



P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

Frank Corrado
President
Udi Ofer
Executive Director
Edward Barocas
Legal Director

**Testimony on Assembly Bill Nos. 3350 and 3417
Edward Barocas, Legal Director
American Civil Liberties Union of New Jersey
Assembly State and Local Government Committee
October 27, 2014**

Thank you for the opportunity to address you today in support of A3350 and A3417. My name is Edward Barocas and I am the Legal Director for the American Civil Liberties Union of New Jersey. The ACLU-NJ is a private, non-profit organization that promotes and defends our founding American principles of freedom, justice and equality. The ACLU has more than 14,000 members and supporters in New Jersey, and half a million nationwide.

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 on inappropriate or unlawful activity when it does occur. As explained by United States Supreme Court Justice Louis Brandeis, “Sunlight is...the best of disinfectants.”²

The legislature’s investigation related to the Port Authority of New York and New Jersey’s (PANYNJ) closure of local lanes to the George Washington Bridge in September 2013, has brought the issue of the PANYNJ’s lack of transparency and accountability to the fore. The lack of transparency at the PANYNJ has been a concern to New Jersey citizens well before the lane closure incident.³ The ACLU-NJ supports A3350 and A3417 as positive steps toward addressing

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.

³ 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

this significant and long-standing concern, and we commend the bills' sponsors for moving the bills forward toward passage.

The ACLU-NJ supports A3350 without reservation. We also support A3417, although we do so with the understanding that a follow-up bill must be passed if there are to be real teeth in enforcing the bill's provisions. The ACLU-NJ recommends that the follow-up bill to A3417 subject the PANYNJ to the same enforcement processes and remedies for non-compliance with public meetings mandates that all New Jersey state and local government entities face.

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.

A3350 would subject the PANYNJ to the same OPRA provisions that are applied to all New Jersey state agencies, local governments and school boards. It will help ensure that the PANYNJ can no longer hide its communications about public business from public view. Importantly, by subjecting the PANYNJ to OPRA, this bill will provide a remedy to persons who are denied records. If the PANYNJ refuses to comply with the law's transparency requirements, individuals who have been unlawfully denied public records can sue the agency for them. That statutory enforcement mechanism does not currently exist as against the PANYNJ and that is why A3350 is essential. Currently, while the PANYNJ has adopted its own public records policy, there is no statutory mechanism for enforcement and, therefore, no consequences for even willful disregard for public records provisions. This bill corrects that.

While A3350 provides robust enforcement mechanisms, A3417, which addresses, among other things, transparency for public meetings, does not. A3417 is a welcome step forward, imposing essential transparency requirements on the PANYNJ, such as mandating public meetings and public notice of agenda items. Absent from this bill, however, is a provision setting forth consequences for non-compliance and remedies for actions taken in violation of the transparency provisions this bill sets forth.

As you are aware, the PANYNJ is a bi-state agency and in order for laws pertaining to the agency to be enforceable, New Jersey and New York must adopt parallel laws. The New York legislature has already adopted a bill parallel to A3417. Both A3417 and its New York counterpart would mandate that PANYNJ follow most of the provisions of New Jersey's Open Public Meetings Act. Because these provisions represent a significant step forward, the ACLU-NJ strongly supports passage of this bill.

However, we ask that you recognize that mandates are only as strong as their enforcement provisions. Under the Open Public Meetings Act, when an entity takes action in violation of the Act (for example, by voting to adopt a new ordinance or enter a contract without having provided the required notice to the public that such votes may take place), affected individuals

can go to court to void the illegal actions.⁴ When a government body consistently violates OPMA's provisions, individuals can obtain a court-ordered injunction to ensure that the offending government body complies with the law in the future.⁵

A3417 does not subject the PANYNJ to any such enforcement mechanism or provide aggrieved parties with any statutory remedy. Without such an enforcement mechanism clearly set forth in a statute, the PANYNJ might again be left to its own devices, as there would potentially be no consequences for its unlawful actions. In the wake of what the public has learned over the past year about the conduct of PANYNJ officials, these accountability tools are essential.

Therefore, while ACLU-NJ supports A3417, we ask the legislature to pledge to adopt a follow-up bill that would adopt the necessary enforcement mechanisms that currently exist in OPMA, as well as institute other best practice provisions not contained in the present bill.⁶ In essence, we ask that the Legislature subject the PANYNJ simply to the same enforcement mechanisms that all state and local agencies are subject to. Anything less could shield the PANYNJ from consequences for unlawful activity that apply to all other New Jersey government agencies. Indeed, without clear consequences, failure to adopt such enforcement mechanisms may enable the PANYNJ to continue to operate in a culture of secrecy that is harmful to democratic governance and public trust.

⁴ N.J.S.A. 10:4-15.

⁵ N.J.S.A. 10:4-16.

⁶ For example, the ACLU-NJ recommends that provisions also be adopted to (1) prevent private discussions by officials about agenda items during public meetings; (2) require PANYNJ to videotape (rather than just audiotape) meetings; and (3) post additional public documents, such as meeting minutes and recordings of meetings, online.