

**New York Coalition**



**For Open Government, Inc.**

***New York Has An Open Government Crisis  
We Need Reform Now!***

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# **New York Coalition For Open Government**

## **About:**

The New York Coalition For Open Government is a nonpartisan non-profit charitable organization comprised of journalists, activists, attorneys, educators, news media organizations, and other concerned citizens who value open government and freedom of information.

## **Mission Statement:**

Through education and civic engagement, the New York Coalition For Open Government advocates for open, transparent government and defends citizens' right to access information from public institutions at the city, county, and state levels.

## **Statement of Purpose:**

We believe that, if government is of the people, by the people and for the people, then it should also be open *to* the people. Government exists to serve its citizens. Access to public information should be simple. Freedom of Information Laws and the New York Open Meetings Law make access to public records a right.

When government operates openly and honestly, we, the people, can hold our elected officials accountable, fulfilling our duties as an informed citizenry. The New York Coalition For Open Government works to ensure that all people have full access to government records and proceedings on the city, county, and state levels. Such access fosters responsive, accountable government, stimulates civic involvement, and builds trust in government.

# The New York Coalition For Open Government

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## Introduction

Open government laws are being abused and ignored across New York State. We have documented this in numerous reports the past few years.

How can the public be aware what government officials are up to if meeting agendas and meeting documents are not posted online prior to a meeting? How can the public hold government officials accountable if Freedom of Information Law requests are not responded to timely?

All across New York State private executive sessions are being improperly held, where the public is being left in the dark regarding basic information. Even worse are secret caucus meetings where public business is being discussed, without any notice or minutes.

The whole point of the Open Meetings Law is that public business be performed in an open manner, so that citizens can observe the performance of government officials by being able to attend and listen to the deliberations and decisions that result in public policy.

The right to request documents through the Freedom of Information Law (FOIL) has turned into a frustrating exercise of delays for information that is usually readily accessible. All too often FOIL requests are ignored or improperly denied.

While Governor Hochul talks a good game about a “new era of transparency”, significant reforms have not occurred. Not one word was mentioned about open government in Governor Hochul’s recent State of the State speech.

In December, we forwarded a letter to the Governor with suggestions before she released her proposed state budget. We never received a response to our letter, in fact we have never received a response to any communication we have sent to the Governor. In the Governor’s \$227 billion proposed budget, no new funding or programs were proposed to bring about a new era of transparency.

We have contacted state legislators seeking their support for reform usually without getting any response. Lobbyist money and campaign cash sadly provides personal access to elected officials and their staff; meanwhile we can’t even get a response to our emails.

The Attorney General proclaims herself as “the people’s attorney”, but the Attorney General does not assist the public with open government issues. In other states, the Attorney General will investigate, mediate and enforce open government laws through citizen complaints. No such effort exists in NY State.

We contacted the NY Attorney General's Office and met with her staff to discuss creating an open government dispute mediation program. The Attorney General's staff said that legislation was needed to make this happen. In our opinion, the Attorney General without the need of any legislation or resources can find a way in her \$243 million dollar budget with 1,800 staff members (including 700 attorneys) to create a mediation program. We researched other state laws and drafted legislation for the Attorney General's staff to review. The draft legislation was forwarded to the Attorney General's staff and since then our emails are no longer being responded to.

There is an open government crisis in New York State as existing laws are repeatedly ignored without any consequences. At every level of NY State government there is very little interest in transparency and any reform effort to improve transparency. It appears that from the beginning New York state legislators were not very interested in open government. The first state to pass an open meetings law in the United States was Alabama in 1915. New York was the last state in the country to pass an open meetings law in 1976.

The Open Meetings Law begins with the following:

*“It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.*

*The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.”*

In New York's Freedom of Information Law passed in 1974, the state legislature declared the following:

*The legislature hereby finds that 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 in accordance with the provisions of this article*

The reality is that too much public business is being performed behind closed doors. Public access to governmental records is being hampered by long delays and improper denials. Too many elected officials are serving their own interests or special interests at the expense of the public.

## **The Statistics Tell The Real Story**

The only entity in NY State monitoring compliance with the Open Meetings Law and Freedom of Information Law is the New York Coalition For Open Government. The Governor, the Legislature, the Attorney General, the Comptroller, the Committee on Open Government do not monitor compliance with open government laws in any statistical way.

Several times a year, the Coalition does random checks at the local level regarding compliance with open government laws. Each report that we have done shows large non-compliance with the law.

## **2022**

72% of towns not posting meeting documents online

25% of towns not posting meeting minutes or recording

39% of counties failed to acknowledge a FOIL request within five business days as required by law.

28% of counties never acknowledged our FOIL request.

Took an average of 25 days just to receive a copy of a policy.

65% of county board of elections did not respond to emails or telephone calls seeking information.

