

## **COMMITTEE ON OPEN GOVERNMENT**

STATE OF NEW YORK  
**DEPARTMENT OF STATE**  
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### **COMMITTEE MEMBERS**

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

### **EXECUTIVE DIRECTOR**

SHOSHANAH BEWLAY

## MEETING AGENDA NYS COMMITTEE ON OPEN GOVERNMENT October 19, 2021

1. Welcome and Roll Call
2. Approval of minutes of September 21, 2021, meeting
3. Discussion of Draft of 2021 Annual Report
4. Process for Taking Public Comment
5. Rules of Order
6. Research and Data Analysis
7. Other or New Business
8. Adjourn

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## DRAFT MINUTES

### MEETING OF NYS COMMITTEE ON OPEN GOVERNMENT

#### HELD IN-PERSON AND BY WEBEX PURSUANT TO CHAPTER 417 of LAWS of 2021

September 21, 2021, 10:00am

#### Members Present:

Stacy Lynch (Lt. Gov; in person), Phil Giltner (Lt. Gov; in person), Vilda Mayuga (Secretary of State; in person), William Bruso (OGS; by videoconference), Joel Lombardi (DOB; by videoconference), Stephen Waters (in person), David Schulz (by videoconference), Hadley Horrigan (by audio conference), Peter Grimm (in person), Franklin Stone (in person)

#### Department of State Staff Present (in person):

Shoshanah Bewlay, Christen Smith, Jake Forken

#### Welcome:

Quorum present

#### Approval of Minutes:

On motion to approve minutes of the December 11, 2020, meeting, Franklin Stone requested an amendment to reflect that no additional information was available in the provided status update regarding member vacancies; with that addition, the minutes were approved.

#### Committee Vacancies and Committee Structure:

Members discussed the need to fill two current Committee member vacancies which were the subject of Franklin Stone's September 2021 letter to Governor Hochul.

After a discussion among members, Franklin Stone stepped down as Chair. Members agreed that the Committee would not have a Chair pending a determination after further discussion of Committee structure and, potentially, the adoption of bylaws. Members agreed that the Committee letterhead should be amended to remove the designation of Chair.

#### Staff Activities and Updates:

The Executive Director reported on her staff's activities for the period November 2020 through August 2021, representing the period since the last annual report was finalized. She reported: 1,203 calls handled; 1,745 informal advisory opinions issued; 38 formal advisory opinions issued; 4,337 appeals reviewed; and 29 training sessions (both virtual and in-person) provided to 3,245 people (representing a large increase in participation in training sessions over the pre-pandemic period in 2019).

With respect to training opportunities, Franklin Stone suggested that in-person training sessions were preferred. The Executive Director reported that feedback from trainees indicated a preference for virtual training sessions. The Executive Director and her staff will continue to deliver both types of training to interested people.

The Executive Director reported that in September 2021, the Department of State hired two new attorneys, Christen Smith and Jake Forken, assigning them to the Executive Director's staff to further support the Secretary's statutory role as secretariat to the Committee.

**Current Open Government Issues/Legislative Issues:**

Members discussed of the issue of "virtual" and "hybrid" open meetings pursuant to the now-expired Executive Order 202.1 and the current Chapter 417 of the Laws of 2021, which is set to expire January 15, 2022. The Executive Director provided written and oral updates on pending legislative proposals on this issue and discussed the highlights of some.

Members requested that the Executive Director and her staff prepare updates to aspects of prior annual report recommendations and proposals to assess them for inclusion in the 2021 annual report. These include: (i) a recommendation that the state legislature be subject to the Freedom of Information Law (FOIL); (ii) a recommendation concerning a limitation on the amount of time trade secrets may be exempt from FOIL disclosure; and (iii) possible amendments to the Open Meetings Law to require that meeting documents be posted online before a meeting and that minutes be posted after a meeting.

Franklin Stone raised the question whether the Committee should discuss in its annual report the issue of whether, in light of the repeal of Section 50-a of the Civil Rights Law, FOIL now requires disclosure of any aspects of unsubstantiated reports of law enforcement misconduct. The Executive Director explained that FOIL provides a permissive exemption for agencies to withhold most unsubstantiated complaints against government employees and there does not seem to be any legislative intent associated with the repeal of Section 50-a and the associated amendment to FOIL that law enforcement employees and other government employees should now be treated differently in this regard; the Executive Director and her staff will provide information on the current state of the law and any pending litigation on this topic for members' consideration.

Franklin Stone read from a list of recommendations drafted by ReInvent Albany for member consideration, including a proposal to permit the public to view union contract agreements before approval and a process for collecting FOIL data from state agencies. Members did not come to any agreement about these proposals.

**Rebranded Website:**

The Executive Director reported that as of May 2021, the Committee website had been rebranded consistent with the template for all state agency websites. Franklin Stone suggested that the website should contain additional functionality concerning ready access to certain types of information and the Executive Director agreed to speak to the New York State Office of Information Technology Services to see what additions may be available.

**Discussion of Process for Possible Public Comment at Committee Meetings:**

In order to develop a policy and related process that makes sense for the Committee, members asked the Executive Director and her staff to provide examples for their consideration of whether, and if so to what extent, other deliberative but not adjudicative committees and bodies within state government allow for public comment.

**Other or New Business:**

Dave Schulz asked that the Executive Director and her staff research what statutory open government bodies do in other states in an effort to assess whether (and ensure that) New York continues to be at the leading edge of government transparency. The members may then assess whether there are any recommendations to make to the Legislature and Governor concerning the role of the Committee as defined in statute.

