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TESTIMONY PRESENTED BY

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AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

TO

PENNSYLVANIA HOUSE STATE GOVERNMENT COMMITTEE

AUGUST 7, 2007

HARRISBURG

Good morning, Madam Chair and members of the committee. My name is Andy Hoover, and I am a Legislative Assistant and Community Organizer for the American Civil Liberties Union of Pennsylvania. Thank you for the opportunity to testify today about House Bill 443 and the need to improve Pennsylvania's open records law.

Last year we celebrated the 40th anniversary of the federal Freedom of Information Act. FOIA, as it is commonly known, has been an important tool for shining more light on the business of the federal government. Recent examples of information obtained through FOIA have included the photos from Abu Ghraib prison in Iraq, which revealed the horrific torture that was happening there, and the revelation that the FBI had conducted surveillance on the Thomas Merton Center, an interfaith peace group in Pittsburgh that apparently attracted the attention of the FBI through its fervent opposition to the war in Iraq.

Although it is not always perfect in practice, FOIA has given Americans the power to know more about their federal government. This kind of transparency is essential in a free society, and the people of Pennsylvania deserve the opportunity to know more about their state and local governments, as well. With this in mind, the ACLU of Pennsylvania supports House Bill 443.

The ACLU supports making significant revisions to Pennsylvania's open records law. Over the years, we have found Pennsylvania's Right to Know Law to be frustrating and in conflict with modern notions of citizen access to those documents that are used in making decisions regarding public policy. We are encouraged that both the legislative and executive branches are pushing for significant changes to the existing law.

Over recent months, we have had other opportunities to discuss proposed changes to Pennsylvania's open records law. Larry Frankel, our legislative director, was a member of the working group pulled together by the General Counsel's office to review a draft of a bill being prepared by the Rendell Administration. Mr. Frankel also addressed this subject when he testified before the Speaker's Commission on Legislative Reform on April 26, 2007, and through written testimony to the Senate State Government Committee on June 4, 2007.

On these occasions, we have stated that in the opinion of the ACLU there are three important changes that should become part of any legislation on open records:

- (1) establishing a presumption that a record is a public record;
- (2) placing the burden on agencies to demonstrate why their records should not be disclosed; and

(3) the creation of an advocate who will promote better disclosure practices throughout all the agencies of this Commonwealth.

We believe that House Bill 443, which contains these three changes, will foster more open government, one in which the citizens of Pennsylvania will have greater trust.

We have also stated an open records law must be sensitive to privacy concerns, and we have urged that careful consideration be given to protecting the privacy rights and interests of ordinary citizens. Every level of government collects all sorts of information on us in the course of our regular interactions with agencies. Some of that information is of a very personal nature. We do not think that an open records law should result in public access to each and every item of information that citizens routinely submit to government.

With these points in mind, there are several sections of House Bill 443 to which I'd like to draw specific attention and ask the committee to ensure that these sections are preserved throughout the process toward passage.

On page 3, lines 24-27, the bill states, "It is important that access to public records be balanced against rights of privacy and confidentiality provided in law regarding personal data gathered by government agencies." To the disappointment of many of us, government collection of our personal information does not seem to be decreasing any time soon. This statement in House Bill 443 clearly states that the intention of the General Assembly is not to open the personal information of average citizens to public access. State agencies and the Office of Access to Public Records can use this statement as a guide to protect a private citizen's personal information.

As I have stated, the ACLU believes that a record should be presumed to be a public record and that the burden for arguing otherwise should be placed on the agency. HB 443 establishes this presumption and burden on page 4, lines 20-27 and on page 10, lines 25-27. We urge you to protect these portions of the legislation.

In addition, the bill notes that the exceptions to what shall be deemed a public record shall be “strictly construed” on page 18, line 27. In the pages prior to this statement, House Bill 443 includes a detailed list of the exceptions. This statement regarding strict construction of exceptions is a very important piece of the legislation. Through the course of court proceedings, weaknesses in a law can be exploited. The mandate that the exceptions are to be “strictly construed” makes HB 443 less vulnerable to being undermined.

Our lone critique of House Bill 443 regards placing the burden on the issuing agency to show that a record is not a public record and the appeals process. Generally, the bill places the burden on the agency, which we support. In addition, it lays out a clear process for requesting a record and appealing a decision to deny access to a record. However, HB 443 does not explicitly state that the burden is on the agency at each step of the appeals process. The ACLU believes that the agency should have the burden of showing why a record is not public throughout the entire process, and we recommend amending the bill to make this clear.

HB 443 is an important step forward in improving Pennsylvanians’ right to know what their government is doing. We commend the co-sponsors of the bill for introducing it and this committee for holding this hearing. I am willing to take questions, and you may also refer questions to Larry Frankel, our legislative director.