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December 2019

2019 REPORT TO THE GOVERNOR AND STATE LEGISLATURE

*“Whenever the people are well-informed, they
can be trusted with their own government.”*

~Thomas Jefferson, 1789

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INTRODUCTION

This report includes a summary of 2019 legislative amendments; a summary of significant 2019 court decisions; an update on the status of previous recommendations for continuing consideration including an update on the status of efforts to repeal or significantly amend §50-a of Civil Rights Law relating to personnel records of police officers, corrections officers, and paid firefighters; and data reflecting the services provided by the Committee.

2019 LEGISLATIVE AMENDMENTS

A. The “Mugshot Bill”

On April 12, 2019, the Governor signed legislation, as part of the fiscal year 2020 Public Protection and General Government Article VII Budget Bill, amending the Freedom of Information Law (FOIL) to expressly provide that “an unwarranted invasion of personal privacy includes . . . disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.”

B. Livestreaming Meetings of Industrial Development Agency Open Meetings and Public Hearings

On August 27, 2019, the Governor signed legislation amending General Municipal Law and Public Authorities Law, which requires each industrial development agency to live stream and post video recordings of all open meetings and public hearings; and, requires each industrial development agency to post those recordings on the agency website for a period of not less than five years (see Gen. Muni. Law §857 and Pub Auth. L. §§1952-a and 2305). This legislation is effective January 1, 2020.

C. Online Submission of FOIL Request to State Agencies

As of January 1, 2019, each state agency that maintains a website is required to ensure that its website provides for the online submission of FOIL requests (see Pub. Officers. Law §89(3)(c)).

2019 Court Decisions of Note

- Kosmider v. Whitney, 34 NY3d 48 (2019), reargument denied, 33 NY3d 1134 (2019)

The Court of Appeals held that Election Law §3-222(2), which prohibits examination of “voted ballots” absent court order or legislative committee direction during the first two years following an election, precluded county board of supervisors from granting a FOIL request for disclosure of electronic copies of ballots. The Court held that, under the plain text of the election law, during the relevant time frame, electronic ballot copies were no less protected from disclosure than underlying paper ballots cast at the polls; and since the FOIL requester had not obtained a court order or direction from the relevant legislative committee for access, the ballot images were “specifically exempted from disclosure by state or federal statute” within meaning of FOIL exemption.

- Matter of Luongo v. Records Access Appeals Officer, 168 AD3d 504 (1st Dept 2019)

At issue was a FOIL request for New York City Police Department (NYPD) “personnel orders” which contain summaries of employment updates for both officers and civilian employees of the NYPD, including transfers, promotions, retirements, and disciplinary dispositions. The First Department held that the personnel orders contained information used to evaluate officers’ performance including factual details regarding misconduct allegations and punishments imposed. The First Department held that the orders were “material ripe for degrading, embarrassing, harassing or impeaching the integrity of [the] officer[s]” and were, therefore, exempt from disclosure under Civil Rights Law §50-a (internal quotations and citations omitted).

- Matter of Patrolmen's Benevolent Ass'n of City of New York v. De Blasio, 171 AD3d 636 (1st Dept 2019)

The First Department held that the body-worn camera footage at issue was not a personnel record covered by the confidentiality and disclosure requirements of Civil Rights Law §50-a. The Court noted that the body-worn camera program’s key objectives not only included performance evaluation purposes, but also included transparency, accountability, and public trust-building. The Court further found that the subject body-worn camera footage had not been used in connection with any pending disciplinary charges or promotional processes, and; as such, Civil Rights Law §50-a was not implicated. Instead, the Court equated the footage to arrest or stop records, stating that “to hold otherwise would defeat the purpose of the body-worn camera program to promote increased transparency and public accountability.”

- Prisoners' Legal Servs. of New York v. New York State Dept. of Corrections and Community Supervision, 173 AD3d 8 (3d Dept 2019)

The Third Department held that unusual incident reports, use of force reports, and inmate misbehavior reports generated in a correctional facility setting did not qualify as “personnel records” within the meaning of Civil Rights Law §50-a. The Court found that, even if these reports could sometimes be probative of a correction officer’s job performance, they served a mix use, notably to document facility occurrences, analyze trends, and review overall quality control.

PREVIOUS RECOMMENDATIONS FOR CONTINUING CONSIDERATION

The following recommendations have been offered in earlier reports. The Committee believes that they continue to have merit and should be considered seriously by the Governor and Legislature.

