

## **COMMITTEE ON OPEN GOVERNMENT**

STATE OF NEW YORK  
**DEPARTMENT OF STATE**  
ONE COMMERCE PLAZA  
99 WASHINGTON AVENUE  
ALBANY, NY 12231-0001  
TELEPHONE: (518) 474-2518  
FAX: (518) 474-1927  
[WWW.DOS.NY.GOV/COOG/](http://WWW.DOS.NY.GOV/COOG/)

### **COMMITTEE MEMBERS**

BRIAN A. BENJAMIN  
ROANN M. DESTITO  
PETER D. GRIMM  
HADLEY HERRIGAN  
ROBERT MUJICA, JR.  
ROSSANA ROSADO  
DAVID A. SCHULZ  
STEPHEN B. WATERS

### **CHAIRPERSON**

FRANKLIN H. STONE

### **EXECUTIVE DIRECTOR**

SHOSHANAH BEWLAY

## **MEETING AGENDA NYS COMMITTEE ON OPEN GOVERNMENT September 21, 2021**

1. Welcome and Roll Call
2. Approval of minutes of December 11, 2020, meeting
3. Committee Vacancies and Committee Structure
4. Updates:
  - a. Staff activities
  - b. New Members of Staff
  - c. Current Open Government Issues
  - d. Rebranded Website
  - e. Legislative session/Legislative activities
5. Discussion of Process for Public Comment at Committee meetings
6. Other or New Business
7. Adjourn

# COMMITTEE ON OPEN GOVERNMENT

STATE OF NEW YORK  
DEPARTMENT OF STATE  
ONE COMMERCE PLAZA  
99 WASHINGTON AVENUE  
ALBANY, NY 12231-0001  
TELEPHONE: (518) 474-2518  
FAX: (518) 474-1927  
WWW.DOS.NY.GOV/COOG/

## COMMITTEE MEMBERS

ROANN M. DESTITO  
PETER D. GRIMM  
KATHY HOCHUL  
HADLEY HARRIGAN  
ROBERT F. MUJICA, JR.  
ROSSANA ROSADO  
DAVID A. SCHULZ  
STEPHEN B. WATERS

## CHAIRPERSON

FRANKLIN H. STONE

## EXECUTIVE DIRECTOR

SHOSHANAH BEWLAY

## DRAFT MINUTES

### MEETING OF NYS COMMITTEE ON OPEN GOVERNMENT HELD BY WEBEX PURSUANT TO EO 202.1

December 11, 2020, 10:00am

#### Members Present by Videoconference:

Vilda Mayuga (Secretary of State), William Brusco (OGS), Joel Lombardi (DOB), Peter Grimm, Franklin Stone, David Schulz, Jeff Lewis (Lt. Gov), Stephen Waters

#### Committee Staff Present by Videoconference:

Shoshanah Bewlay, Kristin O'Neill, Candace Watson

#### Welcome:

Quorum present

#### Approval of Minutes:

On motion to approve minutes of the November 19, 2020, meeting, all were in favor and the minutes were approved.

#### Draft Annual Report:

Committee members approved the December 10 draft of the Committee's 2020 Annual Report with minor revisions, including the format of the table of contents, adding formatting to the "Legislative Recommendations" section, revising the last sentence of the fourth paragraph of the "Introduction & Summary" to make it a stand-alone sentence. Once revisions are made, Committee members agreed that Staff should submit it as final.

#### Other or new Business:

The Executive Director gave members an update on: (i) the anticipated rebranding of the Committee website; (ii) status of filling member vacancies; and (iii) a new series of monthly webinars available to all members of the public that will be posted on the Committee website.

Committee members discussed establishing a process for public comments at future meetings. Members agreed that they would hear comment at this meeting pending a future agreed process and three people commented: Tom Speaker, Paul Wolf, and Mary Shai.

**Adjourned at 11:18am**

## 2020-21 Open Government Legislative Summary

### FOIL

[S01667/A07545](#): Relates to expanding the definition of agency; includes 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 in the definition of agency under the public officers law. As of 6/3/21: Passed Senate; referred to governmental operations in Assembly

[S01821](#): Relates to publishing records of public interest by agencies and the legislature on their websites.

