

## **COMMITTEE ON OPEN GOVERNMENT**

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**DEPARTMENT OF STATE**  
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### **COMMITTEE MEMBERS**

BRIAN A. BENJAMIN  
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 November 23, 2021**

1. Welcome and Roll Call
2. Approval of revised minutes of September 21, 2021, meeting and minutes of October 19, 2021, meeting
3. Discussion of Draft of 2021 Annual Report
4. Other or New Business
5. 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, approved with amendment to reflect that no additional information was available in the provided status update regarding member vacancies.

#### **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.

There was a consensus that any discussion regarding Committee structure would wait until after the new year.

#### **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).

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:**

The Executive Director invited staff members to raise issues they would like to see addressed in the next annual report. Members agreed that the Executive Director should prepare a draft report for review that includes discussions of the following issues:

- "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.
- whether litigation following the repeal of § 50-a of the Civil Rights suggests that any amendments to FOIL are necessary, including whether legislative amendments clarifying the definition of "unsubstantiated complaints" made against government employees generally and the availability of those records in response to FOIL requests should be recommended.
- updates to aspects of prior annual report recommendations and proposals to assess them for possible continued 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.

A member asked whether Committee had staff resources to investigate how other states operated with regard to oversight of open government statutes. Executive Director advised that staff could begin doing that research after the completion of the annual report.

A member suggested that the Committee consider inviting staff from the Governor's Executive Chamber or the Lieutenant Governor's office to a meeting to discuss issues they deem pressing.

**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. A member 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:**

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:**

A member 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**

DRAFT

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## EXECUTIVE DIRECTOR

SHOSHANAH BEWLAY

### DRAFT MINUTES

#### MEETING OF NYS COMMITTEE ON OPEN GOVERNMENT HELD IN-PERSON AND BY WEBEX PURSUANT TO CHAPTER 417 of LAWS of 2021

October 19, 2021, 10:00am

#### Members Present:

Phil Giltner (Lt. Gov, in person), Peter Grimm (in person), Franklin Stone (in person), Vilda Mayuga (Department of State, in person), William Bruso (Office of General Services, by WebEx), Joel Lombardi (Division of the Budget, by WebEx), Stephen Waters (by WebEx)

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

Shoshanah Bewlay, Kristin O'Neill, Christen Smith, Jake Forken, Candace Watson

#### Welcome:

Quorum present

#### Approval of Minutes:

On a motion to approve the minutes of the September 21, 2021, meeting, members suggested that the minutes be revised to provide additional details. Revised will be forwarded to members for review and comment prior to the next meeting.

#### Discussion of Draft 2021 Annual Report

The Executive Director reviewed the draft 2021 Annual Report with Committee members and they proposed several modifications to the draft, including both structural and substantive. The Executive Director will circulate for review as soon as possible a new draft that incorporates comments from the meeting and any additional comments, edits and material submitted after the meeting by Committee members.

#### Process for Taking Public Comment

On motion, members unanimously agreed to permit public comment at the end of business at today's meeting only, relating to the business of the Committee, with a three-minute time limit. Three people commented: Paul Wolf, Rachel Frost and M.A.

#### Rules of Order

Franklin Stone suggested that the Committee adopt Robert Rules of Order as guidelines for the conduct of Committee meetings.

### **Research and Data Analysis**

A member referred to a report in an online blog that had noted that it is difficult to track statewide FOIL compliance and that the Committee's appeals log, which was the subject of a FOIL request and discussed in the blog, does not provide all of the details that the blogger needed to render an analysis of statewide compliance with FOIL.

The Executive Director explained that the log, which was begun in June 2020, is meant only to track basic information concerning appeals and determinations that agencies are required to submit to the Committee pursuant to FOIL § 89(4)(a); because not all agencies comply with this provision and some agencies only partially comply, it is difficult to draw meaningful conclusions from the collected data.

Members suggested that agencies might be sent reminders about their obligation under FOIL § 89(4)(a) in order to increase compliance. Public commenter Paul Wolf suggested that the Committee could contact representative groups, such as the NYS Conference of Mayors, NY Association of Counties, and NYS Clerks Association, to ask that these groups contact their constituents with such reminders. Members asked that the Executive Director and her staff report back on this topic.

