

Memorandum in Support

May 16, 2024

S. 5801-A
A. 5357-A

By: Senator Liu
By: M. of A. Steck

Senate Committee: Finance
Assembly Committee: Governmental Operations
Effective Date: Immediately

AN ACT to amend the public officers law, in relation to the award of reasonable attorneys' fees in certain proceedings.

LAW AND SECTIONS REFERRED TO: Subdivision 4 of Section 89 of the Public Officers Law

This bill would provide for the award of reasonable attorneys' fees in FOIL proceedings if the petitioner is successful.

The New York State Bar Association's Task Force on Free Expression in the Digital Age completed the attached report, outlining a few deficiencies they found in FOIL when speaking with those, primarily the press, who rely on it regularly. One of those deficiencies is the difficulty that requesters face in recovering attorneys' fees when prevailing in a FOIL action.¹

The statute's weak provisions for awarding fees to requesters when they prevail in FOIL litigation contribute to the fact that when requesters are denied, for legitimate reasons or otherwise, the most likely outcome is that the denial will never be challenged in court. Requesters have no assurance of fee recovery, making it financially risky to pursue even obviously legitimate litigation.

In its current form, the attorneys' fee provision has both a mandatory and discretionary component. Fees are mandatory where the requester "substantially prevailed" in a FOIL litigation and the agency had "no reasonable basis for denying access." Fees are discretionary when a requester denied access has "substantially prevailed" in a FOIL litigation and the agency's response was untimely. Based on information gathered by the Task Force when compiling their report, reviewing courts appear reluctant to grant fee-shifting awards, even when the agency engaged in long delays.

This legislation will amend the public officers law by removing the qualifiers defining how a petitioner prevailed, making it so that in any proceeding brought pursuant to the section, "costs and reasonable attorney fees shall be awarded by the court to the successful petitioner and against the public body." The strengthening of this statute will assist the public in being reimbursed

¹[Task-Force-on-Free-Expression-in-the-Digital-Age-FINAL-with-edits-from-HOD-meeting-and-cover.pdf \(nysba.org\)](http://www.nysba.org/Task-Force-on-Free-Expression-in-the-Digital-Age-FINAL-with-edits-from-HOD-meeting-and-cover.pdf)

attorney fees when they successfully prevail regarding an Open Meetings Law and Freedom of Information Law violation, making litigation a more reasonable and affordable path and ensuring that there is some consequence for those agencies that don't comply with open government laws.

For the above reasons, and the attached report, the New York State Bar Association **SUPPORTS** S.5801-A/A.5357-A.

³[Task-Force-on-Free-Expression-in-the-Digital-Age-FINAL-with-edits-from-HOD-meeting-and-cover.pdf \(nysba.org\)](#)