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December 3, 2015

The Honorable Andrew M. Cuomo  
New York State Capitol Building  
Albany, New York 12224

## **RE: Opposition to A1438B-2015/S533B-2015 (Paulin, Gallivan)**

Dear Governor Cuomo:

I am writing on behalf of the District Attorneys Association of the State of New York ("DAASNY") to oppose the above-referenced legislation, which involves court imposition of attorneys' fees and litigation costs when an agency fails to respond timely to a Freedom of Information Law ("FOIL") request or appeal.

DAASNY opposes the legislation for several reasons. First, the bill is unartfully drafted and unclear. The initial portion of the bill sets forth that a court "may" assess fees and costs if a requestor has substantially prevailed in challenging a FOIL denial or the agency fails to respond to a request for an appeal, but the latter portion of the bill sets forth that a court "shall" assess fees if the requestor prevails. In addition, the bill's inclusion of the clause that fees are warranted where there has been a "material violation of this article" is undefined and its meaning unclear in the context of FOIL litigation. Accordingly, the statute does not provide appropriate guidance regarding what circumstances require a court to grant fees and costs, and under what circumstances the imposition of fees and costs is discretionary. Moreover, the portion of the bill that states that a court "may" grant fees does not appear to include a provision (unlike the latter portion of the bill) that fees and costs cannot be ordered if there were no material violation of the FOIL statutes and the agency had no reasonable basis for denying access. The bill's confusing draftsmanship would likely lead to additional litigation in attempts to clarify the legislation, which would undoubtedly be an unwelcome burden on the judicial system and could result in different standards being employed in different counties.

Second, to the extent that the proposed bill might be read to mean that a court *must* grant fees and costs, such a dictate removes from the court's discretion the decision whether or not to grant litigation costs and attorneys' fees. The court could no longer consider any relevant circumstances attendant to a given case. Instead, a court would be mandated to impose attorneys' fees and litigation costs if the responding agency, although acting expeditiously and in good faith, misses a statutory deadline by a relatively inconsequential amount of time due to the onerous nature of the review of extensive files and documents that is necessary to respond appropriately to the FOIL request. Thus, the court assigned to the matter would be stripped of its inherent authority to control the proceedings before it and exercise its judgment and discretion as it deems appropriate.

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Third, the proposed bill unfairly penalizes an agency that acts in good faith. Throughout New York, government agencies and officers respond to a constant stream of requests for records, a significant percentage of which require compilation and review of thousands of pages of documents. For example, in 2014, the New York City Police Department responded to 11,496 FOIL requests. The automatic imposition of fees and costs to an agency -- deluged by FOIL requests -- that missed a deadline by merely one day is inequitable. Fairness compels consideration of an agency's workload and resources to determine whether costs should be imposed for a *de minimis* violation of statutory deadlines, which results in no prejudice to the requestor. As another example, recently in Nassau County, a seemingly simple FOIL request that came into the Office of the Nassau County District Attorney in a short email letter, required the initial compilation and review of approximately 30,000 individual emails.

Fourth, the imposition of costs and fees by fiat may well lead to gamesmanship and unnecessary litigation that could burden an already overloaded court system. Encouraged by the prospect of automatic fees for even the slightest violation by an agency, calculating requestors (or representatives thereof) may inundate agencies and challenge every agency response as untimely. Neither the budgets of agencies nor the court systems should have to be encumbered by the prospect of such litigation, which will not speed up the disclosure process, but, instead, further strain agencies' already-stretched resources.

For these reasons, DAASNY opposes **A1438B-2015/S533B-2015 (Paulin, Gallivan)** and strongly urges the veto of this legislation.

Sincerely,



Gerald Mollen  
President, DAASNY  
District Attorney, Broome County

cc: Alphonso David  
John Czajka