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2020 REPORT TO THE GOVERNOR AND STATE LEGISLATURE

Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

- Louis D. Brandeis

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INTRODUCTION & SUMMARY

“Sunlight is the best disinfectant.” Those words, expressed by Judge Louis Brandeis more than a century ago, serve as the foundation of our open government laws, the Freedom of Information Law (FOIL), the Personal Privacy Protection Law (PPPL) and the Open Meetings Law (OML). In these turbulent times the public’s trust and confidence in government make those words more important than ever.

Created as part of the original version of FOIL in 1974, the Committee on Open Government is one of few agencies of its kind in the United States. Although every state has enacted open records and open meetings laws, in most jurisdictions members of the public who have questions or difficulties have no one to call. In New York, the Committee responds to thousands of inquiries annually, provides training and makes an immense amount of useful material available through its website. Through this annual report, the Committee offers recommendations to the Governor and the State Legislature designed to improve open government laws and to enhance the public’s right to information.

Along with the rest of the world, the Committee found its operations and interests significantly affected by the dramatic events of 2020. A global pandemic, civil protests and a contentious election, among other developments, all brought open government issues to the forefront, presenting both challenges and opportunities. By necessity, governmental operations moved from their customary in-person formats with established protocols to “virtual” formats that raised new substantive, procedural and technical issues. In the area of law enforcement oversight, long simmering tensions between privacy and disclosure exploded, bringing about the repeal of Civil Rights Law § 50-a – a step long advocated by this Committee.

The current crisis also served to highlight some of the shortcomings in our current methods for allowing public access to government records. Advocacy organizations have written to the Committee to underscore their frustration with the FOIL process as it currently exists. They have referenced anecdotal accounts where FOIL requests were met with “massive delays and endless wrangling,” a problem that they noted predates the current health crisis but has been exacerbated by it.

The Committee believes that this is an issue that warrants the gathering of facts and data so that informed decisions may be made regarding the necessity of reform.

New York State entities now receive over 250,000 FOIL requests annually, many by businesses seeking information to compete and to innovate. Yet the State and local agency resources required to respond to requests are not unlimited. Additional delay caused by the pandemic thus underscored a very real need to reassess our current laws and practices, to consider ways that information technology and proactive disclosure could make government at every level more open and accountable.

The unusual year that will soon pass did indeed bring to light both challenges and opportunities with the laws over which this Committee has responsibility – there are important open government lessons to be learned from developments this year. We urge the Governor and the Legislature to investigate the successes and shortcomings of the ways technology was harnessed to preserve public access to meetings and to explore new technologies and new transparency rules to improve efficiency and reduce the cost of providing access to information essential for our democracy to function and New York’s economy to flourish. The time is ripe for a reassessment of open government in New York.

This annual report to the Governor and the State Legislature includes the following:

- a summary of 2020 legislative amendments to the Freedom of Information Law, including a discussion of the new provisions associated with the repeal of Civil Rights Law § 50-a and the introduction of new provisions concerning lawsuits brought by commercial entities seeking to block disclosure;
- a discussion of temporary modifications to laws during the COVID pandemic to leverage technology, including the Open Meetings Law, effectuated by Executive Order;
- a discussion of the Committee’s support for certain legislative action, including proposed statutory amendments and additions to the Open Meetings Law and Freedom of Information Law which would require certain entities to make meetings more accessible and to proactively disclose some frequently-requested records;
- a discussion of the Committee’s support for other legislative proposals that have featured in the Committee’s previous reports, including the use of cameras in courtrooms and the expansion of the coverage of the Freedom of Information Law to additional governmental entities and the Legislature;
- a summary of significant 2020 court decisions; and
- data reflecting the services provided by the Committee.