Members will discuss the 2021 annual report and any draft material therefore at future meetings. The Executive Director will facilitate the reservation of rooms and technology to permit the next meeting of the Committee in October 2021.

**Adjourned at 11:56 am**

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SHOSHANAH BEWLAY

**DRAFT**

**December 2021**

## 2021 REPORT TO THE GOVERNOR AND STATE LEGISLATURE

**VERSION CIRCULATED OCTOBER 15, 2021**



**Committee on  
Open Government**

# Table of Contents

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## I. INTRODUCTION

### II. 2021 LEGISLATIVE AMENDMENTS TO THE OPEN MEETINGS LAW

On September 2, 2021, Governor Kathy Hochul signed into Law Chapter 417 of the Laws of 2021 which, in part, amends the Open Meetings Law (OML) to authorize most public bodies “to meet and take such action authorized by law without permitting in public in-person access to meetings and authorize 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.” The language of the amendment substantially mirrors former Executive Order 202.1 issued in March 2020 (discussed in greater detail below). Guidance relating to that order can be found on the Committee on Open Government website under Open Meetings Law Advisory Opinions, key phrase “Declared Disaster Emergency.”

### III. 2021 LEGISLATIVE AMENDMENTS TO THE FREEDOM OF INFORMATION LAW

On October 8, 2021, Governor Kathy Hochul signed into law Chapter 460 of the Laws of 2021 which amends § 87(2) of the Freedom of Information Law (FOIL) to add a section (r), which adds to the list of permissible grounds for denial of access under the Law “photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-f of the vehicle and traffic law.”

### IV. CONTINUING TO LEVERAGE TECHNOLOGY TO ENHANCE TRANSPARENCY

As we reported in our 2020 Annual Report to the Governor and the Legislature, in order to respond to the restrictions and limitations necessitated by the COVID-19 pandemic, Executive Order 202.1 was issued suspending certain aspects of the Open Meetings Law (the “OML”) relating to in-person attendance. Executive Order 202.1 authorized virtual meetings and required that virtual meetings be recorded and later transcribed. However, that order expired on June 25, 2021. On September 2, 2021, Governor Kathy Hochul signed into law Chapter 417 of the Laws of 2021 which temporarily re-authorizes most public bodies to hold virtual meetings as long as the public can listen in, and the meeting is recorded and later transcribed. Chapter 417 provides:

Notwithstanding the provisions of article 7 of the public officers law to the contrary, any state agency, department, corporation, 46 office, authority, board, or commission, as well as any local public body, or public corporation as defined in section 66 of the general construction law, or political subdivisions as defined in section 100 of the general municipal law, or a committee or subcommittee or other similar body of such entity, shall be authorized to meet and take such action authorized by law without permitting in public in-person access to meetings and authorize 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. “Local public body” shall mean any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for an entity limited in the execution of its official functions to a portion only of the state, or a political subdivision of the state, or for an agency or department thereof.

Chapter 417 is a temporary law that is set to expire on January 15, 2022. The Committee supports the steps taken to improve transparency and access through the use of virtual platforms and continues to believe that virtual platforms and new communication technologies allow governmental bodies to conduct their business in new ways that are more transparent, more efficient and more effective.

Later in the report, we will discuss pending legislative proposals relating to the use of remote access platforms. We encourage the Legislature to carefully craft any permanent amendments to the Law to ensure both increased access through the use of technology while preserving the right of members of the public to in-person engagement with public bodies.

#### **V. LEGAL DEVELOPMENTS SINCE THE REPEAL OF CIVIL RIGHTS LAW § 50-a**

As we reported in our 2020 Annual Report to the Governor and Legislature, on June 12, 2020, Chapter 96 of the Laws of 2020 repealed Civil Rights Law § 50-a and amended 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. 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.

In the 2020 report, we identified three key concerns that had presented since the repeal of § 50-a:

1. Are former employees covered by the new amendments?
2. Are records created before June 12, 2020, covered?
3. What about unsubstantiated, pending or dismissed charges or complaints?

Below we summarize the court decisions that have been rendered relating to these issues in the just over a year since the repeal.

1. Retroactivity



*Puig v. City of Middletown*, 71 Misc.3d 1098, 147 N.Y.S.3d 348 (Supr. Ct. Orange Co. 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.

*Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093, 2020 NY Slip Op 34346(U) (Supr. Ct. Schenectady Co. 2020): There is strong evidence that the Legislature intended the repeal of Civil Rights Law § 50-a to apply retroactively.

*Brighton Police Patrolman Association v. Town of Brighton*, Index No. 12020002814 (Supr. Ct. Monroe Co. 2021): Repeal of § 50-a should not be given retroactive effect because, under the New York General Construction Law, legislation should not apply retroactively in the absence of clear legislative intent.

## 2. *Unsubstantiated Complaints and Issues of Unwarranted Invasion of Privacy*

*New York Civil Liberties Union v. City of Syracuse*, 72 Misc.3d 458, 148 N.Y.S.3d 866 (Supr. Ct. Onondaga Co. 2021): 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, had been repealed. Repeal of § 50-a did not alter previously existing privacy considerations and exemptions to public disclosure under FOIL: *i.e.*, disclosure of unsubstantiated claims may continue to constitute an unwarranted invasion of personal privacy.

*Uniformed Fire Officers Association v. De 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 failed to demonstrate 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. Specifically, the Court noted that the police unions had cited no examples which lend credence to their claim that publicizing these records will create a risk of harm to police officers. The Court carved out a narrow exception to its ruling for a specific subset of records that may implicate collective bargaining agreements and recognized specific FOIL exemptions that were designed to protect against unwarranted invasions of personal privacy or endangering a person's safety.

*Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093, 2020 NY Slip Op 34346(U) (Supr. Ct. Schenectady Co. 2020): A particular officer's personnel record, or any portion thereof, would not be withheld or redacted on the basis that its release would constitute an unwarranted invasion of personal privacy. However, court specifically limited its ruling to the facts presented, holding 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."

*Buffalo Police Benevolent Association v. Brown*, 69 Misc.3d 998, 134 N.Y.S.3d 150, 2020 N.Y. Slip Op. 20257 (Supr. Ct. Erie Co. 2021): Declined to find the release of information concerning unsubstantiated and pending allegations would violate police officers' constitutional rights because acts of the Legislature are entitled to a strong presumption of constitutionality and any harm alleged by police union is speculative.

#### **A. Civil Rights Law § 50-a Legislative Proposals**

In response to the legal questions raised by these court decisions, the Legislature has considered several amendments to FOIL relating to law enforcement disciplinary records.

1. *Senate Bill 06286 (no same as): Amendment to § 86 of FOIL*

Would require the redaction of unfounded and unsubstantiated allegations of misconduct in law enforcement disciplinary records. The terms "unsubstantiated complaint, allegation or charge" and "unfounded complaint, allegation or charge" are defined in the bill. The bill has been referred to the Investigations and Government Operations Committee.

### **VI. 2021 COURT DECISIONS OF NOTE**

#### **Freedom of Information Law**

*Binghamton Precast & Supply Corp. v. New York State Thruway Authority*, 196 A.D.3d 944 (3d Dep't 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 (3d Dep't 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

*Brighton Police Patrolman Association v. Town of Brighton*, Index No. I2020002814 (Supr. Ct. Erie Co. 2021): The Monroe County Supreme Court held the repeal of § 50-a should not be given retroactive effect because, under the New York General Construction Law, legislation should not apply retroactively in the absence of clear legislative intent.

*Carr v. de Blasio, Mayor of the City of New York, et al.*, 197 A.D.3d 124 (1st Dep't 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, 150 N.Y.S.3d 808 (3d Dep't 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 Section 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 Information Law Request v. New York City*, 191 A.D.3d 504, 142 N.Y.S.3d 502 (1st Dep't 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 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.

*Empire Center for Public Policy v. NYS Department of Health*, 72 Misc.3d 759, 150 N.Y.S.3d 497 (Supr. Co. Albany Co. 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 City Police Pension Fund*, 188 A.D.3d 595, 132 N.Y.S.3d 750 (1st Dep't 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.

*Hutchinson v. Annucci*, 189 A.D.3d 1850, 136 N.Y.S.3d 560 (3d Dep't 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 (1st Dep't 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 Housing Preservation & Development*, 193 A.D.3d 483, 147 N.Y.S.3d 8 (1st Dep't 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.

*Legal Insurrection Foundation v. SUNY Upstate Medical University*, 0003459/2021 (Supr. Ct. Onondaga Co. 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 *Pflaum* standard, which allows requests where it is shown the records were electronically maintained and the request pertains to one individual. Second, the Court held a request for "meeting minutes, meeting agendas and presentation material" are routine records subject to disclosure as being reasonably identified.

*Lepper v. Village of Babylon*, 190 A.D.3d 738, 140 N.Y.S.3d 533 (2d Dep't 2021): Where a public agency's letter denying a 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.

*Komatsu v. City of New York*, 2021 WL 3038498 (S.D.N.Y. 2021): Southern District of New York declined to exercise federal jurisdiction over petitioner's state FOIL Article 78 and Open Meetings Law claims due to Article 78 proceedings being a "novel and special creation of state law."

*New York Civil Liberties Union v. City of Syracuse*, 72 Misc.3d 458, 148 N.Y.S.3d 866 (Supr. Ct. Onondaga Co. 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 § 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 (1st Dep't 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 (1st Dep't 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 (Supr. Ct. Erie Co. 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 the video undiscoverable. 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*, 71 Misc.3d 1098, 147 N.Y.S.3d 348 (Supr. Ct. Orange Co. 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

*Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093, 2020 NY Slip Op 34346(U) (Supr. Ct. Schenectady Co. 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 found that the particular officer's personnel record, or any portion thereof, would not be withheld or redacted on the basis that its release would constitute an unwarranted invasion of personal privacy. 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.”

*Suhr v. New York State Department of Civil Service*, 193 A.D.3d 129, 142 N.Y.S.3d 616 (3d Dep’t 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. deBlasio*, 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.

### Open Meetings Law

*Boyd v. Brooklyn Community Board 9*, 193 A.D.3d 1043, 147 N.Y.S.3d 651 (2d Dep’t 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, 144 N.Y.S.3d 745 (3d Dep’t 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.

## VII. LEGISLATIVE RECOMMENDATIONS

The Assembly Standing Committees on Governmental Operations, Local Governments and Cities conducted a public hearing on October 25, 2021, designed to elicit information relevant to possible amendments to the OML concerning the impact of the Covid-19 pandemic on meetings of public bodies. Due to the unique role of the Committee on Open Government, it has heard from many correspondents since March 2020 who are concerned about aspects of public meetings during a pandemic and in the future. The following is a summary of data relevant to potential changes to the Open Meetings Law sorted by type of constituent and collected by the Committee on Open Government based on 2,082 calls, emails and letters since March 2020. The data may be useful for members of the Legislature as they identify problems, consider proposals and attempt to craft solutions.

