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UDI OFER
Executive Director

FRANK CORRADO
President

January 13, 2014

Chris Christie
Governor
P.O. Box 001
Trenton, NJ 08625

John Jay Hoffman
Acting Attorney General
P.O. Box 080
Trenton, NJ 08625

**Re: Request for Corrective Actions to Address Open Government Concerns
Raised By Documents Disclosed By David Wildstein**

Dear Governor Christie and Acting Attorney General Hoffman:

Open government is a cornerstone of democracy that enables the public and the press to “play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct.”¹ It permits the people to be engaged in their governance. Indeed, openness engenders trust. By keeping its actions open to scrutiny, government can show the public that it has nothing to hide, while helping cast light upon inappropriate or unlawful activity. As explained by United States Supreme Court Justice Louis Brandeis, “Sunlight is...the best of disinfectants.”²

The American Civil Liberties Union of New Jersey (ACLU-NJ) has reviewed the records disclosed by David Wildstein, a former executive at the Port Authority of New York and New Jersey (“PANYNJ”), in response to a subpoena issued by the New Jersey Assembly Transportation, Public Works and Independent Authorities Committee. The disclosed records have been the subject of much public debate. Yet the content of the records also highlight two major areas of concern regarding government transparency that the ACLU-NJ has previously sought to address: (1) the lack of uniform, mandatory transparency requirements for the PANYNJ and other bi-state and multi-state agencies, and (2) the use of personal email accounts and text messages to conduct government business.

We write to request that you now take appropriate actions to address these concerns by facilitating the adoption of policies and practices that will ensure that the public has proper

¹ *Burnett v. Cty. of Bergen*, 198 N.J. 408, 414 (2009).

² Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 92 (1914), New York, Frederick A. Stokes Co.

access to, and information regarding, the operations of bi-state agencies such as the Port Authority, and that will help prevent the circumvention of government transparency laws in the future. Specific requests for action are described below.

(1) Enact Statutory Transparency Requirements for Port Authority and Other Bi-State Agencies

Currently, New Jersey's Open Public Records Act (OPRA) and Open Public Meetings Act (OPMA) apply only to state and local public agencies. They do not apply to bi-state or multi-state agencies such as the PANYNJ. Those agencies can voluntarily adopt transparency regulations (and most, if not all, have done so, with varying degrees of openness) but they are, in effect, left to self-govern, and often institute regulations that provide for far less public oversight than those that apply to state agencies, municipalities and school boards.³ The absence of uniform, mandatory, statutory transparency requirements comparable to those that govern all state and local government entities must not be permitted to continue.⁴

In order to ensure the public has equal access to records maintained by government agencies such as the PANYNJ, New Jersey and its relevant sister state(s) must adopt the same laws to govern the PANYNJ and similar multistate agencies as currently govern all other agencies. Anything less would place the PANYNJ in a distinctive position that shields it from the same mandatory transparency and accountability requirements that apply to all government agencies.

We therefore ask the administration and the New Jersey Legislature to work with their counterparts in New York to adopt a statute mandating that the Port Authority (and any other NY-NJ bi-state agencies) be subject to the same transparency requirements to which all New Jersey agencies, municipalities and school boards are already bound. This must include a right of action that allows requestors who are denied access to records an opportunity for a court to

³ Most notably, OPRA provides the public with a statutory right of action for improper withholding of documents. That statutory right of action does not currently exist against PANYNJ and other bi-state agencies.

⁴ The lack of transparency of the Port Authority has been a concern to New Jersey citizens well prior to the recent lane closure incident. See, e.g., Kate Hinds, *Audit: Port Authority of New York and New Jersey is a "Challenged and Dysfunctional Organization"*, WNYC (Feb. 7, 2012), <http://www.wnyc.org/story/285422-audit-port-authority-of-new-york-and-new-jersey-is-a-challenged-and-dysfunctional-organization/>; Kate Hinds, *Port Authority Must Open Its Budget Process: Report*, WNYC (Jul. 16, 2013), <http://www.wnyc.org/story/307038-port-authority-must-open-its-budget-process-report/>. In August 2013, a United States Government Accountability Office study found that transparency of the Port Authority and other agencies could be enhanced. It noted: "For example, in September 2011, the New York State Committee on Open Government found that the PANYNJ's freedom of information policy which allows the public to request PANYNJ documents and open meeting policy were more restrictive and provided less access than freedom of information and open meetings laws that apply to state agencies in New York." United States Government Accountability Office, *Interstate Compacts: Transparency and Oversight of Bi-State Tolling Authorities Could Be Enhanced* 16 (2013), <http://www.gao.gov/assets/660/656956.pdf>. In 2012, the New Jersey Legislature passed the "PANYNJ Transparency and Accountability Act" that would have brought about greater oversight over the Port Authority. That bill was conditionally vetoed, with the Governor requesting alternate transparency reforms for PANYNJ and other multistate agencies. That said, PANYNJ has adopted an open records policy that includes a significant amount of transparency although, for example, it allows the agency to charge substantial fees for records that would not be permitted under New Jersey law. (According to its policy, that fee schedule was suspended until April 1, 2013. Based on a review of the PANYNJ website, it is unclear whether that suspension of fees was extended.)

