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Radio Television Digital News Association • Red Hook Initiative  
Reinvent Albany • Reporters Committee for Freedom of the Press  
Society of Environmental Journalists (SEJ)  
Surveillance Technology Oversight Project (S.T.O.P.) • The Legal Aid Society • Youth Represent

March 11, 2024

Governor Kathy Hochul  
State of New York

Speaker Carl Heastie  
New York State Assembly

Majority Leader Andrea  
Stewart-Cousins  
New York State Senate

Minority Leader William Barclay  
New York State Assembly

Minority Leader Robert Ort  
New York State Senate

**Re: Please Strengthen NYS FOIL For Sunshine Week**

Dear Governor Hochul and Legislative Leaders,

For Sunshine Week, our groups ask you to support and pass legislation to strengthen New York's Freedom of Information Law (FOIL).

Transparency is essential for a functioning democracy, but FOIL is broken in New York State. State and local agencies routinely take months or years to provide public records requested via FOIL. Not only are agencies incredibly slow to provide records – they often provide a fraction of the records requested and contrive endless excuses, basically daring the public to go to court.

Thankfully, there are a number of bills in the NYS Legislature that will strengthen FOIL so the public has access to the information we deserve:

### **FOIL Timeline Act ([A8586 \(Raga\)](#) / [S8128 \(Skoufis\)](#))**

New York state agencies frequently undermine the FOIL process through near-endless delays. This bill will speed up the FOIL process by deeming requests constructively denied if the agency does not acknowledge requests within five business days. The bill also makes 30 days the maximum amount of time an agency may take to deny requests, and 60 days the maximum to provide them. A firm cap at 60 days will allow requestors to get documents and, if necessary, appeal and sue within a reasonable timeline.

Currently, requests are deemed “constructively denied” if an agency does not respond in a timely manner; however, as long as a judge thinks response delays are “reasonable,” an agency will not be held to have violated the law. This creates perverse incentives for agencies to short-staff their FOIL response teams and otherwise give themselves reasons to delay. In practice, while some agencies respond to requests promptly, others routinely delay six months or even a year or more before giving an initial response. By the time a requestor gets records, if they ever do, the records are often stale and unable to provide needed transparency.

### **FOIL Reporting Act ([S8671 \(Hoylman-Sigal\)](#))**

It is impossible to assess the state of NYS FOIL because agencies are not required to publicly report basic information about how they deal with the FOIL requests they are receiving. The public must literally FOIL the agency FOIL logs to analyze the state of FOIL. This bill requires agencies to annually report FOIL data such as when each request was received, how it was resolved, and more to the Committee on Open Government. Publishing this data will show legislators and the public which agencies are complying with FOIL and which are shirking it. Access to this data is essential to keep implementation of our state’s core transparency law – FOIL – transparent. If our systems of transparency are themselves opaque, they are unlikely to be effective.

### **Limiting the Commercial FOIL Exemption Act ([S3257 \(Hoylman-Sigal\)](#))**

Currently, if a business submits proprietary information to state or local governments, it can have that information exempted from public disclosure indefinitely. In other words, the business can keep what should be public records from ever being released.

Functionally, this prevents taxpayers from being able to see who is getting their money and what goods and services vendors are providing. This bill will require businesses to reapply for the exemption every three years, preventing businesses, vendors and other third parties from permanently exempting records submitted to the government from disclosure. The bill thereby closes a gaping loophole in the law that allows agencies to keep dealings with corporations secret under the false pretense that disclosure of any portion of any of the dealings would somehow hurt the company’s business interest.

## **FOIL Attorneys' Fees**

Thanks to a 2017 law, when a court decides that a state or local agency had no reasonable basis for denying records, the agency is now required to reimburse the requestor's fees. While this a major step forward, there is much room for improvement – agencies routinely fail to provide records yet the prohibitive costs of Article 78 litigation means only a tiny handful of lawful FOILs requests are upheld in court. We urge the Legislature to look at bills that would improve this process, such as [A5357-A \(Steck\)](#) / [S5801-A \(Liu\)](#).

This bill allows requestors who are successful in litigating a wrongful FOIL denial to recover attorney's fees more easily. Currently, requestors who sue agencies that wrongfully denied their FOIL request have to prove that they “substantially prevailed” against the agency to be eligible for fee reimbursement. As a result, agencies can wrongly deny FOIL requests, knowing that litigating is a tremendous risk to the requestor, as even if the requestor wins, a judge has discretion not to award fees if they view the victory was insufficiently “substantial.” In practice, many denials illegally contain insufficient information for a requestor to be able to know whether the denial was appropriate. In such cases, even if a court rules that the denial was illegally vague, so long as the court generally thinks not too many documents were improperly withheld, the requestor is out-of-pocket for legal fees. As a result, agencies are incentivized to be illegally vague in their denials, especially when they are wrongly withholding large amounts of disclosable records. This legislation would allow requestors to sue agencies for illegal denials, confident that if their claims are meritorious, their fees will be reimbursed, regardless of whether a judge decides the victory was sufficiently “substantial.”

New Yorkers should be able to use FOIL to access records to which they are entitled—without delay, runarounds, or perverse agency incentives. These bills are urgently needed in order that FOIL fulfills its purpose. The status quo, where indefinite denials, costly litigation, and misuse of exemptions prohibit us from accessing government information is untenable. We urge the Senate and Assembly immediately to pass these bills, and the Governor to sign them.

Sincerely,

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