Assessment of Executive Order and Vetoes of FOIL Bills A1438B, A114

December 15, 2015

Governor Cuomo recently vetoed two bills that would have strengthened the Freedom of Information Law. The vetoed bills were introduced at the behest of the State Committee on Open Government, and were intended to address long-standing problems the public faces when agencies refuse to obey FOIL. The bills were strongly supported by leading public interest groups and garnered support from more than a dozen editorials.

1. Summary

This assessment rebuts the governor's veto message and the executive order he issued. In his combination veto message/executive order, and in his subsequent remarks, the governor and his administration have made three basic points:

1. The bills are unfair because they do not apply to the legislature. FOIL has never applied to the legislature, so this seems like an odd reason to veto two bills that would apply to all statewide and local agencies and offices.
2. The bills would create "radical changes" and are "seriously flawed." The bills are taken from language provided by the State Committee on Open Government, the state's open government ombudsman. Our analysis does not find them flawed.
3. "The governor will continue to lead by example in advancing transparency" and "will immediately direct state agencies to fast track FOIL appeals" via executive order. Unfortunately, as the chart below shows, the governor's executive order does only a fraction of what the two vetoed bills do.

	Attorney's Fees			Faster Agency Appeals		
	State Agencies	Attorney General and Comptroller	Authorities and Local Governments	State Agencies	Attorney General and Comptroller	Authorities and Local Governments
Vetoed Bills A.114 and A.1438-B	YES	YES	YES	YES	YES	YES
Executive Order	NO	NO	NO	YES	NO	NO

2. Background

The Freedom of Information Law provides a formal process for the public to request public records held by government agencies. In New York, FOIL applies to state agencies, public authorities, local government agencies, and local legislatures, like the NYC Council and nonprofit groups which are acting on behalf of the government.

FOIL is heavily used by journalists, government watchdog groups, businesses, and the general public. Reinvent Albany estimates that state agencies and authorities receive 100,000 FOIL requests a year, and all local governments combined receive nearly as many.

Unfortunately, government agencies in New York often are very slow to respond to FOIL requests, and frequently provide incomplete or heavily redacted records. Agencies know that it can be very inconvenient and prohibitively expensive for the public to appeal a FOIL request to the courts. Because of this, agencies are often able to effectively ignore the requirements of FOIL without legal consequences. To remedy this, the State Committee on Open Government has proposed two bills, which Governor Cuomo vetoed.

2.1 Summary of the Vetoed FOIL Bills

- *A.114* (Buchwald/Ranzenhofer) reduces the time agencies have to appeal a judge's decision granting public access to public records, to two months from nine months.
- *A.1438-B* (Paulin/Gallivan) requires judges to award attorney's fees when a member of the public "substantially" prevails in a Freedom of Information lawsuit and an agency had "no reasonable basis" for failing to provide the requested records.

2.2 Combined Veto Messages and Executive Order: Governor Vetoes FOIL Bills Because They Do Not Apply to Legislature – Though FOIL Never Has

The gist of the governor's complaint about the vetoed FOIL bills is that they do not apply to the state legislature. We find this bizarre. Previous governors have signed bills strengthening and modernizing FOIL, including the biggest recent change, which explicitly addressed emails. Yes, FOIL should apply to the state legislature, as it does in almost two dozen states. But it is bizarre and unprecedented

for a governor to veto FOIL bills which strengthen the existing FOIL—which applies to state agencies and authorities and non-profits, the attorney general, comptroller, and all local governments—because it does not apply to the legislature. We do not understand the logic of vetoing bills that would improve the existing FOIL process, which already encompasses the vast majority of government activity.

2.3 Vetoed Bills Were Proposed By State Committee on Open Government

The two vetoed FOIL bills were introduced at the request of the Committee of Open Government, and had been high on the Committee's list of legislative recommendations for at least five years. (See the Committee's annual reports going back to 2010, perhaps longer.) The bill language was drafted by the Committee on Open Government to address problems that the public was having with the FOIL appeal process, and with wide scale non-compliance with FOIL by state agencies, authorities, and local governments.

2.4 Bills Had Repeatedly Passed the Assembly and Had Support from Civic Groups and Editorial Boards

Both bills had previously passed the Assembly and were widely considered non-controversial. Underscoring the non-controversial nature of the bills, the bills were supported by more than a dozen major public interest groups via group memos and requests to the governor. The bills were also backed by numerous newspaper editorials.

