ACLU Pennsylvania

MEMORANDUM

TO: The Pennsylvania Senate State Government Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: September 19, 2022

RE: OPPOSITION TO SB 492 P.N. 591 (MASTRIANO)

Bill summary: Under current law, incarcerated individuals, as any other Pennsylvanians, have full and equal access to records under the Right to Know Law (RTKL). But SB 492 (PN 591) would amend Pennsylvania's Right to Know Law to make several changes, including to restrict the right for incarcerated people to access public records. Specifically, SB 492 would create a new section, Section 508–Inmate access," which would:

1. Categorically exclude "inmates" from the definition of "requester" under the Right to Know law; and
2. 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.

SB 492 would not prohibit agencies from responding to other requests by incarcerated individuals (i.e., requests for records not on the pre-approved list), but they are not legally obligated to do so.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 492.

SB 492 would prevent incarcerated people from exercising their First Amendment right to petition the government.

SB 492 would categorically exclude incarcerated individuals from the RTKL and from exercising their right to petition the government. 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.

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.

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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).

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 in 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 SB 492 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.

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

SB 492 would create a new section, Section 508, which 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***.

SB 492 would create a logistical nightmare in determining who counts as an "inmate."

SB 492 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/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.

For the 65 years it has had an open records law, Pennsylvania has never defined access to public records based on *who* is making the request. SB 492 would break that precedent.

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."

SB 492 would radically depart from that precedent. By categorically and arbitrarily restricting one particular type of person from accessing public records under the RTKL, SB 492 would invite a dangerous and untested interpretation of how the entire Right to Know Law has been understood and applied since it was first enacted.

Any legislation that allows the government to pick and choose to whom it responds is dangerous, likely unconstitutional, and creates processes that are needlessly burdensome and punitive to unrepresented citizens who can be targeted by a hostile agency. Individuals who are incarcerated still have rights under our state and federal constitutions 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 ask you to oppose Senate Bill 492.