



**Testimony on Public Protection and General Government
Joint Legislative Hearing**

February 12, 2020

Good morning Chairs Weinstein, Krueger, and members of the legislature. My name is Tom Speaker, and I am a Policy Analyst for Reinvent Albany. We are a nonprofit watchdog group that advocates for open and accountable New York State government. Today we are calling on the Governor and legislature to address in the budget or this session:

- 1. Establishing an OpenFOIL portal and proactively disclosing records**
- 2. Applying the Freedom of Information Law (FOIL) to government-affiliated entities, including ethics commissions and economic development entities**
- 3. Reforming the Joint Commission on Public Ethics (JCOPE) and lobbying laws**
- 4. Limiting outside income for elected officials**

We will also respond to the following parts of the Governor's bill:

- **Part X - Support Only with Amendments**
- **Part Z - Support**
- **Part JJ - Support**
- **Part SS - Support**
- **Part TT - Support Only with Amendments**
- **Part UU - Oppose**

Establishing an OpenFOIL portal and proactively disclosing records

The Governor's budget makes a number of FOIL proposals aimed at improving government transparency in New York. To that end, Reinvent Albany strongly believes the budget should include legislation establishing an OpenFOIL portal for New York State. While the State has made strides to open up its data and records over the past

several years, on the whole New York has been slow to comply with FOIL requests and make information public. Reinvent Albany's report on MTA FOIL in October 2018 found that none of the eight agencies we sought records from responded within the 20 business days required by law.¹

The state can streamline FOIL administration by establishing an OpenFOIL portal that allows the public to see and track FOIL requests and download frequently requested records. [New York City has had such a portal for years](#), established by executive order, which allows requesters to see the status of their request while providing a public history of records requests made through the portal of different city agencies and entities.² Other governmental entities have better OpenFOIL portals than New York City, including the [Port Authority](#) of NY/NJ, [Oakland](#) and [Montgomery County, Maryland](#). A starting point for drafting legislation establishing a state OpenFOIL portal is [Int. No. 328](#) of 2014, sponsored by Councilmember Ben Kallos in New York City.

Ideally such a portal would display and track all FOIL requests made to state agencies and authorities, permanently display all records that have been granted, and provide the following metrics on FOIL administration:

- *Number of Requests Received*
- *Number of Requests Processed*
- *Number of Requests Pending*
- *Median Number of Days for Processed Perfected Requests*
- *Requests Fully Granted*
- *Requests Partially Granted/Partially Denied*
- *Requests Fully Denied*
- *Number of Denials Based on Exemptions*
- *Number of Denials Based on Reasons Other than Exemptions*

These metrics are a simplified version of the tracking done by the federal government. Federal agencies provide extensive information on their Freedom of Information Act (FOIA) administration. Agency FOIA officers submit an annual report which includes thorough tracking on the disposition of FOIA requests with uniform metrics established by the United States Department Of Justice (DOJ).³ DOJ then summarizes these agency

¹ Reinvent Albany. "FOIL That Works: Increasing MTA transparency and accountability by putting FOIL online." October 2018. <https://reinventalbany.org/wp-content/uploads/2019/03/FOIL-that-Works-MTA-FOIL-Report-October-2018.pdf>

² See: <https://a860-openrecords.nyc.gov/>

³ <https://www.justice.gov/oip/annual-foia-reports-fy-2017>

reports into a Summary and Assessment report, which provides a picture of FOIA administration across the federal government.⁴

Short of an OpenRecords portal, we support requiring that all agencies and authorities proactively disclose records in a reading room on their websites, a proposal also backed by the Committee on Open Government. One bill that would enact this proposal is [S1630-B \(Skoufis\)](#)/A121-A (Buchwald). However, if the bill is adopted, lawmakers should provide specific criteria on what types of records should be disclosed, such as records that have been frequently requested, including commonly sought datasets.