73% of election boards failed to acknowledge the FOIL request within five business days as required by law.

Took an average of 49 days just to receive meeting minutes.

## 2021

75% of Planning Boards not posting meeting documents online

Only 25% of villages posted meeting minutes online

35% of villages did not even post a meeting agenda

Out of the 158 school district executive session motions reviewed, 61% were not in compliance with the Open Meetings Law (96 out of 158).

During the six-month period studied only 39% of executive session motions were made correctly (62 out of 158).

61% of the time the public is being left in the dark as to what is happening behind closed doors by motions that do not specifically describe the matter being discussed.

70% of the school districts reviewed received a failing grade for how they handled executive session motions. With 30% of school districts getting none of their executive session motions correct.

In 2017, the New York Coalition For Open Government reviewed the executive sessions of fourteen local governments in Western New York and determined that **ninety-seven percent (97%), of executive sessions were held incorrectly.**

In 2018, a follow-up report reviewing the same local governments determined 25% of local governments received a passing grade. Despite the fact that the 2017 report received front page coverage in the Buffalo News and the report was sent to every local elected official and their attorneys, **75% of local governments continued to receive a failing grade for how they conduct executive sessions!**

## **Conclusion**

The documented large-scale non-compliance with open government laws is proof that there is an open government crisis in New York State. To address this crisis the New York State legislature needs to act by amending existing laws and by adopting new laws. Below are eight recommendations of actions that the state legislature can take.

## **Recommendations**

### **Constitutional Amendment**

Several states have the right to open government stated in their Constitution (California, Florida, Louisiana, Montana), New York does not. The New York State legislature has done recent Constitutional amendments regarding the environment and equal rights. A simple short amendment adding a Constitutional right to open government should easily pass the legislature and be approved by the public. The Buffalo News over the past two years has done two editorials in support of adding the right to open government to the New York State Constitution.

We have been in contact with legislators about introducing a Constitutional Amendment and look forward to this happening.

### **Open Government Training**

Since 2007, it has been mandatory for members of planning boards, zoning boards, to receive a minimum of four hours of annual training. Members of a public authority board are also required to complete training regarding their fiduciary, financial and ethical responsibilities.

Newly-elected school board members are required to complete training within their first year of service. This training requires topics on the essentials of school board governance and a minimum of six hours in fiscal oversight, accountability and fiduciary responsibilities of a school board member. This is a one time training requirement.

Every year newly elected Judges in NY attend a week long training prior to taking the bench. Attorneys and other professionals are required to complete continuing education programs.



There should be a law requiring elected officials at the village, town, city, county and school board level to complete 4 hours of annual training regarding the Open Meetings Law and Freedom of Information Law.

## **Mandatory Attorney Fees**

No entity has the power to enforce New York's Open Meetings Law. The only recourse a person has in NY is to hire an attorney. In other states such as Massachusetts, the Attorney General has the authority to investigate and to fine government officials who violate the law. In Connecticut, they have an independent commission with power to address complaints and violations of the law. A restructured Committee on Open Government should be provided increased staffing and enforcement powers.

Unlike other states, New York does not have an independent body with enforcement powers to address violations of the Open Meetings Law and Freedom of Information Law. Other states also impose fines or criminal charges for violations of open government laws, such penalties are not available in New York. The only recourse available to the public in NY is retaining an attorney to file an Article 78 proceeding and hope that the court will award attorney fees.

New York's current attorney fee statute is weaker than many other states and it is more difficult to obtain attorney fees when litigation is successful. In California, Colorado, Delaware, Florida, Illinois, Louisiana, Michigan, Montana, New Jersey, Rhode Island, and Washington, attorney fees are awarded if a party "prevails" in a lawsuit. New York's statute requires that a party "substantially prevail" before attorney fees will be awarded, which is a higher standard. After a plaintiff is successful in an Article 78 action, then a whole debate occurs as to whether the plaintiff "substantially prevailed" or not in order to receive attorney fees. New York's statute has an additional hurdle in that there must be an additional finding by the court that there was no reasonable basis for the agency to deny the FOIL request. This additional finding is not required in the states listed above.

Under the Open Meetings Law, if an agency believed there was a reasonable basis for holding an improper executive session then attorney fees will not be awarded. Whether there was a reasonable basis or not if a court determines that an executive session was improperly held a successful plaintiff should be reimbursed for their attorney fees.

Assemblymember Steck and Senator Liu have introduced a bill which reforms New York's attorney fee statute for Freedom of Information Law and Open Meetings Law litigation. We encourage all legislators to support Assemblymember Steck and Senator Liu's bill A05357/S05801.

