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A step back on open records

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The Department of Environmental Protection is inundated with Open Public Records Act requests -- more than 12,000 a year. That places a herculean strain on an agency already short on money and workers, but its proposed solution undermines the spirit and letter of New Jersey's public records law.

The more odious provisions of legislation being fast-tracked in Trenton at the DEP's request would eliminate access to a whole class of now-public documents.

Records of any information relating to a lawsuit -- which have always been public -- would be placed off limits altogether. The DEP could refuse to disclose any information relating to a case in litigation, no matter how innocuous -- even strictly factual reports on, say, the amount of water pollution at a given site. Public records requests themselves, now available for public review, would also be locked away.

Sponsored by Sens. Bob Smith (D-Middlesex) and John McKeon (D-Essex), the legislation would also let the DEP charge \$25 to \$50 an hour to fill public records requests that now are free of charge.

Though the bills' provisions would block access to anyone seeking the information -- not just the hordes of law firms that now use the statute to get material for legal actions and check up on what competing law firms are seeking -- it's the law firms and other commercial requesters that are the reason the DEP wants relief.

The agency has gotten more than 55,000 open-records requests since 2001, more than 90 percent from lawyers and other business folk. That volume dwarfs every other state agency's. The second-most-queried agency, Law and Public Safety, has received a bit more than 5,000 requests.

The volume of requests at the DEP is unquestionably a burden. Some case managers spend 50 percent of their time filling requests instead of resolving pollution problems.

Still, the state and lawmakers must come up with a better solution than a broad-brush gelding of the public's ability to review documents that can shed light on important environmental issues.

The preponderance of law firm and business open-records requests prompted Smith and McKeon to exempt from fees people seeking records for personal, nonprofit reasons, charitable groups and the news media, at least for the first four hours of staff effort required to respond to a request. After four hours, everyone would pay \$50 an hour.

But discriminating between different groups of requesters would start the state on a slippery slope. So would creating a fee schedule specifically for the DEP. Other agencies would soon be knocking on the Legislature's door for similar statutes.

Instead, the DEP should take advantage of provisions in the existing open-records law that let government agencies charge a fee when a request involves extraordinary time and effort. The law even lets agencies deny records if a request would substantially disrupt government operations and the requester isn't willing to wait a reasonable amount of time or pay a reasonable fee.

The DEP hasn't applied those provisions consistently and aggressively. Last year the agency charged only \$28,675 in records request fees while spending some \$3 million answering inquiries.

The DEP could be fair to all -- without committing budgetary hara-kiri -- by setting a policy, for instance, that the first hour of staff time is without charge, no matter who is doing the requesting. After the first hour, fees could be tied to staff costs.

New Jersey's open-records laws are based on the democratic idea that the public can best monitor government when it can readily access the documents that show how government works. And that taxes paid should cover a

reasonable amount of government response to records requests, no extra fees needed.

The current legislation would go way over the line. There is no justification for limiting access to records that should continue to be public. And there is no need for a statute creating a fee schedule that the DEP -- and other agencies -- can already implement under existing rules.

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