2020 LEGISLATIVE AMENDMENTS TO FOIL

A. Amendments to FOIL Enacted with the Repeal of § 50-a of the Civil Rights Law

On June 12, 2020, Governor Andrew M. Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Civil Rights Law § 50-a and amending the Freedom of Information Law (FOIL) to add certain provisions relating to law enforcement disciplinary records. These provisions direct that certain “law enforcement agency” records concerning employee discipline which formerly were not subject to disclosure pursuant to FOIL are now subject to FOIL. The repeal or amendment of the statutory exemption formerly covering law enforcement disciplinary records was the primary legislative recommendation in several of the Committee’s prior annual reports. Briefly stated, pursuant to these amendments, law enforcement disciplinary records which had formerly enjoyed a blanket statutory exemption under Civil Rights Law § 50-a and, correspondingly, FOIL § 87(2)(a), are no longer statutorily exempt and must be analyzed pursuant to FOIL § 87(2)(b)-(q) to determine rights of access.

Following is a discussion of the new provisions and early issues we have encountered since passage of Chapter 96.

1. New “definitions”:

The law now defines “law enforcement agency” in a new § 86(8) as:

a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff’s department, the department of corrections and community supervision, a local department of correction, a local

probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

The law now defines “law enforcement disciplinary record” in a new § 86(6) as:

any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:

- (a) the complaints, allegations, and charges against an employee;
- (b) the name of the employee complained of or charged;
- (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
- (d) the disposition of any disciplinary proceeding; and
- (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency’s complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

The law now defines “law enforcement disciplinary proceeding” in a new § 86(7) as “the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.”

Finally, the law now defines a “technical infraction” within the records of a law enforcement agency employee as:

a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person’s investigative, enforcement, training, supervision, or reporting responsibilities.

2. New provisions concerning specific rights of access to newly-available records:

Under the amended law, if a FOIL request is made for “law enforcement disciplinary records,” § 87(4-a) provides that certain aspects of the records *must* be redacted prior to disclosure and § 87(4-b) states that certain aspects of the records *may* be redacted before disclosure.

New § 87(4-a) provides:

A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.

New § 87(4-b) provides:

A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

3. New instructions relating to the specific information which shall or may be redacted (or withheld) from law enforcement disciplinary records prior to disclosure:

New § 89(2-b) provides that:

For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation; (b) the home addresses, personal telephone numbers, personal cell phone numbers, personal email addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment; (c) any social security numbers; or (d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

Finally, new § 89(2-c) provides that:

For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical

infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

It is not surprising that there have been few reported decisions from the courts relating to these very new provisions of law (the one recent written decision of which we are aware is discussed below) as requesters and agencies are working through the FOIL process with respect to this newly-covered record type. However, since the enactment of these amendments to FOIL, we have seen several themes arise in correspondence with and inquiries to the Committee, which are discussed below.

1. Are former employees covered by the new amendments?

The Committee received multiple inquiries concerning the application of the new amendments to the former employees of law enforcement agencies, and, in the absence of decisional law or legislative history explaining the intention of the new statute, the Committee advised that the new amendments do apply to former employees.

The language added to FOIL by Chapter 96 of the Laws of 2020 replaces the confidentiality provisions of Civil Rights Law § 50-a. In a 2013 decision by the Appellate Division, Third Department, the court rejected a FOIL requester's contention that the protections offered by § 50-a could not be applied to the personnel records of former officers. The court concluded that "whether a document constitutes a personnel record under Civil Rights Law § 50-a does not hinge on whether the officer to whom it relates is a current or former employee of the agency maintaining the record." *Hearst Corp. v. New York State Police*, 109 A.D.3d 32, 35 (3d Dep't 2013). In other words, the protections of § 50-a applied to former employees as well as current employees. In our view, it follows that FOIL, and the provisions added to FOIL by the same statute that repealed § 50-a, would apply to all law enforcement disciplinary records maintained by a law enforcement agency, just as § 50-a did, regardless of the current employment status of the subject individual.

Assuming, *arguendo*, that a court were to determine that the definition of law enforcement disciplinary records does not apply to records of or relating to former employees, as we believe it does, the presumption of access to those records still stands. Section 50-a of the Civil Rights Law has been repealed and no longer applies to any category of records. Accordingly, the records of a former law enforcement employee are either subject to the *new* provisions of FOIL or the provisions of FOIL *otherwise applicable to government records*. A request for disciplinary records relating to a former police officer must therefore still be reviewed in the same manner that a request for disciplinary records of any other public employee is reviewed.