[S02004/A06459](#): Permits assessment of certain fees and costs upon wrongful denial of access to records under the freedom of information law when either the person has substantially prevailed and the agency had no such reasonable basis for denying access, or if the agency failed to respond within the statutory time, or when the record is substantially disclosed and the agency lacked a reasonable basis in law for withholding the record. \* **Passed Senate**

[S03120/A00484](#): Authorizes and directs the committee on open government to study proactive disclosure as a means of increasing transparency and access to government information.

[S03988/A04499](#): Waives the ability of government agencies in New York to claim copyright protection except where the record reflects artistic creation, or scientific or academic research, or if the agency intends to distribute the record or derivative work based on it to the public by sale or other transfer of ownership.

[S04863-A/A04667-A](#): Prohibits agencies from charging a fee for records where an electronic copy is already available from a previous request made within the past six months; requires that fees be apportioned equally among requestors when more than one request is made for identical records before such request has been fulfilled.

[S06017/A05470](#): Requires a particularized and specific justification for denial of access to records under the freedom of information law; relates to exemption from disclosure under the freedom of information law of certain law enforcement related records and to records identifying victims. \*\* **Passed Senate and Assembly**

### OML

[S00447](#): Relates to compliance with the open meetings law during a state disaster emergency; provides that during a state disaster emergency, a public body in the affected area may make a determination that, as a direct result of the state disaster emergency, complying with a particular requirement of the open meetings law would unduly threaten the health or safety of members of the public body or the general public. \* **Passed Senate**

[S01150A/A01228A](#): Requires certain documents to be made available for open meetings (adds 24 hour requirement to §103(e)). \*\* **Passed Senate and Assembly**

[S01625A/A00924A](#): Amends the definition of "public body" to include any entity created or appointed to perform a necessary function in the decision-making process. \*\* **Passed Senate and Assembly**

[S03430](#): Requires public officers and public bodies to make proactive efforts to provide qualified interpreters at no charge for the hearing impaired at public meetings and hearings upon written request to

the public officer responsible for the siting of such hearing; requires installation and use of assistive listening devices.

[S04367A/A06960A](#): §103(c) amended to read “a public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any **public** site at which a member participates.” **\*Passed Senate**

[S04387B](#): Directs public bodies that have meetings that allow public comments to provide a means for the public to comment in real time during the time allocated for public comment. **\*Passed Senate**

[S04704-A/A01108-A](#): Requires that minutes taken at a meeting of a public body be posted on the agency's website within two weeks from an open meeting and one week from an executive session. “For purposes of this subdivision unabridged video recordings or unabridged audio recordings or unabridged written transcripts may be deemed to be meeting minutes.” **\*\* Passed Senate and Assembly**

## November 2020 – October 2021 Open Meetings Law Case Law Summary

*Boyd v. Brooklyn Community Board 9*, 193 A.D.3d 1043 (2<sup>nd</sup> Dept. 2021)

Meeting of five community board members (less than a quorum) to draft letter requesting that city planning department conduct study of a proposal to rezone area did not violate Open Meetings Law, where letter was later voted on at public meeting with a quorum present.

*Delgado v. State*, 194 A.D.3d 98 (3<sup>rd</sup> Dept. 2021)

Third Department held that trial court did not abuse its discretion in declining to nullify under the Open Meetings Law the report of compensation committee, which committee could issue recommendations that, under certain conditions, would have the force of law as to compensation of state legislators and certain other state officials; committee held four public hearings, its members discussed and voted on recommendation that would be included in report, purported violations of Open Meetings Law were technical in nature and did not amount to good cause for nullifying committee's actions, and there was no showing that the violations were intentional.