Missing from the Governor's 2020-21 budget are some of the strong reforms proposed last year that Reinvent Albany supported but did not make it into the final budget. Lawmakers should take a second look at these proposals and consider including them in this year's budget, particularly:

- **Making contractual bargaining agreements subject to FOIL before they are voted on by the membership.** State employees' salaries and benefits are covered by taxpayers, so the public should be able to view these agreements before they are enacted.
- **Placing time limits on the ability of businesses, vendors and other third parties to restrict the release of records and information submitted to government.** The release of such information can currently be extended indefinitely.

Applying the Freedom of Information Law (FOIL) to government-affiliated entities, including ethics commissions and economic development entities

Reinvent Albany also calls for the budget to include legislation applying FOIL to government-affiliated entities, particularly those participating in economic development and the creation of tax subsidies. Whereas state agencies and authorities are subject to FOIL requests, certain government-affiliates have claimed they are not, including SUNY-affiliated nonprofits and certain local development corporations (LDCs). Any entity that is performing a government function as measured by different criteria should be required to disclose information about its activities to the public.

FOIL should also be applied to the Joint Commission on Public Ethics (JCOPE), the Legislative Ethics Commission, and the state legislature. JCOPE in particular needs greater transparency so that its operations can be more fully examined by the public. We

⁴ <https://www.justice.gov/oip/oip-guidance/guidelines-2018-chief-foia-officer-reports>

understand that sensitive matters sometimes come before JCOPE that should not be made public, but no other public board in New York state has the privilege of so much confidentiality and freedom from scrutiny. The public should be able to see the results of votes, at least in the aggregate.

Last year's Assembly budget resolution language would be a workable starting point for addressing the issue. Both the Senate and Assembly budget resolutions last year would have applied parts of FOIL to economic development entities. We preferred the Assembly's proposal, which would have allowed for FOIL to apply to a wider range of economic development entities, whereas the Senate proposal only covered Regional Economic Development Councils (REDCs).

However, the Assembly's proposal needs clarity on the definition of "constituent units" in Public Officers Law as referenced in the definition of "economic development entity." Last year's language left unclear whether or not that would include SUNY- and CUNY-affiliated not-for-profits dealing with economic development. Any application of FOIL to economic development entities should include SUNY- and CUNY-affiliated not-for-profits, particularly as the former were at the center of the Buffalo Billion scandal in 2014.

We have also proposed criteria for determining whether government-affiliated entities should be subject to FOIL, after conferring with the National Freedom of Information Coalition (NFOIC), of which we are the New York affiliate. Applying FOIL to government-affiliated entities is a national issue, and there is case law across the country, sometimes conflicting, on this matter.

Reforming the Joint Commission on Public Ethics (JCOPE) and lobbying laws

Reinvent Albany also believes New York State needs to create a politically independent ethics enforcement body. Like many other watchdog groups, journalists and legislators, we believe JCOPE is structured to fail, is failing and needs to be dissolved and replaced with a new ethics enforcement agency.

New Appointment Process for State Ethics Enforcement

The first step for creating a new ethics enforcement agency is establishing an appointments process so that elected officials no longer choose the majority of the Commission's members. Of JCOPE's 14 members, six are appointed by the Governor, three each by the Assembly Speaker, three by the Temporary President of the Senate, and one each by the minority leaders of each legislative body. Legislative vacancies are

filled by the leaders of the parties, who made the initial appointments when JCOPE was established. Under this process, legislators are literally nominating their own watchdogs.

Reinvent Albany supports the appointments process in the constitutional amendment [S.594A \(Krueger\)](#)/A.1282A (Carroll), as well as the provision proposing JCOPE's dissolution. These provisions would dissolve JCOPE and establish a new ethics enforcement with 13 members (as opposed to 14), with seven members appointed by the Chief Justice of the New York State Supreme Court and the Presiding Justices of each of the Appellate Divisions, two chosen by the Governor, and one each by the majority and minority legislative leaders (this proposal has been advanced by Evan Davis, Governor Mario Cuomo's former counsel and former president of the New York City Bar Association). We agree with Evan Davis and the bill's many co-sponsors that introducing judicial appointments would result in more independent effective ethics enforcement.