A. Civil Rights Law §50-a

In 2019, Civil Rights Law §50-a continued to be one of the highest profile access to records issues in New York State. Section 50-a states that “[a]ll personnel records used to evaluate performance toward continued employment or promotion” of police officers, corrections officers, and paid firefighters, “shall be considered confidential and not subject to inspection or review without the express written consent” of the employee or as “mandated by lawful court order.”

A review of its legislative history indicates that §50-a was enacted in 1976 with a narrow purpose - to prevent criminal defense lawyers from reviewing police personnel folders in search of unproven or irrelevant information to use in cross examination of police witnesses. The problem is that over time this narrow exception was expanded by the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer. Section 50-a is now being used to prevent meaningful public oversight of law enforcement agencies. Its repeal or revision is long overdue.

Court Decisions

In December 2018, the Court of Appeals affirmed an Appellate Division decision that held that if a record constitutes a “personnel record” as described in §50-a, an agency cannot be compelled to disclose redacted records as Public Officers Law §87(2)(a) does not authorize release of redacted records where those records are exempt from disclosure by state or federal statute. Matter of New York Civil Liberties Union v. New York City Police Department, 32 NY3d 556 (2018)

While that Court of Appeals decision affirmed its prior holdings that records which are exempted by state or federal statute are not subject to release in a redacted form, the First and Third Departments clarified what types of records can be considered “personnel records” for purposes of §50-a privacy protection. The First Department found that “given its nature and use, the body-worn camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements of section 50-a” (see Patrolmen’s Benevolent Assoc. of City of New York v DeBlasio, 171 AD3d at 637-8, *supra*). In Prisoners’ Legal Servs. of New York v. New York State Department of Corrections & Community Supervision, the Third Department opined that given their mixed-use nature, unusual incident reports, use of force reports and inmate misbehavior reports generated in correctional facilities were not “personnel records” within the meaning of Civil Rights Law §50-a (173 AD3d 13-14, *supra*).

2019 also included the following events and reports centered on §50-a or police disciplinary matters.

NYSBA Task Force

In April 2018, the New York City Bar Association Civil Rights and Criminal Courts Committees joined nearly 30 organizations, including the New York Civil Liberties Union and the Legal Aid Society, in support of a bill, A.3333, that would repeal §50-a. To evaluate the City Bar's report, the New York State Bar Association (NYSBA) designated a "Working Group on Civil Rights Law §50-a." In January 2019, the Working Group submitted a recommendation to NYSBA's Executive Committee, calling for a substantial amendment of the statute. In February, the Executive Committee approved the recommendation of the Working Group to limit the application of §50-a to unsubstantiated complaints or unsubstantiated allegations of misconduct.

The Report of the Independent Panel on the Disciplinary System of the New York City Police Department

In June of 2018, New York City Police Commissioner James P. O'Neill appointed an Independent Panel to conduct a review of the internal disciplinary system of the New York City Police Department (NYPD) and to propose recommendations to improve it. In January of 2019, the Panel issued its report which included recommendations that 1) the NYPD support efforts to amend §50-a to increase transparency and enhance accountability and 2) the NYPD must guard against unwarranted expansion of the scope of §50-a. The report stated in conclusion, in part:

"When an officer uses excessive force, engages in an unjustified stop and frisk, is disrespectful to a citizen, shades the truth in court, or otherwise abuses his or her authority, the entire Department is tainted and diminished. When that happens the Commissioner must hold the officer strictly accountable. Just as importantly, the Commissioner must be transparent with the public to demonstrate that the Department's disciplinary system is effective and fair—that discipline is handed out consistently and without favor." <https://www.independentpanelreportnypd.net/index.html>

NYS Senate Codes Committee Hearings

In October 2019, The Senate Standing Committee on Codes held public hearings in New York City and Albany on bill S3695, legislation sponsored by Senator Jamaal Bailey to repeal §50-a. (Assemblymember Daniel O'Donnell also sponsored a "Same As" bill in the Assembly - A2513).

