



MEMORANDUM

TO: The Pennsylvania Senate State Government Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: September 18, 2023

RE: OPPOSITION TO SB 210 P.N. 84 (BROOKS)

Bill summary: Currently, Pennsylvania's [Right-to-Know Law](#) (RTKL) does not distinguish between requests for commercial or noncommercial purposes. [SB 210](#) (PN 84) would add a new category of commercial purpose requesters that are subject to different rules and fee structures.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 210.

SB 210 would create, for the first time, distinctions between types of requesters under the Right to Know Law.

Under the current Right to Know Law, the reason for a document request, the identity of a requester, and/or the type of requester are 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 or the purpose for which they intend to use it.**

SB 210 would introduce the first such distinction—a worrisome departure that will invite further meddling with who has the right to access government records and at what cost.

"Commercial purpose," as defined under SB 210, would invite subjective and ultimately different interpretations of who gets designated as a commercial requester.

Included in SB 210's definition of "[commercial purpose](#)" is whether the record will be used for "any other purpose through which the **requester can reasonably expect to generate revenue.**" It is not clear what "*any other purpose through which the requester can reasonably expect to generate revenue*" means or how an individual agency will interpret the scope of that criterion. If a nonprofit organization requests records related to government malfeasance and publicizes those records, could the nonprofit "reasonably expect to generate revenue" as a result of its actions? Would that make the nonprofit a commercial requester?

"Commercial purpose" is defined far too broadly and imprecisely, likely resulting in erroneous and/or subjective designations, creating a needless obstacle for requesters to reliably obtain information from the government without being subjected to additional delays and onerous fees.

Recommendations:

- Ideally, the RTKL would not be amended to impose different fee structures based on who is making the request or for what purpose the information will be used.
- However, if such a distinction is being made, we urge that **all** nonprofit organizations be exempt from the definition of “commercial requester,” especially if the bill retains the vague element of the definition “**any other purpose through which the requester can reasonably expect to generate revenue.**” This could inadvertently sweep in any number of non-commercial, nonprofit entities, depending on who happens to review the request.

SB 210 would impose a different fee structure for commercial purpose requesters.

If a right-to-know request is determined to be for a commercial purpose, SB 210 would allow an agency to assess additional fees, as defined in a new subsection, [Section 1307 \(e.1\)](#). Based on whether an agency believes this to be a commercial request, the agency could then charge hourly fees for document search, retrieval, review, and redaction—substantial expenses to which no current RTKL requests are subject.

Recommendation: The ACLU-PA strongly cautions against **any** increase in RTK fees. Furthermore, differential fee structures would create needless confusion and delays, especially when the decision to charge higher fees is based on vague criteria that could easily be applied differently by individual local and state agencies across the state, depending on who is reviewing the request.

SB 210 fails to define the authority of the Office of Open Records when considering an appeal.

Under SB 210 [Section 1307 \(j\)](#), a fee charged under this section may be appealed to the Office of Open Records (OOR). This provision offers no clarity on what the authority of OOR is following an appeal, including what process OOR should follow and whether it can order the removal of fees that were improperly imposed on a non-commercial entity.

Recommendation: At a minimum, the bill must specify that OOR has the ability to make a final determination as to whether or not an entity is commercial, thus waiving fees entirely, as well as the authority to reduce fees if OOR determines that the agency has exceeded the maximum statutory amount for the fees.

If enacted, SB 210 would, for the first time in the 65-year history of Pennsylvania’s public records law, allow government agencies to impose different rules and fee structures on requesters depending on who they are and why they want the information. If a record is public, then it should be available to all members of the public without exception.

Compounding the problem of such a departure is the imprecise criteria for making this distinction, inviting a patchwork of incongruous outcomes throughout the commonwealth.

Changing this framework to allow government agencies to condition access based on who the requester is or what their intentions are, opens a Pandora’s box that would be nearly impossible to close and could easily, if not presumptively, bite the hand that penned it.

For these reasons, we urge you to oppose Senate Bill 210.