2. Are records created before June 12, 2020, covered?

Another question that has arisen with respect to the FOIL amendments is whether they "have retroactive effect" such that they apply to records maintained by the agency that were created prior to the June 12, 2020, enactment of the new law. In our opinion, this question is not one of retroactivity but rather of consistent FOIL application to records maintained by an agency. In general, it has long been understood by courts and the Committee that FOIL renders records "maintained by an agency," regardless of creation date, subject to disclosure. In other words, the question is not whether the

amendments to FOIL concerning the disclosure of law enforcement disciplinary records have retroactive effect, but rather whether records dating before June 12, 2020, are maintained by the agency at the time of a FOIL request. If such records exist, it is our opinion that FOIL directs that for a request for those records, the agency is required to analyze whether each such record must be disclosed pursuant to FOIL or may be withheld pursuant to one of the exemptions appearing in §§ 87(2)(a)-(q) of the Law.

3. What about unsubstantiated, pending or dismissed charges or complaints?

Perhaps the most contentious question we have been asked is whether the new provisions of FOIL continue to offer a blanket exemption for records reflecting “unsubstantiated complaints” made against law enforcement agency employees. There has never been specific language in FOIL addressing “unsubstantiated complaints,” either before or since amendment this year. Moreover, there is nothing in the legislative history of the amendments reflecting an intention to specifically deal with unsubstantiated complaints as separate and distinct from any other category of law enforcement agency record. Rather, it appears that FOIL continues to require that “records” be made available unless they are exempt pursuant to one of the provisions of §§ 87(2)(a)-(q) of the Law.

Law enforcement agencies appear to accept that, since the repeal of § 50-a, FOIL requires that they make substantiated complaints available, subject to a review for specific rights of access. However, many law enforcement agencies have questioned whether there continues to be a blanket exemption protecting from disclosure *unsubstantiated* complaints as a distinct category of records.

By July 2020, the Committee had received multiple inquiries on this precise question and no court had ruled on it. On July 27, 2020, the Committee issued an opinion advising that there is no longer a blanket exemption for any law enforcement agency records since the repeal of Civil Rights Law § 50-a. Rather, the Committee advised that, in the absence of judicial precedent or legislative direction, FOIL does not require a law enforcement agency to disclose “unsubstantiated and unfounded complaints against an officer” *where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy* pursuant to FOIL § 87(2)(b) (or is otherwise exempt pursuant to one of the delineated exemptions in FOIL). Our conclusion was that, in light of the repeal of § 50-a, a request for disciplinary records relating to a police officer must now be reviewed in the same manner as a request for disciplinary records of any other public employee long has been.

In October 2020, the New York State Supreme Court in Erie County upheld the validity of the new FOIL amendments against a challenge by a Buffalo police union seeking an injunction against the release of unsubstantiated complaints of police misconduct made against its members. The court’s ruling was consistent with the Committee’s July advice. The Court, in refusing to enjoin the release of the records, held that such records were no longer protected by the blanket exemption for all police disciplinary records contained in the repealed Civil Rights Law § 50-a. The court found, however, that while there is no longer a statutory exemption for unsubstantiated (or any other type of) complaints, the provisions of FOIL do apply to such records and, accordingly, made it clear that its “rulings do not mean that police disciplinary records . . . shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the exemptions set forth in the Public Officers Law, including § 87(2)(b).” *Buffalo Police Benevolent Association, Inc. v Brown*, ___ N.Y.S.3d ___, 2020 WL 6039110, at *4, 2020 N.Y. Slip Op. 20257 (Supr. Ct. Erie Co. October 9, 2020).

Because the amendments are so new and no court has yet to formally address any of the substantive provisions thereof, the Committee believes it is premature to offer suggestions for any possible additional changes or clarifications in this report. However, the Committee will continue to monitor inquiries, court decisions and other developments and may offer such suggestions in its reports in the coming years.

