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**Promoting Freedom of Information in New York:  
How Public Policy Can Support Journalism in  
the Public Interest**

**A Working Paper for the Charles H. Revson Foundation**

As the unrelenting business crisis of the press nears the end of its second decade, and even as critical philanthropic intervention accelerates, it is increasingly clear that public policies that enhance independent journalism will be a necessary component of the societal response to the decline of legacy news outlets.

One area that has received too little attention is the dysfunction of the nation's freedom of information laws, which have significant potential to promote democracy through greater transparency in the operation of government, but have mostly been a source of frustration for journalists and political executives alike, and fallen far short in the service they can perform for citizens.

The burden of this dysfunction falls with particular force on local news, where longtime leading outlets face difficult financial straits and many promising emerging newsrooms, supported largely by philanthropy, remain small, with their resources limited and stretched.

This paper looks closely at the prevailing situation with respect to the law and practices in the Revson Foundation's home state of New York, albeit in the context of this as a national problem. Its aim is to spotlight promising areas for possible reform, some of which may be appropriate for philanthropic investment.

The paper draws in part on consultations with leading figures in the field. We gratefully acknowledge the generosity of attorneys and others at the First Amendment Clinic at Cornell Law School, Hearst Newspapers, Lawyers for Reporters, the Media Freedom and Information Access Clinic at Yale Law School, New York Focus, the New York Times, ProPublica and the Reporters Committee for Freedom of the Press in sharing their thoughts. An earlier draft of this paper was reviewed by a number of leaders in nonprofit journalism and funders supporting it; we appreciate their suggestions. None of those

consulted are, however, responsible for the conclusions reached or suggestions advanced here.

It's important to note upfront that over the past decade, good government groups across the political spectrum have advocated and litigated to improve access to public records in New York, including Reinvent Albany, Empire Center for Public Policy, Citizens Union, League of Women Voters of New York State, NYPIRG, BetaNYC, and Common Cause New York.

### The promise of Freedom of Information laws

American freedom of information laws are a recognition that if the people are to be truly and effectively sovereign they must have the understanding necessary to exercise their power. These laws arose in the third great Twentieth Century wave in the expansion of government, not in the Progressive Era or the New Deal, but only beginning with the Great Society reforms of the 1960's. The laws were enhanced particularly when Watergate spotlighted the dangers of secrecy in the executive. The federal Freedom of Information Act ("FOIA") was enacted in 1966, going into effect in 1967 and establishing a broad principle of public access to agency records. New York State's Freedom of Information Law ("FOIL") followed in 1974, becoming effective just weeks after Richard Nixon's resignation in disgrace from the presidency, and was significantly strengthened in 1978.

[New York's FOIL](#) begins with a stirring legislative declaration:

a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government...

Unfortunately, both the federal and New York laws, while resulting in the release of substantial amounts of information, have consistently fallen short of that promise. Sufficiently comprehensive data does not currently exist to say with precision where the problem is most acute, and both statutes and regulations vary from jurisdiction to jurisdiction, but we are aware of literally nowhere in America where freedom of information laws are thought by those involved to be living up to their promise. At both

the national and local levels, our government has failed to uphold New York's and other such declarations.

### Disappointment in practice

The disappointments in New York have been many and varied, but they can generally be grouped into a number of analytical buckets.

First, the law has simply not kept up with changes in society. Other than adding a very few discrete sorts of records to be disclosed, FOIL was last significantly amended in 1978. That is to say that the statute was crafted for a world before the consumer internet, which has, of course, revolutionized both the provision of government information and the practice of journalism.

Second—and as at the federal level—the legislature has not lived up to the obligations implicit in its declaration and adoption of the law. From the beginning, the legislature exempted itself from the law's provisions. Where FOIL established a general principle of disclosure and then set out a number of exemptions from that principle, the legislature turned disclosure of information about its own operations on its head, specifying particular information to be disclosed and exempting everything else.

Beyond this, and even more important in practice, the legislature (joined by all of the eight governors who have served since FOIL's enactment) has systematically underfunded compliance with the law. Demand for information has exceeded the commitment of public employees and other resources to supply it.

This is a national problem, both federally and at other levels of government, but New York's performance is, on at least some dimensions, among the worst. Transparency group [MuckRock](#) tracks public records requests, including those to all 50 states. A New York Focus analysis of the [MuckRock figures](#) indicates that New York's average response time of 130 days to an FOIL request ranks 47<sup>th</sup>, trailed only by Alabama, Mississippi and Oklahoma. Of course, underfunding is no excuse for state agencies failing to observe legal requirements.

Next, philosophically, and again at both the federal and state levels, freedom of information statutes have come to be seen as a set of what we might call "inferior laws."