1. Feedback from government agencies and other “public bodies” as defined in the Open Meetings Law (1,153 calls or emails):

Public bodies have nearly universally reported to my staff that the ability to hold meetings using a remote access platform has been extremely valuable and they would like for it to continue. Public bodies report that without this option, they would in most instances have been unable to convene a quorum and conduct public business since March 2020. Public bodies have also reported that it has become far easier than even before the pandemic to convene a quorum to schedule necessary meetings because they no longer have to accommodate the busy schedules of members who may not be able to attend at a particular physical location at a particular time.

Agencies report that they have seen a large uptick in public attendance and engagement generally in all meetings since before the pandemic – both remotely and in-person – since the option to participate remotely has been in effect. We have been told by multiple bodies that more members of the public are showing up to meetings in-person and by videoconferencing than ever before; they attribute this increase to the easier and more flexible access they have to meetings now.

Agencies report that they are concerned about the requirement, now contained in Chapter 417 of the Laws of 2021, mandating the preparation of a transcript of an open meeting conducted, in whole or in part, using a remote access platform. They report that their concerns center on what they identify as extra expense and time associated with preparing a word for word transcript. Agencies report that they do not understand the reasoning behind the requirement when a recording and the preparation of minutes is also required. Chapter 417 is silent with respect to the method of preparation of the required transcript (is a stenographer required? Will the transcription function of the remote access platform be sufficient?) and the timeline for its required creation.

Public bodies have nearly universally reported that, if they are permitted to continue to convene open meetings using videoconferencing or a remote access platform, their members object to having to open their personal remote locations (which may be their homes or vacation addresses) to the public, or to notify the public of the location from which they are videoconferencing. Members of public bodies universally report that they would prefer to be able to participate by videoconferencing (remote platform) without the requirement contained in the Open Meetings Law (currently suspended until January 15, 2022) mandating that they do so. This is particularly true while COVID-19 continues to pose a significant public health concern. At least one pending bill proposes amending § 103(c) of the Open Meetings Law 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.” Public bodies have asked us how the public body is to determine what constitutes a “public” site?

Government agencies also seek clarity regarding the process for determining whether meetings should be held in person, through a hybrid approach, or fully remotely. Public bodies would like to understand with greater specificity who has the authority to make these determinations. Relatedly, public bodies have asked whether, should the Legislature pass a bill permitting it, there will be a defined rule or process for making a determination to prohibit in-person attendance at meetings under certain circumstances.

Public bodies have identified concerns with what has come to be known colloquially as “Zoom bombing” – when disruptive attendees crash a meeting held on a remote platform and prevent the body from conducting business at all. Public bodies have asked if the law would be clarified to permit them to require pre-registration for remote attendees, even in an anonymous capacity, in an attempt to prevent these occurrences.

Finally, if videoconferencing is permitted in whole or part using remote access platforms, public bodies have reported confusion concerning the requirements in §§ 103(b) and 103(d). Public bodies would like clarity on which locations must be physically accessible and which must be large enough to contain any member of the public wishing to attend the meeting.

2. Feedback from members of the general public (720 calls or emails):

A majority of the members of the public from whom we have heard since March 2020 report that they appreciate the option to attend meetings virtually and would like to see it continue. Members of the public have expressed the following reservations to us, however:

Many members of the public are concerned about the process for hearing public comment or participation at meetings for such bodies that permit it. Specifically, members of the public report that they would like to see a requirement that, for bodies that permit public comment or participation, such permission apply to both in-person and remote attendees equally.

Many members of the public are concerned that, if a body is conducting a meeting using a remote access platform, they will be unable to attend any location of the meeting in person. These members of the public would prefer to maintain the option of attending meetings in-person. While most people understand the current need for limited in-person interaction, it is our understanding based on the feedback that the public would prefer to be able to choose between in-person and remote access. Chapter 417 of the Laws of 2021 authorizes “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.” Many members of the public have expressed to us that the ability to listen only, without the ability to view a meeting, is insufficient. These members of the public have reported that they would rather go to a meeting in-person if the only remote option is to listen rather than to view.

Members of the public from areas of the state that are still awaiting widespread broadband access report that they have felt left out of the remote meetings movement. For areas of the state that remain unserved and underserved by high-speed internet access, accessing meetings using broadband access is not always a possibility.

Finally, we have heard from a few members of the public who object to the requirement that some remote access platforms impose of “pre-registration” before or “signing in” to a meeting, presumably to prevent the disruptive practice of “Zoom bombing” already mentioned. While many such remote access



platforms do not require someone to insert their real name or email address, these members of the public are concerned that even providing an anonymous credential before being able to access an open meeting is inconsistent with the Open Meetings Law.

3. Feedback from members of the news media (209 calls or emails):

Members of the media have reported to us that they have many of the same concerns as members of the general public, with the following addition: some members of the news media have reported that they do not believe that public bodies should have the option to hold fully virtual meetings that do not allow for in-person access at any location where a member of the public body is participating. These members of the media report that they are concerned that fully remote meetings diminish accountability of accessibility to elected officials. These members of the media report that they would prefer, at a minimum, that a majority of members of a public body be present together at one or more physical locations that are open to the public, even if also taking advantage of using a remote access platform for additional public access and for the participation of a minority of members of the public body.

**A. Proposed Amendments to the Open Meetings Law Relating to Remote Access**

The Committee encourages the Legislature to consider the feedback provided above when crafting proposed amendments to the OML relating to remote access.

1. S04367A/A06960A and A08134 (no same as)

Senator Mayer and Assemblymember Otis introduced S04367A/A06960A amending § 103(c) of OML to state: “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.” S04367A has passed the Senate and has been delivered to the Assembly.

