

New York Coalition



For Open Government, Inc.

Advocating for timely access to information & meaningful citizen participation

www.nyopengov.org

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LEGISLATIVE PRIORITIES

Amending the NY State Constitution

Four states have the right to open government stated in their Constitution (California, Florida, Louisiana, Montana). The legislature has done recent Constitutional amendments regarding the environment and equal rights, the same should be done for the right to open government. **Assemblymember Phil Steck and Senator Rachel May have introduced A4429/S01063.** The legislation simply states:

“The right to public information, being a necessary and vital part of democracy and public deliberation, shall be a fundamental right of the people. The right of the people to inspect and/or copy records of government, and to be provided notice of and attend public meetings of government, shall not be unreasonably restricted.”

Around the country, state legislatures are seeking to weaken the public’s right to information and we should take steps to prevent that from ever happening in New York.

Mandatory 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, a legal debate occurs as to whether the plaintiff "substantially prevailed" 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 believes there was a reasonable basis for holding an improper executive session, 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 their attorney fees.

Assemblymember Steck and Senator Liu have introduced a bill A05357/S05801, which incorporates the points made above. This legislation passed the Senate in June.

Livestreaming of Meetings

New York City Community Boards were mandated in 2014 to livestream their meetings and to post video recordings online. In 2015, state agencies were required to do the same as "best as practicable," and in 2019, Industrial Development Agencies were required to livestream and post video recordings of their meetings online "as best as practicable."

In 2022, Governor Hochul signed legislation that expanded the use of videoconferencing by public bodies to conduct meetings. This new law allows members of a public body to participate in a meeting remotely provided written procedures have been adopted that set forth what the body determines to be "extraordinary circumstances."

What is interesting about the new hybrid meeting legislation is that it is geared totally towards accommodating public body members who cannot attend a meeting in person due to disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event. Interested members of the public who encounter such issues and cannot physically attend a village board or town board meeting are not provided any accommodation under current New York law. If elected officials can be accommodated and allowed to attend meetings remotely, that same opportunity should be made available to the public at large.

In a recent review of over 1,200 villages, towns, and cities, we determined that 23% are livestreaming their meetings. It is not difficult or expensive to livestream and post video recordings online. In some communities, residents or government officials livestream and film board meetings using a cell phone and a tripod. During the pandemic, with the ability to watch meetings live and to view recordings anytime, the number of people following local government meetings skyrocketed.

We support providing additional funding to local governments to address any technology needs or assistance required so that they can livestream and record their meetings.

Oregon and Indiana recently passed laws requiring local governments to livestream their meetings and to post recordings online. Similar bills have been proposed in Virginia, Mississippi, Rhode Island and Maryland.

Senator Addabbo and Assemblymember Paulin have introduced S4475/A2700, which requires “local governments” to livestream meetings and post recordings online. We have pointed out to legislator Paulin that the bill does not define “local governments” and should be amended to apply to public bodies as they are defined in the Open Meetings Law. It is our understanding that Paulin will be amending the bill.

Enforcement Powers

No entity has the power to enforce New York’s Open Meetings Law. 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.

In the 1980s, 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 the 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 Small Claims Assessment Reviews (SCAR).

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 system. Applicants pay a \$30 filing fee, and the Court Administration pays hearing officers \$75 per case.

The same system can and should be replicated to handle Freedom of Information Law and Open Meetings Law appeals. **Assemblymember Rosenthal has introduced a bill to create a hearing officer system A07933**. We are seeking a Senate sponsor.

Require State Agencies to Track FOIL Requests

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. Requiring 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.

Making data available to the public will allow us to see how well FOIL is working and where changes need to occur. The Committee has pointed out that FOIL reform efforts revolve around anecdotal stories and not data. State agencies are in the best position to track and report on FOIL data. The Committee's support in requiring such tracking and reporting would be a significant step towards making this happen.

Assemblymember Epstein and Senator Holyman-Sigal, are working on this legislation.

Open Government Training

Since 2007, it has been mandatory for members of planning boards and 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.

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 annual training regarding the Open Meetings Law and Freedom of Information Law.

Assemblymember McMahon has expressed interest in this bill and is reviewing the information we forwarded.

Mandating Public Comments

Many people are shocked to learn that they do not have a right to speak at their town board, city council or county legislature meetings. The NY Open Meetings Law does not mandate that there must be a public comment period. While most local governments provide an opportunity for the public to speak, not all do. The right to be heard, which is a fundamental democratic right should be required by law.

13 states that mandate hearing from the public at meetings (Alaska, Arkansas, California, Hawaii, Louisiana, Montana, Nebraska, Nevada, New Jersey, North Carolina, Pennsylvania, Tennessee, Vermont)

In a recent Coalition report we documented that 177 towns in NY State do not allow for public comments at their meetings. **Assemblymember Woerner has expressed interest in sponsoring this legislation** and is working on a draft.