

Appellate Division — Third Department Case No. 527904

New York Supreme Court

APPELLATE DIVISION—THIRD DEPARTMENT

—◆◆◆—
GANNETT SATELLITE INFORMATION NETWORK LLC,

—against— *Petitioner-Appellant,*

NEW YORK STATE THRUWAY AUTHORITY,

Respondent-Respondent.

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*
SOCIETY OF PROFESSIONAL JOURNALISTS, REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS AND
21 MEDIA ORGANIZATIONS IN
SUPPORT OF PETITIONER-APPELLANT**

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

GANNETT SATELLITE INFORMATION
NETWORK LLC,

Petitioner-Appellant,

– against –

NEW YORK STATE THRUWAY
AUTHORITY

Respondent-Respondent.

Index No. 904252/18

Case No. 527904

**NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER-APPELLANT**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Mark I. Bailen, dated November 8, 2019, the Society of Professional Journalists, Reporters Committee for Freedom of the Press and 21 media organizations (collectively, the “News Media Movants”) will move this Court, located at Robert Abrams Building for Law and Justice, State Street, Room 511, Albany, New York 12223, on the 18th of November, 2019, at 10:00 a.m. for an order granting the News Media Movants leave to file the brief attached hereto as *amici curiae* in support of Petitioner-Appellant in the above-captioned action and for such other and further relief as the court may deem just and proper under the circumstances.

Dated: November 8, 2019

Respectfully submitted,

By: /s/ Mark I. Bailen

* Mark I. Bailen

Kristen Rasmussen, Of Counsel

* Counsel of Record for *Amici Curiae*

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SUPREME COURT OF THE STATE OF NEW YORK
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NETWORK LLC,

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– against –

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Respondent-Respondent.

Index No. 904252/18

Case No. 527904

**AFFIRMATION OF MARK I. BAILEN IN SUPPORT OF
MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER-APPELLANT**

I, Mark I. Bailen, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirm the following to be true under penalty of perjury:

1. I am a partner at BakerHostetler, located at 1050 Connecticut Avenue NW, Suite 1100, Washington, D.C. 20036-5403, and am counsel of record for the Society of Professional Journalists, The Reporters Committee for Freedom of the Press, The Associated Press, Atlantic Media, Inc., Daily News, LP, The E.W. Scripps Company, First Look Media Works, Inc., International Documentary Assn., Investigative Reporting Workshop at American University, MediaNews

Group Inc., MPA – The Association of Magazine Media, National Press Photographers Association, New York Public Radio, The New York Times Company, News Media Alliance, Newsday LLC, The NewsGuild - CWA, Online News Association, POLITICO LLC, ProPublica, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, and Tully Center for Free Speech (collectively, the “News Media Movants”). I submit this affirmation in support of the News Media Movants’ motion for leave to file a brief as *amici curiae* in support of Petitioner-Appellant Gannett Satellite Information Network LLC.

2. Attached hereto is a true and correct copy of the brief that the News Media Movants seek leave to file as *amici curiae*. The News Media Movants have duly authorized me to submit this brief on their behalf.

3. Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

4. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970. The interests of all other News Media Movants are set forth in Appendix A. The News Media Movants include the publishers of daily and weekly newspapers and magazines, professional societies for reporters, news editors, and photographers, and advocates for the news media and the First Amendment.

5. The News Media Movants seek leave to file the attached brief because this appeal presents an issue of great importance to them: state agencies' compliance, or lack thereof, with the New York Freedom of Information Law ("FOIL"). As representatives and members of the news media, *amici* frequently rely on FOIL to gather the news and report on matters of public concern. *Amici* thus have a strong interest in ensuring that courts interpret the law in a manner that enforces their right of timely access to government records, awards fees when litigation is necessary to compel their disclosure and thereby facilitates the news media's ability to disseminate news to the public.

6. Given the News Media Movants' experience with the New York Shield Law, other state shield laws, and the federal Freedom of Information Act,

the News Media Movants provide a unique perspective and can identify law and/or arguments that might otherwise escape the Court's consideration and otherwise provide information that would be of assistance to the Court. Specifically, the proposed brief of *amici curiae* describes FOIL's legislative history as it relates to fee-shifting and delay and underscores the larger problem of routine delays in access to records under FOIL for members of the news media.

7. WHEREFORE, I respectfully request that this Court grant the News Media Movants' motion for leave to file a brief as *amici curiae* in support of Petitioner-Appellant, a copy of which is attached hereto.

Dated: November 8, 2019
Washington, D.C.