Assemblymember Niou introduced A08134, which would require:

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. **If no member is participating at a public site, such public body shall provide a site for the public to attend, listen and observe. Such site may include the internet address of the website streaming such meeting if such meeting is occurring only through the internet. Each member of the public body shall ensure they are present for the duration of such videoconference.**

A08134 has not advanced since its introduction.

If the Legislature wishes to pursue passage of either bill, we encourage it to evaluate other aspects of the statute which may require corresponding amendments (*i.e.*, § 104(4): “If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing

will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

2. S07333/A08108 and S06958/A08071

Senator Martucci and Assemblymember Thiele introduced S07333/A08108 and Senator Cooney and Assemblymember McMahon introduced S06958/A08071, both sets amending § 103(c) of the OML to provide an alternative option to the requirement that the public be allowed to attend at every site from which a member of a public body participates:

a public body of a municipal corporation as defined in section sixty-six of the general construction law may conduct a meeting via video conference or via simultaneous video conference and in-person if the public body: (1) provides an opportunity for the public to contemporaneously view and listen to such meeting online; (2) makes a video recording of the meeting; and (3) posts the recording on the public body's website within five business days of the meeting. In addition, upon request of a member of the public, the public body must make available a specific location within the jurisdiction of the municipal corporation for the public to view and listen to such meeting online, provided the request is received at least forty-eight hours prior to the time the meeting is scheduled to begin.

These bills have not advanced since being introduced.

3. S07305/A08107

Senator Kaplan and Assemblymember Paulin introduced S07305/A0817 amending § 103(f) of the OML, which currently only applies to state agencies, to read as follows:

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~~ **public body**. 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 recording of such open meeting 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 the purposes of this subdivision, the term "agency" shall mean only a state department, board, bureau, division, council or office and any~~

~~public corporation the majority of whose members are appointed by the governor. 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.~~

This bill has not advanced since being introduced.

4. S04521/A03349

Senator Harckham and Assemblymember Abinanti introduced S04521/A03349 which amends § 103 of the OML to continue the authority to hold remote meetings as established by Chapter 417 of the Laws of 2021. This bill, however, establishes a more detailed procedure and would enact amendments to §§ 103(b) and (d) to clarify that public bodies are only required to ensure physical locations meet those statutory requirements when they are not held remotely. This bill has not advanced since being introduced.

5. S07261/A08155

Senator Hoylman and Assemblymember Paulin introduced S07261/A08155 which amends §§ 103, 104, and 106 of the OML as follows:

Section 1. Subdivisions (c) and (d) of section 103 of the public officers law, subdivision (c) as added by chapter 289 of the laws of 2000 and subdivision (d) as added by chapter 40 of the laws of 2010, are amended to read as follows:

(c) [A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.

(d)] Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.

§ 2. Subdivision 4 of section 104 of the public officers law, as added by chapter 289 of the laws of 2000, is amended to read as follows:

4. If videoconferencing is used to conduct a meeting **or such meeting is being held both physically at a location or locations open to the public and also virtually by one or more members of the public body at a location or locations not open to the public**, the public notice for the meeting shall inform the public that videoconferencing will be used [;] **and shall** identify the **physical** locations for the meeting [, and state that

the public has the right to attend the meeting at any of the locations] **that shall be open to the public.**

§ 3. Section 106 of the public officers law is amended by adding a new subdivision 4 to read as follows:

**4. The minutes of a meeting shall reflect whether the meeting was conducted by electronic means in whole or in part, the type of electronic means if used, which if any members participated by electronic means, when each member participating by electronic means joined or left the meeting, and any interruption in or suspension of the meeting due to a technical problem with the electronic means supporting the meeting if used.**

The bills have not advanced since their introduction.

## **B. Additional Proposed Amendments to the Open Meetings Law**

### **1. Proactive efforts to provide qualified interpreters required by S03430 and A03924**

The 2021-22 legislative session saw the introduction of two separate bills seeking to improve access to open meetings for individuals with disabilities. The Senate version, S03430, would substantially amend § 74-a of Public Officers Law and § 103 of Open Meetings Law. Public officers responsible for scheduling public hearings and meetings would be required to make “proactive,” instead of “reasonable,” measures to ensure that hearings and meetings are held in physically barrier-free facilities. However, qualified interpreters would also be required for any person requesting one. The requester would need to submit a request in writing within a reasonable amount of time before the hearing or meeting. Additionally, all rooms used for public hearings and meetings that can accommodate more than one hundred people must be equipped with assistive listening systems. The term “assistive listening systems” is defined.

The Assembly version, A3924, would not require “proactive” measures, and would retain the “reasonable” efforts language regarding holding hearings and meetings in physically barrier-free facilities. Interpreters would be required for someone requesting assistance within a reasonable time before the meeting, but only if “available.” It also implies that a public officer arranging the meeting or hearing could decline to provide an interpreter if providing one would create an “undue hardship on the public body.” Rooms capable of accommodating more than 100 people would also need to be equipped with assistive listening systems after 2024 for public hearings and after 2022 for public meetings.

Both the Senate and Assembly have been presented versions of these bills since 2003. The Assembly passed and referred A3924 to the Senate. The Senate version remains in committee.

### **2. Public comment in real time for bodies that allow public comment required by S04687B/A06863**

There are two bills before the Senate and the Assembly that would amend § 103 of Open Meetings Law to require real time transmission of public comments during meetings that are open to public comments. The Senate version, S04687B, provides:

Any meeting of a public body that is open to the public, is broadcasted, webcasted, or otherwise recorded and/or transmitted by audio or video means, and allows for public comment, shall provide for

an opportunity for the public to comment in real time by any available means during the time allocated for public comment.

