New Jersey
Appleseed

Testimony of New Jersey Appleseed Public Interest Law Center with respect to S2930

Before the Senate Budget and Appropriations Committee May 9, 2024

Chair Sarlo, Vice-Chair Greenstein and members of the Committee:

My name is Mary Pat Gallagher. I am a Policy Analyst with New Jersey Appleseed Public Interest Law Center (NJA), 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 S2930 is enacted. The bill was pulled in March in the face of a public outcry over how it would eviscerate the Open Public Records Act (OPRA) and significantly undermine government transparency and thus accountability, making it fundamentally undemocratic.

The amended version of S2930 is now before this committee and it is hardly any better. We therefore stand with other open government advocates, those interested in good governance in general and the general public, in continuing to oppose it.

S2930 retains the worst flaws of the earlier version, most significantly the elimination of mandatory fee shifting, which has been part of the law since its enactment in 2002 and played a crucial role in enforcement. OPRA, like government transparency in general, exists not just for wealthy individuals or corporations who can afford to pay legal fees out-of-pocket, but for all of us. Most people cannot afford a lawyer if we are wrongfully denied records but mandatory fee shifting has ensured that anyone can enforce their rights under OPRA provided they have a strong enough case to induce a lawyer to take it on a contingency basis.

Mandatory fee shifting thus serves a double purpose. It not only enables vindication of rights under the law but helps weed out unmeritorious cases when lawyers pass on those where there is little chance of getting paid for their efforts.

Actually, mandatory fee shifting serves a triple purpose because the prospect of fee-shifting incentivizes records custodians to comply with the law. Take away mandatory fees and you will

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have many more wrongful denials even without any other changes that undermine access. Not only will records custodians not have to fear fee-shifting if they lose, but they will know there is a far greater likelihood that any denial or delay will not be challenged at all without lawyers to take on the cases.

As amended, fee shifting would only occur if a prevailing plaintiff proves that the agency acted in bad faith, which is extremely difficult, if not impossible, to establish. This would result in a situation where a records requester who was entitled to but was denied access and then won a determination from a court or the Government Records Council that the denial violated OPRA, would be faced with an additional hurdle --the nigh impossible task of establishing bad faith. Once again, the risk of not being able to meet that last burden will deter challenges to wrongful and illegal denials and encourage agencies to violate the law. In fact, the amended bill is even worse than the prior iteration which would have allowed fees to be awarded on a showing that the denial of access was merely "unreasonable."

Multiple other serious problems remain. The bill 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 meetings between officials and lobbyists and others seeking to influence government action and policy.

The legislation would block access to emails and texts in many instances by requiring the requestor to specify the individual (as compared to the job title even though the public often does not know the individual name), as well as a "discrete and limited time period" and "a specific subject matter." Requesters might know one or two of these but not all three. Further, what qualifies as a "discrete and limited time period" is exceedingly vague and should not be left to the discretion of records custodians on a case-by-case basis. The new vague yet exacting standard would replace the current requirement that the records sought be identified with "reasonable clarity." What this means is that an agency can know exactly what records you seek but be able to withhold them on a technicality to bar public scrutiny. This is NOT OPRA reform.

One of the most troubling of the new exclusions applies to logs of telephone calls, emails, or texts, which would overrule the New Jersey Supreme Court's unanimous decision in *Paff v Galloway*. There, 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 wrongdoing.

Also unchanged from March is the undemocratic (small "d") process by which a long and complex bill of great public importance and interest is being rushed through on short notice, in 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. We were told that this was being done after the bill was held in March but it seems to have been a sham, performative process that failed to cure the bill's worst problems. The legislation still seems designed to serve the interests of the League of Municipalities and the Association of Counties rather than the interests of the public you are supposed to represent. It should matter to you that a Fairleigh Dickinson poll found that 81% of registered NJ voters opposed tightening access to public records. It is hard to get that many New Jerseyans to agree on anything.

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.

This legislation continues to reflect a profound misunderstanding about government transparency. Responding to records requests and ensuring transparency is not a pesky distraction from the work of governance – it is at the heart of it, as essential as any other aspect of the job.

OPRA, as it stands now, is far from perfect and there are aspects that need to be updated to reflect technological changes in how records are stored, retrieved and accessed. But that need to update should not be used as a pretext to weaken the law. Any reform should make it easier rather than harder to obtain records. 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.

I urge you to heed the views of New Jersey voters and discard this bill and start from scratch on real OPRA reform.

Thank you for your consideration.

Respectfully submitted,

/s/Mary Pat Gallagher