B. Amendments to FOIL Dealing with Lawsuits by Commercial Entities to Block Disclosure

FOIL includes unique provisions concerning the treatment of records that a commercial enterprise is required to submit to a state agency 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 enterprise has fifteen days to initiate a judicial proceeding to block disclosure. In such a case, the enterprise 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. Since the issuance of our last annual report on December 20, 2019, Governor Cuomo signed into law Chapter 707 of the Laws of 2019, which includes language intended to resolve this problem of delay and expedite this 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.

LEVERAGING TECHNOLOGY TO ENHANCE TRANSPARENCY DURING THE COVID PANDEMIC

In 2020, due to restrictions and limitations required to combat the COVID-19 pandemic, many governmental organizations have had to rethink how they interact with the public. In response, Governor Andrew M. Cuomo temporarily modified or suspended aspects of some laws designed to ensure continued transparency during the global health emergency. The Committee views the steps taken to promote openness in the face of the pandemic as an important learning opportunity: a chance to see if new technologies leveraged during this emergency can transform open government, contribute to improved efficiency and save money.

On March 12, 2020, Governor Cuomo, in response to a disaster emergency declared pursuant to New York State Executive Law § 28, issued Executive Order 202.1 suspending certain aspects of the Open Meetings Law (the “OML”) relating to in-person attendance (the “Order”). The Order provides, in relevant part:

Suspension of law allowing the attendance of meetings telephonically or other similar service:

Article 7 of the Public Officers Law, to the extent necessary to permit any public body to meet and take such actions authorized by the law without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.

Many public bodies subject to the requirements of the OML have contacted the Committee since March seeking advice on how best to comply with these temporary changes to the Law. Some common themes have emerged, and below we discuss how the Committee has addressed these inquiries (both formally by the issuance of opinions and informally in response to telephone or other requests):

1. What is a transcript? Are minutes still required?

The Order imposes a new, temporary, “transcription” requirement on public bodies. Many smaller public bodies without access to sophisticated technology or a large staff have inquired about the specifics of this new requirement. The Committee has advised that this new temporary requirement calls for a “word for word” transcript of a meeting held remotely, but that such transcript need not be prepared by a professional transcription service. Rather, the transcript can be made from the recording of the meeting that is also required by the Order. Moreover, the Committee has learned that many of the free remote meeting platforms in use by public bodies contain a free “transcript” function that prepares an acceptable transcript from its recording of the meeting.

2. Can a public body limit attendance in the online platform?

The fundamental premise of the OML is that any person who is interested in the deliberations of a public body may be present to view and listen to such deliberations as they occur. The Order is consistent with that fundamental premise. The Committee has advised that any meeting that occurs “remotely by conference call or similar service” pursuant to the Order must be available to anyone who wishes to tune in. The Committee has consistently opined that a public body may not artificially limit attendance at its meetings – to do so would not be consistent with the requirements of the OML.

3. Can a public body combine in-person and remote attendance?

Some public bodies may be ready to re-commence essential meetings “in person.” However, such meetings must comply not only with the requirements of the OML but also with the Governor’s executive orders and other guidance concerning limitations on physical gatherings. Accordingly, any meeting of a public body covered by the provisions of the OML must permit any member of the public who wishes to attend in person to attend but must also comply with the Governor’s orders and any guidance or regulation promulgated by the Governor’s administration or the New York State Department of Health.

The Committee has advised that if a public body can reasonably anticipate that any persons who may wish to physically attend a meeting governed by the provisions of the OML cannot be safely physically accommodated in the proposed meeting location pursuant to legal and regulatory restrictions, that public body is required to simulcast to the public, by either video or audio means, the proceedings of the meeting as they are occurring so that all members of the public who wish to “attend” may do so safely.

4. Can a public body convene a quorum of remote members?

In the Committee’s view, the plain language of the Order temporarily suspends the requirement that otherwise exists pursuant to the provisions of the OML and General Construction Law that members of the Board be physically convened or convened by videoconferencing in order to achieve a quorum and conduct the public business of the Board.

5. Do members of public bodies participating remotely have to disclose their locations?

The Order may fairly be read to temporarily suspend the OML requirement that notice of the meeting include the physical location of each Board member who is participating by telephone or similar means.