### **Other New Business**

The Executive Director reported that there was no update on the status of filling member vacancies.

A member suggested the posting of new Advisory Opinions in the "News" section on the Committee website. The Executive Director agreed that this would be done.

The next Committee meeting will be November 15, 2021, at 10 am, both in person at Department of State offices in New York City and Albany and by WebEx. Notice will be posted.

**Adjourned at 11:45 am**

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## EXECUTIVE DIRECTOR

SHOSHANAH BEWLAY

**DRAFT**

**December 2021**

## 2021 REPORT TO THE GOVERNOR AND STATE LEGISLATURE

Version with Committee Edits as of November 16, 2021 – circulated to members 11-17-2021

“Public business is the public’s business. The people have the right to know.”  
Harold L. Cross (1953)

“Nothing could be more axiomatic for a democracy than the principle of exposing the process of government to relentless public criticism and scrutiny.”  
Francis E. Rourke (1960)



**Committee on  
Open Government**

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DRAFT

## I. INTRODUCTION

This has been a year of challenges and change – the challenges of maintaining government accountability and transparency through the second year of a pandemic, and the change to a new administration in Albany. We applaud the incoming pledge by Governor Kathy Hochul to bring in a new era of accountability, and her initial efforts to focus all state agencies on improving transparency.

Public feedback to the Committee on Open Government (the Committee) reflects substantial support for several types of open government law reform. This year's report seeks to amplify this feedback and focuses on ways to reform current open government procedures and to leverage technology to address the increasing demands for public engagement. This report presents our recommendations for reform in two of the key areas within our legislative mandate: (1) reforms to the Freedom of Information Law (FOIL) needed if New York is to remain a leader in government transparency, and (2) reforms to the Open Meetings Law (OML) to capture the potential of new technologies and benefit from the experience with them during the pandemic. Finally, this report discusses some issues following the June 2020 repeal of § 50-a of the Civil Rights Law and corresponding amendments to FOIL.

## II. TIME TO REFORM THE FREEDOM OF INFORMATION LAW

September 2024 will mark the 50th anniversary of the effective date of FOIL. While FOIL has been subject to many small changes over the years, there has been no major reform since 1978 when a presumptive right of public access to any document, subject to an enumerated list of limited exemptions, replaced an enumerated list of publicly available documents. . While there has been no substantive change in the law since 1978, there have been tremendous changes in information technology, how government agencies generate and store information, and public expectations for government transparency. The Committee encourages the Legislature to undertake a serious review of the current operation of FOIL to identify areas of shortcomings and opportunities to improve FOIL efficiency and government transparency.

In particular, we believe there are three key areas that should be a part of meaningful FOIL reform in New York: the creation of a centralized FOIL oversight system, new mandates for proactive, online disclosure of data and information the public routinely seeks under FOIL, **and maintenance or strengthening of the sanctions for an agency's failure to adhere to FOIL's mandates**. These three reforms would address the key drivers of a successful system of disclosure. Improving government transparency in this way not only will support democratic decision-making and public confidence in government but can also reduce the costs of transparency and promote economic development and innovation. We urge the Legislature and Administration to take up these issues and adopt a package of meaningful FOIL reforms before the 50th anniversary of this landmark law in 2024.

### A. Effective, Centralized FOIL Oversight

When FOIL was adopted, the Committee was created and charged with developing regulations for the implementation of its provisions and authorized to issue advisory opinions. This was done to promote the uniform and efficient implementation of the new disclosure obligations across various state agencies. The system has worked fairly well for many years, but the current structure is unable to ensure the prompt and efficient disposition of FOIL disputes because the Committee has no enforcement powers. Reforming the law to empower a single entity with the authority to resolve

administrative appeals from any agency within the State over the application of FOIL would create an entity that will quickly develop the experience and expertise to ensure the consistent application of the law and reduce the time required to resolve FOIL disputes. Such an entity would also likely reduce the number of disputes that end up in protracted litigation, as both FOIL requestors and the courts gain confidence in the reliability of the expert judgments of the oversight authority.