/s/ Mark I. Bailen
Mark I. Bailen

APPENDIX A

Descriptions of amici:

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

Atlantic Media, Inc. is a privately held, integrated media company that publishes *The Atlantic*, *National Journal*, *Quartz* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the largest papers in the country by circulation. The Daily News’ website, NYDailyNews.com, receives approximately 100 million page views each month.

The E.W. Scripps Company serves audiences and businesses through local television, with 52 television stations in 36 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional

newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

MediaNews Group Inc. publishes the Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post, the Boston Herald and the Detroit News and other community papers throughout the United States, as well as numerous related online news sites.

MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously

promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

With an urban vibrancy and a global perspective, **New York Public Radio** produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online and in person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking, award-winning programs including Radiolab, On the Media, The Takeaway, Nancy, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New Jersey Public Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect

today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Newsday LLC (“Newsday”) is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the editorial and online departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and

support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

ProPublica is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won four Pulitzer Prizes, most recently the 2017 Pulitzer gold medal for public service. ProPublica is supported primarily by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica's first regional operation, ProPublica Illinois, began publishing in late 2017, and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting.

Radio Television Digital News Association (“RTDNA”) is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries.

RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are members and representatives of the press who require access to records of transit agencies to fully and accurately report on matters of central concern to the citizens of this State—traffic along major transportation arteries, the manner in which government officials spend taxpayers’ money, and the influence of politics on those funding decisions. *Amici* regularly rely, pursuant to the Freedom of Information Law (“FOIL”), on the prompt release of such records for newsgathering purposes. Consequently, *amici* have a strong interest in ensuring that this Court rejects the finding that a nine-month delay in releasing records under FOIL is not unreasonable such that the requesting party is not entitled to attorneys’ fees when it must sue to enforce its right of public access. *Amici* respectfully submit this *amici curiae* brief in support of Petitioner-Appellant.

The identity of the *amici* are as follows: Society of Professional Journalists, The Reporters Committee for Freedom of the Press, The Associated Press, Atlantic Media, Inc., Daily News, LP, The E.W. Scripps Company, First Look Media Works, Inc., International Documentary Assn., Investigative Reporting Workshop at American University, MediaNews Group Inc., MPA – The Association of Magazine Media, National Press Photographers Association, New York Public Radio, The New York Times Company, News Media Alliance, Newsday LLC, The NewsGuild – CWA, Online News Association, POLITICO LLC, ProPublica,

Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, and Tully Center for Free Speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are news media organizations that frequently rely on New York’s Freedom of Information Law, N.Y. Pub. Off. Law §§ 84 *et seq.* (“FOIL”), to keep the public informed about the activities of state and local government officials and agencies. As New York has long recognized, “[t]he people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.” *Id.* § 84. Timely access to such information is necessary and “should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.” *Id.*

In a September 27, 2018 decision (the “September 27 Ruling”), the Supreme Court, Albany County, dismissed the Article 78 petition brought by Petitioner-Appellant Gannett Satellite Information Network LLC, publisher of *The Journal News* (the “*Journal News*”), against Respondent-Respondent New York State Thruway Authority (the “Authority”) and declined to award it attorneys’ fees. The court found that the Authority’s nine-month delay in releasing records was not unreasonable, “given [its] repeated written updates to [the *Journal News*] during that time period” and what the trial court deemed to be the “voluminous amount of documents that were ultimately produced.” September 27 Ruling at 3. In a

subsequent February 14, 2019 order (the “February 14 Ruling”), the court below found that it had “previously considered all of the relevant facts and evidence presented on the issue of whether [the Authority’s] delay in providing a FOIL response was reasonable and thus denied the *Journal News*’ motion for leave to reargue or renew the dismissal granted in the September 27 Ruling.

Amici write to urge the Court to reverse. *Amici* agree with the *Journal News* that the Authority’s response to its FOIL request was contrary to both the letter and purpose of FOIL. Specifically, *amici* write to emphasize that lengthy delays in obtaining access to records under FOIL are inconsistent with the statutory scheme and threaten the news media’s ability to “provid[e] the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities,” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565–66 (1986) (internal quotations and citations omitted). See Br. for Pet’r-Appellant *Journal News* at 3.