It would further direct public bodies to develop rules regarding public policies and authorizes the Committee to establish advisory rules. The Assembly version, A06863, simply provides:

Any meeting of a public body that is open to the public that allows for public comment shall provide for an opportunity for the public to comment in real time by any available means during the time allocated for public comment.

The Senate version passed the Senate and was delivered to the Assembly. The Assembly version has failed to advance.

### **C. Proposed Amendment to FOIL relating to Law Enforcement Disciplinary Records**

In 2021, Senator Serino introduced S06286 (no same as) which would amend FOIL to require the redaction of unfounded and unsubstantiated allegations of misconduct in law enforcement disciplinary records. The terms “unsubstantiated complaint, allegation or charge” and “unfounded complaint, allegation or charge” are defined in the bill. The bill was referred to the Investigations and Government Operations Committee but has not advanced further.

### **D. Proposed Amendment to FOIL to More Strictly Define Period for Providing Records**

In 2021, Senator Harckham and Assemblymember Zebrowski introduced bills (S04280/A07544) 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 by and large 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) and 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.

S04280/A07544 would also amend FOIL to clarify two additional issues relating to invasions of privacy that the Committee has long supported.

First, 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 bill makes this change. The exception does not apply to a list of vendors or others engaged in a business or professional activity.

Second, § 89(3)(a) of FOIL states, in part, that “[n]othing 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 makes this change.

Senator Tedisco and Assemblymember Lawler introduced S05752/A0816 which would require, in part, that:

Any entity which furnishes such a written acknowledgement and statement shall have up to thirty days from the date of the request to grant or deny such request, and where such request is granted, such entity shall have up to a maximum of ninety days from the date of the request to make such record available to the person requesting it. When a state agency grants a request for records from a person and the records are not made available within thirty days of such request, the head of such agency shall have a duty to review such request and direct such agency, in writing, to make the records available to the person who made the request no later than ninety days from the date of such request, and to ensure such records are made available. When a state agency receives a request for records and provides a statement of the approximate date when such request will be granted or denied, the head of such agency shall have a duty to direct such agency, in writing, to make such determination no later than thirty days from the date of such request, and to ensure such determination is made by such agency within such time.

Senator Serino has also introduced a bill which would amend § 89(3)(a) to require:

Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the [approximate] date,

which shall be ~~[reasonable under the circumstances of the request]~~ **no longer than twenty days**, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. **Any entity subject to the provisions of this article which does not grant or deny a request for a record within twenty-five days of such request shall be deemed to have denied the request for such record. Any entity subject to the provisions of this article which grants any request for a record within twenty-five days of such request, but fails to provide such records within forty days of such request, shall be deemed to have denied the request for such record.**

None of these bills have advanced since being introduced.

#### **E. Additional Proactive Disclosure Will Increase Public Access to Government Records**

There are several bills pending before the Senate and Assembly that would increase public access to government records in different ways.

1. S01150A/A01228A requiring that certain records be available 24 hours before an open meeting

In 2020, Assemblymember Paulin introduced A10983A, seeking to amend § 103(e) of OML. The 2020 version of the bill would have, among other changes, eliminated the “to the extent practicable as determined by the agency or department” language and require that records to be discussed at a meeting be made available at least 24-hours before the meeting. That bill did not advance out of governmental operations. In 2021, a substantially similar bill was introduced by Assemblymember Paulin and Senator Kaplan (S01150A/ A01228A). Under the 2021 proposal, § 103(e) would be amended to 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.

S01150A/A01228A passed both houses of the Legislature in the spring of 2021 and was delivered to the Governor on October 13, 2021.

2. S04704-A/A01108-A requires meeting minutes be posted to websites

S04704-A, passed by the Senate in 2021, would require agencies that maintain a website and use a high-speed internet connection to post meeting minutes on its website within two weeks of the date of the date of the meeting, or within one week of an executive session. It further states:

unabridged video recordings or unabridged audio recordings or unabridged written transcripts may be deemed to be meeting minutes. Nothing in this section shall require the creation of minutes if the public body would not otherwise take them.

This bill was first proposed during the 2019-20 session by Assemblymember Paulin but failed to advance. The 2021 bill has been passed by both houses of the Legislature but has yet to be delivered to the Governor.

3. Posting records of public interest on websites

This Legislative session, Senator Skoufis introduced S01821, which would add a provision on “records of public interest” to FOIL. This amendment would require that agencies with the ability to do so publish on their website: “records or portions of records that are available to the public . . . and which, in consideration of their nature, content or subject matter, are determined by the agency to be of substantial interest to the public.” Records may then be removed when they are “no longer of substantial interest to the public” or “have reached the end of their legal retention period.”

This bill does not define “substantial interest to the public,” but would require the Committee on Open Government to develop regulations regarding this requirement. The bill includes an exemption for records which if disclosed would constitute an unwarranted invasion of personal privacy. The bill also states that “[g]uidance on creating records in accessible formats and ensuring their continuing accessibility shall be available from the office for technology and state archives.”

This bill failed to advance in the Senate during the current session. The text of this bill mirrors the 2019 proposed bill, S1630-B/A0121-A, which passed in the Senate but failed to advance in the Assembly. While the Committee continues to support the intention of these bills, concerns remain surrounding the financial implications to the affected governmental bodies, the level of governmental discretion in determining which records are of interest to the public, and unintended delays disputes would incur.

