



**Testimony of New Jersey Appleseed Public Interest Law Center
with respect to A4045**

**Before the Assembly State and Local Government Committee
March 11, 2024**

Chair Karabinchak, Vice-Chair Swain and members of the Committee:

My name is Renée Steinhagen. I am Executive Director of New Jersey Appleseed Public Interest Law Center (NJALC), a nonprofit, nonpartisan legal advocacy center based in Newark. Over the course of our nearly quarter century existence, government accountability has been a major focus of our work through our prerogative writ project. We have battled misuse of government funds and public lands, fought to enforce pay to play protections, opposed discriminatory government action and otherwise stood up against government malfeasance and overreach, both of which I fear would greatly increase if the Legislature, starting with the members of this committee, approves A4045. It would eviscerate the Open Public Records Act (OPRA) and significantly undermine government transparency and thus accountability, making this legislation fundamentally undemocratic.

OPRA as it stands now is far from perfect and there are aspects of it that need to be updated to reflect technological changes in how records are stored, retrieved and accessed. Any reform of OPRA should strengthen the law by making it easier rather than harder to obtain records but this bill goes precisely in the wrong direction, eating away at the transparency that is the core value of OPRA, the essence of our democracy and the foundation of good government. These changes will make it more difficult, and in some instances, impossible, for members of the public and for the press, which is essential to an informed electorate, to access a broad range of public records and to challenge denials of access. How ironic that this attack is happening during National Sunshine Week, which is meant to highlight the fact that "government functions best when it operates in the open."

There is so much that is problematic that I will discuss only some of the worst aspects:

It chips away at the definition of government record by adding new categories of exclusions including draft materials and notes, which can help the public understand government decision making; metadata, which can shed light on the timing, authorship and alteration of records; and electronic or paper calendars of individuals, which, among other things, can reveal

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meetings between official and lobbyists and others seeking to influence government action and policy.

Probably the most troubling of the new exclusions is for logs of telephone calls, emails, or texts, which would overrule the New Jersey Supreme Court's unanimous decision in *Paff v Galloway*. The case involved a request by a Somerset County resident for a list of emails between the Township of Galloway municipal clerk and police chief during a two-week period, showing the "sender," "recipient," "date," and "subject." The Court held that information electronically stored in government computers constitutes a government record, and that public entities can be required to disclose such information and even to gather together scattered pieces of it, if the request is clearly stated and the process requires no analysis or research. Since, it takes only a few minutes and the push of a button, to create such a list, this new exclusion is clearly not necessary to ease the burden on records custodians but appears aimed at keeping the public in the dark and possibly covering up government error or even wrongdoing.

A separate provision applicable to mail, email, text messages, correspondence, or social media postings and messages (and perhaps other types of record because it uses the phrase "including but not limited to") would further hinder access by letting custodians of the hook from complying with such requests unless they specify the individual or account to be searched, as well as a "discrete and limited time period and a specific subject matter." First, it should be sufficient to provide the job title rather than the name of the official which many, if not most requesters, will not know. In addition, what qualifies as a "discrete and limited time period" is exceedingly vague and should not be left to the discretion of records custodians.

Yet another new loophole would apply to requests that the custodian decides will require research and compiling of information into a new record, an issue also addressed in the *Paff* case.

Short of outright exclusions, A4045 would interfere more broadly with public access through a provision that extends the protection rightfully afforded for personal information to also encompass "information that might reasonably lead to disclosure of personal information" and information whose disclosure the agency has "reason to believe ... will result in harassment, unwanted solicitation, identity theft or opportunities for other criminal acts." That language is far too sweeping and ambiguous. Given that it is possible to misuse almost any information or data, it would open the floodgates to denials of many types of otherwise available records.

Yet another obstacle would be created by a new mandate to use only the official form where under current law, no official form is needed so long as all the information necessary to fill the request is provided. This language would effectively shut down OPRAmachine, an invaluable online tool for requesting records from more than 1,300 state agencies, municipalities, counties, school boards, sheriff's departments, prosecutor's offices and other government entities in New Jersey, with the records produced then posted to the website. The Government Records Council's November 2022 handbook specifically mentions OPRAmachine in instructing custodians to accept online records requests so long as they contain all the requisite information. It is hard not to believe that mandating use of a form is not intended to shut down OPRAmachine because it has been so useful in facilitating public access.

The bill also seems geared to increase the cost of public records in some instances. It amends the provision regarding special service charges for oversized and otherwise hard-to-copy records by removing the limitation that such special charge be reasonable and replacing it with a proviso that such special charges are to be presumed reasonable. It also removes the requirement that municipalities pass an ordinance in advance in order to impose special service charge for particular kinds of records.

No matter how much access the law provides, strong enforcement is essential so that custodians will comply with it. OPRA's mandatory fee-shifting provision does the job well, enabling requestors to find lawyers to challenge denials and delays because those lawyers know they will get paid if they prevail. But this bill would make the award of legal fees permissive rather than mandatory, which would discourage attorneys from taking OPRA cases. That would leave most members of the public unable to vindicate their rights under OPRA unless they have enough money to pay legal fees out of pocket. The number of OPRA suits would go way down, which would in turn, result in more violations of the law since custodians would be less likely to face legal action for violating the law.

It is not the only part of A4045 that would encourage OPRA violations. Another provision states that if an OPRA complaint is filed in court or with the GRC, the matter will be dismissed if the records at issue are produced within seven days of the filing and that fees will only be available if the agency knew or should have known the denial violated OPRA. The harmful impact of this escape hatch goes beyond the delayed access. It is an invitation for agencies to roll the dice and violate OPRA because they know that even if the requester decides to take them to court or to the GRC, they have a get out of jail card by complying with the law at that late date. Even where the custodian was clearly in the wrong for withholding access, they are likely to have impunity because it can be so difficult to prove what they knew or should have known.

The last aspect of the bill that I will mention—though there are many more we find problematic—applies it retroactively to all pending complaints and appeals. I suspect the intent and the result will be that a lot of meritorious claims of OPRA violation will be dropped because fee-shifting will no longer be guaranteed if the requester prevails. I suppose it's one way to clear the court docket and the two-year backlog in the GRC but it seems terribly unjust and a waste of all the effort that went into vindicating OPRA rights in those cases. And once again, it will reward custodians who violated OPRA with impunity.

It is not just the substance of A4045 that is detrimental to democracy but the way it is being rushed through. Despite the bill's length and complexity, it is being heard in committee only six days after the text was made publicly available, and it is being heard in two committees simultaneously, all in all a process that seems designed to thwart public scrutiny and input on a controversial and unpopular measure.

Government transparency is so fundamental to our democracy that any significant changes to OPRA should be well considered and based on input from all stakeholders. That did not happen here. According to a news report, even the NJ Press Association never saw a draft of

the bill before it was introduced, despite assurances that it would and multiple inquiries on its part.

The only ones who seem to have been allowed any input were the League of Municipalities and others aligned in interest with it. The League might be an important organization and one you should listen to but the bottom line is that the business of government, and your job too – even those of you who are dual office holders-- is not to serve the League but to serve the people, who have a right to scrutinize what the government does and hold it accountable.

At a time when democracy is under attack in the U.S. and around the world, this attempt at greater secrecy for NJ government operations is especially dismaying.

I urge you to hold this bill to allow for serious consultation with entities like the NJ Press Association, ACLU-NJ, League of Women Voters-NJ and others, so that you can hear and respond to their concerns before moving ahead with any attempt to amend OPRA. It is too central to our democracy to not get it right.

Thank you for your consideration,

Respectfully submitted,

/s/Renée Steinhagen
Renée Steinhagen