# The Multiple Faces of Transparency

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In December, Governor Cuomo vetoed two bills intended by their sponsors to strengthen New York's freedom of information law, or FOIL. In his veto message the Governor stated: "While I appreciate the Legislature's attempt to further transparency in government, these bills provide an unworkable, inequitable, and piecemeal approach to FOIL reform." Sounds like the legislation was seriously flawed.

Both bills were proposed by New York's Committee on Open Government (COOG) in its December 2014 Annual Report to the Governor and the Legislature, and passed during the 2015 legislative session. The first bill would have significantly reduced the time for a state agency to appeal a court's decision overturning the denial of an information request. The second bill would have provided attorney fees to a party successfully overturning an agency's denial of a request for information where there was no reasonable basis for the denial. In both cases, the COOG argued that the changes were necessary deterrents to unreasonable denial of access by state agencies. "Compliance would improve, and costly and time-consuming litigation would diminish."

What is it about the legislation that makes it "unworkable, inequitable, and piecemeal" as the Governor suggests? His primary issue with the attorney fee bill is that it does not apply equally to all parties to a lawsuit, but only to the state agency. Further, he argues, the bill does not define "material violation," thus leaving state agencies open to multiple interpretations resulting in a lack of clarity.

The Governor's main argument against the bill condensing the time to appeal by a state agency is that it "would substantially alter the balance of appellate rights between state agencies and non-state agency requestors" by (i) applying only to state agencies, (ii) eliminating judicial discretion, and (iii) placing an undue burden on state agencies to meet the condensed timetable. While these may seem to be valid arguments to some, they are subject to criticism in the context of the strong public policy in favor of open and "transparent" government. Among other things, objectors would certainly point to the executive order signed by the Governor a day after issuing his veto message directing all state agencies "to adhere to the spirit" of the bill requiring state agencies to fast-track appeals. This direction to state agencies in the name of open and transparent government seems a bit incongruous and contrary to his veto message. So what is really going on?

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Transparency in government is often fraught with multiple layers of meaning, interpretation and limitations. At the fore is the standard universal political message extolling the virtues of conducting the state's business in an open and forthright manner – no secrets and no doubts about the motives behind the actions. When it comes to the details, however, there are all kinds of exceptions and limitations on openness, including privacy concerns, protection of trade secrets or interference with judicial proceedings, among others. But from a cynic's perspective "transparency" often has a totally different meaning, as in "I can see right through you!" You are saying one thing and meaning quite another. Is that the case with the Governor's veto? What is it about the two bills that really offends the Governor? Is he really concerned with the details of the two bills or is there another motivation to his veto?

Upon closer reading, what seems to gall the Governor most about the vetoed bills is that they do not expand FOIL's applicability to the Legislature. This feeling is summed up in an introductory clause to his executive order requiring state agencies to follow the spirit of the bill condensing the appeal process:

> ". . . while their goals were well-intended, these bills are seriously flawed and would radically transform the litigation process, are myopic in their scope and focus only on one branch of government, and would only serve to perpetuate a fractured system of transparency and data production by intentionally excluding other branches of government."

In its 2014 Annual Report, the Committee on Open Government had also recommended amending FOIL to, among other things, include the State Assembly and Senate within the definition of state agencies, stating that ". . . the Committee believes that FOIL should be amended to require the State Legislature to meet standards of accountability and disclosure in a manner analogous to those maintained by state and local agencies." These recommendations, however, were not addressed by the Legislature to the apparent chagrin of the Governor.

It is reasonable to conclude that the vetoes of these bills is not so much about flaws in the legislation, but about pressur-

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ing lawmakers to expand the applicability of FOIL to the Legislative Branch. Naively one might suggest that if the vetoed bills would actually improve compliance with the freedom of information law by state agencies, shouldn't that be the overriding consideration? Is it right to reject them simply because they do not apply to the Legislature? How FOIL should be properly applied to legislators is a topic unto itself and should not be mixed in with meaningful improvements to the "transparency" of state agencies. Naivety aside, however, it is clear that the Governor wants to force the expansion of the applicability of FOIL to the Legislature as a price for improving compliance by state agencies.

In its 2015 annual report recently released, the COOG seems to acknowledge this reality: "Although the proposals concerning the award of attorney's fees and accelerating the appeals process in litigation involving FOIL were vetoed, we will work with the Governor and the Legislature to overcome his objections and continue to press for changes to advance the public's right to know."

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Frankly, however, the vetoed legislation does not address the most serious shortcoming of the freedom of information statute – bureaucratic inertia. Stalling litigation is a time honored method of delay, but most users of the FOIL process rely on the good faith of our public servants to meet their statutory obligations without having to resort to litigation to compel compliance. In other words, the vetoed bills deal with the back end of the process – litigation and appeal – rather than the front end of the process where bureaucrats rule supreme.

In my experience, FOIL works exceptionally well when a state agency has nothing to hide, or where the information sought is readily available and issue neutral. On the other hand, where the information is not so neutral, or even slightly embarrassing, bureaucratic delay at its most sophisticated becomes the rule rather than the exception. Bureaucratic inertia is a talent honed over numerous millennia, and it is unlikely that even the vetoed changes will seriously interfere with that expertise.[IA]