Lawmakers must create new voting procedures for ethics enforcement. Under JCOPE's procedures, as few as two members can stop certain investigations from proceeding or stop referrals for penalties from even being made with a majority vote by JCOPE. Since JCOPE's votes are confidential, it's difficult to know much about how the veto provision has impacted investigations, but JCOPE's lack of involvement in high-profile indictments suggests that vetoes have stymied attempts to get major investigations underway. The voting process for the new agency should be made consistent with that of most state boards, in which the majority always decides.

As with FOIL, there are some good ethics and lobbying proposals from last year's Executive Budget proposal that have not been included this year. We encourage lawmakers to consider including the following:

- **Banning lobbyists, political action committees (PACs), labor unions, and independent expenditure committees from making loans to candidates (Part M of last year's budget Ethics proposals).** Loans can create the appearance of a conflict of interest, particularly when the lender has business before the state. Reinvent Albany also recommends that campaign committees be required to repay loans prior to the next election, or have the loans treated as contributions.
- **Providing greater disclosure of lobbyist fundraising for candidate committees (Part O of last year's budget Ethics proposals).** This would require lobbyists file a bimonthly report with JCOPE disclosing the name,

address or phone number of the lobbyist and staff who have engaged in fundraising for candidates, along with other relevant information. This information is already being compiled by entities that lobby.

- **Increasing lobbyist penalties (Part S of last year's budget Ethics proposals).** This would allow for longer bans and heavier fines on lobbyists who knowingly and willfully violate state ethics laws. We believe the law should be clarified to indicate that violations should be significant in order for penalties to be assessed.

Limiting outside income for elected officials

Under binding rules proposed by the pay raise commission in 2018, elected officials would have been banned from receiving more than 15% of their official salary in outside income. The rules would also have prohibited lawmakers from earning compensation when they have a fiduciary relation to a client or employer – these restrictions are consistent with those of the U.S. Congress. However, a judge struck down those provisions in August 2019, saying they were outside the commission's authority. The Office of the Attorney General is no longer defending the commission's recommendations.

It has been more than four years since the former Assembly Speaker's first conviction following his attempts to use his position to benefit himself financially, and yet no steps have been taken to deter future abuses. The legislature must act to restrict elected officials' outside income.

At the very least, officials whose positions pose the greatest corruption risk – the legislative leaders and the chairs of Ways and Means and Finance, for example– should be subject subject to restrictions on outside income. Outside income for rank-and-file legislators poses a lower corruption risk than for high-ranking officials. Reinvent Albany would not be opposed to a proposal that only placed the restrictions on the government's key decision makers as a starting point especially because the current holders of these positions have already led by example with limited or no outside income.

Reinvent Albany also has thoughts on the certain parts of the Governor's PPGG bill, specifically parts JJ, SS, TT, UU, X and Z.

GOVERNOR'S PUBLIC PROTECTION AND GENERAL GOVERNMENT BILL

X Comprehensive Technology Service Contracts - Support Only with Amendments

This bill would allow the director of the Office of Information Technology Service to solicit bids and award contracts for the design and implementation of technology projects together rather than dividing these up as separate bids. Reinvent Albany cannot support this bill if it includes the provision “notwithstanding section 163 of the state finance law, or any other provision of law to the contrary.” This section is essential to ensure that bids conducted by state agencies are competitive. The language may have been included out of concerns that it may have prevented the ITS office from bidding the “design” and “build” components of a project together, but we see nothing in the law supporting these concerns.

Z Establishment of SFS Procurement and Contracting Authority - Support

This bill enables the Statewide Financial System to issue and award procurements and contracts for its own business operations, which SFS does not currently have the authority to do. Reinvent Albany supports this bill as it enables SFS to bid out procurement rather than doing so through other agencies when it wants contractual work done.

Part JJ Manual Recounts - Support

Reinvent Albany supports this bill because it will clarify when local boards of elections should conduct manual recounts. The bill’s procedures and thresholds also align with the recommended practices of national experts such as FairVote.