Here, the Authority repeatedly extended its response date, resulting in delays totaling more than nine months; it eventually released only 1,107 records—two-thirds of which were already public and required no review or redaction—and only after the *Journal News* filed suit under Article 78. *Id.* at 3, 11. Even then, the majority of the records the Authority released were nonresponsive, and additional records were withheld under claimed FOIL exemptions that the Authority refused

to justify. *Id.* Journalists and news organizations, including *amici*, frequently face similar FOIL request delays and denials from local and state agencies across New York. They rely on trial courts to enforce their and the public’s rights of timely access to government records under FOIL, and to award fees when litigation is necessary to compel the disclosure of requested records. For the reasons herein, *amici* urge the Court to reverse.

ARGUMENT

I. The trial court erred in dismissing the *Journal News*’ Article 78 petition.

A. FOIL was enacted to ensure prompt, meaningful public access to government records.

“[A] free society can be maintained only when government is open and accessible to its citizens,” Governor Malcolm Wilson acknowledged, as he signed the first FOIL in 1974. 1974 N.Y. Laws chs. 578, 579, 580 (Approval Message No. 47). In 1977, FOIL was repealed and reenacted, with an express affirmation that its purpose is to ensure an open and responsive government, accountable to the public. *See* N.Y. Pub. Off. Law § 84. The most significant change in the reenacted FOIL was a reversal of the previous law’s presumption that records would be unavailable unless falling within specified, limited categories of available documents. 1977 N.Y. Laws ch. 933. FOIL now requires all records to be available to the public unless they fall within one of the law’s specified exemptions. N.Y. Pub. Off. Law § 87(2). An agency seeking to withhold records

“carries the burden of demonstrating that an exemption applies to the FOIL request.” *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007).

The legislative amendments to FOIL since 1977 have only reaffirmed that the law is intended to promptly provide the public with information about its government. *See, e.g.*, 1982 N.Y. Laws ch. 73 (adding a provision authorizing an award of attorneys’ fees to requesters in certain instances); 1989 N.Y. Laws ch. 705 (adding a provision that made it a violation for any person to willfully conceal or destroy any record with the intent to prevent public inspection); 2005 N.Y. Laws ch. 22 (making more specific the timeframes available to an agency in which to respond to a request for records); 2006 N.Y. Laws ch. 182 (requiring all agencies that have “reasonable means available” to accept requests for records in e-mail format and to respond in e-mail format when so requested); 2006 N.Y. Laws ch. 492 (allowing a court in its discretion to award reasonable counsel fees and litigation costs under certain circumstances); 2008 N.Y. Laws chs. 223, 351 (reflecting advances in information technology and the costs associated with providing access to information that is maintained electronically); 2017 N.Y. Laws ch. 453 (removing judicial discretion and mandating the award of attorneys’ fees against an agency under certain circumstances).

These amendments underscore that the Authority’s response to the FOIL request at issue, including its delay in releasing records, was not reasonable. A

2005 amendment codified case law that, among other things, established timelines under which records requests must be granted or denied. Under that provision, still in effect today, an agency must respond within five business days of receipt of a written request. N.Y. Pub. Off. Law § 89. During that time, it must grant the request, deny the request in writing, or provide a statement of the approximate date by which the request will be granted or denied. *Id.* If the agency decides to grant the request, it must do so within 20 days, or, if there are reasonable circumstances as to why it cannot meet the deadline, inform the requester in writing of the reason the deadline cannot be met and provide a date certain when access will be granted. *Id.* Failure to conform to these requirements constitutes a denial of access to the records. *Id.* § 89(4)(a).

Then-Governor George Pataki noted that this increased efficiency in obtaining responsive documents would “ultimately, result in a more open and accountable government. In addition, the new provision ensuring that records are timely disclosed after an agency determines to grant a FOIL request will prevent unjustified delays in turning over material that FOIL requires to be disclosed to the

public.” Mem. Filed With Assembly Bill No. 6714, at 3, Bill Jacket, L. 2005, ch. 22.¹

The Authority failed to comply with its statutory duty to either justify nondisclosure by reliance on an exemption or provide the releasable records in a timely manner. These unreasonable delays and denials of access are precisely what the New York Legislature sought to prohibit when it repeatedly acted to strengthen compliance with FOIL, based on the premise that “the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.” *See Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (citing *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)) (internal quotations omitted). Affirming the Supreme Court’s holding that the Authority’s nine-month delay was “reasonable” would, therefore, significantly impair FOIL’s effectiveness as a tool for public oversight of government activity.

B. FOIL’s fee-shifting provision is intended to discourage unwarranted delays and improper withholdings.

According to the trial court:

¹ Then-Governor Pataki’s comments indicate that the measure was also intended to curtail certain conduct on the part of some agencies. *See* Mem. Filed With Assembly Bill No. 6714, at 3, Bill Jacket, L. 2005, ch. 22 (“I am advised that, in the past, there have been situations where a governmental entity has acknowledged having responsive records but delayed disclosure of such records.”).

