ACLU Pennsylvania

MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: October 15, 2022

RE: OPPOSITION TO HB 2524 P.N. 3499 (SCHMITT)

Bill summary: HB 2524 (PN 3499) would amend Pennsylvania's Right to Know Law (RTKL) to make a variety of updates and changes to the statute, including provisions regarding vexatious requesters, requests by incarcerated people, exceptions to public records, retention of records, commercial requests, appeals processes, and fees.

HB 2524 is a well-developed bill that proposes some useful and beneficial changes to the current law. Unfortunately, two provisions in particular—(1) designating some people as "vexatious requesters" and (2) limiting requests from incarcerated people—establish dangerous and potentially unconstitutional precedents for allowing the state to pick and choose to whom it responds.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 2524.

For the first time in RTKL history, HB 2524 would radically change this law to allow the government to decide whether to release a record based on WHO is making the request.

Under the RTKL, the reason for a document request or the identity of a requester is irrelevant. The only question is whether the record is a public record. If it is, then all members of the public are entitled to access it, regardless of who they are or why they want it. It is the nature of a document itself that determines whether the document should be released.

Notably, neither the RTKL nor its predecessor have ever conditioned access to public records based on the identity of the requester. From 1957 until 2008, any "citizen of the Commonwealth of the Pennsylvania" had a right to inspect records. Our current Right to Know law expanded that definition by permitting requests from any "person that is a legal resident of the United States." For the 65 years that it has had an open records law, Pennsylvania has never defined access to public records based on who is making the request.

By categorically and arbitrarily restricting "vexatious requesters" and incarcerated people from accessing public records under the RTKL, HB 2524 would introduce a radical and fundamental change to how Pennsylvania law has determined access to public records since the Right to Know Law was first enacted.

HB 2524 would likely violate a requester's First Amendment right to petition the government.

If HB 2524 were to become law, it would likely be challenged as unconstitutional for its creation of two new problematic sections under the Right to Know Law:

1. Section 906—"Vexatious requesters": This section would allow local agencies to designate people "vexatious requesters" (a requester whose sole intention is to annoy or harass the local agency) and subsequently deny their request. It would also permit the local agency to seek an order from the Office of Open Records allowing them to deny all future requests from the vexatious requester for up to one year.

2. Section 508—"Inmate access," which would:
   a. Categorically exclude "inmates" from the definition of "requester" under the Right to Know law; and
   b. Create something akin to a pre-approved list of records that incarcerated people are entitled to—a narrow list of 11 types of documents, such as personal records or records related to their detention or criminal case, which assumes incarcerated people are not interested in—or should not have the right to—any other kind of public document other than ones that pertain to their specific life or circumstances.

In *Campbell v. Pennsylvania School Boards Association* (2018),[1] the United States District Court for the Eastern District of Pennsylvania held that right to know law (RTKL) requests constitute protected speech under the First Amendment's right to petition the government, and as such are permitted to be unreasonable and even harassing as long as they represent "a genuine effort to procure governmental action."[2] The Court's analysis was squarely grounded in First Amendment precedent holding courts "regularly recognized that statutorily authorized petitions" such as RTKL requests, "are protected by the First Amendment."[3] The federal court found that even requests perceived by government agencies as problematic are protected by the First Amendment, no matter how voluminous or annoying they may be. Even in a case with facts as extraordinary as the *Campbell* case, the District Court recognized and affirmed the use of the RTKL process as constitutionally protected speech.

There is no way of knowing how many people would be denied access to public records after being labeled "vexatious." But HB 2524 would invite restrictions on requesters simply because an agency does not like the requester or would prefer to avoid having to respond—in fact, this kind of alleged agency bias was the subject of Republican accusations against the administration in several COVID-related RTKL disputes.

For incarcerated people, enacting this legislation would deny approximately 37,000 people[4] serving a state sentence of incarceration and over 10,000 people[5] serving their sentence in a Pennsylvania county jail from exercising their civil right to seek public records from an agency—a right denied to them based solely on their incarceration status. In fact, former Secretary of the Pennsylvania Department of Corrections John Wetzel recently remarked that "[e]liminating this [access to the RTKL] would be unconstitutional." He is correct. The right to submit public records requests under the RTKL constitutes activity that is protected by the fundamental right to petition the government under the First Amendment.