*Komatsu v. City of New York*, No. 20-CV-7046 (ER), 2021 WL 256956, at \*4 (S.D.N.Y. Jan. 26, 2021), reconsideration denied, No. 20 CIV. 7046 (ER), 2021 WL 670778 (S.D.N.Y. Feb. 2, 2021)  
Federal trial court held that petitioner established no violation of New York's Open Meetings Law. Petitioner sought to have meetings of the New York City Council's Committee on General Welfare declared void under the Open Meetings Law. However, a Court may only void such a meeting if the public body "failed to comply" with the law and a plaintiff shows good cause. Unless otherwise required by law to accept testimony, public bodies conducting meetings via videoconference need only "provide an opportunity for the public to attend, listen and observe." There is no general obligation to permit members of the public to testify, and Committee meetings at issue were not of the type in which testimony would have been required.

*Komatsu v. City of New York*, No. 20-CV-7046 (ER), 2021 WL 3038498, (S.D.N.Y. July 16, 2021)  
Southern District of New York declined to exercise federal jurisdiction over petitioner's state Open Meeting Law and FOIL Article 78 claims due to Article 78 proceedings being a, "novel and special creation of state law."

## November 2020 – October 2021 Freedom of Information Law Case Law Summary

*101CO, LLC v. New York State Department of Environmental Conservation*, 189 A.D.3d 1948, 139 N.Y.S.3d 658 (3<sup>rd</sup> Dept. 2020)

Third Department held that after records requesters were deemed on appeal to be the prevailing party in underlying FOIL proceeding against the agency, the trial court's refusal, on remand, to include counsel fees and costs incurred by requesters in their prior appeal of the trial court's determination that they were not the prevailing party amounted to an abuse of discretion, since prior appeal stemmed from agency's failure to timely provide access to public records, which was exactly the kind of unreasonable delay and denial of access to records which the counsel fee provision under FOIL sought to deter.

*Aron Law, PLLC v. New York City Department of Education*, 192 A.D.3d 552, 146 N.Y.S.3d 7 (1<sup>st</sup> Dept. 2021)

First Department affirmed trial court order determining that petitioner had not reasonably described records sought and that DOE met its burden of establishing that the descriptions in the FOIL request were insufficient for purposes of locating and identifying the documents sought.

*Binghamton Precast & Supply Corp. v. New York State Thruway Authority*, --- N.Y.S.3d ----, 196 A.D.3d 944 (3<sup>rd</sup> Dept. 2021)

Third Department partially upholds trial court's dismissal of petitioner's claims regarding FOIL requests pertaining to the solicitation of bids for construction contracts. The Court upheld the dismissal of a request for "[a]ll documents relating to the selection of [entity] as a sole source provider," because the selection of a single supplier of materials does not mean the supplier is the "sole source" within the meaning of State Finance Law § 163(1)(g). However, the Court granted a hearing regarding, and overturned the dismissal of, petitioner's request for "[a]ll 'backdrop contracts' awarded to [entity]," because a letter from the Comptroller indicated that "[respondent] procured certain precast products. . . pursuant to other competitively bid backdrop contracts." As such, petitioner met the burden "to articulate a demonstrable factual basis to support [its] contention that the requested documents existed and were within [respondent's] control."

*Broach & Stulberg, LLP v. New York State Department of Labor*, 195 A.D.3d 1133, 150 N.Y.S.3d 336 (3<sup>rd</sup> Dept. 2021)

Respondent agency advised petitioner that it was not able to produce the requested documents because it did not have them in its possession as they were created and maintained by a union in order for it to demonstrate its compliance with Labor Law, and to maintain its status as an active sponsor of apprenticeship programs. Third Department found that the definition of "record" is not so broad and all-encompassing as to bring within its ambit any document that a private entity, such as a union, might create and maintain pursuant to a state agency's regulation under the guise that said records are held "for" that agency

*Burns v. Cooke*, 189 A.D.3d 826, 133 N.Y.S.3d 476 (2<sup>nd</sup> Dept. 2020)

Second Department upheld trial court's determination denying the petition and, in effect, dismissing the proceeding relating to a FOIL request to the New York City Department of Correction for records relating to a former inmate. Court found that the DOC met its burden of establishing that the records that were not provided to the petitioner are exempt from disclosure pursuant to § 87(2)(f) of FOIL based on the fear of retaliation.