Governor Cuomo made these temporary revisions to requirements of the OML to address an emergency, but that emergency has afforded an opportunity to experiment with new technologies and new approaches to government transparency. New York's courts, both state and federal, have also responded to the COVID crisis by using communications technologies in new and innovative ways. While the Committee has only anecdotal evidence of the impact of these measures, there are substantial indications that new communications technologies can allow governmental bodies to conduct their business in new ways that are more transparent, more efficient and more effective.

For example, retaining the ability for public bodies to regularly conduct open meetings using audio-visual platforms where all officials are visible to each other and the public can fully observe what transpires, can make it easier to attain a quorum and facilitate greater public engagement and allows the easy recording of a visual transcript for future use. This technology promotes efficiency by reducing travel times and wait times for both the participants and the public and may reduce the carbon impact of the meeting by eliminating travel that would otherwise be required. In areas of the state where the technology for members of the public who wish to view a meeting remotely from their homes does not yet reliably exist, public bodies can continue to make provisions for live locations for the public to safely gather to view the meeting.

The potential benefits from new communications technologies seem equally promising in other forums where the costs associated with in-person appearances and wait times might be substantially reduced. Some states are farther forward in seeking to exploit the benefits of technology to make government more transparent and efficient. In Texas, for example, some courts conduct business with the litigants and the judge connected online, while public proceedings are live streamed for public observation online. This has reportedly improved both access to and the quality of justice, particularly among lower income and disadvantaged individuals for whom the need to travel to a courtroom can often impose insurmountable childcare, job-related or other economic burdens.

The Committee recognizes that expanded use of new technologies will raise many questions concerning data security, archiving and storage, capacity, and other issues. However, it is imperative that access to government records and meetings be enhanced through the utilization of resources available in the digital age, and the potential for greater transparency, improved efficiency and cost savings seem tangible and significant and we believe this potential should be studied. In that connection, we encourage the Legislature and the Governor to embark on a comprehensive review of the impact of COVID-related temporary measures concerning transparency and access and investigate ways other states are utilizing new technologies to advance open government. Such an undertaking is a necessary first step if New York is to enhance government openness in ways that might increase transparency while decreasing costs, both for governmental entities and for those who live in and do business here. The Committee stands ready to assist such an effort in any way that would be useful.

2020 COURT DECISIONS OF NOTE

Forsyth v. City of Rochester, 185 A.D.3d 1499 (4th Dep't 2020)

Fourth Department held that City could not charge petitioner fee for costs associated with its review or redaction of body-worn camera footage requested by petitioner.

Gannett Satellite Info. Network, LLC v. New York State Thruway Auth., 181 A.D.3d 1072 (3d Dep't 2020)

Third Department upheld trial court's decision dismissing petition as moot and denying the award of attorney's fees. Court held that petitioner did not establish that Thruway Authority either lacked reasonable basis for denying access to requested records or failed to respond to FOIL request within statutory time, as required to recover counsel fees in its FOIL action. Court opined that even though Authority adjusted its anticipated response date several times over nine-month period (in writing before expiration of previously set anticipated date), its actions were consistent with law by it providing written acknowledgment that it had received petitioner's FOIL request within five business days of receipt of request and by providing a statement of approximate date by which it would respond.

Meola v. Doe, 131 N.Y.S.3d 846 (Supr. Ct. Putnam Co. 2020)

Court affirmed opinion of the Committee that a complainant's identity can be withheld in response to a FOIL request on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Court opined that the complainant's identity is considered irrelevant to the substance of the complaint and how such complaint was processed by the government agency.

LEGISLATIVE RECOMMENDATIONS

A. Additional Proactive Disclosure Will Increase Public Access to Government Records

One of the most frequent complaints to the Committee relates to the unavailability of “public 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 governmental efforts toward proactive disclosure such as those discussed herein as an efficient means of facilitating quicker and easier public access to public records.

An example of a larger scale effort to render public records of substantial public interest more easily accessible to the public, in 2019, 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 [of information] technology [services] and state archives.” After being passed by the Senate, the bill failed to advance in the Assembly. It was placed on the Senate Floor Calendar again in 2020.

