



Legislative FOIL: A Tale of Two Houses

*Senate Should Change FOIL Rules to Release More Records
and Assembly Should Proactively Disclose Records as Open Data*

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New York State's Freedom of Information Law (FOIL) currently enables the state legislature to disclose fewer records than state and local elected officials and agencies. To its credit, the Assembly has passed internal rules that increase the number of records available to the public by creating a "presumption of disclosure" similar to state agencies. Unfortunately, the Senate has not matched the Assembly's increased transparency and follows only the minimum required by FOIL.

Similarly, to the Senate's credit, it has included in its Rules that there be a searchable online database of legislative information including expenditure and payroll records, and has posted much of this information in an open data format. The Assembly's rules are silent on whether records are proactively posted online.

Proposed changes to Legislative FOIL have focused on requiring the Legislature to release more types of records. However, this can be done without passing a new law. Both the Senate and Assembly can pass internal rules giving the public access to more records than required by law.

This report shows how the Freedom of Information Law applies to both houses of the Legislature and what actions each house has taken on FOIL.

Legislative FOIL - Public Officers Law Section 88

[Section 88 of the Public Officers Law \("Legislative FOIL"\)](#) lists which types of records must be released to the public by the Legislature. The law contains an "including, but not limited to..." standard, which means that the Legislature can go beyond the minimum required by the law. Importantly, the law also says that the Senate and Assembly can use their own house rules to create standards for disclosure.

A summary of the records which must be released by the Legislature under FOIL is below, We believe this list is the floor for disclosure, rather than the ceiling:

- Bills, amendments, bill memoranda, and resolutions;
- Messages from the governor or other house of the legislature and home rule messages;
- Legislative notifications of proposed rule adoptions by agencies;

- Transcripts or minutes and journal records of public sessions, committee meetings, public hearings, and attendance and voting records;
- Votes of each member in every session and committee meetings;
- A record of each legislative employee, including title and salary;
- Internal or external audits, and statistical or factual tabulations of disclosable materials;
- Administrative staff manuals and instructions to staff regarding the public;
- Final reports and formal opinions submitted to the legislature;
- Final reports or recommendations, minority/dissenting reports, and opinions of legislative committees and commissions;
- Any other files, records, papers or documents required by law to be made available;
- Independent audits of the legislature and internal control schedules; and
- Subject matter list of records required to be made publicly available.

Rules of the Assembly

In [Rule VII](#) of the Assembly Rules, the Assembly allows public access to records beyond those required by FOIL. The Assembly Rules say the body intends to “be governed by the same presumption of disclosure which governs access to executive agency records, with similar enumerated exceptions.”

Assembly Rule VII specifically expands upon Legislative FOIL and says “all other existing records maintained by the Assembly shall be available for public inspection and copying.” The Assembly provide the following list of exemptions for records it does not want disclosed, because they (summarized):

- are exempted from disclosure by state or federal statute, or Assembly or Senate rules;
- if disclosed, would constitute an unwarranted invasion of personal privacy, including:
 - medical, financial, or employment matters; or
 - personal identifying information in communications.
- if disclosed, would impair contract awards or collective bargaining negotiations;
- if disclosed, would impair negotiations relating to legislation;
- are trade secrets or proprietary information;
- are compiled for legislative purposes and which, if disclosed, would:
 - interfere with legislative or law enforcement investigations, or judicial proceedings;
 - deprive a person of a right to a fair trial or impartial adjudication;
 - identify a confidential source or disclose information from an investigation; or
 - reveal criminal or legislative investigative techniques or procedures.
- if disclosed would endanger the life or safety of any person;
- are inter-agency or intra-agency materials which are not:
 - statistical or factual tabulations of data otherwise subject to FOIL;
 - instructions to staff that affect members of the public;
 - final reports and formal opinions submitted to the legislature;
 - final reports or recommendations and minority/dissenting reports, and opinions of members of legislative committees, subcommittees, or commissions;
 - are computer access codes; or
 - constitute material prepared for litigation, or attorney work product.

Rules of the Senate

The Senate also has its own rules on FOIL: [Rule XIV](#). The [Senate staff has also published regulations](#) that give the public information about how to request records and how to appeal if their request is denied. Importantly, the Senate's rules and regulations do not require the same level of record disclosure as the Assembly. Instead the Senate Rules say that "Nothing in this section shall be construed to *increase* the legislative requirements set forth in subdivision 2 or 3 of section 88 of the Public Officers Law [emphasis added]."