Those providing testimony included:

Family Members: Gwen Car, Mother of Eric Garner; Valerie Bell, Mother of Sean Bell; Constance Malcolm, Mother of Ramarley Graham; Victoria Davis, Sister of Delrawn Small

Law Enforcement: Oleg Chernyavsky, NYPD; Rev. Fred Davie, NYC CCRB; Elias Husamudeen, Correction Officers' Benevolent Association; Pat Saunders, Suffolk County PBA; Richard Wells, Police Conference of New York; Michael O'Meara, NYS Association of PBAs; Daniel F. Sisto, Retired NYSP/NSPIA Rep.;

Social Justice Organizations: Michael Sisitzky, NYCLU; Alvin Bragg, New York Law School Racial Justice Project; Rachel Bloom, Citizen's Union; Joo-Hyun Kang and Carolyn Martinez-Class, Communities United for Police Reform; Quadira Coles, Girls for Gender Equality; Loyda Colon, Justice Committee; Monifa Bande, Moms Rising;

Isaiah Quinones, Make the Road; Lupe Aguirre, Center for Constitutional Rights; L Joy Williams, Brooklyn NAACP; Callie Jayne, Rise Up Kingston; Clyanna Lightbourn, Citizen Action of New York; Lurie Favors, Center for Law & Social Justice; Rev. Kevin McCall, Crisis Action Center; Kirsten John Foy, Arc of Justice

Media: David McCraw, Sr. VP and Deputy General Counsel, New York Times Co.; Diane Kennedy, New York News Publishers Association; Diego Ibarguen, Hearst Corporation

Public Defender Organizations: Karen Thompson, New York State Association of Criminal Defense Lawyers; Molly Giffard, NYC Legal Aid Society; Cynthia Conti-Cook, NYC Legal Aid Society; Oded Oren, Bronx Defenders; Jaqueline Renee Curuana, Brooklyn Defender Services; Kevin Stadelmaier, Legal Aid Bureau of Buffalo; Katurah Topps, NAACP Legal Defense Fund;

Jumaane D. Williams, NYC Public Advocate

Gabrielle Seay, Political Director at 1199SEIU United Healthcare Workers East

Franklin H. Stone, Chair, Committee on Open Government

Other Legislative Options

In addition to Senator Bailey's bill, Senator Kevin Parker has sponsored two bills, S4214 and S4215, that would amend §50-a instead of repealing it. S4214 would allow disclosure under certain limited circumstances ("if those records relate to an officer who was involved in a police shooting or police misconduct..."). S4215 would amend the statute to limit its application to "personnel records created and used solely to evaluate performance..."

Media Coverage

As in past years, the media has raised significant concerns with the application of §50-a through articles and editorials on the subject:

Editorial. (Nov. 2, 2019) "A cover for police misconduct." *The Buffalo News*. (<https://buffalonews.com/2019/11/02/editorial-a-cover-for-police-misconduct/>)

Tarinelli, R. (Oct. 24, 2019) "NYPD supports changes to disciplinary records law." *Associated Press*. (<https://apnews.com/f6c1e71860b04531a46858ff3e123b82>)

Lyons, B. (Oct. 24, 2019) "Legislative hearing focuses on access to internal police records." *Albany Times Union*. (<https://www.timesunion.com/news/article/Legislative-hearing-focuses-on-access-to-internal-14559935.php>)

Merlino, V. (Oct. 17, 2019) "Tensions flare at hearing over the law that shields police records from public view." *The Brooklyn Eagle*. (<https://brooklyneagle.com/articles/2019/10/17/50-a-state-senate-hearing/>)

Lyons, B. (July 5, 2019) “Law shielding police misconduct records stymies prosecutors.” *Albany Times Union*. (<https://www.timesunion.com/news/article/Law-shielding-police-misconduct-records-stymies-14069805.php>)

Editorial. (June 12, 2019) “Chokeholds and police abuse, kept from the public.” *The New York Times*. (<https://www.nytimes.com/2019/06/12/opinion/police-brutality-discipline-eric-garner.html>)

Lyons, B. (June 12, 2019) “Police reform uncertain as Legislature hits final week of session.” *Albany Times Union*. (<https://www.timesunion.com/news/article/Police-reform-uncertain-as-Legislature-hits-final-13971693.php>)

Conti-Cook, C. (Winter 2019) “A new balance: Weighing harms of hiding police misconduct information from the public.” *City University of New York Law Review*. Issue 22, Volume 1

Lovett, K. (Dec. 24, 2018) “Relatives of those who died at hands of police push for repeal of NYS law shielding release of cop disciplinary records. *The Daily News*. (<https://www.nydailynews.com/news/politics/ny-pol-50a-police-discipline-diallo-bell-garner-carr-20181223-story.html>)

Silberstein, R. (Dec. 24, 2018) “Advocates push for repeal of 50-a ahead of session. *Albany Times Unions*. (<https://www.timesunion.com/news/article/NYS-50-a-13488713.php>)

The Committee continues to agree that §50-a is ripe for reconsideration by the Governor and the State legislature.