There are several different models for such a system that have been adopted over recent years in other states. Connecticut was a leader in this respect and for a long time has had a Freedom of Information Commission with such oversight in that State. Under that model, a person seeking documents who believes an agency has failed to disclose material required by law to be public can appeal the agency's action to the FOI Commission, an independent body appointed by the Governor. The FOI Commission has the power to do any necessary fact-finding, including the authority to review the disputed documents *in camera*, and then issue an opinion on the administrative appeal of the agency's action. See generally Ct. Gen. Stat. § 1-205. The Commission's action itself can then be challenged in court, but the uniformity and consistency achieved by having a single agency handle all administrative appeals from all agencies around the state makes litigation less likely.

Other states have adopted variations on this approach, vesting FOI appeals in a single person or single judge, who similarly develops expertise and is viewed as a reliable arbiter of FOI disputes. In Pennsylvania, for example, all FOI administrative appeals are decided by a single Office of Open Records staffed by an attorney from within the Attorney General's office. See PA Right to Know Law, § 503; PA Office of Open records, "How to File an Appeal," <https://www.openrecords.pa.gov/Appeals/HowToFile.cfm>.

There are a number of ways to achieve the desired result of expertise, uniformity and efficiency. We do not recommend a specific oversight approach for New York State, but we encourage the Legislature to investigate the benefits that can be obtained from a centralized oversight authority. Creating such an oversight authority could be a major step toward increased disclosure, increased speed in disclosure and decreased costs.

#### **B. Use Technology for Proactive Disclosure and Centralized Online Processing of FOIL Requests**

The second key to significant FOIL reform is improved use of technology in aid of transparency. We support a new legislative mandate for compelled disclosure of data and information that the public routinely seeks under FOIL and expanded use of online FOI portals by state and local agencies.

With modern online technology the cost of proactive disclosure is minimal, and making information available on the website saves time and money that would otherwise be required to respond to specific FOIL requests. There are several bills already pending before the Senate and Assembly that would increase public access to government records in different ways.

One such approach is reflected in S01821, introduced in this Legislative session by Senator Skoufis. It would add a provision to FOIL on "records of public interest", requiring agencies that have the ability to do so to 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 this Committee to develop regulations implementing the new disclosure mandate. The bill exempts records which if disclosed would constitute an unwarranted invasion of personal privacy. The Committee strongly endorses the objective of these bills and encourages the legislature to explore their value and their concomitant financial implications.

Alternatively, as a second-best solution, the Committee supports adoption of S03120/A00484 that would require this Committee to:

- (a) study the feasibility of requiring agencies 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.

We also encourage the Legislature to investigate ways to expedite the adoption of automated FOIL portals by local governments. A number of low-cost tools are now available and can facilitate prompt and orderly responses to requests for records. Increased use of such technology to enable online submission of and response to FOIL requests would promote transparency, efficiency and long-term cost savings.

## **C. Other Specific FOIL Reform Proposals**

### **1. 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 discussed, legislators have expressed a 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. Some such communications would certainly be exempt under existing FOIL provisions exempting disclosures that would constitute an unwarranted invasion of personal privacy. But in many cases, disclosure of such communications would be valuable to public discourse and democratic oversight. We support extending disclosure obligations to the Legislature, a reform that is long overdue.



## 2. 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 inconsistent with the intent of FOIL, New York courts by and large have not agreed with this opinion. This bill addresses this issue (and some of the other technical concerns the Committee has raised relating to compliance with FOIL) and clarifies 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 confirms this clarification. 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, taking a different approach to this issue. Their bill would require, in part, that an agency grant or deny a request within 30 days, and if granted, produce the requested records within 90 days.

Senator Serino has introduced a bill that would require agencies to grant or deny a request within 20 days and produce records within 40 days.

None of these bills have advanced since being introduced. While the Committee agrees that disclosure too often takes too long under current law, in our view, tinkering with statutory deadlines will do little to effectively improve compliance times. The needs of agencies and the scope of requests often make “one size fits all” mandates unrealistic. We believe that the creation of a centralized oversight authority to handle FOIL appeals when delay constitutes a constructive denial is more likely to achieve quicker compliance without overtaxing the capacity of agencies to respond.

