

Written testimony by Dwight Arthur re Resolution 154, 24 July 2019

As a citizen of this county, I understand that the county often handles information which is actually confidential, and I recognize the need to protect actually confidential information from inappropriate disclosure. I would even support a local law that clarified the types of information that would be confidential, specified appropriate procedures to follow when called upon to disclose actually confidential information, and specified consequences for anyone willfully making inappropriate disclosure of actually confidential information. I also believe that most or all of the members of the legislature honestly believe that this is what their proposed law does. This is inaccurate, the proposed law creates new broad swaths of confidential information, places new and egregious limitations on permitted disclosure, and asks the citizens to believe that this flawed law will be fine because all of the staff and officials involved in administering it will consistently and always act in good faith. Why is the actual proposed law so different from what the members of the legislature apparently believe it to be? I believe that the legislature is receiving inadequate and poor quality legal advice. I call on the County Executive to send this resolution back to committee where we may be able to have a full and open discussion of the defects in the resolution's language and drafting.

I would like to call attention to eight issues with poor drafting which contribute to the gap between the legislature's intentions versus what the resolution actually says.

1. The Legislature apparently believes that this resolution does not create any new broad swaths of confidentiality. This is a good intention but it's not what the unfortunate resolution actually does. In section 1 B, it specifies that any record created by or any communication to or from [an] outside consultant shall be presumed to be confidential material even if not explicitly designated Confidential. Most people would agree that if you are watching for signs of mismanagement, you have to pay attention to consultants, who show up in many incidents of fraud and mismanagement. By creating a bubble of presumed confidentiality over everything done by consultants this resolution absolutely carves out a new broad swath of confidentiality. Maybe this is not the intention but it is the legislature's responsibility, with the help of its counsel, to get this right.

2. The members of the legislature, in defending this resolution, have repeatedly made the point that all information is still available via FOIL. In my opinion, this

perverts the purpose of the FOIL. FOIL is supposed to be a last resort, when information that should be freely available is being withheld. This resolution is making the FOIL into the default method for disclosing information about county business to its citizens. FOIL requests, especially if wrongfully denied by the county, can take a long time and a lot of money to prosecute. A lot of people do not have the time and money to go through this and will therefore be effectively prevented from requesting information.

3. The legislature apparently believes that this resolution does not lock down confidential material. This is another good intention but again it's not what the unfortunate resolution actually does. In section 2(J) in addition to the prohibitions on actually disclosing confidential information, the resolution creates a new prohibition on even describing the existence of confidential information. You can't create a FOIL request unless you can describe the information you are seeking, and you cannot find out the description of the data you seek without submitting a FOIL. Perhaps the Legislature did not intend this resolution to prevent people from getting enough information to submit a FOIL. This kind of mistake could be prevented if the Legislature was receiving higher quality legal advice during the drafting process.

4. In laws about privacy protection, it's customary to include a provision that allows private, confidential information about an individual to be disclosed directly to that individual on request. Perhaps the legislature did not intend to block individuals from access to records about themselves, but the only provision supported under this resolution is for the individual to file a FOIL request. The Legislative Counsel has the obligation to ensure that this sort of error does not get into finalized and enacted legislation. As it stands, if a county healthcare practitioner receives confidential medical test results, she cannot provide them to the client, she would have to tell the client to file a FOIL request. And because of the inappropriate prohibition on even **describing** confidential information, she cannot even tell the client what test results to request. She has to say "I know something you should know, go file a FOIL." This could all get sorted out in the courts but it would be much more effective for the Legislature to eliminate the errors in its resolution before passing it.

5. Here's another new, broad swath of confidential information. Item 9 in the second paragraph of the resolution says that confidential material includes, and I am quoting directly from the resolution, "inter-agency or intra-agency materials which are not statistics or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, or external audits" This sentence is hard to understand because it is poorly drafted, but it is saying that unless a memo includes one of these six things, data, statistics, etc, then it defaults to confidential. So, a report about toilet paper usage by month, maybe not confidential. A memo suggesting the creation of a bribery and extortion ring, definitely confidential so long as it doesn't contain any statistics. This is outrageous and ridiculous. I don't suggest that this is what the Legislature intended, but it is what they passed.
6. The legislature apparently believes that it is clarifying for county employees and officers what is required under existing law, but it's not true. This resolution blurs the boundary between what is actually confidential versus what is possibly confidential. Once a memo is stamped "confidential" then under this law it IS confidential even if it is just a weather report. There are no consequences if an employee stamps CONFIDENTIAL on a document that does not contain a shred of anything remotely confidential, but there would probably be consequences if an employee failed to stamp actually confidential information which subsequently became inappropriately disclosed. So employees will understand that to play it safe they should stamp every document that they create or send. And because this resolution's definitions section makes that document actually confidential, that means that everything that is potentially confidential is actually confidential. This does nothing to clarify anything, instead it creates a cloud of inappropriate confidentiality that drives the sunshine out of Putnam County government. If anyone doubts that this resolution is poorly drafted, just look at how many people who have read the actual resolution are confused about what it means.
7. The Legislators would like us to believe that this proposed law could not be used to suppress information about mismanagement or fraud within Putnam County, because the District Attorney and the members of the Board of Ethics would be unlikely to take action against someone reporting a crime. This is entirely inadequate. First, the citizens of Putnam County have a right and obligation to engage with and to be informed about the actions of the county government. The county executive and the people should share an interest in discovering any

mismanagement or fraud in county government and seeing it corrected. We should not be adversaries with the people struggling to be informed while the executive struggles to keep everything confidential. If there is mismanagement that does not rise to the level of a crime, that should not justify taking action against an employee who breaks the county's code of silence. And the point of open government laws is not to ensure good government but only if you trust a series of office holders to remain always above approach. If office holders always were trustworthy we would not need open government rules, but we do need them.

8. Finally, the Legislature would like the citizens to take comfort from the fact that the county is committed to disclosure except where actual confidentiality must be protected. But this is cold comfort because this is not how the county is operating. The county is misusing attorney/client confidentiality to improperly hide its deliberations and decisions from the citizens. Attorney/client confidentiality is important to allow legislators to obtain legal advice about their decisions, and to freely explore alternatives. It is not appropriate for the legislature to hide their deliberations and decisions from the public by consulting an attorney and then drawing a veil of confidentiality over anything discussed with the attorney. The NY Open Meeting Law states and I quote, "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

The Legislature is already facing credibility problems because of its refusal to discuss the rationale for many statements made in Resolution #79 passed in April which, on their face, appear to be serious and substantial misstatements of both law and of fact. While refusing to disclose anything about this, the legislature cannot tell the citizens that they favor disclosure.

I ask the County Executive to return this flawed and unpopular resolution to the Legislature for further discussion. Thank you.

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