While some boards of elections, such as New York City’s, have policies that mandate recounts if the margin of victory is a certain percentage, other boards have no such policy, leaving voters and candidates in limbo for months. In last November’s Broome County election for District Attorney, the initial canvass of votes showed Libertarian candidate Michael Korchak with a .01% margin of victory (55 votes) over Republican candidate Paul Battisti. Battisti filed a lawsuit asking a judge to order the Board of Elections conduct a recount. The judge did not reject the request until December 17th, six weeks after the election.

Including this bill will provide clarity for local boards of elections on when to administer manual recounts.

Recommendations

- **While we support this legislation, the state should consider lowering the threshold for statewide elections from .2% to .15%.** This would bring

the threshold in line [with the proposal made by voting rights organization FairVote](#) after a review of statewide election recounts. In their analysis, FairVote noted that vote totals only change an average of .03% after completion of recounts.

Part QQ Ensure Pay Equity at State and Local Public Authorities

This bill requires equal pay for protected classes working at state authorities, bringing it in line with the Pay Equity Law that applied to state workers last year. Reinvent Albany supports equal pay for protected classes, but also believes the state should reduce the pay disparity between state workers and authorities workers, which this bill does not address.

Salary and health benefits for authorities workers is typically higher than for state agency workers. For example, in 2016, agency workers earned an average of \$76,000, while workers at the New York State Energy Development and Research Authority earned \$101,000 as of 2019. Authorities' current payroll costs come at great expense to the state. According to the ABO's 2019 report, \$12 billion was spent on salaries of state and local authority employees in 2018.⁵ Twenty-three authorities also have bonus programs, some of which award employees bonuses of more than \$10,000.⁶

We believe that the state should address this by making authorities' pay consistent with that of state workers.

Part SS Ban on Contributions from Foreign-Influenced Corporations - Support

Reinvent Albany supports this bill, believing foreign nationals (unless they are citizens or permanent residents) and foreign-influenced corporate entities should not have a role in influencing politics and elections in New York State. We have been troubled by the reports of efforts by foreigners and foreign governments to influence American elections through veiled campaign contributions, social media and other means. Reinvent Albany believes direct or indirect contributions or expenditures by foreign nationals or entities to candidates or political entities in New York State should be prohibited.

⁵ NYS Authorities Budget Office 2019 Annual Report. Public Authorities Staffing and Compensation 2014 – 2018, pgs. 37-45 (on the document). Available at:

<https://www.abo.ny.gov/reports/annualreports/ABO2019AnnualReport.pdf>

⁶ Ibid, pgs 45-48 (on the document).

This proposal not only bans direct and indirect contributions and expenditures by individual foreigners to candidates, political parties, political committees, and political organizations but also by corporate entities that are influenced by foreign nationals, as measured by different criteria. We think this criteria is generally reasonable but some changes should be made for clarity as outlined below.

Recommendations

- Clarity is needed for organizations like the business chambers of commerce, trade associations or even unions that may have foreign companies or entities as part of their membership. Presumably the entity making the political contribution or expenditure would apply the threshold tests to its component membership, which would in turn measure whether it was foreign-influenced according to the same criteria, but this should be clarified in the legislation.
- Five and ten percent thresholds for ownership and control are low for a determination of foreign influence, and we would not be opposed to an increase in the threshold.
- The bill, modeling subsection (1) of Election Law 14-116 which bans corporate contributions but for the exceptions in subsection (2) limiting contributions to \$5,000 annually, appears to only cover corporation, limited liability company, joint-stock association or other corporate entity *doing business in this state* (emphasis added). The bill, along with subsection (1) banning corporate contributions generally, ought to include any corporation regardless of whether they do business in the state if that is not already the practice.

Part TT Nothing to Hide Act - Disclosure of Tax Returns - Support Only with Amendments

Reinvent Albany supports disclosure of tax returns but believes it should only apply to those elected officials and appointments with the most power and potential for conflicts, namely statewide elected officials, legislative leaders, agency heads, and select local elected officials (county executives, city mayors, county legislative speakers, city council speakers). We do not believe rank-and-file lawmakers should have to disclose such personal information (and by extension, their family's) given they already disclose extensive financial information to JCOPE and any conflicts they have are a reduced corruption risk relative to more powerful executives and legislative leaders.