*Carr v. Bill de Blasio, Mayor of the City of New York, et al.*, --- N.Y.S.3d ----, 197 A.D.3d 124 (1<sup>st</sup> Dept. 2021)

First Department affirmed the grant of a petition for summary inquiry pursuant to New York City Charter § 1109 regarding the fatal arrest of Eric Garner. In part, the Court held a previous FOIL request relating to the subject-matter of the summary inquiry petition did not preclude the use of a §1109 summary inquiry because § 1109 contained no restriction regarding the availability of FOIL and petitioners demonstrated

respondents' lack of response to their FOIL requests. The Court further noted any material uncovered by a FOIL request would be subject to redactions and exemptions not applicable in a summary inquiry.

*Clayton v. Wetmore*, 195 A.D.3d 1264, --- N.Y.S.3d ---- (3<sup>rd</sup> Dept. 2021)

Third Department affirmed trial court's determination that a pending appeal exempts underlying criminal trial exhibits from FOIL request under Public Officers Law § 87(2)(e)(i), which provides a governmental agency may deny access to records where such records "are compiled for law enforcement purposes and which, if disclosed, would ... interfere with law enforcement investigations or judicial proceedings." The Third Department also affirmed the trial court's ruling that § 255 of the Judiciary Law, requiring a court clerk to conduct a record search upon the payment of fees, cannot be used to compel a district attorney to produce records.

*Dioso Faustino Freedom of Info. L. Request v. New York City*, 191 A.D.3d 504, 142 N.Y.S.3d 502 (1<sup>st</sup> Dept. 2021)

First Department held that petitioner substantially prevailed when police department, during the pendency of FOIL proceeding, voluntarily disclosed the records sought in FOIL request for video footage from body cameras worn by officers during an incident in which deadly force was used, as required to be entitled to be entitled to attorney fees and litigation costs. The voluntariness of government record disclosure is irrelevant to the issue of whether petitioner substantially prevailed in FOIL proceeding for purposes of awarding attorney fees and costs.

*Disability Rights New York v. New York State Commission of Correction*, 194 A.D.3d 1230 (3<sup>rd</sup> Dept. 2021)

Third Department held that inmate death forms provided the initial factual report with respect to an inmate's death and triggered the investigatory process, and thus, were compiled for law enforcement purposes, supporting denial of petition seeking to compel production of inmate death forms under law enforcement exemption to under FOIL. Court opined that an adequate factual basis for applicability of the law enforcement exemption to under FOIL was provided, supporting denial of petition seeking to compel production of inmate death forms.

*Empire Center for Public Policy v. NYS Department of Health*, Supreme Court, Albany County (February 3, 2021)

Court held that agency's claim that petitioner failed to exhaust administrative remedies was without merit wherein petitioner appealed agency's alleged failure to comply with the time limits for response set forth in § 89(3)(a) of FOIL. Court found that agency violated §89(3)(a) by failing to provide an "approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied." Guided by the factors set forth in Committee regulations, Court opined that agency had not provided a reasonable explanation for the delay and held that it was not persuaded that agency's estimated date of response was reasonable under the circumstances.

*Empire Center. for Public Policy v. New York State Energy & Research. Development Authority*, 188 A.D.3d 1556, 137 N.Y.S.3d 540 (3<sup>rd</sup> Dept. 2020)

Sworn attestations by agency officials that agencies did not possess completed requested study satisfied agencies' obligations FOIL with respect to request for electronic copies of study. Officials attested that study referenced in press release had not yet been completed at time of FOIL request.

*Empire Center. for Public Policy v. New York City Police Pension Fund*, 188 A.D.3d 595, 132 N.Y.S.3d 750 (1<sup>st</sup> Dept. 2020)

First Department held that respondent met its burden of showing a possibility that disclosure of police officer retirees' names could endanger the lives or safety of police retirees, as required to exempt them from disclosure pursuant to § 87(2)(f) of FOIL by submitting affidavits outlining the dangers faced by police officers generally, and detailing the risks retired officers faced, including thefts of handguns and assaults by persons they had arrested during their careers.

*Gaston v. New York City Department of Housing Preservation & Development*, 193 A.D.3d 643, 143 N.Y.S.3d 192 (1<sup>st</sup> Dept. 2021)

First Department held that agency properly conditioned production of responsive documents on petitioner's payment of the fee (estimated at \$2,500 to \$2,700) for photocopying more than 10,000 pages of documents to be redacted of identifying details.