Here's what we mean by that: There is no question that a mandate of disclosure of government records will inevitably conflict with other legal principles. Among these are privacy (personal and medical), business confidences and trade secrets and necessary secrecy in law enforcement. When laws conflict in this manner, as they often do, one of the primary responsibilities of the executive (and ultimately the courts) is to balance these laws and principles in the public interest.

However, in practice, and over many years, freedom of information laws have been widely interpreted, especially by political executives—the very officials the law is intended to help citizens oversee—to give way when other interests arise. The single most important

reform in this area, in our view, would be to philosophically strike this balance anew, to restore freedom of information to its rightful place as on a par with other critical rights in a democratic society. It is especially ironic in New York that commercial and employment privacy rights, which are generally not codified, should prevail over freedom of information rights which are.

Finally, the judicial system in New York, and the legal structure surrounding FOIL, has proven particularly incompatible with the need not just for eventual disclosure, but disclosure on a sufficiently timely basis to ultimately enable voters to exercise an informed franchise. In particular, the imperatives of journalism for prompt engagement on matters of current public interest are a poor fit for the very slow pace of civil justice in New York (admittedly a larger issue), as well as the absence of any avenue for relief under FOIL outside of the courts. To the extent we have data, it indicates that only a relatively small fraction of freedom of information requests are made by journalists, but they are clearly key stakeholders in making these laws function effectively.

When the press had more resources, as it did before the secular business crisis set in about 2005, a steady drumbeat of public records litigation could provide some discipline—candidly a bit of *in terrorem* effect—on agencies tempted to stonewall. As the resources available to newsrooms have dried up, this disciplinary impact has been lost, and the sense is widespread that the volume of FOIL litigation launched by the press has declined, and that transparency has suffered.

The operation of the Committee of Open Government was, in years past, something of a moderating force in all of these limitations, largely because of the extensive practical experience and considerable private influence of its former executive director. His influence was particularly felt by those dealing with local agencies, where the practical problems in securing the release of information are generally most acute. When he was removed from his role in light of revelations of egregious personal misconduct, it became clear that these benefits had been idiosyncratic rather than structural.

### Possibilities for reform

With all of this in mind, and after our consultations with experts in the field, we have identified a number of opportunities for reform of FOIL, both by statute and in practice. We outline and group them below, noting which could be promulgated by the governor and other political executives, which would require amendments to the statute, and which would be primarily budgetary.

#### A. By executive order

The first and likely most effective reform from a practical point of view would be to take advantage of the internet, bringing FOIL into the Twenty-first Century, by *requiring that any document or other item (such as a dataset) released in whole or in part to any requester be publicly posted online.*

This is hardly the radical idea it might at first seem. The law is clear that any document releasable to anyone is releasable to everyone. No consideration in fulfilling FOIL requests is given, or should be given, to anything concerning the requester. The press, for instance, has no special FOIL rights with respect to release (they may with respect to the waiver of fees). Many (perhaps most) requests are made for commercial reasons, including by competitors. The issue is always, in some sense, the same: Does the statute mandate the item's release? It is also noteworthy that current freedom of information practice does not at all align with access to court records: court records made public are placed on a public docket, available to anyone, and in most courts today, retrievable online.

Making all released items public would reduce duplicative requests, and thus perhaps actually reduce the resources necessary to process them. It could also decrease the costs of fulfilling requests by reducing the need for copying and mailing. There is no question that the statutory goal of enhancing accountability would be served. The costs of posting items online would not be large (particularly given that almost all agencies have already been directed to establish online "reading rooms" for materials already public). This could be accomplished by executive order, although making this reform permanent would require legislative action.

Other important steps which could be accomplished under the current statute by executive order include the following:

- *Mandating the release of data sets in open format*, greatly facilitating the use and analysis of the data, as well, in some circumstances, of the data's "cleaning" and wider dissemination by news organizations and other groups operating in the public interest. A mandate on this point would be especially helpful because many agency officials currently processing requests lack the training and experience to fully grasp data formatting questions that may arise;
- *Mandating that agencies report summary data in a standardized format* regarding the volume of FOIL requests they receive, categorizing their disposition, and noting the time to disposition.
- *Revitalizing the Committee on Open Government*, including filling vacancies among its public members, as well as explicitly charging the governor's designees with striving to make the Committee an advocate for transparency in government rather than merely an observer of current law. The Committee could also be directed to aggregate and publicly release data in its possession about administrative appeals from denials of FOIL requests.