### **3. Expanding Entities That Are Subject to FOIL and OML**

Senator Skoufis and Assemblymember Otis introduced a bill (S01667/A07545) that would expand the types of entities subject to the Freedom of Information Law. Their bill would add to the definition of an “agency” subject to FOIL’s disclosure obligations “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.” The Committee continues to support expanding the definition of agency in this way to include those entities that, despite their corporate status, are effectively subsidiaries or affiliates of 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.

Senator Skoufis and Assemblymember Paulin have also introduced a bill (S01625A/A00924A) that would expand the type of entities that are subject to Open Meetings Law. Under this proposal, the definition of a “public body” subject to the OML would be amended to include any body “consisting of members of a public body or an entity created or appointed to perform a necessary function in the decision-making process,” other than simply providing guidance or advice. This bill passed the Senate and was returned to the Assembly.

### **4. Bring JCOPE within the coverage of FOIL and the OML**

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.

## 5. Proposed Technical Amendments to FOIL

### a. 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 but not the identity of defendants. As the Committee detailed in last year's report, because of 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 the Committee recommends 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 it hasn't advanced beyond the Senate Codes Committee. In addition, Senator Skoufis and Assemblymember Englebright have 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 and 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.

### b. 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.

**c. 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.

**d. 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.

**III. LEVERAGE TECHNOLOGY TO AMEND THE OPEN MEETINGS LAW AND ENHANCE PUBLIC ENGAGEMENT WITH PUBLIC BODIES**

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).



As noted in the Committee's 2020 Annual Report to the Governor and the Legislature, in response to the restrictions and limitations of the COVID-19 pandemic, Executive Order 202.1 suspended 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. 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 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."

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 contends that virtual platforms and new communication technologies allow governmental bodies to conduct their business in a more transparent, efficient and effective fashion.

**A. FEEDBACK FROM GOVERNMENT AGENCIES, THE PUBLIC AND THE MEDIA REGARDING REMOTE ACCESS TO MEETINGS OF PUBLIC BODIES**

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. Government agency and other public body feedback (1,153 calls or emails):

Public bodies have nearly universally reported to Committee staff that the ability to hold meetings using a remote access platform has been extremely valuable and they would like for it to continue.

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.

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.

**2. General public feedback (720 calls or emails):**

Since the beginning of the pandemic in March 2020, many members of the public 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 are concerned about the process for hearing public comment or participation at meetings for such bodies that permit it.

Many 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.

Some, from areas of the state that are still awaiting widespread broadband access, report that they have felt left out of the remote meetings movement.

**3. Media Feedback (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.

Taking into consideration this feedback, the Committee supports the legislative proposals discussed below. The Committee encourages 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.

**B. 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 and 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. The following are legislative proposals currently pending in the Legislature regarding this topic.

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

Senator Mayer and Assemblymember Otis introduced S04367A/A06960A amending § 103(c) of the Public Officers Law 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 only.

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, the Committee encourages 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 Public officers Law 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 Public Officers Law, 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 Public Offices Law 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 Public Officers Law 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.

### C. Other 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 and 103 of Public Officers Law and § 103. 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.

The Committee understands that the process for providing qualified interpreters may be made more complex when a public body is using technical remote platforms.

## **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 broadcast, webcast, 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.

## **IV. ISSUES TO ADDRESS IN THE WAKE OF THE REPEAL OF CIVIL RIGHTS LAW § 50-a**

As reported in the Committee’s 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, Public Officers Law § 87(2)(a), are no longer statutorily exempt and must be analyzed pursuant to Public Officers Law § 87(2)(b)-(q) to determine rights of access.

In the 2020 report, the Committee identified key concerns that had presented since the repeal of § 50-a: (i) do the provisions relating to the availability of records formerly exempt apply retroactively, especially to records created prior to June 2020 and former employees no longer employed by agencies after June 2020, and (ii) are unsubstantiated or pending complaints of misconduct available? The following court decisions relate to these issues in the year since the act.

## A. Post-Repeal Litigation Regarding Law Enforcement Disciplinary Records

### 1. Retroactive application of provisions.

*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. I2020002814 (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.

In light of the cases discussed above, the Committee recommends that the Legislature consider clarifying its intent concerning the retroactive application of the provisions of FOIL applicable to law enforcement disciplinary records.