The record demonstrates that upon receiving petitioner's initial request, respondent furnished a written acknowledgment of the receipt of such request and a statement of the approximate date when a response would be forthcoming. Each time the expected date approached, respondent advised petitioner in writing that additional time was required and provided a new expected compliance date.

September 28 Ruling at 3. Yet, although only 1,300 documents were ultimately produced, *see* February 14 Ruling at 2, the court found the Authority's repeated delays "not unreasonable," and declined to award fees. September 28 Ruling at 3–4. This runs contrary to both the statute's language and its legislative history, and the former longtime executive director of the state's Committee on Open Government has condemned the practice of repeated delays. *See* N.Y. Dep't of State, Committee on Open Government, Advisory Opinion, No. FOIL-AO-18008 (Feb. 22, 2010) ("First, pursuant to § 89(3)(a), an agency cannot engage in one delay after another. ...When the date certain is reasonable in consideration of attendant facts and circumstances, the agency would be complying with law. **There is no provision that permits agencies to indicate extension after extension.** Moreover ... if the agency fails to determine rights of access by the date certain, § 89(4)(a) states that such failure constitutes a denial of access that may be appealed.") (emphasis added).

The addition of an attorneys' fee provision to the FOIL in 1982 was "based upon the Legislature's recognition that persons denied access to documents must engage in costly litigation to obtain them and that '[c]ertain agencies have adopted

a ‘sue us’ attitude in relation to providing access to public records,’ thereby violating the Legislature’s intent in enacting FOIL to foster open government.” *N.Y. State Defenders Ass’n v. N.Y. State Police*, 927 N.Y.S.2d 423, 425 n.2 (3d Dep’t 2011), (quoting Assembly Mem. in Support, at 4, Bill Jacket, L. 1982, ch. 73). The amendment is further designed to “discourage public bodies from denying access to records as a matter of course.” Mem. In Support at 4.

In addition to eliminating the arbitrary noncompliance and difficulty in obtaining releasable information under FOIL, the 1982 bill authorizing attorneys’ fees in certain cases was also intended to be a “positive step in the direction of correcting an inequity . . . in the Freedom of Information Law, which now encourages agency non-compliance while making it costly for the general public to pursue legal rights, thus frustrating the original intent of the legislation to make certain government records accessible.” S. Budget Report on Bills, at 11–12 , Bill Jacket, L. 1982, ch. 73. Then-Governor Hugh Carey observed that the bill “provides a supportive method of facilitating the public’s right of access to government records in appropriate cases without deterring agencies from exercising judgment in interpreting the requirements of law.” Mem. Filed With S. Bill No. 7699, at 9, Bill Jacket, L. 1982, ch. 73.

Repeated delays by state agencies are, in part, what the statutory fee-shifting provision was designed to avoid. When he introduced the enacted 2006

amendment allowing a court in its discretion to award reasonable counsel fees and litigation costs under certain circumstances, bill sponsor Senator John DeFrancisco stated that the proposal would create a clear deterrent to unreasonable delays and denials of access and thereby “encourage every unit of government to make a good faith effort to comply with the requirements of FOIL.” Introducer’s Mem. in Support, at 6, Bill Jacket, 2006 N.Y. Laws ch. 492. In particular, he stated that “[g]overnment agencies should not be allowed to ignore requests made pursuant to FOIL or delay responding for so long a time that the accountability the law seeks to ensure is lost.” *Id.* The fee-shifting provision was amended in 2017 to “encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding.” Assembly Mem. in Support, at 9, Bill Jacket, L. 2017, ch. 453. Now, agencies are required to pay fees and costs in cases where a requester denied access to records “substantially prevailed,” and the agency had no reasonable basis for denying access. N.Y. Pub. Off. Law § 89(4)(c).

The Authority’s actions in this case are inconsistent with FOIL’s purpose to promote openness and transparency in state and local government. The Authority adopted a “sue us attitude,” forcing Plaintiff to incur costly litigation fees over the past eighteen months in an attempt to obtain documents. *See N.Y. State Defenders Ass’n*, 927 N.Y.S.2d at 425 n.2. In addition, affirming the holding that the *Journal*

News is not entitled to attorneys’ fees would undermine the Legislature’s intent of “correcting an inequity” that, as this case demonstrates, still exists in FOIL. *See* S. Budget Report on Bills, at 11.