B. Proactive Disclosure

One of the complaints most frequently received by the Committee relates to the unavailability of records on an agency’s or public body’s website. Since FOIL was first enacted, advances in technology have enhanced the ability to gain access to and widely disseminate public information. The Committee continues to support agency efforts toward proactive disclosure as an efficient means of promoting FOIL, which serves as an effective method of providing public access quickly and easily.

Senator Skoufis and Assemblymember Buchwald introduced bills which would require agencies and the houses of the state legislature to proactively publish on their websites “records or portions of records that are available to the public pursuant to [FOIL], and which, in consideration of their nature, content or subject matter, are determined by the agency to be of substantial interest to the public.” (S1630-B/A0121-A)The proposed legislation would impose these requirements only when the agency “has the ability to do so” and also states that “[g]uidance on creating records in accessible formats and ensuring their continuing accessibility shall be available from the office for technology and state archives.”

C. The Reasonable Use of Cameras in Courtrooms

While several judges have determined that the statutory ban on the use of cameras is unconstitutional, legislation remains necessary to ensure that court proceedings are meaningfully open to the public. The Committee reaffirms its support for the concept, subject to reasonable restrictions considerate to the needs of witnesses.

As former Chief Judge Lippman expressed, “[t]he public has a right to observe the critical work that our courts do each and every day to see how our laws are being interpreted, how our rights are being adjudicated and how criminals are being punished, as well as how our taxpayer dollars are being spent.”

A bill proposed in the Senate and Assembly and referred to the Judiciary Committee (S5039/A4216) would allow the Chief Judge of the Court of Appeals or his or her designee to authorize an experimental program in which presiding trial judges, in their discretion, would permit audio-visual coverage of civil and criminal court proceedings, including trials.

D. Government Created Entities Should Be Subject to FOIL

An entity created by a government agency or a subsidiary or affiliate of a government agency is, in reality, an extension of the government. The records of such an entity should fall within the coverage of FOIL.

FOIL applies to agency records. To ensure that the records of entities created by government are subject to FOIL, the definition of “agency” in FOIL §86(3) should be amended to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, as well as entities created by an agency or that are governed by a board of directors or similar body a majority of which is designated by one or more state or local government officials, except the judiciary or the state legislature.”

While profit or not-for-profit corporations would not in most instances be subject to FOIL because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are “agencies” that fall within the scope of FOIL. (see e.g., Buffalo News v Buffalo Enterprise Development Corp., 84 NY 2d 488 (1994); Hearst Corporation v Research Foundation of the State of New York, 24 Misc. 3d 611 (2012)).

We emphasize that the receipt of government funding or entering into contractual relationships with a government agency would not transform a private entity into a government agency. Rather, the Committee’s proposal is limited to those entities which, despite their corporate status, are subsidiaries or affiliates of a government agency.

E. Bring JCOPE within the coverage of FOIL and the Open Meetings Law

Currently, the Joint Committee on Public Ethics (JCOPE) is exempt from FOIL and the OML. JCOPE and its predecessor, the Commission on Public Integrity, were created to offer guidance and opinions to public officers and employees concerning ethics and conflicts of interest, and to investigate possible breaches of law relating to statutes that contain standards concerning ethical conduct. In addition, elected state officials and policy making employees are required to submit detailed financial disclosure statements to JCOPE.

Every municipal ethics body is required to comply with FOIL and the OML, and those laws do not create a hindrance regarding their operation. On the contrary, the exceptions to rights of access provide those bodies with the flexibility necessary to function effectively. Moreover, the balance inherent in those laws serves to enhance the public's confidence in government.

As the Committee has recommended since at least 2014, an area of particular criticism that should be corrected involves a basic element of government accountability: knowing how our government officials vote on issues. A requirement of FOIL since its enactment in 1974, FOIL §87(3)(a), is an obligation that agencies maintain records indicating the manner in which its members cast their votes. Here, the absence of accountability of that nature breeds mistrust and clearly warrants the change that we seek.

