# NEW JERSEY STATE BAR ASSOCIATION

March 10, 2024

**Via Electronic Mail**
The Honorable Paul A. Sarlo
496 Columbia Boulevard, 1st Floor
Wood-Ridge, New Jersey 07075

Assemblyman Joe Danielsen
334 Elizabeth Avenue
Somerset, New Jersey 08873

Re: S2930 (Sarlo)/A4045 (Danielsen) – Makes various changes to process for access to government records; appropriates $8 million

Dear Senator Sarlo and Assemblyman Danielsen:

On behalf of the New Jersey State Bar Association, I write to express our concerns regarding S2930/A4045, addressing significant amendments to the Open Public Records Act (OPRA). We appreciate your concerns with the current law and certainly understand your intention to balance the equities. Without taking a position on the bill, we have serious concerns about the amendments proposed.

I outline for you three concerns that have been raised in the time we have had to discuss this with our members:

- The definition of "Commercial Purpose" could implicate attorneys who use documents obtained through an OPRA request for the benefit of their clients;
- Section 3(g) strips the ability of an attorney to pursue an OPRA request and presents ethical issues for attorneys seeking documents that may not be incorporated in a discovery request but are still relevant to a legal matter;
- Section 3(i)'s broad mandate to omit as a public record a document that is "created or maintained by another public agency" presents concerns that a government entity may read this to broadly exclude production of government records that are not specifically generated by that entity and ironically could generate unnecessary OPRA requests to other entities for the same document that could have been produced by the original entity.

**Definition of "Commercial Purpose"**

As we read the bill, the definition of commercial purpose could include attorneys who may use a document obtained through an OPRA request for the benefit of their clients. For this

discussion only, I am referring to documents that would not fall within the ambit of Section 3(g) of this bill.

The bill defines "commercial purpose" as the "direct or indirect use of any part of a government record for sale, resale, solicitation, rent or lease of a service, or any use by which the user expects a profit either through commission, salary or fee." This ostensibly includes attorneys who obtain a government record through an OPRA request and then uses it to provide legal advice to a client.

By way of an example, attorneys do not simply seek documents as part of a discovery request. Documents may be obtained by any number of ways in order to research whether a claim is viable, prepare a discovery request, prepare questions in anticipation of an interview or deposition, research permits to review a real estate contract, or any number of issues. To the extent that the attorney bills a client for that OPRA search and bills for services – whether it be litigation, a contract, or just legal advice – that attorney is ostensibly using a government record in furtherance of receiving a fee for service.

Furthermore, a requestor must certify whether the request is for another person or for a commercial purpose. (see Section 3(f)). Under the definition, an attorney's request may be a commercial purpose. To the extent that the attorney must disclose that the search is for another person, attorneys have an ethical obligation to keep confidential certain information regarding representation. (see Rules of Professional Conduct (RPC) 1.6). As written, a litigant may obtain a government record without indicating that it is in anticipation of a legal matter, but an attorney who is charged with handling the legal matter is prohibited from obtaining that document without revealing the client and as later noted in Section 3(g) the matter, if applicable.

As written, there are exemptions for certain entities, presumably honoring the aim of OPRA to "be readily accessible for inspection, copying, or examination by the citizens of the State, with certain exceptions, for the protection of the public interest" as well as to "safeguard from public access a citizen's personal information." Access by the media, for use in scholarly pursuits, and by candidate committees are certainly laudable exemptions. Similarly, when citizens of the State hire an attorney to protect their legal interests, they should equally be permitted to access such documents in furtherance of that aim. The mere fact that a litigant has retained an attorney to obtain this information, or the fact that an attorney – and not a litigant – is prohibited from obtaining this information does not advance the purpose of OPRA. In fact, the opposite seems true – such information in an attorney's hands would seemingly protect a citizen's personal information.

<u>Section 3(g): Legal Proceedings</u>

The bill prohibits a requestor from submitting an OPRA request "if the record sought is the subject of a court order in the legal proceeding or if compliance would otherwise be unreasonable, oppressive or duplicative of already pending discovery request made in that legal proceeding, and a custodian shall not be required to complete such a request." Furthermore, the requestor would again be required to certify whether the government record is being sought in connection with a legal proceeding and identify the proceeding for the request to be fulfilled

including disclosing a "party in interest," that party's attorney and "any person acting as an agent for or on behalf of that party." This is problematic for a number of reasons and we strongly suggest that this be removed from the bill.