While the Committee commends and generally supports the intention of these bills, we note that there could be significant financial implications to the affected governmental bodies associated with compliance with the requirements thereof. Further, the proposed bill expressly leaves to governmental discretion the determination of which records are of interest to the public and should therefore be proactively disclosed. The Committee believes that these issues could cause disputes between members of the public and government entities that could give rise to unintended delays to access to records. Such disputes could severely undercut the intended benefits of these bills.

Examples of more targeted and practical approaches to facilitate ease of access to public records are more likely to avoid dispute and hasten public access to government records. For example, open government advocates have recommended legislation requiring agencies to maintain on their websites a virtual “reading room” of records that are frequently requested. Proactive publication of a record that is frequently requested would save members of the public the necessity of making their own requests and provide instant access to the desired record. The Committee believes that mandating the public posting of frequently, or even already, requested records introduces few logistical or financial obstacles to such bodies.

Another example of a practical approach to facilitate access to frequently-sought public records would be a requirement to proactively post on the relevant municipal websites, if such websites are maintained by the municipality, the annual Financial Disclosure Forms of local government elected officials. The intent of such a requirement would be to mirror the requirement that already exists for state government elected officials. The Committee does not believe that such a requirement would impose undue obligations on localities maintaining a website, and may reduce FOIL volume for such municipalities.

Several bills have been introduced in the Legislature during the current session that involve the proactive disclosure of specific government records. Assemblymember Paulin has introduced several targeted bills increasing proactive disclosure of identified government records.

In A10983A, Assemblymember Paulin seeks to amend § 103(e) of the OML to add a requirement that records subject to that provision be made available to the public at least twenty-four hours prior to the open meeting and to remove the “to the extent practicable” language therein. The bill has been referred to the Assembly Governmental Operations Committee. Section 103(e) of the OML would read:

Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, ~~[to the extent practicable as determined by the agency or the department,]~~ **at least twenty-four hours** prior to ~~[or at]~~ the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website ~~[to the extent practicable as determined by the agency or the department,]~~ **at least twenty-four hours** prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

A10983A would also amend §103(f) of the OML to require all public bodies, not just public bodies associated with State agencies and authorities, which maintain a website and utilize a high-speed internet connection, to stream open meetings in real time and post the recordings on their websites, and maintain such recordings for five years. Section 103(f) of the OML would read:

Open meetings of ~~[an agency or authority]~~ **a public body** shall be, to the extent practicable and within available funds, broadcast to the public and maintained as records of the agency or authority. If the ~~[agency or authority]~~ **public body** maintains a website and utilizes a high speed internet connection, such open meeting shall be, to the extent practicable and within available funds, streamed on **or available through** such website in real-time, and **video recordings of such open meetings shall be** posted on such website within **five business days of the meeting** and for a reasonable time after the meeting **and such recordings shall be maintained for a period of not less than five years.** ~~For purposes of this subdivision, the term “authority” shall mean a public authority or public benefit corporation created by or existing under any state law, at least one of whose members is appointed by the governor (including any subsidiaries of such public authority or public benefit corporation), other than an interstate or international authority or public benefit corporation.~~

The Committee supports the intention of A10983A and believes that these amendments may be appropriate and encourages the legislature to study and evaluate whether these changes may impose unanticipated burdens on public bodies. In addition, the Committee notes that the proposed five year retention period for posted meeting recordings is considerably longer than the four-month period currently required by the otherwise applicable record retention and disposition schedules established by the New York State Archives for State and local governments. The Committee would therefore recommend consulting with the New York State Archives to understand the possible ramifications of this alteration before passage.

Assemblymember Paulin has also proposed an amendment to § 106(3) of the OML to add a requirement that public bodies that maintain a regularly updated website and utilize a high-speed internet connection post their minutes to their websites – rather than simply having them available upon request as is already required – within two weeks of a meeting. Pursuant to the bill, A11142, § 106(3) would provide:

Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two [hereof] **of this section** shall be available to the public within one week from the date of the executive session. **If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high-speed internet connection, such minutes shall be posted on the website within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two of this section shall be available to the public within one week from the date of the executive session.**

The Committee supports the intention of A11142 and believes that adding a requirement to post minutes within the time that they are already statutorily required to be available to the public presents no logistical or financial obstacles to bodies that maintain a regularly updated website and utilize a high-speed internet connection. The Committee notes that entities whose minutes will still be in draft form at the time of the posting requirement may choose to identify such fact by placing the word “draft” on such minutes before posting them.