The governor's veto message claims the bills mandate "radical changes," yet the language in A1438-B, which requires a judge to issue attorney fees when a member of the public wins the release of public records, is almost identical to the existing law in at least five states, including:

- *Colorado*: fees "shall be awarded" to anyone who wins FOI lawsuit;
- *California*: court "shall award costs and fees";
- *Florida*: "court shall assess" costs and fees;
- *Illinois*: fees "shall be awarded" to anyone who wins FOIL lawsuit;
- *New Jersey*: fees "shall be awarded" to anyone who prevails.

2.4 Governor's Executive Order Covers Fraction of What Vetoed Bills Did

Press accounts have implied that the governor's executive order achieves substantially the same results as the vetoed bills. In fact, the EO does only a fraction of what the two bills would. The EO does not make it easier for the public to win attorney's fees, and only requires state agencies to speed up their appeals, it does not apply to state authorities, state controlled non-profits, the attorney general, the comptroller or local governments – like New York City. Based on our experience examining agency FOIL logs and various oversight reports, it is clear that most FOIL requests in New York State go to government entities not covered by the governor's EO.

3. Veto Messages

3.1 A1438-B Provides Attorney's Fees to Plaintiffs Who Win FOIL Lawsuits

The governor's veto message calls the bills "myopic" and notes that they focus on one branch of government. However, these bills have been proposed each year for five consecutive years by the New York State Committee on Open Government: a committee in which most of the members are appointed by the Governor himself. Further, a 2010 report by the National Association of Counties noted that most states' FOI laws do not cover legislative records. New York's FOIL is modeled on the federal Freedom of Information Act, which does not cover the records of the legislative or judicial branches.

The veto message claims that A.1438-B has "significant technical issues" because it provides for attorney's fees to be assessed against a state agency if it loses, but not for attorneys' fees to be awarded to the agency if it wins. But this is incorrect: agencies can win attorney's fees already, according to §130 of New York's Administrative Rules of the Unified Court System, which provides for awards of costs (filing expenses and attorney's fees) to any prevailing party in cases of frivolous lawsuits. Forcing unsuccessful FOIL plaintiffs to pay attorney's fees would only serve to increase the expense of FOIL litigation; the expense is already so daunting that the Committee on Open Government has—for half a decade—proposed this legislation to encourage plaintiffs to take their cases to court. These provisions exist in Colorado, California, Florida, Illinois, and New Jersey; New York needs to bring its FOIL up to date.

The veto message correctly notes that A.1438-B allows for attorney's fees to be assessed against state agencies which lose at trial, even though the agency may later win on appeal. The Governor apparently finds this problematic. But attorney fees, like court costs, legal sanctions, and all manner of judicial orders, may be later reversed by an appellate court. According to the logic in the veto message, no trial court should ever award remedies, just in case the appellate division reverses the verdict. But the appellate division's verdict could later be reversed by the New York State Court of Appeals, which can itself be reversed by the U.S. Supreme Court.

The veto message points out that "material violation" is not defined by the A. 1438-B, and therefore leaves litigants "without any clarity." But "material" is an entirely mundane legal concept, defined bluntly in Black's Law Dictionary as "significant." For example, a material violation of the terms of a contract is one which is significant enough for the aggrieved party to sue the counterparty. Any first-year law student understands this principle. The legal system is more than capable of determining whether an agency was significantly or slightly in violation of the law.

3.2 A114 Bill Gives Agencies Two Months to Appeal a Judge's FOIL Verdict

The veto message describes A.114 as creating an "inequitable outcome" because it forces agencies to appeal a loss at trial within two months, while providing FOIL requesters who lose at trial nine months to perfect their appeal. It is unclear why the Governor believes that FOIL requesters who: waited months for their request to be denied; filed an administrative appeal which was also denied; initiated and litigated an Article 78 lawsuit to completion; and ultimately lost the trial, would abruptly decide to file nine months of continuances and motions to postpone the perfection of their appeal. Simply put, people file FOIL requests to get public records. It is difficult to understand why any FOIL requester would voluntarily and unilaterally stall the process for nine months.

The veto message claims that forcing agencies to perfect their appeal in two months instead of nine "eliminates judicial discretion," because each department of the appellate division sets its own rules for how quickly appeals must be perfected under §5530 of the Civil Procedure Law and Rules. However, A.114 only amends FOIL—by directing agencies to expedite their work or obey the judicial order—and thus leaves judicial discretion completely intact. Each department can

continue to enforce the extant provisions of Civil Procedure Law and Rules, while FOIL would simply require agencies finish writing their appeal earlier.

The veto message notes that A.114 fails to provide for extensions in the 60-day timeframe for agencies perfecting their appeals, but the status quo abuse of repeated requests for extensions of the timeframe to file an appeal is the problem identified by the Committee on Open Government which A.114 seeks to address. It is unclear how allowing agencies to request extensions for the timeframe would curb the abuse of extensions which gives rise to this legislation.