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No need for a study delay. OPRA reform bill is ready to go, senator says

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By Star-Ledger Guest Columnist

By Loretta Weinberg

Once again, the League of Municipalities is pushing for a commission to study the Open Public Records Act (OPRA), a study that would delay reform and weaken the only statute in New Jersey that guarantees the press and the public access to public records.

Speaking for the League, staffer Lori Buckelew complained in a recent NJ Advance Media/Star-Ledger article about the high costs and the burdensome work imposed by OPRA and calls for a study. She neglects to mention that over the past several years, I have met regularly with Ms. Buckelew and the League, as well as the Municipal Clerks Association, the Press Association of New Jersey, the American Civil Liberties Union of New Jersey, and a bevy of other organizations, records custodians, and local and county elected officials. That process has produced a bill, S107, which reforms the Open Public Records Act.

In a public letter to the New Jersey Senate dated June 20, 2019, the League of Municipalities laid out its argument against S107. If I might paraphrase, there are three points of contention raised in the letter.

First, S107 does not abolish "attorney fee shifting" in the law. Under current law, when a party wins an OPRA lawsuit against a government body, the government body is obligated to pay that party's attorney's fees. This is the only reasonable enforcement mechanism available for the law. There is no way a private citizen — not to mention a great deal of news organizations! — would be able to afford constant legal challenges, and there is no avenue for the Attorney General to pursue OPRA violations.

Second, S107 expands the definition of "public record" to include records "required to be made, maintained, or kept on file." This simply means that the responsibility of a public body to furnish a record is not diminished by the destruction of that record. Certainly, there is no penalty under the bill should a records custodian fail to produce a destroyed record, but I think the public has a right to know the difference between a record that does not exist because it never existed and a record that used to exist but does not now.

Third, S107 does not put the same requirements on the Legislature as it does other public bodies. This is a feature of the current law, and it is unlikely that a majority of the Legislature would vote to put these obligations on their offices. Bodies of 40 and 80 need different rules from official bodies of five, seven, or nine. Also, in at least one respect, the Legislature

already does more than local governments: unlike in many towns, our subcommittee meetings are open to the public and available for viewing online in real time.

You may notice something missing from this letter -- the League of Municipalities does not mention the burden of commercial requests, which was the primary complaint laid out in the Star-Ledger article of January 5. Why? The answer is that S107, being the product of years of stakeholder meetings, addresses this concern! Per recommendations received from the League of Municipalities, S107 offers records custodians several avenues of relief when it comes to voluminous commercial requests.

First, unlike current law, S107 allows records custodians to direct requesters to view records online if the records are so available. Once made available online, a records custodian might never again have to produce a physical copy of that record for a requester. The bill appropriates some state monies to set up a centralized open data website on which records custodians could post their records cost-free to the municipality.

Second, S107 creates a new charge for commercial entities, a "special administrative charge," which is meant to cover the ongoing operational expenses of producing a record. The high costs referenced in the January 5 article would thus be borne by the commercial entities making these requests, not the taxpayers.

Finally, S107 would allow municipal governments to seek protective orders from the courts in the case of "harassing" records requests. There does need to be some recourse when the nature and volume of requests is more than a custodian could reasonably handle. Current law offers no such recourse, but S107 does.

What would be accomplished by a new study commission, which has not already been accomplished by years of negotiations? The members of the proposed commission are essentially the same groups we have been meeting with for years. The only purpose of such a commission would be to kick the can down the road in the hopes of addressing the three points raised in the League of Municipalities' letter.

The removal of fee shifting under OPRA would be the death of government transparency in New Jersey, and the League of Municipalities knows it. All of us who have worked on OPRA reform — the League of Municipalities included — know how much progress has been made these past few years. Knowing how quickly technology changes, S107 even includes a study commission of its own to report on the successes and failures of the bill a few years after passage.

It would be folly to throw away well-considered solutions and compromises, especially if the real aim of doing so is an absolute victory for government unaccountability and non-transparence.

Senate Majority Leader Loretta Weinberg (D-Bergen) is the sponsor of S107, the OPRA reform bill.

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