*Hutchinson v. Annucci*, 189 A.D.3d 1850, 136 N.Y.S.3d 560 (3d Dept. 2020)

Third Department held that Department of Corrections and Community Supervision (DOCCS) records relating to staff evaluations of inmates in special housing unit (SHU), were exempt from disclosure under FOIL on grounds that, if disclosed, they could endanger the life or safety of the staff that made the evaluations. Court noted that disclosure of staff evaluations created safety concerns because the reports were often handwritten, and therefore potentially identified the staff member who made them, and commented upon SHU inmates' behavior, attitude, and progress, and were relied upon to determine if an inmate's time in SHU should be reduced. Court also held that failure by DOCCS to invoke "endanger life or safety" FOIL exemption in its initial did not preclude trial court from addressing applicability of the newly raised exemption in article 78 proceeding, where confidentiality rights of third parties not before the court, that is the safety concern of SHU staff, were implicated by the disclosure determination.

*Jewish Press v. Metropolitan Transportation Authority*, 193 A.D.3d 460, 141 N.Y.S.3d 707 (1<sup>st</sup> Dept. 2021)

First Department held that petitioner's request for "all requests for religious accommodations (such as, dress, shifts etc.) by employees and the result thereof ... includ[ing] details of the request, the job title and date," during a certain three-year period, failed to describe the documents sought with sufficient specificity as to permit respondent to identify and locate them. Respondent submitted an affidavit of its Director of Human Resources explaining that such information is not stored in any centralized manner, and that the only way to attempt a complete response to the FOIL request would be to have the agency's thousands of employees search through their paper and electronic records. Accordingly, respondent established a valid basis for denying the FOIL request by showing that any responsive records are not indexed in a manner that would enable the identification and location of documents in the agency's possession.

*Jewish Press, Inc. v. New York City Department of Education*, 190 A.D.3d 737, 135 N.Y.S.3d 882 (2<sup>nd</sup> Dept. 2021)

The petitioner previously appealed a judgment which dismissed its CPLR article 78 proceeding to compel compliance with its request pursuant to FOIL, seeking the production of certain records from the DOE. Appellate Division reversed that judgment, reinstated the petition, and remitted the matter to the trial court for further proceedings (see *Matter of Jewish Press, Inc. v. New York City Dept. of Educ.*, 183 AD3d 731 (2<sup>nd</sup> Dept. 2020)). The trial court granted petition, however, the Second Department found that it failed to conduct further proceedings, including the taking of additional submissions on the issues of burden, cost and reimbursement, in accordance with the Second Department's decision and order. Accordingly, the Second Department reversed the judgment and remitted the matter for further proceedings in accordance with its previous decision and order.

*Jewish Press, Inc. v. New York City Department of Housing Preservation & Development*, 193 A.D.3d 483 (1<sup>st</sup> Dept. 2021)

Four-month limitations period to challenge agency's administrative decision in response to FOIL request began to run when agency constructively denied petitioner's timely appeal by failing to respond within statutorily mandated 10 business-day period.

*Jewish Press, Inc. v. New York City Dep't of Investigation*, 193 A.D.3d 461 (1<sup>st</sup> Dept. 2021)

First Department held that agency failed to demonstrate that disclosure of records responsive to petitioner's FOIL request would interfere with law enforcement investigations or judicial proceedings. Court opined that even if an investigation or ensuing judicial proceeding were ongoing, agency made broad arguments for withholding all of the responsive records, which, if accepted, would have amounted to a blanket exemption that would have seemingly applied to virtually all records of any investigation conducted by agency. Court also held that agency failed to establish that disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation" and that agency's assertion that disclosure would reveal nonroutine "criminal investigative techniques or procedures" was conclusory.