### 2. Unsubstantiated or Pending Complaints

*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.

In light of the cases discussed above, the Committee recommends that the Legislature consider clarifying its intent concerning whether, and to what extent, unsubstantiated or pending complaints concerning law enforcement employees should or may be withheld as potentially unwarranted invasions of personal privacy pursuant to FOIL § 87(2)(b).

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

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

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

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 as follows:

"Unsubstantiated complaint, allegation or charge" means any complaint, allegation or charge against a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic where the evidence is



insufficient to determine whether the person employed by a law enforcement agency did or did not commit misconduct.

“Unfounded complaint, allegation or charge” means any complaint, allegation or charge against a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic where there is sufficient credible evidence to believe that the subject employed by a law enforcement agency did not commit the alleged act.

The bill was referred to the Investigations and Government Operations Committee but has not advanced further.

The Committee encourages the Legislature to ensure that any amendment carefully distinguishes between “uninvestigated,” “unsubstantiated,” and “unfounded.” Agencies should not be permitted to avoid disclosure of complaint records by failing to properly investigate those complaints in a timely manner and issue a finding.

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## APPENDIX I

### 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 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.”

### 2021 LEGISLATIVE AMENDMENTS TO THE OPEN MEETINGS LAW

On October 19, 2021, the Governor signed into law Chapter 481 of the Laws of 2021, which amends § 103(e) of OML to require that records to be discussed at a meeting be made available, to the extent practicable, upon request and posted online, at least 24-hours before the meeting. The obligation to make records available to the public upon request “prior to or at the meeting” and to post the records on the agency or public body website “prior to the meeting” has been in effect since February 2012. This amendment simply places a 24-hour minimum time frame for making those records available.

On November 8, 2021, the Governor signed into law Chapter 587 of the Laws of 2021, which amends the OML to 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.”

## APPENDIX II

### 2021 COURT DECISIONS OF NOTE PERTAINING TO OTHER THAN ISSUES RELATED TO THE REPEAL OF CIVIL RIGHTS LAW § 50-a

#### A. Freedom of Information Law

*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.

*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 the 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): The Second Department held that where an 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 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.

*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.

## B. 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.

### APPENDIX III

#### SERVICES RENDERED BY COMMITTEE

1,487 TELEPHONE INQUIRIES  
2,114 RESPONSES TO WRITTEN INQUIRIES  
44 FORMAL ADVISORY OPINIONS  
38 PRESENTATIONS  
THOUSANDS OF CORRESPONDENTS ADDRESSED  
THOUSANDS OF WEBINAR LISTENERS AND VIEWERS

Department of State staff assigned to work with the 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 these 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 working with 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 and 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 began offering virtual open government educational programs on a near monthly basis.

During the past year, through the staff, the Committee responded to over 1,400 telephone inquiries, over 2,100 requests for guidance answered by email or U.S. mail and responded to over 40 requests for formal advisory opinions regarding FOIL, the OML and Personal Privacy Protection Law (PPPL). In addition, staff gave 38 presentations for government and news media organizations, on campus and in public forums, training and educating approximately 4,000 people concerning public access to government information and meetings. The Committee is grateful that many entities are now broadcasting, webcasting and/or recording its presentations, thereby making them available to others.

#### Online Access

Since its creation in 1974, staff working with the Committee have 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 2021, the Committee 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 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, staff answered approximately 1,487 telephone inquiries.

### **Informal Advisory Opinions**

This past year, the Committee through the staff issued 2,114 informal advisory opinions and written inquiry responses by email and postal mail regarding FOIL, OML and the PPPL.

### **Formal Advisory Opinions**

Staff working with the Committee are 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.

Staff prepared 44 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 38 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, approximately 4,000 individuals received contemporaneous training and education through those events, and countless additional individuals benefitted from recordings of these programs posted on entity websites and materials posted on the Committee website. This number compares favorably with pre-pandemic numbers. As mentioned above, staff began offering its own virtual open government educational programs on a near monthly basis. The contemporaneous versions of these programs were attended by nearly 1,700 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 CLE  
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



## I. INTRODUCTION

Responding to the historical use of the Freedom of Information Law (FOIL) and the Open Meetings Law (OML), the Committee on Open Government (the Committee) recommends improving current open government procedures while also encouraging the use of technology to better engage the public.