[Our view is consistent with our position on a similar proposal in last year's Executive Budget \(see pages 3-4\)](#). As we pointed out then, there is overlap between financial disclosure information already reported by public officers and policymakers, and any

consideration of this proposal ought to crosswalk information from the typical tax return with the financial disclosure requirements already in state law.

We appreciate that Governor Cuomo's Office adopted several suggestions we made last year to improve this proposal, including: 1) having the forms be filed with JCOPE rather than the SBOE; 2) limiting disclosure to 5 rather than 10 years of tax returns; and 3) requiring consultation with the NYS Department of Taxation and Finance to identify tax return information to be redacted.

We also note the Governor in his Executive Budget presentation put forth this proposal because of the court decision invalidating outside income restrictions in the interest of identifying a compromise with the legislature. We believe the Governor and legislature ought to also consider, as a compromise, restricting the outside income of legislative leaders and key committee chairs like Ways & Means and Finance. Both Speaker Heastie and Stewart-Cousins, along with Chairs Krueger and Weinstein, to their credit, are already limiting their outside income. Past scandals have involved senior positions like these and so codifying the practice of existing leaders would be a meaningful step forward and gesture to improve ethics in Albany.

Recommendations

- Require candidates provide tax returns when ballots are finalized. Under the current proposal with a consolidated primary in June, tax returns would not be available for public review until after a candidate takes office
- Require JCOPE disclose commonly reported tax information like Adjusted Gross Income and commonly used deductions and credits in a machine readable format along with PDF copies of the tax returns on its website.
- Require JCOPE in conjunction with the Department of Tax and Finance promulgate rules to identify broad areas of tax returns (rather than on a more individualized basis) that would and would not qualify for an exemption from public reporting.

Part UU - Disclosure Requirements for Charitable Nonprofit Entities - Oppose

Reinvent Albany opposes this proposal because the bill appears to be a backdoor way of shifting certain responsibilities from the Attorney General's Charities Bureau to the NYS Department of Taxation and Finance. It creates duplicative reporting requirements for charities by requiring they file registration, financial disclosure reports, and IRS forms already filed with the Attorney General's Charities Bureau with the NYS Department of Taxation and Finance. If the Governor believes the Department of Taxation and Finance

is better suited for charities oversight, Reinvent Albany believes that should be considered more fully and examined outside the budget.

We do not think Tax and Finance should have access to charities' donor filings or publish donor names for 501(c)(3) organizations on the IRS 990 form. We do support data sharing between the Charities Bureau and Tax and Finance as needed in particular instances, but do not think all filings should be filed with both entities. We support the Charities Bureau enforcing the law more effectively and [making current filings with the Charities Bureau more transparent in an open data, searchable form rather than in static PDFs](#).

The bill appears to attempt to align the law with the court decision in 2019 that struck down disclosure of donors to 501(c)(3)s making in-kind contributions to 501(c)(4) organizations. Rather than disclosing the donors of 501(c)(3)s making in-kind contributions to 501(c)(4)s, this proposal amends the law to require a description of the in-kind contribution. However, this information is already disclosed in sections of the IRS Form 990, which is made available on the Charities Bureau's website.

The proposal also narrows the disclosure of donors to 501(c)(4)s so the disclosure is more aligned with a so-called covered communication. We think these covered communications are likely rare, since they seemingly would only include mass communications that are issue-based but do not include a call to action or target an elected official, which would otherwise be subject to the lobbying and campaign finance laws and, in most instances, would require donor disclosure under those laws.

Recommendations

- Eliminate reporting to the NYS Department of Taxation and Finance and instead provide more resources to the Charities Bureau so it can make current filings on its website more accessible in a searchable, open data format and do more charities enforcement beyond the charities controlled by President Donald Trump.
- Provide more clarity on which donors to 501(c)(4)s should be disclosed when the donor does not earmark the funds for a covered communication or indicate the funds should not be used for that purpose.

Thank you for the opportunity to testify today. I welcome any questions you may have.