*Jewish Press, Inc. v. New York City Police Department*, 190 A.D.3d 490, 140 N.Y.S.3d 485 (1<sup>st</sup> Dept. 2021)

NYPD failed to meet its burden of showing a particularized justification for withholding from newspaper records concerning a traffic accident under FOIL law enforcement exemption; Traffic Violations Bureau (TVB) hearings were judicial proceedings, and as such were subject to FOIL requests, and even though department asserted any release of documents would somehow tip hand of TVB's prosecuting attorney or prevent prosecutor from testing recollection of witnesses, department conceded documents would be released to motorist who would not be under any legal admonition not to release documents to others.

*Legal Insurrection Foundation v. SUNY Upstate Medical University*, Index# 0003459/2021 (Supreme Court, Onondaga County, 2021)

Court largely sustained FOIL Appeals Officer's denial of petitioner's FOIL requests for "all records" or "all records received, reviewed or created," as impermissibly broad under FOIL § 89(3). However, the Court overturned the denial of two requests. First, the Court held a request for "all records received, reviewed, or created by the Diversity Task Force Chair, Daryll Dykes, PhD, MD, JD, regarding the business of the Diversity Task Force and/or Implement and Oversight Tiger Teams," is not impermissibly broad under the standard established in *Matter of Pflaum v. Grattan*, 116 A.D.3d 1103 (3d Dept 2014), which held that a request which involve records that were electronically maintained and pertained to one individual reasonably described the records sought. Second, the Court held a request for "meeting minutes, meeting agendas and presentation material" are routine records subject to disclosure as being reasonably described.

*Lepper v. Village of Babylon*, 190 A.D.3d 738, 140 N.Y.S.3d 533 (2<sup>nd</sup> Dept. 2021)

Where a public agency's letter denying a Freedom of Information Law (FOIL) request does not inform the records requester that further administrative review of the determination is available, the requirement that the records requester must exhaust administrative remedies prior to bringing an appeal is excused.

*Maldonado v Workers' Compensation Board*, 148 N.Y.S.3d 913 (2<sup>d</sup> Dept. 2021)

Second Department upheld trial court's dismissal of petitioner's Article 78 petition because petitioner failed to exhaust all administrative remedies after filing an untimely appeal of a denied FOIL request.

*McGee v. Bishop*, 192 A.D.3d 1446 (3d Dept. 2021)

Petitioner contended that respondents disclosed copies of two federal cases but improperly withheld copies of other cases, based on the RAO's statement, in his response to the first FOIL appeal, that "some research was performed during the review that involved case law." The footer information on the two federal cases that were provided to petitioner indicate that they were located on and printed from the website of an online legal research company. Third Department determined that the DA conducted additional legal research on that website but did not print or save any other cases, so he did not create another record and had nothing further to disclose. As an agency is not required to create a new document to make its own records transferable, it logically follows that an agency is not required to print out or make an agency document for every webpage of another entity that is viewed by employees of the agency. Court opined that cases on a legal research company's website are not being held "by, with or for an agency."

*National Lawyers Guild, Buffalo Chapter v. Erie County Sheriff's Office*, 196 A.D.3d 1195, 148 N.Y.S.3d 816 (4th Dept. 2021)

After conducting an in-camera review of the subject documents, the Fourth Department modified the trial court order in that it agreed with respondent that the trial court erred in ordering disclosure of certain record determined to constitute intra-agency or inter-agency material.

*New York Civil Liberties Union v. City of Syracuse*, -- N.Y.S.3d. --, 2021 WL 1804382 (Supreme Court, Onondaga County, 2021)

Court held that neither city nor its police department were required to produce documents related to unsubstantiated complaints against police officers under FOIL to requester, even though Civil Rights Law §50-a, which deemed police discipline records confidential as personnel records and limited disclosure

thereof, was repealed. Court held that repeal of CRL §50-a did not alter previously existing privacy considerations and exceptions to public disclosure under FOIL, whereas disclosure of unsubstantiated claims constituted an unwarranted invasion of personal privacy.

