From: The Town Crier
To: mdarcy@njslom.com
Subject: [New post] Amendments to OPRA and OPMA Advance in Senate
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New post on **The Town Crier**

Amendments to OPRA and OPMA Advance in Senate

by njlmblog

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On June 14, by a vote of 4-0, the Senate State Government Committee amended and released S-106, which revises the Open Public Meetings Act (OPMA), and S-107, which revises the Open Public Records Act (OPRA). The League testified, along with the New Jersey Association of Counties and the School Boards Association, in opposition.

The bills were amended as follows:

S-106 (OPMA)

- Permits legal counsel or independent consultants or advisors to communicate privately to members of the governing body during a meeting about matters on an agenda;
- Requires the Legislature to keep comprehensive, rather than reasonably comprehensible, minutes of its meetings;
- Clarifies that minutes must be available to the public as soon as possible but no later than 15 business days after the next meeting;
- Provides municipalities with 5,000 or fewer residents, according to the most recent census, a board of education with 500 or less pupils and public authorities with less than $100 million in assets will have 20 business days after the next meeting to make their minutes available to the public;
- Permits a governing body to vote in favor of a reasonable delay in making the minutes available by the mandatory 15 or 20-day deadline. Prior to taking such a vote, the governing body must announce and provide a detailed explanation of the reason for the delay. The minutes must contain the explanation. The amendments also defined “emergency” to mean “any sudden, unexpected, or unforeseeable event or condition, natural or man-made, which interferes with the conduct of normal business operations of a public body for three or more calendar days. Without limiting the generality of the foregoing, an emergency may arise when a condition such as any one or more of the following arises: forces of the natural

elements, fire, explosions, epidemics, power failures, labor disputes, transportation failures, war, riots, civil disturbances, and other acts of lawlessness or violence."
- Requires the Legislature to record its all of its public meetings;
- Requires subcommittees to prepare reports of meetings that are closed to the public; and
- Removes the language requiring subcommittee reports to be open in the same manner as minutes.

S-107 (OPRA)

- Amends the definition of "public agency" and "quasi-governmental agency" to exclude volunteer fire company or volunteer fire department or volunteer first aid, rescue or ambulance squad. As a result, also removed the provision that permitted a volunteer fire company/department to contract with municipality to have the municipal clerk serve as the fire company's records custodian;
- Exempts from disclosure any portion of a document that discloses personal and identifying information of minors, except when permitted by law for the New Jersey Motor Vehicle Commission, or when driver information is disclosed to insurance companies for use in connection with claims investigation activities, antifraud activities, rating or underwriting;
- Removes interns and volunteers employees from the definition of "public employees";
- Permits a public agency to charge a special service charge whenever
    - a person requests a paper copy of record that is available electronically after they were advised that the record may be emailed at no charge or
    - A person is advised as to the specific online location of the record;

- Removes the requirement that the *sole* purpose of a person's request must be to harass a public agency in order for the agency to file a petition in court against the requestor;
- Incorporates into the "New Jersey Open Data Initiative" law rather than creating a new section of law, the requirement that the State maintain a single, searchable Internet website providing certain State agency information;
- Requires the Office of Information Technology, in consultation with Department of Community Affairs, Government Records Council, a representative from Municipal Clerks Association of New Jersey, New Jersey Association of Counties and the League, to develop and maintain a searchable, online database to which units of local government may submit any government record for retention on the database

Over the past several years, the League has met with the sponsors to discuss our concerns with the proposed amendments. We appreciate the strides the sponsors have taken to address issues through the proposed amendments, such as addressing both the privacy issues surrounding OPRA and the issue of commercial request for records.

However, we still have major concerns with the bills and must continue to oppose S-106 and S-107.

In addition to some technical concerns with the amendments, our concerns include:

1. Subcommittees (OPMA): The definition of subcommittees has been changed to

"any subordinate committee of a public body, except the Legislature, regardless of label, that is formally created by that body, comprised of two or more members, but less than a quorum, of the public body, and recognized by the public body as a subcommittee thereof." Subcommittees would be required to prepare at least quarterly reports of their meetings that must include the number of meetings held since the last report, the names of members of the subcommittee, and a concise statement of the matters discussed. Every subcommittee must file at least one report with the public body. If the subcommittee has given an oral report at a meeting of the public body then they are not required to submit the written report for that quarter. The public body must determine if a subcommittee meeting is open to the public. If the meeting is open to the public, adequate notice must be provided. **The purpose of subcommittees is to make recommendations to the governing body for the governing body to take action. Subcommittees digest and vet information informally but do not expend public funds nor make binding decisions. That power remains with the governing body. By their very nature, subcommittees are advisory, deliberative, and consultative. Advisory, deliberative and consultative materials are exempted from the Open Public Records Act and thus subcommittees remain not subject to the provisions of the Open Public Meetings Act.**

2. Expands the definition of Government Records (OPRA): The bill expands the definition of government record to include a record that is "required by law to be made, maintained or kept on file." Currently, if an OPRA request is received for a document that does not exist, the OPRA request is denied and there is no violation of OPRA. **By expanding the definition, a Records Custodian will be in violation of OPRA if the record was required to be made (e.g. an old municipal budget) but they are unable to locate the archived record. The bill does provide protections to limit the Record Custodian's liability but the Records Custodian will still be in violation of OPRA**. **We strongly believe this should be addressed in the legislation and not by the courts.**
3. Prevailing Attorney Fees (OPMA & OPRA): The OPRA bill continues to mandate prevailing attorney fees for violation of OPRA, and the OPMA bill is changing prevailing attorney fees from permissive to mandatory. **Courts and the Government Records Council need the flexibility to award reasonable attorney's fees based on the given circumstances of a particular case**.
4. Exemption of the Legislature (OPMA & OPRA): Both bills continue to exempt the Legislature from many requirements of the Open Public Meetings Act and all of the requirements of the Open Public Records Act. **In the interest of transparency and openness, the various exceptions in the Open Public Meetings Act and Open Public Records Act that apply to the legislature and the legislators should be removed. The rules that the legislation makes applicable to other governmental bodies should apply equally to all governmental levels and officials**.

The bills have been referenced to the Senate Budget and Appropriations Committee. Senator Weinberg made a commitment to continue to work with the stakeholders, including the League, over the summer, to address the remaining issues.

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