4. Studying proactive disclosure required by S03120/A00484



Bills requiring the study of proactive disclosure of documents have been proposed since 2009 with various sponsors but have not advanced. Senator Kavanagh and Assemblymember Rozic proposed S03120/A00484 in 2021. This bill would require the Committee on Open Government to:

- (a) study the feasibility of requiring agencies, as defined in subdivision 3 of section 86 of the public officers law, to proactively disclose documents that are available under article 6 of the public officers law;
- (b) make specific findings and legislative recommendations relating to mandatory proactive disclosure by agencies;
- (c) estimate the costs or savings of proactive disclosure; and
- (d) report its findings to the governor, the temporary president of the senate and the speaker of the assembly no later than January 31, 2024.

The Senate bill has been committed to the Committee on Rules where it remains.

#### **F. Limiting Copyright Protection**

Senator Reichlin-Melnick and Assemblymember Galef introduced S03988/A04499 in 2021 which would curtail copyright protections asserted by government agencies. The bill adds a new § 89(10) to FOIL which would provide:

Any copyright in a record prepared by an agency that is required to be disclosed pursuant to the provisions of this article is waived, except where the record reflects artistic creation, scientific or academic research, or if the agency intends to distribute the record or a derivative work based on it to the public by sale or other transfer of ownership, or by rental, lease, or license. If any of the foregoing exceptions apply, the entity from which the record is sought may in its discretion elect to waive any such copyright.

The bill passed the Senate but has not advanced in the Assembly.

#### **G. Assessment of fees and costs for wrongful denial of access to records**

Senator Jackson and Assemblymember Thiele in S02004/A06459 proposed amendments to § 89 of FOIL that change the provision relating to access to attorneys' fees. Under this bill the awarding of all attorney fees and litigation costs against an agency would be discretionary rather than mandatory in certain circumstances. The bill also expands the circumstances under which attorneys' fees can be awarded:

(c) The court in such a proceeding [~~-(i)~~] may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this [~~section in which~~] **article in which:**

**(i) such person has substantially prevailed[,] and [when] the court finds that such agency had no such reasonable basis for denying access; or**

**(ii) the agency failed to respond to a request or appeal within the statutory time; [~~and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed]~~ or**

**(iii) the record is substantially disclosed following the initiation of such proceeding but prior to a judicial determination** and the court finds that the agency [~~had no~~] **lacked a** reasonable basis **in law** for [~~denying access~~] **withholding the record.**

**Nothing contained herein shall be construed to abridge or deny any right or remedy available under article eighty-six of the civil practice law and rules.**

The current law requires a court to impose attorney fees and litigation costs when the requester substantially prevails and the agency had no reasonable basis to withhold access and permits a court to impose fees when the agency failed to respond or appeal within the statutory time.

The proposed bill passed the Senate and was delivered to the Assembly. The same amendments were proposed in 2020 but did not advance.

Senator Tedisco and Assemblymember Lawler introduced bills (S5752/A8186) in August 2021 that would criminalize the failure to produce records in response to a FOIL request, but those bills have failed to advance. Assemblymember Englebright proposed legislation providing that where a court finds that an agency had no reasonable basis for denying access under FOIL, a civil penalty of not more than \$1500 may be imposed.

#### **H. Specific justification for denial of access to certain law enforcement records and records identifying victims required (S06017/A05470)**

The Committee continues to support changes to the Civil Rights Law that would protect the identity of sexual assault victims rather than defendants. As the Committee detailed in last year's report, the breadth and vagueness of the language in § 50-b, 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 (allowing for a private right of action). 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.”

Additionally, the Committee continues to believe that there should be standards specifying 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 defined in subdivision one of section fifty-b of this article is disclosed in violation of such section [~~any person injured by such disclosure~~] **and has not otherwise been publicly disclosed, such victim** 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.

Senator Lanza introduced a bill in 2020 (S00413) and again in 2021 (S05239) to amend §§ 50-b and 50-c consistent with the Committee’s recommendations but both times it failed to advance beyond the Senate Codes Committee. In addition, Senator Skoufis and Assemblymember Englebright have for the past few years introduced bills (S06017/A05470 in 2021) which would, among other things, amend § 50-b as proposed by the Committee. S06017/A05470 was passed by both houses of the Legislature in 2021 has yet to be delivered to the Governor. A substantially similar bill was also passed by the Legislature in 2019 but was vetoed by the Governor that year.

#### I. Expanding Entities That Are Subject to FOIL and OML

Senator Skoufis and Assemblymember Otis introduces bills (S01667/A07545) which would expand the type of entities that are subject to Freedom of Information Law. These bills would amend §86 as follows:

“Agency” means 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 and 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.

This amendment to the definition of agency has been introduced every year since 2017. The current Senate bill passed the Senate and was delivered to the Assembly.

The Committee continues to support expanding the definition of agency to include those entities which, despite their corporate status, are subsidiaries or affiliates of a government agency, while not expanding

the definition to include those in receipt of government funding or entering into contractual relationships with a government agency. 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.

Similarly, Senator Skoufis and Assemblymember Paulin introduced bills (S01625A/A00924A) that would expand the type of entities that are subject to Open Meetings Law. Under these proposals, § 102 would be amended as follows:

“Public body” means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory, and which does not require further action by the state or agency or department thereof or public corporation as defined in section sixty-six of the general construction law.

This bill passed the Senate and was returned to the Assembly.

From 2007-2017 there were bills introduced to expand the definition of public body to include any body of two or more people created by an executive order of the governor. In 2018 and 2019, the proposed language changed to include “an entity created or appointed to perform a necessary function in the decision-making process.” However, neither of those amendments were enacted.

