. *Id.* at § 6.

92. S. 1631 at § 7(q).

93. *Id.* at § 8(a). This section allows an aggrieved party to go before any court of competent jurisdiction and file for a writ of mandamus to compel release of the public records. *Id.*

94. *Id.* at § 8(b), 8(c). This expedited procedure allows the complainant to be granted, upon request, a placement on the court calendar ahead of other civil cases and a decision within 30 days of the filing of his complaint. *Id.* at § 8(b)(4).

95. *Id.* at § 8(d).

96. *Id.* at §§ 8(d), 8(e). The bill would allow courts to order a public office to pay damages to an organization dedicated to informing the public about the act, attend or sponsor seminars about the operation of the act, or purchase advertisements to make public the court's rulings. *Id.*

97. S. 1631 at § 8(f).

98. *Id.* at § 8(g). The criteria for permitting appeal is that the records custodian would have to demonstrate that the disclosure of the requested document(s) would present a bona fide threat to the physical safety an individual or the court

The Bill also requires the awarding of attorney fees and costs if the citizen is successful.<sup>99</sup> This would permit lawyers to take cases on a contingent fee basis, allowing citizens who could not otherwise afford legal counsel, to enforce their rights to access. Under the current law, the people who can most often afford to pursue legal action are usually news reporters employed by large newspapers or broadcast companies.

### THE FLORIDA EXPERIENCE

If the proposed Freedom of Information Bill becomes law, it would bring Pennsylvania in line with many other states that already have more modern and comprehensive laws affording greater access to public records. An example is Florida's Public Records Act,<sup>100</sup> which provides citizens with clearly defined rights to inspect government records.<sup>101</sup> Several aspects of the Florida law make it a more useful tool in gaining access to public documents than the current Pennsylvania Right-to-Know Act. First, the Florida law has a further reach, because its definition of agency is much broader. It includes all governmental units within the state, and their various departments, boards, commissions and authorities, as well as any "private agency, person, partnership, corporation or business" which acts on behalf of a public agency.<sup>102</sup>

Second, the Florida Public Records Act also defines public record to encompass any material "regardless of physical form or characteristics," so long as it is part of the official business of the agency.<sup>103</sup> More than a decade ago, Florida's District Court of Appeals settled a matter which is still being litigated in Pennsylvania. In *Seigle v. Barry*,<sup>104</sup> the court held that under the Florida statute, computer documents are public records, the same as any hand-written or printed paper stored in a filing cabinet.<sup>105</sup> Florida's law also contains penalty provisions which subject the custodians of public records to criminal sanctions

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would have to determine that a significant legal issue exists which should be addressed by a court of superior jurisdiction. *Id.*

99. *Id.* at § 9.

100. FLA. STAT. § 119.01 (West Supp. 1993).

101. FLA. STAT. § 119.07. The Florida Act begins with a general statement of policy that records of government on all levels of the state "shall at all times be open for . . . inspection by any person." *Id.* at § 119.01.

102. *Id.* at § 119.011(2).

103. *Id.* at § 119.011(1).

104. 422 So. 2d 63 (Fla. Dist. Ct. App. 1982).

105. *Seigle*, 422 So. 2d at 65.

and attorney fees for violations.<sup>106</sup> Additionally, the law not only gives those who are denied access the right to file a civil action, but it also provides that their case will be given priority over other pending cases.<sup>107</sup>

Case law interpreting the Florida statute has favored a liberal construction; thus, allowing for few limitations on access.<sup>108</sup> The Florida law contains many of the same exemptions from disclosure as does Pennsylvania's Right-to-Know Act, such as the protection of documents relating to investigative matters.<sup>109</sup> The Florida courts, however, have shown a tendency to interpret the law as supporting disclosure whenever possible.<sup>110</sup> The terms of disclosure have also been liberally construed. Under the statutory requirement for document inspection at reasonable times and under reasonable conditions, the courts have permitted delays only to locate and retrieve the records and delete any confidential material.<sup>111</sup>

#### CONCLUSION

If the Pennsylvania General Assembly wishes to make government open to the people at all levels, then it should approve Senate Bill 1631, the Freedom of Information Act. The proposed law would put the state on record as unequivocally favoring a government that is open to all citizens. It makes those seeking information from government aware of their rights and how to enforce them. It also establishes clear guidelines for the custodians of public records by stating their responsibilities and duties. In addition, the bill meets most of the criteria suggested by commentators to make computer records as open as paper records by making them accessible in the most useful formats.<sup>112</sup>

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106. FLA. STAT. §§ 119.10, 119.12(1).

107. *Id.* at § 119.11(1).

108. *See, e.g.,* Tal-Mason v. Staz, 614 So. 2d 1134, 1135 (Fla. Dist. Ct. App. 1993) (holding that public policy dictated that records be freely accessible unless an overriding public purpose requires secrecy).

109. FLA. STAT. § 119.07(3) (West Supp. 1993).

110. *See, e.g.,* Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. Dist. Ct. App. 1985) (holding that the judiciary's role was to make certain that government claims for exemption did not defeat a right to disclosure). *See also* Palm Beach Community College Foundation, Inc. v. WFTV, Inc., 611 So. 2d 588, 590 (Fla. Dist. Ct. App. 1993) (holding that exemptions from disclosure were to be narrowly construed, and that when doubt existed, courts had to rule in favor of disclosure instead of secrecy).

111. *See* Tribune Co. v. Cannella, 458 So. 2d 1075, 1079 (Fla. 1984), *appeal dismissed sub. nom.*, Deperte v. Tribune Co. 471 U.S. 1096 (1985).

112. *See, e.g.,* Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin and Linda M. Perry, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 596-98

In short, the proposed Freedom of Information Act is a modern law, which eliminates most of the barriers to access that have been erected over the years by those individuals inside government who prefer to shield their activities from those on whose behalf they are employed.

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