*New York Lawyers for Public Interest v. New York City Police Department*, 192 A.D.3d 539, 140 N.Y.S.3d 696 (1<sup>st</sup> Dept. 2021)

First Department modified trial court order granting petition by directing respondents to produce all records sought by petitioner, except that video footage of murder victim should be redacted by blurring images of victim's body and blood spatter, and remanding the matter to trial court for further proceedings, including in camera review as necessary. Court held that respondents did not meet their burden of showing that the video and audio footage should be redacted to remove victim's home address and to blur the faces of bystanders at the scene. The court noted that the privacy interests in both categories were attenuated (victim's address has already been repeatedly reported in the press and the bystanders' expectations of privacy in the public square are limited) and, under the circumstances, are outweighed by petitioner's interest in full access.

*New York Times Co. v. City of New York Office of Mayor*, 194 A.D.3d 157, 144 N.Y.S.3d 428 (1<sup>st</sup> Dept. 2021)

First Department held that a "private" warning letter issued to the Mayor of the City of New York by the Conflicts of Interest Board is subject to FOIL disclosure. The Mayor's Office declined to disclose the letter to the New York Times on the ground that the letter was exempt pursuant to New York City Charter § 2603 (k), which states that "the records, reports, memoranda and files of the board shall be confidential and shall not be subject to public scrutiny." The Mayor's Office argued that since the letter was designated as "private" by the Board, and therefore confidential, it falls within the ambit of section 2603 (k). The First Department disagreed and stated "[a]s the plain text of section 2603 (k) indicates, it is meant to protect the confidentiality of documents in possession of the Board. Once the letter was issued to another entity, the Mayor could not rely on section 2603 (k), because the NYT sought disclosure from the Mayor and not from the Board."

*Next Star Media, Inc. v. Village of Depew*, No.804772/2021 (Supreme Court County of Erie 2021)

After conducting an in-camera review to determine the public and private interests involved with a police report and associated video in an Article 78 proceeding, the Erie County Supreme Court ruled the disclosure of a video portraying a suicide attempt qualifies as an invasion of personal privacy and did not relate to the official public duties of the relevant individual, thereby making non-disclosure of the video by the Village permissible on privacy grounds. However, the Court further held the police report may contain information of public interest that is not encumbered by the privacy interest of the individual per se and so ordered the disclosure of the names and addresses of the witnesses to the incident, the names of authors of reports concerning the incident, as well as any information regarding the existence of other videos or photographs.

*Puig v. City of Middletown*, --- N.Y.S.3d ----, 2021 WL 1433396 (Supreme Court, Orange County, 2021)

Repeal of Civil Rights Law §50-a granting statutory exemptions to FOIL request for all personnel records of police officers used to evaluate performance toward continued employment or promotion applies retroactively. Although statutory construction that includes retroactive operation is not favored by courts, remedial legislation, or statutes governing procedural matters, should be applied retroactively in order to effectuate its beneficial purpose.

*Sapienza et al. v. City of Buffalo*, 150 N.Y.S.3d 657 (4<sup>th</sup> Dept. 2021)

Fourth Department affirmed trial court's awarding of attorney's fees and costs in an Article 78 proceeding after respondent failed to meet the anticipated date for document production and ignored petitioners' additional FOIL requests, constituting a denial of access. Such denial provided petitioner grounds to commence the Article 78 proceeding after exhausting all administrative remedies by sending respondent timely letters objecting to the denial.

*Save Monroe Ave., Inc. v. New York State Department of Transportation*, --- N.Y.S.3d ----, 2021 N.Y. Slip Op. 04639 (3<sup>d</sup> Dept. 2021)

Third Department reversed lower court's decision to grant access to certain documents and award attorney's fees because petitioner's Article 78 proceeding was premature, as agency's delays were reasonable and did not constitute a constructive denial. The Court clarified an assessment of reasonableness requires consideration of "the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency and similar factors," and noted the respondent agency received over 1,250 FOIL requests in the last four months of the relevant period. Further, the Court overturned petitioner's award of counsel fees because respondent acted in good faith by specifying a reasonable basis for the delay and promptly released the documents upon completing its review and not just in response to the litigation.

