



New England First Amendment Coalition

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SENT VIA EMAIL TO
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July 11, 2019

RE: BILL H.2740/S.1899: AN ACT PROMOTING GOVERNMENTAL EFFICIENCY

Dear Sen. Marc Pacheco and Rep. Danielle Gregoire,

I'm writing on behalf of the New England First Amendment Coalition, the region's leading advocate for press freedom and open government. NEFAC, a non-partisan non-profit organization, is a broad-based coalition of people who believe in the power of transparency in a democratic society. The coalition is led by some of the most esteemed attorneys, journalists and publishers in New England and is at the forefront of efforts to preserve open government in the Commonwealth.

While we understand the concerns that prompted Bills H.2740 and S.1899 and the challenges vexatious filings of Open Meeting Law complaints can impose on municipalities, we believe these bills lack the appropriate remedies. Enclosed is a June 24 letter sent to your committee by the ACLU of Massachusetts. We support the changes suggested in this letter. In particular, we strongly encourage you to reconsider the limitations your bills would impose on the Attorney General's current review process of Open Meeting Law complaints, as well as the five complaint cap and the "unduly burdensome" standard.

In addition to those concerns expressed by the ACLU, we propose two changes to your legislation that would also help protect the public's right to know about its government:

Section 23(b)(1)(B) | The bills reduce by one-third the number of days a member of the public has to file an Open Meeting Law complaint, imposing an unnecessary burden on citizens. The current law provides 30 days to file the alleged violation with the public body. By reducing this deadline to 20 days, citizens may have a more difficult time gathering information necessary to support their claims. In addition, if a complaint cap is ultimately imposed, the reduction in time is unnecessary to discourage non-meritorious complaints. It will serve only as an additional barrier to those seeking recourse to legitimate Open Meeting Law violations.

Section 23(b)(5)(A) | The bills allow the Attorney General to authorize an extension of time to the public body for the purpose of taking remedial action. The legislation removes the current law's requirement that the public body first request an extension and show good cause. While giving full authority to the Attorney General and removing this requirement will certainly make the process more efficient, there should still be good cause shown by the public body before any extension is provided. The current "good cause" requirement serves a necessary check on public bodies against abuse of the Open Meeting Law and should be included in your legislation for that reason.

The Open Meeting Law is a vital tool to protect transparency in government and the proper functioning of our democracy. We commend your effort to improve the law but believe the proposed changes warrant reconsideration. Our coalition welcomes any opportunity to help your committee address the challenges of vexatious complaints while also protecting the public's right to know about its government.

Sincerely,

Justin Silverman

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June 24, 2019

Joint Committee on State Administration and Regulatory Oversight
Sen. Marc Pacheco & Rep. Danielle Gregoire, Chairs

OPPOSITION TO H.2740/S.1899

OPENNESS SHOULD NOT BE SACRIFICED IN THE NAME OF "GOVERNMENTAL EFFICIENCY"

Dear Senator Pacheco, Representative Gregoire, and members of the committee:

I write on behalf of the American Civil Liberties Union of Massachusetts to express serious concerns about H.2740/S.1899. The ACLU has a long history of advocating for governmental transparency and openness, which are implicated by these bills.

We appreciate that the bills are intended to provide safeguards against certain vexatious filings of Open Meeting Law complaints and Public Records Requests. However, in multiple respects we believe they go too far.

The language of particular concern is in SECTION 1, in what would become G.L. c. 30A, § 23(b)(3).

First, it severely limits the Attorney General's regular receipt and review of Open Meeting Law complaints. Under current law, every Open Meeting Law complaint is forwarded to the Attorney General's office:

The public body shall, within 14 business days of receipt of a complaint, send a copy of the complaint to the attorney general and notify the attorney general of any remedial action taken.

This proposal would strip the Attorney General of this routine oversight function. Instead, her office would only hear *appeals* of Open Meeting Law complaints, and then only in instances where a member of the public has the commitment, resources and capacity to challenge a denial or inadequate remedy. This change would fundamentally undermine the purpose of the Attorney General's involvement, which is to ensure consistent compliance with the law as a matter of course. If this legislation advances, it must be amended to retain the current language of the statute and maintain routine supervision by the Attorney General.

Second, the proposed language provides an exception to the generally applicable requirement that a public entity must respond within 14 business days to an Open Meeting Law complaint. The proposed new exception is stated as follows:

provided, however, that if a complainant files more than five complaints with the same public body within the same year of the body's operation, or a complaint is otherwise unduly burdensome, the public body may respond stating that the complaint is unduly burdensome and advising the complainant of the right to petition the attorney general pursuant to subparagraph (5) of this Section.

This provision would shift the burden onto members of the public to pursue relief from the Attorney General any time she has simply filed more than 5 complaints with the same body during the same year *or* any time the public body merely asserts that a single complaint is "unduly burdensome." This burden shifting is antithetical to the purposes of the Open Meeting Law.

No definition or standard is provided as to when an individual complaint can legitimately be labeled as "unduly burdensome." As a result, a public entity would seem to be left with discretion to label any complaint to which it would rather not respond, perhaps because of the press of other business, as "unduly burdensome." And it apparently could frivolously refuse to respond on this basis without any consequences or sanctions.

Further, the arbitrary standard of 5 of more complaints within the existing year could be too restrictive. It applies without regard to whether the complaints have merit — or even whether the public entity has *in fact* committed more than 5 open meeting law violations during the year. It would not be surprising that within a 12 month period, 5 open meeting law violations might occur and be the subject of legitimate complaints.

There are various potential ways to address these concerns. We offer a few for your consideration.

To address the problem of the public body being given unchecked discretion to label complaints "unduly burdensome" and to unilaterally ignore complaints —

1. Strike the phrase "or a complaint is otherwise unduly burdensome";
2. Add an additional subsection, sentence or proviso providing for the award of reasonable costs and attorneys' fees if a public body is found by the Attorney General or a court of law to have labeled a complaint as "unduly burdensome" without substantial and meritorious reasons;
3. Do not place the burden on a member of the public to seek relief from the Attorney General. Instead, provide that the municipality may refuse to answer a complaint only if *it* files a petition with the Attorney General seeking a ruling as to whether the complaint is frivolous and/or filed solely for the purpose of harassment.

To address the arbitrary and restrictive 5-complaint cap —

1. Increase the number of complaint filings to more than 12 in a 12-month period;
or
2. Change “five complaints” to “five non-meritorious complaints”.

The Open Meeting Law is a key protection for openness and transparency in government — and therefore the proper functioning of a representative democracy. We call upon the Committee to ensure its core purpose is not undercut because of a desire to restrain frivolous complaints.

The ACLU stands ready to assist with further suggestions or to engage in further discussion on this issue to the extent that would be helpful. We would welcome the opportunity to be a resource to the Committee as you consider these proposals. Thank you.