To the Senate's credit, it has emphasized proactive disclosure. Senate rules require that there be a searchable database on the chamber's website of:

- records of committees, agendas, votes, minutes, reports, attendance, fiscal notes;
- records of the chamber including, active lists, votes, transcripts, calendar; and
- the Senate payroll report and expenditure reports.

The Senate puts some of this information in [open data format on its website, including payroll and expenditure reports](#).

Committee on Open Government Opinions and Case Law Summaries

Similar to how it provides the public and agency staff guidance about FOIL for state agencies, the Committee on Open Government (COOG) has published official opinions on its website about how the Freedom of Information Law applies to the state legislature. According to COOG, while there are many judicial decisions about public access to state agency records, "there are few decisions that have been rendered with respect to access to records of the Legislature."¹

COOG's opinions also note that Legislative FOIL differs from FOIL for agencies:²

"...all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (j) of the Law. As the Law applies to the State Legislature, §88(2) and (3) include reference to certain categories of records that must be disclosed. Therefore, unless records of the Legislature fall within one or more of those categories of accessible records, there is no obligation to disclose."

Also according to COOG "...the Assembly, by rule, has chosen to disclose or withhold its records based on standards similar to those applicable to state and local government agencies."³

COOG has issued opinions on Legislative FOIL on the following topics:

- Assembly Rules exemptions for records with personal information about constituents;⁴

¹ COOG FOIL-AO-17574, March 10, 2009 <https://docs.dos.ny.gov/coog/ftext/f17574.html>

² Ibid.

³ See <https://docs.dos.ny.gov/coog/ftext/f8912.htm>

⁴ See <https://docs.dos.ny.gov/coog/ftext/f8912.htm> and <https://docs.dos.ny.gov/coog/ftext/f16670.htm>

- Timesheets and payroll information, which is explicitly allowed under POL Section 88;⁵
- Documents prepared by a legislative committee formed to study legal issues, in which COOG stated that the body was not subject to the Open Meetings Law, but certain records prepared by the legislature would be subject to FOIL; and⁶
- The appeals process under Legislative FOIL. COOG clarified that the process is the same as applies to state agencies.⁷

See COOG summaries of case law related to Legislative FOIL in the appendix.⁸

NYS Legislature Gets Fewer than 200 FOIL Requests A Year

Assembly FOIL staff told Reinvent Albany that the chamber gets about 100 FOIL requests a year. Staff reported that as of November 17th 2020, the Assembly had received 107 requests in 2020, and that the number of requests received each year has been steadily increasing.

The Senate told us they had received 90 FOIL requests in 2018; 80 in 2019; and 55 as of December 11, 2020 for the year 2020. Together, the Legislature receives less than 200 FOIL requests a year in New York State.

In our 2016 report [Modest Burden, Modest Value: Extending FOIL to the NY State Legislature](#), we found that 23 other state legislatures have the same record disclosure requirements as their state's agencies. The report also found that in NYC, the City Council received 70 FOILs in 2013, while the NYC executive branch received at least 50,000 requests.

We believe applying the same record disclosure requirements to the New York state legislature as the rest of government would be a very modest burden. The state legislature gets a fraction of the FOIL requests that the executive branch does, and county and city legislatures have long been subject to the same disclosure as executive agencies. This said, we believe the public benefit of applying the same FOIL requirements to the legislature would be modest given the very small number of FOIL requests it receives -- only about 200 a year in New York State.

By comparison, NYS executive agencies like the Department of Environmental Conservation get more than 10,000 FOIL requests a year. The MTA and its agencies alone received 9,000 FOIL requests in 2017, as noted in Reinvent Albany's 2018 report, [FOIL that Works: Increasing MTA transparency and accountability by putting FOIL online](#).

Finally, it's likely that the Legislature is already processing requests for records that are not currently made available – expanded disclosure would only mean that the Legislature would actually need to provide those records.

⁵ See <https://docs.dos.ny.gov/coog/ftext/f7856.htm>

⁶ See <https://docs.dos.ny.gov/coog/ftext/f8120.htm>

⁷ See <https://docs.dos.ny.gov/coog/ftext/f11003.htm>

⁸ https://www.dos.ny.gov/coog/caselaw_foil.html

Expanding Record Disclosure By The Legislature

Reinvent Albany supports applying the same FOIL standards for state agencies to the state legislature. We also believe the State Senate should match or exceed the transparency rules of the State Assembly. At a minimum, we urge the Senate to adopt new rules incorporating the Assembly's rules standards on FOIL disclosure.