*Schenectady Police Benevolent Association v. City of Schenectady*, Supreme Court, Schenectady County (2020)

Court opined that there is strong evidence that the Legislature intended the repeal of Civil Rights Law §50-a to apply retroactively. Court also held that a finding that the particular officer's personnel record, or any portion thereof, be withheld or redacted on the basis that its release would constitute an unwarranted invasion of personal privacy, could not be realized by petitioners. Of important note, the court held that "notwithstanding any greater societal significance which any actual or interested party, or the media, may seek to ascribe to the instant ruling, it is, in actuality, narrowly confined to the particular FOIL requests outstanding as to [the officer] and the members of the Schenectady Police Department. Any broader applicability as to other locales or other FOIL requests will necessarily have to be determined on their own specific merits."

*Stengel v. Vance*, 192 A.D.3d 571, 140 N.Y.S.3d 707 (1<sup>st</sup> Dept. 2021)

Agency certified that it did not possess the record sought by petitioner. First Department held that "[a]ssuming without deciding that the spreadsheet maintained by DANY, as described in respondents' answer, constituted responsive records, it was properly withheld on the ground that it contained attorney work product, which is specifically exempted from disclosure by state statute (CPLR 3101[c]) and therefore exempt from FOIL (Public Officers Law § 87[2][a]." The court went on to opine that "[t]he spreadsheet cannot be redacted pursuant to FOIL, which permits redactions of records only under the personal privacy exemption (see *Matter of Judicial Watch, Inc. v. City of New York*, 178 A.D.3d 540, 541, 114 N.Y.S.3d 342 [1st Dept. 2019])." Statement regarding redaction appears to be inconsistent with Court of Appeals decision in *Gould v. New York City Police Dep't*, 89 N.Y.2d 267 (1996) requiring redaction of intra-agency material for purposes of disclosing "statistical or factual tabulations or data." ("If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material..." *Id.*, 275)

*Suhr v. New York State Department of Civil Service*, 193 A.D.3d 129, 142 N.Y.S.3d 616 (3<sup>rd</sup> Dept. 2021)

Third Department held that requested disclosure by Department of Civil Service of document containing home zip codes of state employees in classified service fell within exemption to FOIL for records that were specifically exempted from disclosure by state or federal statute; a provision of FOIL indicated that disclosure of home address of public employee was not required, and an employee's zip code matched with their name could readily facilitate access to that employee's complete home address. Further, court opined that home zip codes of employees were entirely unrelated to their positions, official duties, or process of governmental decision-making, so disclosure would not promote openness or accountability in that regard, and disclosure of zip codes could have subjected employees to harassment at home and that Although FOIL does not require the party requesting the information to show any particular need or purpose, and a petitioner's motive or purpose in seeking records pursuant to FOIL is generally irrelevant, the requester's purpose may become relevant if the intended use of the requested material would run afoul of a FOIL exemption.

*Uniformed Fire Officers Association v. Blasio*, 846 F. App'x 25 (2d Cir. 2021)

Under New York law, uniformed officers' unions, seeking to enjoin the City's planned disclosures of disciplinary records, following repeal of Civil Rights Law §50-a, which formerly shielded law enforcement disciplinary records from public disclosure, failed to demonstrate sufficiently serious questions on the merits of their claims that city's decision to publish certain disciplinary records was arbitrary and capricious under Article 78, or alternatively, that it was arbitrary and capricious for city to change its established practice and that documents should be withheld, pursuant to the unwarranted invasion of personal privacy exemption in FOIL. The City still recognized specific FOIL exemptions that were designed to protect against unwarranted invasions of personal privacy or endangering a person's safety.

*Vertucci v. New York State Department of Transportation*, -- N.Y.S.3d --, 2021 N.Y. Slip Op. 03647 3<sup>rd</sup> Dept. 2021)

Third Department held that respondents failed to meet their burden of establishing that they had a reasonable basis for denying access to the requested records under any of the claimed exemptions and, as such, affirmed the trial court's decision to grant petitioner's request for counsel fees and costs. The affirmations submitted by respondents in support of the law enforcement exemption merely quoted the language of the statute and, in conclusory and speculative fashion, determined that the exemption justified denial of access to the requested records, without providing factual assertions from anyone with personal knowledge demonstrating that the requested records were actually compiled for law enforcement purposes, either generally or specifically, in connection with the investigation of this accident.