#### **J. Bring JCOPE within the coverage of FOIL and the Open Meetings Law**

Again in 2021, the Senate and Assembly introduced a bill (S00855/A01929) 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. As with prior versions of the bill, the bill was referred to the Office of the Attorney General for an opinion in January 2021 and that opinion was shared with the Assembly Judiciary Committee in February 2021. The bill failed to advance beyond those referrals.

#### **K. The Disclosure of 911 Records Should Be Governed By FOIL**

The Committee continues to recommend the repeal of § 308(4) of the County Law. 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.

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 and 2021 (S00835/A04053) but failed to advance again.

#### **L. Amend FOIL to Create a Presumption of Access to Records of the State Legislature**

The Committee continues to urge 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.

As previously, 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.

In 2021, Assemblymember Lawler introduced A07002 which would amend FOIL to apply the presumption of access to records of the State Legislature and would repeal § 88 of the Law. The bill does not have a corresponding proposal in the Senate and has not advanced since being introduced.

#### **M. 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 relating 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.” Senator Hoylman introduced S00792 in 2021 which 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 Judiciary Committee in 2021 but has failed to advance.

**SERVICES RENDERED BY THE COMMITTEE**

\_\_\_\_ TELEPHONE INQUIRIES  
\_\_\_\_ RESPONSES TO WRITTEN INQUIRIES  
\_\_ FORMAL ADVISORY OPINIONS  
\_\_ PRESENTATIONS  
THOUSANDS OF CORRESPONDENTS ADDRESSED  
THOUSANDS OF 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, 2020, through October 31, 2021.

As was the case in 2020, 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. Committee staff responded to 100% of the inquiries received and have been able to conduct training or present on open government issues whenever requested. In addition, staff of the Committee began offering its own virtual open government educational programs on a near monthly basis.

During the past year, the Committee responded to over \_\_\_\_ telephone inquiries, over \_\_\_\_ requests for guidance answered by email or U.S. mail and responded to \_\_ requests for formal advisory opinions regarding FOIL, the OML and Personal Privacy Protection Law (PPPL). In addition, staff gave \_\_ presentations for government and news media organizations, on campus and in public forums, training and educating approximately \_\_\_\_ people concerning public access to government information and meetings. We are grateful that many entities are now broadcasting, webcasting and/or recording our presentations, thereby making them available to others.

**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 May of 2021, the Committee's website was modernized and assigned its own, independent web address: [www.opengovernment.ny.gov](http://www.opengovernment.ny.gov).

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:

<https://opengovernment.ny.gov/system/files/documents/2020/09/freedom-information-law-sample-letters.pdf> and <https://opengovernment.ny.gov/agency-response-email-request-records-sample>

Regulations promulgated by the Committee (21 NYCRR Part 1401) and “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. <https://opengovernment.ny.gov/freedom-information-law>

“You Should Know,” which describes the Personal Privacy Protection Law:

<https://opengovernment.ny.gov/what-you-should-know-nys-personal-privacy-protection-law-pppl>

Responses to “FAQs” (frequently asked questions)

<https://opengovernment.ny.gov/system/files/documents/2021/05/freedom-information-law-faqs.pdf>; and <https://opengovernment.ny.gov/system/files/documents/2021/01/open-meetings-law-faqs.pdf>

“News” that describes matters of broad public interest and significant developments in legislation or judicial decisions <https://opengovernment.ny.gov/committee-news>

View recordings of meetings of the Committee on Open Government:

[https://www.youtube.com/playlist?list=PLIjoYdAmWijZApq7uZkCJZ\\_irF0MSJgqk](https://www.youtube.com/playlist?list=PLIjoYdAmWijZApq7uZkCJZ_irF0MSJgqk)

View virtual training recordings and material: <https://opengovernment.ny.gov/training-materialsrecordings>

### **Telephone Assistance**

This year, Committee staff answered approximately \_\_\_\_ telephone inquiries.

### **Informal Advisory Opinions**

This past year, the Committee issued \_\_\_\_ informal advisory opinions and written inquiry responses by email and postal mail regarding FOIL, OML and the PPPL.

### **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 \_\_ formal advisory opinions in response to requests from across New York.

## 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 \_\_\_ 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 \_\_\_ 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. As mentioned above, staff of the Committee began offering its own virtual open government educational programs on a near monthly basis. The contemporaneous versions of these programs were attended by nearly 1700 individuals. In addition, recordings of the programs have been posted to the Committee website.

### Organizations:

Adirondack Association of School Business Officers  
C7 Fellows FOIL Professional Development Session  
College of St. Rose Journalism Class  
Cornell Cooperative Extension Executive Directors  
Delaware-Chenango-Madison-Otsego Board of Cooperative Educational Services  
Dutchess County  
Four County Library System  
Hofstra University Law School 15th Annual Land Use Training Program for Municipal Planning and Zoning Officials  
Judicial Institute OML CLE  
Keane & Beane Brown Bag Lunch OML and Videoconferencing  
Mid-Hudson Library System  
New York Association of Local Government Records Officials  
New York Government Finance Officers' Association North Country Virtual Fall Seminar  
New York State Association of Clerks of Legislative Boards Conference  
New York State Association of Conservation Districts  
New York State Bar Association Local & State Government Section (2 Programs)  
New York State Coalition on Open Government  
New York State Conference of Mayors (2 Programs)  
New York State Office of the Attorney General (2 Programs)  
New York State Press Association  
New York State School Boards Association  
New York State Town Clerks Association (2 Programs)  
Rockefeller Institute Municipal Clerks Institute  
Southern Tier Planning Organization