

June 17, 2016



Memorandum of Opposition

Relating to Freedom of Information Requests and Attorneys' Fees

A.9506-C (Paulin) / S.6949-C (Gallivan)

Title

An Act to amend the public officers law, in relation to freedom of information requests and attorneys' fees

Summary

This bill amends the Freedom of Information Law (FOIL) by replacing the section which allows courts to award attorney's fees to successful plaintiffs who sue agencies for access to public records under FOIL. The new language from A.9506-C and S.6949-C would require the award of attorney's fees to plaintiffs who substantially prevail, unless the agency's denial was substantially justified or special circumstances make the assessment unjust. The bill would also mandate the award of attorney's fees against agencies which fail to respond to FOIL requests and appeals within the statutory time limits, unless the agency can provide substantive evidence of an inability to comply with the requirements of FOIL.

Statement of Opposition

A.9506-C and S.6949-C will make it more difficult for FOIL requesters to win attorney's fees when successfully suing agencies for denying FOIL requests.

While the bill replaces the language 'the court may assess' attorney's fees with 'the court shall assess', there are three exceptions to the mandatory fee shifting

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provision that undermine the utility of this section. While states like California, Florida, Illinois, Colorado, and New Jersey simply provide attorney's fees to successful plaintiffs, A.9506-C and S.6949-C deny fees to plaintiffs where agencies can argue that their denial was substantially justified or if "special circumstances" make the award of fees unjust. We are concerned that these exceptions undermine the ability of plaintiffs to win attorney's fees.

Further, the bills create a massive loophole for agencies to avoid liability for paying attorney's fees. Agencies which fail to respond to FOIL requests or appeals within the statutory time limits are not liable for the plaintiffs' attorney fees if the agency can provide substantive evidence of their inability to comply with the law. Agencies already claim to be overwhelmed by a backlog of FOIL requests when responding to even the most routine new requests; this allows agencies to continually extend their own deadline for responding to requests.

This bill would further reward agencies which fail to keep up with FOIL by insulating them from liability for attorney's fees. Such a loophole incentivizes agencies to deliberately miss their own FOIL deadlines rather than provide a denial to FOIL requests. An actual denial would expose agencies to the risk of paying attorney's fees to successful plaintiffs, but a missed deadline (combined with an overwhelmed and/or underfunded agency FOIL department) protects the agency from liability.

Most plaintiffs cannot afford to self-finance FOIL litigation; it is time-consuming and expensive. Legislation that provides such sweeping protection to agencies which fail to handle FOIL requests on time actively makes this situation worse.

For these reasons, we strongly oppose A.9506-C and S.6949-C, and urges the Assembly and Senate to reconsider this issue with new legislation.