review the agency's decision. Likewise, New Jersey should work with its other relevant sister states to ensure that all bi-state agencies are subject to the same robust transparency requirements. Failure to do so will enable the PANYNJ and similar bi-state agencies to operate in a culture of secrecy that is harmful to democratic governance.

(2) Prohibit the Use of Personal Accounts for the Conduct of Government Business Whenever Possible⁵ and, additionally, Ensure that Government Employees' Emails and Text Messages from Personal Accounts used to Conduct Official Business are Retained as Government Records

Government personnel should not conduct official government business on private email accounts or phones, including via text messages. Doing so creates needless obstacles to open government policies, and weakens accountability laws and regulations. Government officials who are provided with a government email address or government phone should use such accounts for all official business. They must act in good faith by not attempting to evade open records laws by communicating through their private accounts on matters involving government business.

Moreover, when private email or phone accounts are used, strict procedures must be put in place to ensure that such communications are then retained by the relevant public agency in order to comply with open records laws.

In response to a request for public documents under New Jersey's Open Public Records Act, a government agency must provide all responsive records that are "made, maintained or kept on file . . . or that ha[ve] been received in the course of . . . official business,"⁶ unless a specific exemption authorizes the agency to withhold or redact a document. The definition of "records" includes emails and text messages (i.e., a "data processed or image processed document, [or] information stored or maintained electronically..."), and other documents that are on private accounts or that are held off-site.⁷

When requests for records include email correspondence, a records custodian should be able to easily obtain emails from a government system. Problems arise, however, when public work is conducted by individual employees on private email systems or by private text message. Obviously, when that occurs, the public records are not in the physical control of the government records custodian (which they should be). The custodian, who is responsible for responding to the public's requests for documents, will therefore not be able to thoroughly conduct searches for responsive records. At best, the custodian must rely on the forthrightness of other government officials to come forward with privately-held documents that are responsive to records requests (assuming the custodian even knows to ask the officials for those privately-held responsive documents). Thus, permitting officials to use private emails and texts to conduct public business

⁵ The ACLU-NJ recognizes that not all government officials are provided with a government email account. Further, government officials might receive unsolicited emails or text messages on personal accounts.

⁶ *N.J.S.A.* 47:1A-1.1.

⁷ See, e.g., *Donal Meyers v. Borough of Fair Lawn*, GRC Case No. 2005-127; see also *Burnett v. Gloucester Cty.*, 415 N.J. Super. 506 (App. Div. 2012).

increases the likelihood not only that the public will be wrongly denied access to records it has a right to obtain, but that the government records custodian – the very person designated to be in charge of the records – will himself or herself be kept in the dark. The records custodian will thereby be placed in the position of unwittingly denying the existence of public records that do, in fact, exist.

Additionally, the lack of custodial control of government records likely results in violations of the retention schedule set forth by the Department of Treasury, Records Management Service (“RMS”). RMS requires that most correspondence created by an agency be held anywhere from one year to 25 years depending on the nature of the document (e.g., whether the document is an external or internal document, whether it is substantive or administrative, etc.).⁸ Further, documents cannot be destroyed without the approval of RMS. However, records custodians cannot properly maintain records of which they are unaware or are not in possession. If government records are allowed to be held only on private email systems or on private cell phones by individual employees, the government is not properly retaining those documents, and is in violation of the RMS retention schedule. Indeed, an agency would have no way of ensuring that its records are not in fact being destroyed in violation of the RMS schedule (in as simple a fashion as an individual deleting messages or texts or by discarding and replacing a cell phone).

