

Township of West Milford

Passaic County, New Jersey

~ Resolution 2012 - 140 ~

RESOLUTION OF THE TOWNSHIP OF WEST MILFORD, COUNTY OF PASSAIC, STATE OF NEW JERSEY REQUESTING THAT THE MEMBERS OF THE STATE SENATE REJECT S-1452 IN ITS CURRENT FORM AND ALLOW FOR CONSTRUCTIVE COMMENT AND DIALOGUE FROM MUNICIPAL ELECTED AND APPOINTED OFFICIALS BEFORE CONSIDERING AMENDMENTS TO THE OPEN PUBLIC RECORDS ACT

WHEREAS, it is the fervent hope of those elected and appointed officials who serve in the multitude of public entities that the State Senate and State Assembly recognize the compulsion of these public servants to strive for perfection, service and transparency in their respective roles as public servants; and

WHEREAS, no New Jersey State legislation should be drastically amended without consideration for the public bodies that will be compelled by such legislation without research and dialogue from those so affected and/or without consideration and analysis of the expense to the citizens of the State of New Jersey as a whole.

NOW, THEREFORE, BE IT RESOLVED by the Township Council of the Township of West Milford that we do hereby provide the following commentary on proposed reforms to the Open Public Records Act (OPRA) as proposed in S-1452:

- 1) The Township Council of the Township of West Milford **supports** many proposed amendments to the Open Public Records Act as penned in S-1452, including:
 - a) the inclusion of a definition for “advisory, consultative or deliberative material” and would further request that the concluding portion of that definition be further expanded as follows: “..... *and the release of which would be injurious to the **advisory, consultative or deliberative** function of government.*”
 - b) the proposed revisions to the definitions of a government record that pertains to allowances sold at auction and disclosure of information contained in a winning bid.
 - c) the revised definitions of a “public agency” or “agency” as proposed in S-1452.
 - d) the production of an index as proposed in S-1452 explaining redactions made to public records.
 - e) the delivery of public records in an electronic format at no cost to the requester when possible.
 - f) amendments to the Open Public Records Act that may require the requester to obtain records from the Township’s website when the requester has such internet access.
 - g) amendments to OPRA that provide that a request for information may be submitted on a document other than the adopted form.
 - h) records received before noon are processed as of that date while records received after noon are deemed received on the next business day.
 - i) language that would compel the GRC to “*render a decision on all disputes and complaints within 150 calendar days of the filing of the complaint.*”
 - j) amendments that would require the GRC to make its decisions accessible on its website.
 - k) disclosure of all records pertaining to settlements of lawsuits or claims involving this public agency, public officials or employees because we are acutely aware of our fiduciary responsibility to the taxpaying citizens of our Town.
 - l) amendments that include the recognition of a facsimile records request as a bona fide request for records.
 - m) provisions requiring that contact information about the records custodian as well as a statement that information submitted to the agency may be a public record be posted on the public body’s website.
- 2) We oppose the definitions of “privacy” and “reasonable” as proposed in S-1452 because such definitions are so broad as to warrant challenges to the custodian’s deliberations thus subjecting public bodies to unfunded challenges to such decisions equating to an unfunded mandate and a violation of the public trust. Taxpayers will be charged with funding the predictable challenges that will be leveled and which will compel the courts to provide clarity not endowed by the legislature and public officials will be subjected to the unprovoked outfall.