Categorically excluding incarcerated people from the RTKL would violate the Equal Protection Clause of the Fourteenth Amendment.

The restrictions imposed on incarcerated people by HB 2524 would also constitute a violation of the Equal Protection Clause of the Fourteenth Amendment and Article I, Section 26 of the Pennsylvania Constitution.

By creating two classes of people—(1) those who are not incarcerated and are able to exercise their First Amendment right to submit RTKL requests, and (2) those who are incarcerated and are unable to exercise that First Amendment right—the legislature would create a class-based distinction that permits only some people to exercise a fundamental right, in other words, it would treat them unequally. And because there would be no compelling state interest in such a distinction, nor would a categorical exclusion of incarcerated people from the RTKL be narrowly tailored to whatever interest the government is trying to achieve, these provisions would fail the Equal Protection test and would therefore fail the constitutionality test.

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[1] *Campbell v. Pa. Sch. Bds. Ass'n*., 336 F.Supp. 3d 482 (2018).
[2] Id., at 495.
[3] Id., at 496.
[4] Pennsylvania Department of Corrections, Monthly Population Report as of August 31, 2022.
[5] Vera Institute of Justice, Incarceration Trends in Pennsylvania (2019).

Restricting access for incarcerated people is fraught with (presumably) unintended consequences.

Section 508 states that "an inmate may not be a requester for purposes of this act." This categorical exclusion has the effect of making Section 508 an island in the middle of the RTKL, **unaffected by the other provisions within the Right to Know law**. This has two, presumably unintended, consequences:

1. If "inmates may not be requesters," then none of the other requirements under the RTKL would apply, even to requests for documents on the pre-approved list of records. For example, the RTKL currently requires agencies to respond to requests within a certain amount of time. But that timetable is not duplicated or referenced under the proposed Section 508. And because "inmates are not considered requesters," the timetables that govern all other requests would not apply to requests from incarcerated people. An agency may have a legal obligation to provide those records, but when responding to a Section 508 request, an agency could happily take months or years to do so without any consequences. A similar problem arises with appeals; the RTKL gives people defined as requesters the right to appeal to the OOR or the Commonwealth Court when a request is denied. But because inmates are not considered requesters, and Section 508 fails to include any appeals procedures, incarcerated people are, by definition, denied the right to appeal a denied request.
2. Perhaps more astonishing is how the Section 508 island would apply—or not—to exempted records. Section 508 lists 11 types / categories of records that agencies "**shall** provide" to incarcerated people, as long as the record does not "diminish the safety or security of any person or correctional facility." Meanwhile, the current RTKL lists *30 exemptions* under Section 708(b), records that are exempt from access by "requesters under this act." But since incarcerated individuals *are not requesters*, these exemptions—along with everything else in the RTKL—do not apply to them. In other words, if an incarcerated person requests an approved record under Section 508, and the record does not "diminish the safety or security of any person or correctional facility," then **an agency would be required to provide that document, *even if it is exempt under Section 708***.

HB 2524 would create a logistical nightmare in determining who counts as an "inmate."

HB 2524 would define an "inmate" as an "individual incarcerated, *after having been sentenced* by a court of competent jurisdiction, in a Federal, State or county correctional facility or prison" (emphasis added). That means it would not apply, for example, to a person held pretrial or a person held on a probation or parole detainer.

In practical terms, how is an agency supposed to tell the difference and know whether the RTKL request they recieve from a person who is incarcerated comes from an "inmate" who has no RTKL rights or a person who maintains such rights? This administrative morass will cause additional delays and harms for agencies as they face additional appeals and litigation over their failure to respond to RTKL requests based solely on the return address for the individual.

Any legislation that allows the government to pick and choose to whom it responds sets a dangerous precedent, one that is likely unconstitutional. HB 2524 will permit "vexatious" requesters to be treated as hostile by government agencies that could use the bill's new permissions as an opportunity to deny access to those with different political views or just people the agency finds irritating or inconvenient. And incarcerated people still have rights under the Constitution and the laws of Pennsylvania. They should not be subject to additional punishment and discrimination by being categorically banned from submitting RTKL requests seeking public information—information that any non-incarcerated person would be free to request.

For these reasons, we urge you to oppose House Bill 2524.