



June 29, 2023

League of Women Voters of the Morristown Area

lwvmorrisarea.org

Deborah McComber

Communications Chair, LWV Morristown Area and Vice President, LWV NJ

lwvmorrisarea@gmail.com

Direct questions to: Nancy Hedinger

President, LWV Morristown Area

lwvmorrisarea@gmail.com

973-202-7706

Another Assault on Transparency in Trenton

Few people overtly argue against transparency in government. And yet, legislators in Trenton are proposing a package of bills that would do just that, by gutting the provisions of the Open Public Records Act. The bills would exempt records relating to government contracts from disclosure, deprive document requesters of the right to have an impartial judge hear their case, let towns sue individuals who request documents, and much more. Journalists and advocates for open government have rightly sounded the alarm.

Earlier this month, Assemblyman Joe Danielsen introduced four bills (Assembly Bills 5613, 5614, 5615, and 5616) which address OPRA. Collectively, they would have a chilling effect on all future public records requests. Currently, when document requests are denied, that denial can be challenged either in court or before the Government Records Council (GRC). These bills would eliminate the ability to have an appeal heard before a judge and require that they go before the GRC. Not only is the GRC chronically underfunded, taking years to hear appeals, but all its case files are secret until a case is closed. Currently, the GRC's members are appointed by the Governor and confirmed by the Senate. A provision in this anti-transparency package would allow the Governor, Senate President and Assembly Speaker to hand-pick individual GRC members without requiring the advice and consent of the Senate. The bills also eliminate the requirement that members not hold local elected or appointed office or employment while serving as a member. The GRC should be seen to be impartial and apolitical. Ending checks and balances in GRC appointments would undermine that.

These bills also change how attorney's fees are awarded, making it much more financially risky for individuals to pursue a records request. Under current law, when a requester prevails, they must be awarded reasonable attorney's fees. But these bills make fee awards optional instead of mandatory. As a result, only well-financed entities that can afford to pay their attorneys up-front will be practically able to enforce their rights. Ordinary citizens, journalists, and others who want to know what their government is doing will have to take significant financial risks, or represent themselves, if they wish to exercise the same right.

If these provisions were not enough to deter individuals from seeking public documents, these bills also contain a litany of exceptions to open records requirements. The most concerning? They exempt records relating to “applications for and receipts of contracts” from OPRA, a bald invitation to corruption and pay-to-play politics. Allowing the public to know how government contracts are awarded is of essential public interest, the very sort of thing OPRA was meant to provide.

Another OPRA loophole would essentially allow the government to exempt any record they want from public disclosure: Records subject to confidentiality agreements are exempt from disclosure. Governments could simply evade disclosure entirely by entering into non-disclosure agreements with respect to any documents they choose. The bill also requires records custodians to deny requests if they require “research,” a common excuse for denying access. Even worse, that denial cannot be appealed!

If a journalist or concerned citizen has continued to pursue their document request, despite all of these obstacles, the legislative package contains one last hurdle: the government might sue them. These bills would allow agencies to obtain “protective orders” against a requestor if the court finds that the requests are “substantially disruptive.” But what counts as substantial disruption is not defined, creating a highly subjective legal standard that will further chill efforts to seek transparency.

If these bills had been law over the last several years, numerous cases of government corruption or malfeasance would have never come to light. [Because of OPRA, reporter Scott Fallon](#) was able to report that nurses in New Jersey veterans' homes were penalized for wearing masks in March 2020, as COVID-19 spread. Because of OPRA, journalists were able to build [a database documenting police use of force in every NJ town](#). With OPRA’s provisions gutted, this kind of public interest reporting would be impossible to conduct.

When asked about the motivation for this legislation, legislators point to cases where private businesses have used public records requests for commercial purposes, and argue that complying with these requests costs municipalities money. To that end, the bills would limit entities to two requests for a “commercial purpose” per month. While the bill exempts journalistic uses from the “commercial purpose” limit, it is not clear if other non-profit or social justice organizations are also exempt. Reasonable limits on commercial requests are understandable. But unfortunately, the provisions of these bills go far beyond that purpose, and undermine open and transparent government.

####

The League of Women Voters is a nonpartisan organization which does not endorse or oppose any candidate or political party. The purpose of the League is to promote political responsibility through informed and active participation in government.