B. Clarify FOIL to More Strictly Define the Period for Providing Requested Records

In 2019, Senator Harckham and Assemblymember Buchwald introduced bills (S6608A/A0119A) that would clarify the required response periods for FOIL requests. While the Committee has opined that a series of extensions providing progressively later dates certain by which an agency will respond to a FOIL request is not consistent with the intent of FOIL, New York courts have not agreed with this opinion. These bills would address this issue (and some of the other technical concerns the Committee has raised relating to compliance with FOIL). This bill would clarify the intent of the legislature for FOIL requesters and governmental entities subject to FOIL by more strictly defining 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.**

The bill would also amend FOIL to clarify the following:

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, that "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.

The bill passed the Assembly in 2019 and again in 2020 but has yet to advance in the Senate.

C. Transparency is Enhanced by 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. The bill was referred to the Senate and Assembly

Judiciary Committees in 2019 but failed to advance. It was referred again to the same committees in 2020.

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 Buffalo News v. Buffalo Enterprise Development Corp.*, 84 N.Y.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.

In 2019, Senator Skoufis and Assemblymember Schimminger introduced a bill (S5263/A2399) to amend FOIL consistent with the above proposal. However, the bill failed to advance beyond the Senate Rules Committee and Assembly Governmental Operations Committee. The bill was again referred to committees in 2020.

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

Currently, the Joint Commission 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 to their operations. 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.

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, § 87(3)(a) is an obligation that agencies maintain records indicating the manner in which its members cast their votes. Because FOIL does not apply to JCOPE, the public has no way of knowing whether or how its members vote on matters that come before the Commission. The absence of accountability of that nature breeds mistrust and clearly warrants the change that we seek.

In 2019, 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. The bill was referred to the Office of the Attorney General for an opinion in 2020 and that opinion was shared with the Assembly Judiciary Committee. The bill has yet to advance beyond that committee.

F. 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:

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 but the bill failed to advance beyond the Senate Codes Committee. In addition, Senator Skoufis and Assemblymember Englebright introduced bills (S5496/A3939) which would, among other things, amend § 50-b as proposed by the Committee. S5496/A3939 was passed by both houses of the legislature but was vetoed by the Governor in December 2019. The veto message stated, in part, that law enforcement agencies and district attorneys had expressed concern that "the identity of a victim and other identifying case information could be released, thereby causing a victim's traumas to be prolonged or relived." The Governor stated, however, that he "support[s] the overarching goal of this legislation to encourage transparency in government and pledge to work with the Legislature to further these efforts."

G. The Disclosure of 911 Records Should Be Governed By FOIL

Currently records of 911 calls are, in most instances, confidential, even when it is in the public's interest to disclose. 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 E911 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 – *i.e.*, to prevent unwarranted invasions of personal privacy, to protect victims of or witnesses to crimes, to preclude interference with a law enforcement investigation – FOIL already clearly provides grounds for withholding the records.¹

A proposal to repeal County Law § 308(4) was introduced by Senator Hoylman and Assemblymember Abinanti (S1097 /A1579) in 2019 and referred to the Senate and Assembly Local Governments Committees in 2019 but failed to advance. It was referred again to the same committees in 2020.

H. 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 the same manner as the executive branch. Senator Krueger also introduced a bill (S3940) in 2019 which would do the same. The bill was referred to the Senate Committee on Investigations & Government Operations in 2019 but failed to advance. It was referred again to the same committee in 2020.

¹ County Law does not apply to New York City, which has for years granted or denied access to records of all 911 calls as appropriate pursuant to FOIL.