## **Create A Hearing Officer System To Address Freedom of Information Law Appeals And Open Meetings Law Complaints**

In the 1980's homeowners across New York State were angry about increasing property taxes. The only recourse homeowners had to challenge their property assessments was to hire an attorney to file a lawsuit in Supreme Court, which was not easy or affordable. To assist homeowners, the New York State legislature in 1982 passed legislation creating a hearing officer system to hear property tax assessment cases.

Through this system, homeowners complete a simple application, pay a filing fee and the New York State Office of Court Administration appoints a hearing officer to decide the complaint. Hearing officers are attorneys, realtors and others with experience in dealing with real property valuations.

In 2020, 102,000 assessment complaints were handled across the state through this hearing officer system. Applicants paid a \$30 filing fee and the Court Administration paid hearing officers \$75 per case.

The same system can and should be replicated to handle Freedom of Information Law and Open Meetings Law appeals. The Coalition has drafted legislation to create a hearing officer system and are seeking sponsors to introduce a bill.

## **Require State Agencies To Prepare An Annual Freedom of Information Report**

Last year Governor Hochul issued a memo requiring 70 state agencies to prepare a Transparency Plan.

Reinvent Albany, the New York Coalition For Open Government and other organizations sent a letter to the Governor calling for state agencies to go beyond just having a plan. State agencies should be required to complete an annual report regarding their transparency plans.

Federal agencies are required to submit an annual report to the Dept. of Justice. These reports provide helpful information as to the number of FOIL requests, appeals, average response time, reasons for denials etc. Amending the NY FOIL statute to require state agencies to complete an annual report will provide a great deal of useful information, which is currently not being tracked or made available to the public.

## **Restructure The State Committee On Open Government**

The Committee's board consists of 11 member as follows:

- Lt. Governor or their delegate
- Secretary of State or delegate
- Commissioner of General Services or delegate
- Director of Budget or delegate
- Five appointments by the Governor (two of whom have been representatives of the news media, one of whom shall be a representative of local government who is serving as a duly elected officer of a local government)
- One appointment by Senate Majority Leader
- One appointment by Assembly Speaker

It is amazing that 9 of the 11 positions on the NY State Committee on Open Government are controlled by the Governor. Other statewide officials such as the State Comptroller and the Attorney General do not have any appointments to the Committee.

The Coalition supports eliminating the Lt. Gov, Secretary of State, Commissioner of General Services and Director of Budget from serving on the Committee and replace them with:

- One appointment by the State Comptroller
- One appointment by the Attorney General
- One appointment by the Senate Minority Leader
- One appointment by the Assembly Minority Leader

The Committee should be clearly empowered to hire the Executive Director to avoid the back room closed door hiring that occurred with the hiring of the current Executive Director.

An appointment by the NY State Association of Town Clerks would be beneficial as Town Clerks handle responsibilities for meeting agendas, minutes and FOIL requests. There is also an association of City and Village Clerks. There should be a representative from an organization dedicated to addressing government transparency issues on the Committee as well.

A restructured Committee should have the power to enforce compliance with the law by issuing decisions and imposing fines against public bodies. According to a 2019 study done by the National Freedom of Information Coalition, 31 states have the ability to impose fines ranging from \$100 to \$7,500 or daily fines between \$25 to \$100 for

violations of their open government laws. In several states, criminal charges can also be imposed. In NY there is no ability to fine public agencies at all.

## **Increase Funding To The State Committee On Open Government**

The NY State Committee on Open Government is a great resource for information but the Committee does not have any enforcement power and limited staff resources. The legislature can show its commitment to open government by providing more resources to the Committee. The state's lack of commitment to open government is clear when the resources provided to the Committee are compared to other organizations.

Inspector General's Office	92 Employees
Joint Commission on Public Ethics	50 Employees
Authorities Budget Office	11 Employees
NY Committee on Open Government	4 Employees

Due to the lack of staff, the Committee does not have the ability to do any proactive monitoring of compliance with the law. As the legislature did with the Joint Commission on Public Ethics (JCOPE), the Committee is in need of structural reform as previously stated.

## **Legislation & Funding For Attorney General Mediation Program**

The Rhode Island and Massachusetts Attorney Generals have an open government unit that assists the public with addressing Freedom of Information and Open Meetings Law issues. In Florida, Illinois, and Kentucky the Attorney General has mediation programs to assist the public with Freedom of Information Law disputes. In Arizona, the Attorney General has created an Open Meetings Law Enforcement Team.

In New York, the so called "People's Attorney" does not have anything available to assist the public with complaints regarding the Open Meetings Law and Freedom of Information Law. The Attorney General can act on her own to create a unit dedicated to open government. The State Legislature can also pass legislation and provide funding to assist in creating an open government unit in the Attorney General's office. Given the Attorney General's long history of fighting FOIL requests we have reservations about utilizing them as a mediator, but it is something we are willing to explore as a way to assist the public.