This past year, the Senate and Assembly introduced a bill (S0594/A1282) proposing a Constitutional Amendment to replace JCOPE and the Legislative Ethics Commission with a single, independent, enforcement agency (similar to the Commission on Judicial Conduct established in Article VI of the State Constitution) to deter corruption in the legislative and executive branches of state government. Under this bill, the agency would be subject to FOIL and OML.

F. Clarifying Amendments

In 2019, Senator Harckham and Assemblymember Buchwald introduced bills (S6608A/A0119A) that would address some of the technical concerns the Committee has raised relating to compliance with FOIL. The following proposed amendments reflect an effort to clarify existing provisions in FOIL.

1. There are two provisions of FOIL that state that an unwarranted invasion of personal privacy includes the disclosure of a list of names and addresses if a list would be used for solicitation or fund-raising purposes. Because the language involves personal privacy, the Committee has long advised that the ability to deny access pertains to a list of natural persons and their residential addresses. The exception does not apply to a list of vendors or others engaged in a business or professional activity.
2. Section 89(3)(a) of FOIL states, in part, "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity..." The term "prepare" should be replaced by "create." The principle is that FOIL pertains to existing records and does not require that an agency create new records to respond to a request. The term "prepare" has been interpreted far more broadly than intended. For example, some agencies have considered the conversion of a record from one format to another or the process of redaction to be included in the "preparation" of a record. The use of the term "create" more accurately reflects the intent of the statute.

3. The bill clarifies the time in which an agency is required to respond to FOIL request. A portion of §89(3)(a) would be amended to read:

If [~~an agency determines to grant a request in whole or in part, and if~~] circumstances prevent an agency from notifying the person requesting the record or records of the agency's determination regarding the rights of access and disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to [~~grant the request~~] do so within twenty business days and a date certain within a reasonable period, depending on the circumstances, when [~~the request will be granted in whole or in part~~] a determination regarding disclosure will be rendered.

G. Clarify Civil Rights Law §50-b to Protect Privacy of Victims of Sex Offenses, Not that of Defendants

Section 50-b of the Civil Rights Law states that a record that identifies or tends to identify the victims of sex offenses cannot be disclosed, even if redactions would preclude identification of a victim.

Subdivision (1) of that statute provides that:

“The identity of any victim of a sex offense, as defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law, or an offense involving the alleged transmission of the human immunodeficiency virus, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section.”

Due to the breadth and vagueness of the language quoted above, public officials have been reluctant to disclose any information concerning sex offenses for fear of the consequence set forth §50-c of Civil Rights Law discussed below. The Committee recommends that the second sentence of §50-b be amended to state that:

“No portion of any report, paper which identifies such a victim shall be available for public inspection.”

Section 50-c of the Civil Rights Law states that:

“Private right of action. If the identity of the victim of a sex offense defined in subdivision one of section fifty-b of this article is disclosed in violation of such section, any person injured by such disclosure may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney’s fees to a prevailing plaintiff.”

This section refers to any disclosure made in violation of §50-b, whether the disclosure is intentional or inadvertent, or made after the victim's identity has been disclosed by other means. There should be standards that specify the circumstances under which a disclosure permits the initiation of litigation to recover damages, and we recommend that §50-c be amended as follows:

"Private right of action. If the identity of the victim of an offense is disclosed in violation of section fifty-b of this article and has not otherwise been publicly disclosed, such victim [any person injured by such disclosure] may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff."

In 2019, Senator Lanza introduced a bill (S0413/No Same As) to amend §§50-b and 50-c consistent with the above proposals. In addition, Senator Skoufis' and Assemblymember Englebright introduced bills (S5496/A3939) which would amend §50-b as proposed by the Committee. S5496/A3939 was passed by both houses of the legislature, but as of the writing of this report, had yet to be delivered to the Governor for his signature.

H. Disclose or Withhold E911 Records Pursuant to FOIL

Records of 911 calls are, in most instances, confidential, even when it is in the public's interest to disclose, when there is no valid basis for denying access, or when the caller wishes to access the record of his/her own words.

