State of New York

Executive Chamber

No. 149

EXECUTIVE ORDER

EXPEDITING THE FOIL PROCESS

WHEREAS, we seek to further transparency and openness in New York State government; and

WHEREAS, the purpose of the Freedom of Information Law (FOIL) is, and has always been, to foster an open and transparent government that all New Yorkers can hold proud; and

WHEREAS, I received two bills pertaining to FOIL from the Legislature; and

WHEREAS, 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; and

WHEREAS, Assembly Bill 114 has significant technical issues in that it: would substantially alter the balance of appellate rights between state agencies and non-state agency requestors, in that the condensed timeframe would only apply when a state agency appeals an adverse decision, which is necessarily an inequitable outcome, conversely, a non-state agency party would continue to have the longer time periods for appeal that are currently allowed by law; would eliminate judicial discretion regarding the time available to perfect an appeal as permitted by Civil Procedure Law and Rules § 5530(c), which allows each department of the appellate divisions to set their own rules governing the time to perfect an appeal, and/or when an appeal is subject to dismissal for failure to prosecute and/or deemed abandoned; fails to provide for an extension of the 60-day timeframe, even on consent; puts a substantial burden on state agencies to perfect their appeals and may make it difficult for agencies to serve and file appellate records and briefs, possibly compromising a state agency's due process rights; and

WHEREAS, Assembly Bill 1438-B also has significant technical issues in that it: would allow for attorney's fees to be assessed solely against a state agency, rather than uniformly against both parties; would also allow for attorney's fees to be assessed against a state agency, even if the state agency ultimately prevails; would require a trial court to assess attorney's fees against an agency when an agency denies access to FOIL requests in "material violation" of FOIL and with no reasonable basis for denying such access; fails to define what a "material violation" is, allowing each court to define the scope of the term, and leaving litigants without any clarity; and

WHEREAS, these bills fail to include the legislature in any meaningful FOIL reform; and

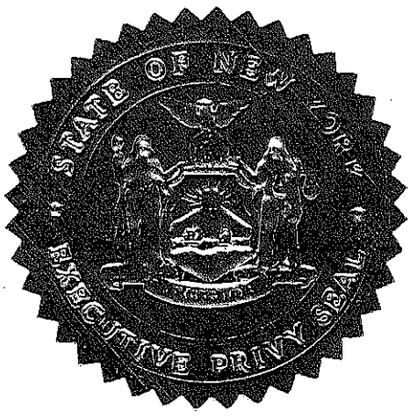
WHEREAS, I vetoed Assembly Bill 114 and Assembly Bill 1438-B for the reasons set forth above; and

WHEREAS, the Executive has and will continue to lead by example in advancing transparency and efficiency in government and, consistent with that principle, will immediately direct state agencies to fast track FOIL appeals, and will introduce legislation that will encompass these issues, address the described flaws, and execute more comprehensive FOIL reform that will cover all branches of state government.

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, do hereby find that, in light of recent events, we must do more to immediately advance transparency in government. Therefore,

pursuant to the authority vested in me by the Constitution of the State of New York and Section 28 of Article 2-B of the Executive Law, I hereby direct all state agencies to adhere to the spirit of Assembly Bill 114, and move post-haste in filing a notice of appeal, settling the record on appeal, and filing a brief, within 60 days, absent extremely complex matters or extraordinary circumstances outside agency control; and

FURTHER, this Order shall take effect immediately and shall remain in effect until further notice.



GIVEN under my hand and the Privy Seal of the State in the City of Albany this twelfth day of December in the year two thousand fifteen.

BY THE GOVERNOR

Secretary to the Governor