- 3) We object to proposed amendments to OPRA that would compel the custodian of records to provide the level of detail being proposed when a requester reviews special service charges. Creating an index at no charge of records that may be subject to a service charge may have the potential to be in and of itself so time consuming, voluminous and costly to be constitute an unfunded State mandate. Unfunded state mandates levied upon public bodies by the State legislature are a breach of the State constitution.
- 4) We object to provision in the proposed amendments to OPRA that define immediate access to mean by 5 p.m. or close of business on the date upon which the custodian of records received the request. The legislature must recognize that not all public entities have the financial wherewithal and/or ability to staff departments to the extent that documents can be retrieved in accordance with such dictates. It is egregious and irresponsible of the State legislature to impose such provisions on public entities that are already operating under extreme financial confines and restraints. This constitutes an unfunded mandate and is a violation of the New Jersey constitution.
- 5) This public body strenuously objects to proposed amendments to the Open Public Records Act that state that *"A requester who prevails in any proceeding shall be entitled to reasonable attorney's fee award...."* and further strongly urges the legislature to recognize the inherent mandates and liabilities such language places on public entities who are funded with public funds. Such language constitutes an unfunded mandate and promotes a cottage industry for those who seek to profit at the taxpayer's expense. This public body implores the Legislature to refrain from such amendments without wholesale debate with public officials about the implications, costs, and liabilities associated with such mandates. We object to the continued legislative acts that allow for prejudicial fee shifting at taxpayer's expense. Public entities throughout the State of New Jersey repeatedly prevail in de minimus challenges to the decisions of records custodians. The legislature must provide a level playing field for those who are charged with the disbursement of public funds by affording public entities equal entitlement to reasonable attorney fees when a court of body of jurisdiction finds in favor of the public entity.
- 6) We object to proposed language contained in S-1452 as follows: *"... in actions involving a record required by law to be made, maintained or kept on file and that does not exist or no longer exists, the prevailing requester shall not be entitled to an attorney's fee award if both: (1) the failure to make, maintain, or keep the record is due to mere negligence or no fault on the part of the government entity; and (2) the requester was informed in writing by formal certification or affidavit by the records custodian prior to the filing of the complaint that the record does not exist or no longer exists, the efforts taken to obtain the record and why the record could not be produced."* This language constitutes a liability for public entities and will result in research, narratives and evidence trails which are unfunded mandates that not only serve to burden the public entities at taxpayer expense.
- 7) We would ask the Legislature to consult with the Municipal Clerk's Association of New Jersey by virtue of comprehensive debate and discourse about the composition of the Government Records Council prior to amending this structure as proposed in S-1452.
- 8) The Township Council of the Township of West Milford strongly opposes proposed amendments to the Open Public Records Act that would deem a denial issued by the Records Custodian as being *"grossly negligent"* and can find no reason to change the existing language of *"knowingly and willfully"* as there is little evidence since the inception of OPRA in 2002 to indicate that Records Custodians behave in a grossly negligent fashion.
- 9) We oppose any attempt by the State legislature to make public records that are currently considered exempt from disclosure as part of the personnel files of public employees and officials. Currently, grievances filed against public officials are subject to protection as an exemption to disclosure and which could be released by virtue of a common law right of access request which would apply a balancing test to such disclosure.
- 10) We object to the provisions in the proposed amendments to OPRA that would make grievances a government record subject to permission from the person against whom the grievance is filed. This provision is very broad and provides no guidance to the records custodian thereby potentially subjecting the public entity to further challenges to the custodian's decisions.
- 11) We object to proposed changes that would make records pertaining to suspensions, demotions, discharge or resignations subject to disclosure under certain circumstances. Such records should be sought under the common law right of access which would protect public entities from liability associated with the potential release of information that could subject that public entity to the defense of actions leveled by parties who feel aggrieved by the release of such records. The common law right of access ascribes a balancing test to the release of such records thereby protecting the rights of all parties involved including the requester, the subject of the records and the public entity.

- 12) The Township Council of the Township of West Milford objects to the definition of "*grossly negligent*" as proposed in S-1452 because the definition is subjective and exposes the public entities that would be subject to this law from which the Legislature has been substantially exempted to liabilities and unwarranted litigation. We strongly object to the legislature exposing records custodians to unnecessary and excessive punitive measures by legislating that an act by such a public official shall be deemed "grossly negligent" especially in light of the many challenges the legislature must expect to legislation as currently drafted.
- 13) We oppose any provision in any legislation, most specifically the Open Public Records Act, that precludes the Legislature from adherence. As such, until the sponsors and those voting on these amendments subject themselves to the same confines as those being imposed on local officials, this public body will emphatically state objections. The Legislature seeks to exempt itself, at a minimum, from the following proposed amendments to the Open Public Meetings Act:
- a) the revisions defining a government record state that "*the term shall also include all forms of electronic mail communication among members of a public body, excluding the Legislature*
 - b) the definition of a "quasi-governmental agency" as proposed in S-1452 with the exception of the provision in the amendments that state that this "*....term shall not include any entity involving the Legislature.*"
 - c) the definition of a "public employee" as proposed in S-1452 with the exception of the provision that states "*..... except the Legislature ...*"

BE IT FURTHER RESOLVED that the Township Council of the Township of West Milford respectfully requests that the members of the State Senate insist that there be a means of constructive dialogue and comment provided to local elected and appointed officials from every public body within the State before amendments to this crucial legislation be considered at any future date.

Adopted: April 18, 2012

Adopted this 18th day of April, 2012
and certified as a true copy of an original

Antoinette Battaglia, Township Clerk