E911 is the term used to describe an "enhanced" 911 emergency system. Using that system, the recipient of the emergency call has the ability to know the phone number used to make the call and the location from which the call was made. Section 308(4) of County Law prohibits the disclosure of records of E911 calls. The law states:

"Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

The Committee recommends that §308(4) of the County Law be repealed. By bringing records of 911 calls within the coverage of FOIL, they can be made available by law enforcement officials when disclosure would enhance their functions, to the individuals who made the calls, and to the public in instances in which there is no valid basis for denying access. When there are good reasons for denying access, to prevent unwarranted invasions of personal privacy, to protect victims of or witnesses to crimes, to preclude interference with a law enforcement investigation, FOIL clearly provides grounds for withholding the records.

A proposal to repeal County Law §308(4) was introduced by Senator Hoylman and Assemblymember Abinanti (S1097 /A1579) in 2019 and referred to the Assembly Local Governments Committee. A proposal to repeal was also included in the Governor's 2019 Budget bill, however, it was not included in the version of the Budget that passed the Legislature and was signed by the Governor.

County Law does not apply to New York City, which has for years granted or denied access to records of 911 calls as appropriate pursuant to FOIL.

I. Amend FOIL to Create a Presumption of Access to Records of the State Legislature

To promote accountability, transparency, and trust, the Committee urges that FOIL 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.

Legislators have expressed concern that expanding the scope of FOIL would require disclosure of communications from constituents that relate to intimate or personal details of the constituent's life. It is our opinion that the Legislature would have authority to withhold such communications on the ground that disclosure would constitute an unwarranted invasion of personal privacy. To confirm the existence of protection of those records, §89(2)(b), which includes a series of examples of unwarranted invasions of personal privacy, could be amended to include reference to communications of a personal nature between legislators and their constituents.

The bill introduced in the Senate and the Assembly proposing a constitutional amendment to replace JCOPE also proposed making the State Legislature subject to FOIL in same manner as the executive branch. Senator Krueger also introduced a bill in 2019 which would do the same. (S3940)

J. Dealing with Lawsuits by Commercial Entities to Block Disclosure

FOIL includes unique provisions concerning the treatment of records required to be submitted to a state agency by a commercial enterprise pursuant to law or regulation. They are intended to provide a procedural framework for consideration of the so-called "trade secret" exception to rights of access.

Section 87(2)(d) of FOIL permits an agency to withhold records to the extent that they:

"are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Under §89(5) of FOIL, a commercial enterprise that is required to submit records to a state agency may, at the time of submission, identify those portions of the records that it believes would fall within the scope of the exception. If the agency accepts the commercial enterprise's contention, those aspects of the records are kept confidential. If and when a request for the records is made under FOIL, the agency is obliged to contact the enterprise to indicate that a request has been made and to enable the enterprise to explain why it continues to believe that disclosure would cause substantial injury to its competitive position. If the agency agrees with the enterprise's claim, the person requesting the records has the right to appeal the denial of access. If the determination to deny access is sustained, the applicant for the records may seek judicial review, in which case the agency bears the burden of proof. However, if the agency does not agree that disclosure would cause substantial injury to the enterprise's competitive position, the enterprise may appeal. If that appeal is denied, the firm has fifteen days to initiate a judicial proceeding to block disclosure. In such a case, the firm has the burden of proof.

Because the commercial enterprise has the right to initiate a judicial proceeding to block disclosure, the result is often a delay in disclosure. Senator Skoufis and Assemblymember Paulin introduced the following bill (S4685A/A114A) this past legislative session in an effort to expedite the process:

Section 1. Paragraph (d) of subdivision 5 of section 89 of the public officers law, as amended by chapter 339 of the laws of 2004, is amended to read as follows:

(d) (i) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision. The proceeding shall be given preference and shall be brought on for argument on such terms and conditions as the presiding justice may direct, not to exceed forty-five days.

(ii) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.

(iii) An appeal taken from an order of the court requiring disclosure:

(A) shall be given preference; and

(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application by any party to the proceeding; and

(C) shall be deemed abandoned when the party requesting an exclusion from disclosure fails to serve and file a record and brief within sixty days after the date of the notice of appeal, unless consent of further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

The bill passed both houses of the Legislature, but as of this date, has not been delivered to the Governor.

SERVICES RENDERED BY THE COMMITTEE

3037 TELEPHONE INQUIRIES
1832 RESPONSES TO WRITTEN INQUIRIES
88 ADVISORY OPINIONS
47 PRESENTATIONS
THOUSANDS ADDRESSED
THOUSANDS OF RADIO AND WEBINAR LISTENERS

Committee staff offers advice and guidance orally and in writing to the public, representatives of state and local government, and to members of the news media. Each year we track telephone calls, written correspondence, and advisory opinions rendered.