II. Routine denials of access, including through unreasonable delay, threaten the news media’s ability to report on matters of significant public concern.

Unfortunately, unreasonable denials and delays by public agencies—including the Authority²—are not an aberration. Indeed, journalists in New York often describe agencies’ noncompliance and delay tactics as a matter of course and lament the resulting difficulty of obtaining releasable information. *See, e.g.*, Mark

² *See, e.g.*, Jon Campbell, *Unlocking State Data*, ROCHESTER DEMOCRAT & CHRON. (Sept. 24, 2013), <https://perma.cc/UUX2-QTBM>; Michael DeMasi, *Delays Remain a Mystery in Big Albany Construction Project*, ALBANY BUS. REV. (Aug. 13, 2015), <https://perma.cc/H2GE-TP4Z>; *Erie County Asks Release of Nov. ’14 Storm Records*, CHEEKTOWAGA BEE (Mar. 24, 2016), <https://perma.cc/U7PT-ZH6C>; Frank Esposito, *Cashless Tolls: Much of New York’s Contract Is Kept Secret*, THE J. NEWS (Feb. 21, 2018), <https://perma.cc/46ND-Z73Q>; Jorge Fitz-Gibbon and Bruce Golding, *Counties Blast Tappan Zee Bridge Secrecy*, THE J. NEWS, June 22, 2005, at A1; Meaghan M. McDermott, *Open-Government Expert’s Removal Offers Opportunity to Boost Freedom of Information Laws*, ROCHESTER DEMOCRAT & CHRON. (Aug. 13, 2019), <https://perma.cc/29KL-9UNG>; Tom Precious, *Agency Kills Erie Canal Development Deal*, BUFFALO NEWS, May 11, 2004, at B1 (“The [housing development] deal has created a huge paper trail. But many of the documents have yet to be made public. The Buffalo News has had a [FOIL] request pending with the [Authority] since last September for access to the documents.”); Matthew Spina, *Staff Raises Preceded Appeal for Toll Hike*, THE POST-STANDARD, Apr. 28, 2000, at A6 (reporting that three months after the news organization requested minutes of every Authority meeting in 1999, the Authority turned over minutes for every meeting except November, during which it handed out raises for senior staff, and didn’t provide the November records until “[a]fter more requests from the newspaper”); Lauren Stanforth, *Wait Times Long for Some State Records*, THE TIMES-UNION (Mar. 14, 2017), <https://perma.cc/SD56-639Z>.

C. Mahoney, *Uphill Battle for Transparency in Government Continues*, THE DAILY GAZETTE (Mar. 15, 2019), <https://perma.cc/KFP6-SENH> (stating that government officials still regularly decide not to follow FOIL and observing that “[a]lmost every day, journalists and citizens encounter public officials who routinely deny access to records without trying to comply with the law, who refuse to follow established deadlines for notification and compliance. ... Citizens routinely have to fight for basic public documents”); Jerry Moore, *Partly Cloudy on Sunshine Week*, WATERTOWN DAILY TIMES (Mar. 13, 2019), <https://perma.cc/KFP6-SENH> (noting that because “New York has an incredibly dysfunctional system when it comes to enforcing the state’s FOIL ... there’s little incentive for government authorities in New York to adhere to FOIL”).

These tactics result in more than mere inconvenience or annoyance. Rather, government agencies often greatly impede the news media’s ability to report on matters of significant public concern by improperly refusing to produce public documents for months. For example:

- After initially denying a Harlem education councilwoman’s request for information about which of the sixteen schools in her district staff librarians, the Department of Education issued ten consecutive monthly extension letters. Selim Algar, *DOE Stalls for a Year*

Without Answering FOIL Request on Librarians, N.Y. POST (Aug. 8, 2017), <https://perma.cc/SR6MPEWN>.

- New York City’s Administration for Children’s Services took 183 days, or about six months, to respond to a request for its FOIL log—spreadsheets that agencies use to keep track of FOIL requests and dispositions that other city agencies were able to produce in less than five days. Jon Campbell, *In de Blasio’s New York, Transparency Laws Mean Nothing*, THE VILLAGE VOICE (Apr. 11, 2017), <https://perma.cc/86CB-YZ9S>.
- A journalist reported in March 2019 that the Metropolitan Transportation Authority had not produced any records in response to his July 2018 request for the names of four attorneys who oversee state tolling contracts, along with the names and salaries of individuals who held those jobs previously. David McKay Wilson, *Despite State Law, Getting Public Documents Often Faces Roadblocks*, THE J. NEWS (Mar. 13, 2019), <https://perma.cc/D7XR-GW9M>. The agency’s last communication to the reporter in late February 2019 said that it was still researching the request and did not provide a date certain when the records would be available. *Id.*