Amending FOIL to require the Legislature and state agencies to have the same records disclosure requirements as the rest of government is not a new idea. The state Committee on Open Government (COOG) has repeatedly recommended doing so, and Governor Cuomo has put "Legislative FOIL" at the top of his FOIL agenda. We note, however, that the Governor has pushed Legislative FOIL while repeatedly vetoing bills strengthening FOIL for state agencies (See Reinvent Albany's 2015 [analysis of his vetoes and subsequent executive order](#).)

Below is a summary of reform options for Legislative FOIL in NYS.

Amending Public Officers Law

- The Committee on Open Government recommended in its [annual report](#) that POL Section 88 be amended to create a presumption of access to records of the State Legislature, "in a manner analogous to those maintained by state and local agencies." COOG noted the concern around constituent communications, and said that "§89(2)(b) ...could be amended to include reference to communications of a personal nature between legislators and their constituents."
- [S.3940 \(Senator Krueger\)](#) would both establish procedures for retention of and access to state electronic records such as emails. It also would apply state agency FOIL requirements to the Legislature. The bill contains a provision to "protect the privacy of individual constituents who seek a legislator's assistance on personal matters."
- [S594A \(Senator Krueger\)](#) is a constitutional amendment which would replace the Joint Commission on Public Ethics (JCOPE) and the Legislative Ethics Commission (LEC) with a single independent enforcement agency. It would also apply state agency FOIL standards to both this new commission and the Legislature.

Amending Senate and Assembly Rules

- The State Senate should amend its Rules to create a presumption of access, similar to Assembly Rules. This should be accompanied by as few exceptions to FOIL as possible.
- The State Assembly should amend its Rules to narrow its exceptions to FOIL.
- The Assembly can amend its Rules to proactively disclose more records, building off of the State Senate's disclosure for employee payrolls and other records.
- Additionally, both houses should proactively release more records such as:
 - MOUs and other agreements between the Legislature and the Governor regarding state spending and discretionary funds
 - Reports and other records provided by state agencies to the Legislature
 - Open data for additional legislative records, such as votes on resolutions and confirmations of gubernatorial appointments

Appendix -- Case Law Summaries on New York State Legislature and FOIL, as provided by Committee on Open Government (edited for length)

- **[Capital Newspapers v. Bruno and Silver \(pdf\)](#), Supreme Court, Albany County, October 23, 2006** – Involved access to names of state legislators who sponsored “member items”, the appropriations maintained in a pool of funds totaling \$170 million distributed as discretionary expenditures. Note that access to records of State Legislature is governed by §88(2), which lists categories of records deemed available to exclusion of all others. Held that disclosure did not affect or unconstitutionally impair Legislature’s ability to legislate and that names did not consist of “deliberative” information, but rather statistical or factual tabulations available under §88(2)(e). Cited Weston.
- **Greene v. Boggess, Supreme Court, Albany County, October 19, 2005** – Involved request for time and attendance records of an employee of the State Senate. Held that records sought do not relate to records “otherwise available for public inspection” under §88(2)(e) and, therefore, need not be disclosed. Note: Disclosure requirements applicable to State Legislature differ from those applicable to agencies generally; same records maintained by agency would clearly be available.
- **Morris v. Patience, as Secretary of the Senate, Supreme Court, Albany County, Index No. 905460-17 (April 10, 2018)** – Court ordered Secretary of the Senate to disclose the “published mail guidelines referenced in the New York State Rules of the Senate, Rule X. §9” on the ground that the guidelines are “instructions to staff that affect members of the public.” (§88(2)(f) of FOIL)
- **Urbach v. Farrell**, 229 AD2d 275, 656 NYS2d 448 (1997) – Use of legislative subpoena to obtain agency records upheld; exceptions in FOIL do not apply, even when firm sought trade secret status under §89(5).
- **[Wasserman Grubin & Rogers, LLP v. New York City Dept. of Education \(pdf\)](#)**, Supreme Court, New York County, August 7, 2009, NY Slip Op 31797(U) – On April 8, 2008, request made for records relating to Employee Protection Provisions in school bus transportation contract specifications, and a “privilege log” concerning denials of access...Department argued that disclosure of communications with State Legislature would violate “speech and debate clause” of state constitution. Held that “to the extent a document is provided to the legislature for consideration in creating legislation, the Clause applies.” That such documents fall outside the intra-agency exemption does not render the privilege afforded by the Speech and Debate Clause any less effective.”
- **Weston v. Sloan**, 84 NY2d 462, 619 NYS2d 255 (1994) – Court of Appeals found that records pertaining to mailings of a state senator were available under §88(2)(e) on the ground that they are factual tabulations “of or with respect to” legislation that was otherwise available by law.