The documents provided by Mr. Wildstein illustrate this problem. Were a records request to have been made under the Open Public Records Act that encompassed some of the documents Mr. Wildstein disclosed in response to the legislature’s subpoena,⁹ the records custodian would not have been able to conduct a comprehensive search for records by searching the government email system, unless records created or received on relevant employees’ private email and text systems were previously transferred to the government system. Thus, in an instance such as this, it is possible the custodian would not know that records that the requestor was entitled to under OPRA (and that the Office was bound to disclose) did exist but were not in the government’s possession.

The fact that individual employees eventually leave their government position exacerbates the problem. If a public records request is made for an employee’s records following that employee’s separation from government, the custodian is still statutorily required to provide all responsive documents that were made, maintained or received by that government official in the course of his or her business (including such documents created on private accounts). Yet, unless all such documents were transferred into the custody of the custodian prior to the separation, those public documents would be solely in the control of an individual who no longer works for government. The custodian therefore would be required under OPRA to turn over documents to which he may no longer have means of access. Further, since these records are held by a person who is no longer a government employee, they are clearly not being

⁸ For the various retention schedules for state, county and local agencies, see <http://www.nj.gov/treasury/revenue/rms/retention.shtml>.

⁹ Apparently at least one such request was made to the Office of the Governor. See Michael Linhorst, *Christie Administration may have violated public records law*, Bergen Record (Jan. 8, 2014), http://www.northjersey.com/news/Christie_administration_may_have_violated_public_records_law.html (“Part of [The Record’s] request, filed on Dec. 17 under the state Open Public Records Act, sought emails sent between David Wildstein . . . and certain employees in the Governor’s Office. . . .”).

“retained” by the agency (and effectively never were retained) and thus the agency is not in compliance with the RMS requirements.¹⁰

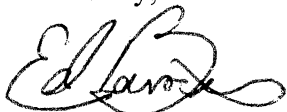
In short, when public officials conduct business on private email accounts or via text messages, it lessens accountability and causes likely breaches of laws and regulations.

The ACLU-NJ therefore requests, pursuant to OPRA and the common law, copies of any regulation, policy or practice of the Office of the Governor and Office of the Attorney General describing how the Office obtains records of correspondence pertaining to public business that are made or received by an employee on non-governmental email or text systems. Please also include regulations, policies or practices, if any, describing the Office’s efforts to obtain such records at the time of an employee’s separation with the Office.

Further, the ACLU-NJ requests that the Attorney General issues a Formal Opinion (as well as regulations if none currently exist) clarifying that, based on OPRA and the RMS retention schedule, custodians must have access to and maintain *all* government records, including those created or received on private email accounts or via text message. The Formal Opinion and regulations should specify that government employees must use their government email addresses for all public business whenever possible. Further, in those situations where correspondence regarding public business necessarily occurs via private email or texting (such as when an employee receives unsolicited messages on a private email system or when a government official is not provided with a government email account), the resulting texts or emails must be printed out or otherwise transferred to the agency as soon as practicable, and then treated the same as all other electronic or printed documents. Finally, the regulations should include enforcement mechanisms to ensure compliance with these policies.

Thank you for your attention to our concerns.

Sincerely,



Ed Barocas
Legal Director



Udi Ofer
Executive Director

cc: Chairman of the Port Authority of New York and New Jersey David Samson;
Executive Director of the Port Authority of New York and New Jersey Patrick J. Foye;
Senate President Stephen M. Sweeney;
Senate Majority Leader Loretta Weinberg;

¹⁰ The ACLU-NJ previously addressed the issue of the use of private emails when, in 2012, it was discovered that the Commissioner of the Department of Education Christopher Cerf and then-Newark Mayor Cory Booker, among others, corresponded on their private accounts. The ACLU-NJ sent the DOE a request to preclude the use of private emails for government work. The ACLU-NJ also filed a lawsuit against the City of Newark and successfully obtained emails received by Mayor Booker on his non-governmental email account. *See American Civil Liberties Union of New Jersey, Parents’ Group Sues for Details of Facebook Donation to Newark Schools* (August 23, 2011), <http://www.aclu-nj.org/news/2011/08/23/parents-group-sues-for-details-of-facebook-donation-to-newark-schools/>.

Senate Minority Leader Thomas H. Kean, Jr.;
Assembly Speaker Sheila Y. Oliver;
Assembly Deputy Speaker and Chair of the Transportation, Public Works and
Independent Authorities Committee John S. Wisniewski
Assembly Majority Leader Louis D. Greenwald;
Assembly Minority Leader Jon M. Bramnick;
Assembly Speaker-Elect Vincent Prieto.