As we stated above, attorneys may be under an ethical constraint to reveal the name of the litigant.[1] Practically speaking, government records may be utilized by an attorney in a legal matter before discovery is even served or a matter is filed. We understand that – notwithstanding our interpretation of "commercial purpose" – the attorney would be permitted to request a document and not violate this provision. But a discovery request does not necessarily mean that the government record is readily producible by the party upon which discovery is sought. For example, a discovery request is made for police reports in which a party is named. That party fails to produce all of those records because that party does not have them in their possession. Is the attorney now foreclosed from attempting to obtain that same information from a government entity under OPRA because the request was made as part of discovery? If there is a government record and the attorney can identify which record is being sought, there should be no bar to receiving that record directly from the government entity. Similarly, a discovery request may include a request for permits or other information related to a certain property. That party may not have all of those documents. Is the attorney now foreclosed from requesting those documents from the government entity because the request was made in discovery?

Similarly, the bill prohibits requests that are "the subject of a court order." This is a broad exemption. The Supreme Court discussed the issue of decisions made in court proceedings and their irrelevance to whether or not a government record is exempt from production in an OPRA request. In Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581 (2011), the Court held that a trial judge's denial of a motion to compel documents did not render those documents confidential for purposes of OPRA. Kovalcik, 206 N.J. at 590. "Discovery motions are denied for any number of reasons that are unrelated to the confidentiality of the information." Id.

This clause also puts those challenging government entities at an unfair advantage and creates a strategic advantage for government entities to avoid production of documents in court or through an OPRA request. Consider another example - a discovery request demands that a municipality produce communications[2] related to a specific permitting approval. By virtue of this request being made in a discovery request, the government entity does not have to produce any documents through OPRA. But if that discovery request does not produce any documentation, this now forecloses a litigant's ability to request the documents in an OPRA request to another government entity that may have relevant information because it is the subject of litigation and the request is contained in discovery. Moreover, this presents a Catch 22 – does the attorney omit the request from discovery and instead ask for it in an OPRA request and run the risk of later

[1] For example, the attorney may represent a minor who is the subject of a guardianship proceeding. By certifying to the client's name and the legal proceeding, this bill ostensibly strips any confidentiality imposed by the courts not to name litigants in certain proceedings. This goes against the very aim of OPRA "to safeguard from public access a citizen's personal information."

[2] While we are not raising it substantively here, the mandate that all requests for mail, email, text messages, correspondence, or social media postings and messages must "identify specific individuals or accounts to be searched" unfairly narrows the ability of a requestor to be able to obtain such information.

being unable to make a discovery request? There should not be such a question because transparency begs the production of more – not less – information from a government entity balancing the consideration of a burdensome request.

The bill already addresses what appears to be the catalyst behind these amendments. Attorney's fees under the "catalyst theory" have long been criticized as a fee generating opportunity. The NJSBA takes no position on the validity of such claims. However, this bill proposes to change the mandatory fee award to a possible fee award, and therefore allows courts to determine whether a request is burdensome or harassing. Imposing prohibitions on valid requests in furtherance of litigation or research related to a legal matter does not advance the right of citizens. It hampers their right to pursue justice and greatly reduces the transparency that lies at the very heart of OPRA.

Section 3(i): Other Public Agency Documents

Finally, we urge you to remove the language in Section 3(i) that would not require production of a public record "that is created or maintained by another public agency and made available to the public agency either by remote access to a computer network or by distribution as a courtesy copy." That paragraph would ostensibly allow a government entity to broadly apply that prohibition to exclude records that may be housed by the public agency, but were not produced by that agency. It also creates additional burdens on other public agencies that will undoubtedly receive requests for the very document that was provided to the original public agency. It also generates numerous unnecessary OPRA requests for documents and obfuscates the process by pointing to another public agency to produce the document.

We do not encourage public agencies to undertake additional efforts to produce a public record that is not theirs. However, if, for example, a municipality is asked to produce records for a building located at a specific location that is the subject of a permit application and those records include a document created by the Department of Environmental Protection, does the municipality rely on this prohibition to withhold production and point to the DEP to obtain such document?

We continue to review the bill. It is in the spirit of attempting to resolve what we understand to be valid concerns while maintaining the laudable goals of OPRA that we urge you to consider our requests. We would appreciate the opportunity to provide more information or answer any questions. I am happy to facilitate these conversations with our members. Please contact me at lchapland@njsba.com, 732-214-8510 (office) or 732-239-3356 (cell). On behalf of the NJSBA, thank you for your continued leadership.

Very truly yours,

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cc: Timothy F. McGoughran, Esq., NJSBA President
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