

August 7, 2015

**RE: Weekly Policy Update**

Dear Mayor:

**I. OPRA/OPMA**

Earlier this week, Senate Majority Leader Loretta Weinberg (D-37) sent municipal and county officials across the State a letter concerning her legislation that would make changes to the Open Public Meetings Act (OPMA) and Open Public Records Act (OPRA). Senator Weinberg highlights various provisions of her legislation that “will provide tools for records custodians and for the public seeking information”. The comments in Senator Weinberg’s letter are based on proposed amendments.

As you may recall, the Senate Budget and Appropriations Committee was set to consider S-781 (OPMA) & S-782 (OPRA) in June, but ultimately did not release the bills from Committee. The companion versions A-2900 (OPMA) and A- 2763 (OPRA) are currently in the Assembly State and Local Government awaiting consideration.

While we appreciate the strides the Senator has taken to address our issues with the proposed amendments, such as addressing both the privacy issues surrounding OPRA and the issue of commercial request for records and look forward to further discussions, the League continues to have major concerns with [S-781](#) and [S-782](#) and **opposes** both bills. These concerns include:

1. **Subcommittees (OPMA):** The definition of subcommittees is proposed to be 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.” Subcommittees would be required to prepare quarterly reports of their meetings that must include number of meetings held since their last report, 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. However, if a subcommittee has given an oral report at a public meeting of the governing body they are not required to provide a written report that quarter. A subcommittee’s written report is available for public access in the same manner as minutes of a meeting of the public body. The public body must determine for each subcommittee if their meeting is open to the public. If the meeting is open to the public, adequate notice must be provided and the public can only be excluded from subcommittee meeting for the same reasons for closed session meetings.

**The League has long argued that the purpose of subcommittees is to make recommendations to the governing body for the governing body to take action. Subcommittees are designed by nature to digest and vet information informally. Subcommittees do not expend public funds nor make binding decisions. That power**

**remains with the governing body. Therefore, they should not be subject to the provisions of the Open Public Meetings Act.**

2. Prevailing Attorney Fees (OPMA & OPRA): The OPRA bill continues to mandate prevailing attorney fees for requestors only if there was a violation of OPRA. The OPMA bill is adding mandatory prevailing attorney fees for any party, other than a public body, that prevails in an action brought in violation of OPMA.

**The League strongly believes that the Courts and the Government Records Council must have the flexibility to award reasonable attorney fees based on the given circumstances of a particular case. We are also concern that by creating prevailing attorney fees for OPMA violations will lead to undue litigation and will divert tax dollars from municipal services to attorney fees.**

3. Audio Recordings (OPMA): The bill would require a public body that possesses a sound recording system that are available and functioning to record the public portion of all meetings of that public body, including any emergency meeting held and to maintain possession of the recordings for a period determined by the State Records Committee. Sound recordings, or any video recordings, must “reflect the public portions of the meeting in their entirety, including public comments portions of the meeting.” The unedited recordings shall be promptly made available to the public, but no later than the 5th business day following the meeting, with the exclusion of closed session items.

**If a municipality has sound recording equipment, they will now be required to audio record every public meeting, such as Planning Board, Board of Adjustment, Environmental Commission, Recreation Commission, regardless of the municipality’s policy. Creating audio recordings is cumbersome and problematic, consequently we must oppose it.**

4. 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 (i.e. old municipal budget) but they are unable to locate the archived record. The bill does provide protections to limit the record custodian liability but the Records Custodian will still be in violation of OPRA.**

5. 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.

**The League has strongly argued that 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.**

We look forward to working with the Senator and other interested parties on this issue. We will continue to keep you apprised of any developments on the bills. For more, please see item 2 of the [League's June 24 letter](#) and [the League's June 9 letter](#).

**Contact:** Lori Buckelew, 609-695-3481 x 137 or [lbuckelew@njslom.org](mailto:lbuckelew@njslom.org)

## **II. Appellate Division Rules Temporary Layoffs can be Non-Negotiable, Clarifying Recent NJ Supreme Court Decision**

Today the Appellate Division issued an important unreported decision. The decision, *IMO Robbinsville BOE v. Washington Twp Educ. Assoc.*, clarifies an issue related to the nonnegotiability of temporary layoffs.

Recently the State Supreme Court ruled, in [IMO Borough of Keyport v. Local 68](#), that temporary layoffs could fall within a municipality's managerial prerogative, and thus were non-negotiable, during times of fiscal distress. This case was reviewed by counsel for the League. That letter can be found [here](#).

Because these temporary layoffs were done pursuant to temporary rules promulgated by the Civil Service Commission, there was some uncertainty as to the full implication of the Supreme Court's decision in [Keyport](#) and whether and how the decision could apply to non-civil service municipalities. In [Robbinsville](#) the Appellate Division reviewed a decision by a local Board of Education (BOE) to institute temporary layoffs in response to budgetary shortfalls. The local union filed an appeal to the Public Employment Relations Commission (PERC). PERC held that such a decision did fall within the BOE's managerial prerogative. The Appellate Division upheld this decision, holding that "PERC properly determined that the Board was not required to negotiate before instituting furloughs." The court cited a portion of the [Keyport](#) decision which stated, "when a layoff plan has been prepared to accommodate a policy determinations about the efficient delivery of services when economy is a factor, the public management's right to reduce its workforce—by a layoff or restructuring of the number and type of positions, full or parttime—must be treated as a managerial prerogative." [Op. Slip.](#) at 10. Consequently, this decision indicates that [Keyport](#) can be viewed as affecting more than just Civil Service communities.

The League recommends that you bring this decision to the attention of your solicitor and labor attorney.

**Contact:** Ed Purcell Esq., [epurcell@njslom.org](mailto:epurcell@njslom.org), or (609) 695-3481 x. 137.

Very truly yours,

Michael J. Darcy, CAE  
Executive Director