The past year has been one of significant change at the staff level of the Committee on Open Government. While the Committee adjusted to these changes, it strove to continue to provide the same level of service to the public, state and local government, and the media. The total number of verbal and written inquiries responded to from July to September 2019 was not significantly lower than the same three-month period in 2018. Staff has made every effort to balance the need to be present in the office and to provide training in-person across the state. With very limited exceptions, Committee staff was able to conduct training or present on open government issues whenever requested.

During the past year, the Committee responded to over 3000 telephone inquiries, over 1800 requests for guidance answered via email or U.S. mail and responded to 88 requests for detailed written opinions in regard to the FOIL, the OML and Personal Privacy Protection Law. In addition, staff gave 47 presentations before government and news media organizations, on campus and in public forums, training and educating more than 1250 people concerning public access to government information and meetings. We are grateful that many entities are now broadcasting, webcasting and/or recording our presentations, thereby making them available to others.

A. Online Access

Since its creation in 1974, the Committee's staff has prepared more than 25,700 written advisory opinions in response to inquiries regarding New York's open government laws. The opinions prepared since early 1993 that have educational or precedential value are available online through searchable indices.

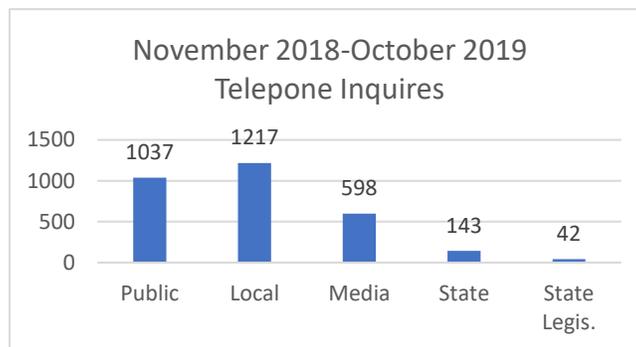
In addition to the text of open government statutes and the advisory opinions, the Committee's website also includes:

- Model forms for email requests and responses
<http://www.dos.ny.gov/coog/emailrequest.html>;
<http://www.dos.ny.gov/coog/emailresponse.html>
- Regulations promulgated by the Committee (21 NYCRR Part 1401)
<http://www.dos.ny.gov/coog/regcoog.html>

- “Your Right to Know,” a guide to FOIL and OML that includes sample letters of request and appeal, as well as links to a variety of additional material.
http://www.dos.ny.gov/coog/Right_to_know.html
- “You Should Know”, which describes the Personal Privacy Protection Law
<http://www.dos.ny.gov/coog/shldno1.html>
- An educational video concerning FOIL and OML consisting of 27 independently accessible subject areas
<http://www.dos.ny.gov/video/coog.html>
- Responses to “FAQ’s” (frequently asked questions)
<http://www.dos.ny.gov/coog/freedomfaq.html>;
<http://www.dos.ny.gov/coog/openmeetinglawfaq.html>
- “News” that describes matters of broad public interest and significant developments in legislation or judicial decisions
<http://www.dos.ny.gov/coog/news.html>

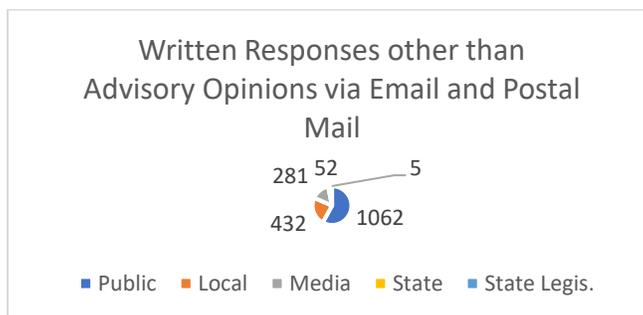
B. Telephone Assistance

This year, Committee staff answered approximately 3037 telephone inquiries, the majority of which pertained to FOIL. We recorded fewer telephone inquiries than in 2018, most likely due to an increased reliance on email and the website.