## II. TIME TO UPDATE THE FREEDOM OF INFORMATION LAW

We believe there are three key areas to address:

1. The creation of a centralized FOIL oversight system,
2. New mandates for online disclosure of data and information the public routinely seeks under FOIL, and
3. Better structuring the sanctions for an agency's failure to adhere to FOIL's mandates.

Improving government transparency in this way not only will support democratic decision-making and public confidence in government but can also reduce the costs of transparency and promote economic development and innovation.

### A. Effective, Centralized FOIL Oversight

The current structure is slow to ensure prompt and efficient disposition of FOIL disputes because the Committee has no enforcement powers. A single entity with the authority to resolve administrative appeals from any agency within the State over the application of FOIL would ensure consistent application of the law, reduce the time required to resolve FOIL disputes, and likely reduce protracted litigation.

Under the Connecticut model, a person seeking documents who believes an agency has failed to disclose material required by law to be public can appeal the agency's action to the FOI Commission, an independent body appointed by the Governor. The FOI Commission has the power to do necessary fact-finding, review the disputed documents *in camera*, and then issue an opinion. *See generally* Ct. Gen. Stat. § 1-205. The Commission's action itself can then be challenged in court, but the uniformity and consistency achieved by having a single agency handle all administrative appeals from all agencies around the state makes litigation less likely.

Other states vest FOI appeals in a single person or single judge. In Pennsylvania all FOI administrative appeals are decided by a single Office of Open Records staffed by an attorney from the Attorney General's office. *See* PA Right to Know Law, § 503; PA Office of Open records, "How to File an Appeal," <https://www.openrecords.pa.gov/Appeals/HowToFile.cfm>.

We do not recommend a specific oversight approach for New York State, but we encourage the Legislature to investigate a centralized oversight authority.

### B. Use Technology for Proactive Disclosure and Centralized Online Processing of FOIL Requests

We support disclosure of data and information that the public routinely seeks under FOIL through expanded use of online FOI portals by state and local agencies.

## Alternative Language Proposal

With modern online technology the cost of proactive disclosure is minimal, and making information available on the website saves time and money that would otherwise be required to respond to specific FOIL requests. Several bills are pending before the Senate and Assembly that would increase public access to government records in different ways.

S01821, introduced in this Legislative session by Senator Skoufis, would add a provision to FOIL requiring agencies that have the ability to do so to 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 this Committee to develop regulations implementing the new disclosure mandate, while maintaining all standard FOIL exemptions.

Alternatively, S03120/A00484 would require this Committee to:

- (a) study the feasibility of requiring agencies 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.

We encourage the Legislature to expedite the adoption of automated FOI portals by local governments. A number of low cost tools, such as [“Next Request,”](#) are now available and can facilitate prompt and orderly responses to requests for information.

### **C. Maintain or Strengthen Sanctions for Non-Compliance**

The third key to FOI compliance and improved transparency is addressing sanctions for non-compliance.

Proposed amendments to § 89 of the Public Officers Law in S02004/A06459 make discretionary attorneys’ fees in certain situations would be a step in the wrong direction. Greater incentives are needed to promote transparency. 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. Proposals that would make tangible sanctions for non-compliance mandatory and more swiftly applied warrant serious consideration.

**D. Other Specific FOIL Reform Proposals**

**1. 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. The Committee disagrees with New York courts that have acquiesced to agency extensions of FOIL deadlines. The Committee does not support this revision, which simply gives an agency greater time to decide *whether* it intends to disclose records, and does nothing to reduce the time it takes to actually produce records.

Senator Tedisco and Assemblymember Lawler introduced S05752/A0816 to require, in part, that an agency must grant or deny a request within 30 days, and if granted, produce the requested records within 90 days. Senator Serino has introduced a bill that would require agencies to grant or deny a request within 20 days and produce records within 40 days.

The Committee suggests that tinkering with statutory deadlines will do little to effectively improve compliance times. An oversight authority to handle FOIL appeals when delay constitutes a constructive denial is more likely to achieve quicker compliance without overtaxing the capacity of agencies to respond.