- In response to a journalist’s August 2018 request to the state Department of Health for information related to hospital safety inspections, the agency provided a November 29 deadline that was subsequently extended twice, with the third anticipated response date eight months after the request was made. *Id.*
- In November 2010, then-New York City public advocate Bill de Blasio filed a request for information related to documentation on delays in school bus service with the Education Department, which had not provided the information by the following October. Kate Taylor, *De Blasio Pushes on Information Requests*, THE N.Y. TIMES (Oct. 19, 2011), <https://nyti.ms/2uG5seE> (quoting de Blasio as saying, “[w]e get a lovely letter every month telling us they’re working on it”).

It is crucial that public records be routinely released—not routinely withheld—to enable the news media and public to evaluate agency-wide practices, not just individual incidents. FOIL is designed to ensure that the public can oversee “the *day-to-day* functioning of State and local government[,] thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities.” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d at 565–66

(emphasis added) (internal marks and citations omitted). Unreasonable delays like the ones imposed by the Authority and sanctioned as reasonable by the trial court below prevent the public from promptly obtaining such important day-to-day information. *See e.g.*, Jake Lucas, *How Times Reporters Use the Freedom of Information Act*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/insider/information-freedom-reporters-pruitt.html> (“Open records law also play an important role in the work of reporters day to day. Alan Blinder is a reporter who covers the South for The Times and said the reasons he uses open records requests are as varied as the day’s news, but he uses them often in the aftermath of big breaking news stories.”).

For FOIL to serve its purpose, the public must be able to access records in a time-efficient manner. Finding reasonable a nine-month delay in releasing records hinders the gathering and dissemination of news, thereby contravening FOIL’s purpose of “encourag[ing] public awareness and understanding of and participation in government.” *See Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440 (2005). Moreover, the significant time delay disincentives journalists and newsrooms from filing FOIL requests knowing that they would be released long after a controversy has disappeared from public consciousness and the requested information has necessarily lost some of its relevance to the public. Heath Hooper

& Charles N. Davis, *A Tiger with No Teeth: The Case for Fee Shifting State Public Records Laws*, 79 MO. L. REV. 949, 968 (2014).

The significant delay in the release of public records defeats the purpose of speedy access that is crucial to timely news coverage of breaking events and ongoing controversies in the community. As the U.S. Supreme Court has observed, “[d]elays imposed by governmental authority” in making information available are inconsistent with the press’ “traditional function of bringing news to the public promptly.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 560–61 (1976); *id.* at 609 (Brennan, J., concurring) (noting that “delay . . . could itself destroy the contemporary news value of the information the press seeks to disseminate.”).

This case, in particular, highlights how extended delays can undermine FOIL’s purpose of informing the public. According to its briefing, now *two years and two months* after its initial request, the *Journal News* still lacks access to documents of critical importance to the public’s understanding of how the Authority spends taxpayers’ money. *See, e.g.*, Pet’r-Appellant Br. at 3–4. The U.S. Supreme Court has observed on more than one occasion, “[t]he peculiar value of news is in the spreading of it while it is fresh.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918). Moreover, delayed access does not allow the media to fulfill its constitutional role of “bar[ing] the secrets of government and inform[ing] the people.” *See N.Y. Times Co. v. United States*, 403 U.S. 713, 717

(1971) (Black, J., concurring). Affirming a finding that nine months is a reasonable delay ultimately results in a complete denial of prompt and meaningful public access to records.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse and find that the Authority's nine-month delay in responding to the FOIL request in this case was unreasonable such that the *Journal News* is entitled to attorneys' fees and costs.

Dated: Washington, D.C.
November 8, 2019

Respectfully submitted,

By: /s/ Mark I. Bailen

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NEW YORK SUPREME COURT
APPELLATE DIVISION-THIRD DEPARTMENT

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CHRISTINA I. BELANGER, being duly sworn, deposes and says:

I am over 18 years of age, not a party to this proceeding and am employed by the law firm of Baker & Hostetler LLP, located at 45 Rockefeller Plaza, New York, New York 10111.

On November 8, 2019, I served a true copy of the foregoing ***NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER-APPELLANT*** upon the following via overnight courier service (Federal Express):

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Sworn to before me this
8th day of November, 2019



Notary Public

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