C. Assistance via Email and Written Correspondence

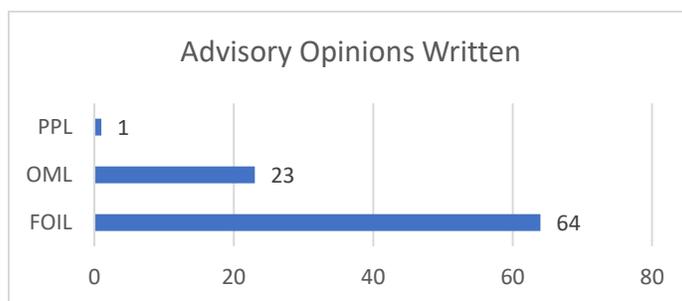
This past year, 1832 written responses to inquiries other than advisory opinions via email and postal mail were prepared in regard to the FOIL and OML. Based on the data captured, the majority of the requests concern issues related to FOIL.



D. Advisory Opinions

Committee staff is conscientious about providing guidance as efficiently as possible, including links to online advisory opinions when appropriate, and therefore, prepared fewer written advisory opinions than in previous years. When a written response from staff contained a substantive opinion with legal analysis, it was recorded as an advisory opinion as before.

Nevertheless, Committee staff prepared 88 advisory opinions in response to requests from across New York. As is true in years past, the majority of the opinions 64 pertained to FOIL.



E. Presentations

An important aspect of the Committee's work involves efforts to educate by means of seminars, workshops, radio and television interview programs, and various public presentations. During the past year, the staff gave 47 presentations. The presentations are identified below by interest group for the period of November 1, 2018 to October 31, 2019. More than 1260 received training and education through those events, and countless others benefitted from the use of the Committee's training video online, materials posted on the website, as well as radio and television programs.

1. Presentations, addresses and training were given before the following groups associated with government:

- Mamaroneck Village Officials, Training, Mamaroneck
- Town of Greenburgh, training, Greenburgh
- Broome County Association of Municipal Clerks Meeting, Binghamton
- Canandaigua Town Department Heads and Supervisors, Training, Canandaigua
- Association of Towns Training School, New York City
- Commack Community Association Meeting, Training, Commack
- Town of Ossining Officials, Training, Ossining
- City College of New York, Training, New York City
- Dutchess County Town Clerks, Training, Milbrook
- Cayuga County Planning & Development Staff, Training, Cayuga
- New York Planning Federation, Bolton Landing
- Long Island Village Clerks and Treasurers Association, Babylon
- NYS Clerks of Legislative Boards Conference, Watkins Glen
- Westchester County Municipal Clerks and Treasurers Association, Hawthorne
- NYS Association of County Clerks, Corning
- New York Association of Mayors, Albany
- NYC FOIL Officers, Training, NYC
- New York Conference of Mayors and Municipal Officials, Cooperstown
- New York Conference of Mayors, Training, Saratoga
- NYS Public Employees Labor Relations Association, Saratoga
- Town of Schuylers Municipal Continuing Education Program, Schuylers
- Cornell Cooperative Extension Executive Leadership Conference, Ithaca
- NYS School Boards Association Annual Conference, Rochester
- Oswego Area Law Enforcement FOIL Training, Oswego
- NYS Town Clerks Association Regional Educational Session, Saranac Lake
- New York Association of Conservation Districts, Cazenovia
- Tompkins County Local Government Conference, Dryden

2. Presentations for students:

- CUNY, Graduate School of Journalism, New York City
- Senate Fellows, Albany
- Excelsior Fellows, Albany
- Ithaca College, journalism students, Ithaca
- Syracuse University, Maxwell School, Humphrey fellows, Syracuse
- SUNY Binghamton, MPA students, Binghamton
- SUNY Albany, journalism students, Albany
- College of St. Rose, journalism students, Albany

3. Presentations for groups associated with the news media:

- WNYC Radio, New York City
- WNYT TV, Albany
- Albany Business Journal, FOIL Training, Albany

4. Other presentations/public forums:

- Nassau Bar Association, Mineola
- Hamilton College, faculty and students, Clinton
- Hofstra University, The Press Club of Long Island, Public Forum
- Westchester Library, Montrose
- NYS Bar Association, New York City (CLE)
- NY Conference of Mayors Training School, Saratoga (CLE, 2 presentations)
- Mid-Hudson Library System FOIL and OML Training, Poughkeepsie
- Legal Services of Central New York, FOIL Training, Syracuse
- NYSBA Task Force on FOIL and the Future of Local Government, Syracuse