SERVICES RENDERED BY THE COMMITTEE

1712 TELEPHONE INQUIRIES
1679 RESPONSES TO WRITTEN INQUIRIES
44 FORMAL ADVISORY OPINIONS
23 PRESENTATIONS
4 MEDIA INTERVIEWS
THOUSANDS OF CORRESPONDENTS ADDRESSED
THOUSANDS OF RADIO AND WEBINAR LISTENERS

Committee staff are responsible for providing legal advice and guidance in response to verbal and written inquiries concerning New York's Freedom of Information, Open Meetings, and Personal Privacy Protection Laws from representatives of the government, public, and news media. In that connection, on a yearly basis Committee staff track, log and respond to thousands of phone and written inquiries, prepare hundreds of formal and informal legal advisory opinions, and provide open government laws training to dozens of interested groups. For purposes of the data presented in this report, the Committee's reporting year is November 1, 2019, through October 31, 2020.

2020 has been, for everyone, an unprecedented year about which no one can make reliable assumptions and with which no other year may compare – and perhaps differences in the provision of services might be explained by the circumstances presented this year. However, notwithstanding the pendency of a global pandemic that has changed virtually everything about how our constituencies interact with each other and with government, the small staff at the Committee have been able to continue to provide normal service levels to our correspondents. Staff have made every effort to provide needed services consistent with public health advice and state and local directives, guidance and regulation. In fact, Committee staff responded to 100% of the inquiries received and have been able to conduct training or present on open government issues whenever requested.

During the past year, the Committee responded to over 1,700 telephone inquiries, over 1,600 requests for guidance answered by email or U.S. mail and responded to 44 requests for formal advisory opinions regarding FOIL, the OML and Personal Privacy Protection Law (PPPL). In addition, staff gave 23 presentations for government and news media organizations, on campus and in public forums, training and educating approximately 2,000 people concerning public access to government information and meetings. Further, staff participated in four wide-ranging media interviews. 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 25,000 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/regskoog.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>
- Responses to "FAQs" (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 1,712 telephone inquiries, the majority of which pertained to FOIL. However, this year, a larger proportion than normal pertained to the Open Meetings Law.

C. Informal Advisory Opinions and Written Inquiry Responses

This past year, the Committee issued 1,679 informal advisory opinions and written inquiry responses by email and postal mail regarding FOIL, OML and the PPPL. Based on the data captured, the majority of the requests concern issues related to FOIL.

D. Formal Advisory Opinions

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

Committee staff prepared 44 formal advisory opinions in response to requests from across New York. As is true in years past, the majority of the opinions 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 reporting year, staff gave 23 presentations to organizations and entities identified below by interest group. Although the number of individual presentations was lower than in past years due to restrictions on in-person gatherings, we estimate that close to 2,000 individuals received contemporaneous training and education through those events, and countless additional individuals benefitted from recordings of these programs posted on entity websites and materials posted on the Committee website.

Organizations:

Association of School Business Officials New York
Association of Towns, Training for Newly Elected Officials (Albany)
Association of Towns, Training for Newly Elected Officials (Rochester)
City of Auburn/Cayuga County Law Enforcement FOIL Training
Empire State Fellows' Leadership and Learning Session
International Center of the Capital Region, Armenian Parliament Delegation
Judicial Institute CLE Recording
New York Coalition for Open Government OML webinar
New York State Teachers Centers
New York Conference of Mayors Fall Training School (FOIL)
New York Conference of Mayors Fall Training School (OML)
NYS Association of Counties
NYS Association of Municipal Purchasing Officers
NYS Conservation District Employee Association Water Quality Symposium
NYS School Board Association Annual Convention
New York State Association of Counties webinar regarding Executive Order 202.1
New York State Bar Association webinar regarding Executive Order 202.1
New York State Bar Association State and Local Government Section CLE
Patterns for Progress webinar regarding Executive Order 202.1
Planning Board Association webinar regarding Executive Order 202.1
Rockland County FOIL Officers FOIL Training
Southern Tier Regional Planning Institute
State Senator Brad Hoylman and Manhattan Borough President Gale Brewer webinar regarding Executive Order 202.1

Media Interviews (as opposed to responses to specific inquiries about FOIL, OML or PPPL):

Glens Falls Post Star
New York Public Radio/Gothamist
Gannett/USA Today
Cortland Standard