#### B. By statute

Those with whom we consulted specified a number of reforms that could usefully be made to the FOIL statute. These included the following:

- Most often recommended is *a mechanism providing oversight and pre-judicial disposition of requests* in cases where agencies decline release (in whole or in part) or fail to respond on a timely basis. Such mechanisms already exist in quite a few

states, including Connecticut (with its Freedom of information Commission often mentioned as a model), Indiana, Maryland and Utah. Review or enforcement of freedom of information has been, to varying degrees, successfully placed with state attorneys general in Illinois, Massachusetts, Pennsylvania, Rhode Island and Texas. Mediation is available in New Jersey, Ohio, Oregon, Pennsylvania (again) and Wyoming. The New York Committee on Open Government has been advocating such a reform for years, most recently in its annual report for 2022.

- Unlike the federal FOIA, FOIL does not have fixed deadlines within which agencies must respond. It would, especially in egregious cases, be helpful to have such *fixed deadlines*, but given that the federal law on this is observed in the breach—that is to say, routinely violated—longer deadlines, perhaps with some variation by agency or geography or by complexity of request, might make sense if there was a move to enact them. Such deadlines would simplify and clarify requesters’ ability to launch litigation, something that the creation of an oversight agency would also accomplish, perhaps making this reform less important if the oversight agency was established. But fixed deadlines would also have the added benefit of limiting the current practice of many agencies, unilaterally granting themselves repeated extensions of time before disclosure, sometimes to the extent of raising doubt about their good faith. Enforceable deadlines were among the key recommendations of the initial 2020 report of the New York State Bar Association Task Force report on Free Expression in the Digital Age.
- *Strengthened fee waiver provisions*, especially benefitting the press, and *greater availability of sanctions* (likely attorneys’ fees) for exceptional nondisclosure could also promote compliance with the law already on the books.
- Litigation under FOIL would also be streamlined, to the benefit of all parties, if *standards of proof and review could be clearly set out in the statute*. The same could be true if better definition were given to statutory terms, such as the exemption for “deliberative process.”
- As noted above, *the legislature could and should be subject to the same accountability as the executive*.
- Beyond all of this, *enshrining the legislative declaration* set out above in the State’s Constitution could be helpful, although it would be unlikely to be revolutionary in practice. It is noteworthy, for instance, that access to judicial records is regarded as a constitutional right in New York, while access to both executive and legislative records comes to the people only through statute. Amendments to the Constitution require approval by voters following that by the legislature.

### C. Budgetary support

A number of these proposals would require *additional appropriations of taxpayer dollars*. The first point to make on that is that the largest such need, by far, is to provide the resources to make good on what the legislature and governor agreed, in 1978, is required to be done under state law. We do not see that as a real choice. At the moment, FOIL is, in large measure, an unfunded mandate. Many agencies at varying levels of government, for instance, lack any personnel dedicated to FOIL compliance. If the legislature and the governor don’t wish to fund the law on the books, they should have the

honesty and integrity to pare back the law to what they do intend to fund—and take the heat for thereby limiting government accountability.

Relatedly, additional appropriations to *bring governmental record-keeping up to modern standards*—which in many cases it is not—would likely entail some upfront cost, but would almost certainly reduce the cost of complying with requests, while reducing delays. This is particularly relevant with respect to requests for data sets.

As noted above, the proposal to post all released items online would have some incremental cost, especially upfront. But creating *a single online portal for use across all agencies* would limit this cost, as well as fostering actual access to the information released.

An oversight agency, and the extension of the law to the legislature, would also have budgetary implications, but these would not be even close to material from the perspective of the state overall, or even within the subset of spending that is discretionary.

In conclusion, the time has long since come for us to bring both the provisions and the practice of our freedom of information laws into the Twenty-First Century. Much of what needs to be done could be accomplished quickly and at limited cost. The rest will take time, and some money. But the return on these investments in terms of democratic governance—the empowerment of an informed citizenry—would be significant. As the philanthropic community turns increasing attention to a new set of public policies in support of a reinvigorated press, we hope that freedom of information will find a meaningful place on the agenda. In that cause, we hope also that this paper has shed some light on the path forward.

## **Additional Reading**

[Better Government Association. “States Failing FOI Responsiveness.” National Freedom of Information Coalition. 2007.](#)

[Committee On Open Government. “2022 Report to the Governor and State Legislature.” December 2022.](#)

[Kusnetz, Nicholas. “Only three states score higher than D+ in State Integrity Investigation; 11 flunk.” The Center for Public Integrity. November 9, 2015.](#)

[New York State Bar Association. “Report and Recommendations of the Task Force on Free Expression in the Digital Age.” June, 2021.](#)

[State of New York Executive Chamber. “Executive Chamber Transparency Implementation Plan.” November, 2021.](#)

[“The ‘State’ of Public Records Law: A 50 State Survey.” Logikcull.](#)