



**STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT**

Committee Members

RoAnn M. Destito
Robert J. Duffy
Robert L. Megna
Cesar A. Perales
Peter D. Grimm
M. Jean Hill
Hadley Horrigan
Colleen Kavanagh
David A. Schulz
Franklin H. Stone
Stephen B. Waters

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650
Albany, New York 12231
Tel (518) 474-2518
Fax (518) 474-1927
www.dos.ny.gov/coog

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**REPORT TO THE GOVERNOR
AND THE
STATE LEGISLATURE**

SOLIDIFYING A CULTURE OF OPENNESS

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I. E-Government and Open Data: Still Our Highest Priority

Technology has moved our culture from a paper-based, copy machine environment to an electronically indexed, digitally driven world where searches are measured in tenths of seconds, and information is transmitted, analyzed and expanded with increasing speed.¹ With an ever vigilant eye toward protection against unwarranted invasions of personal privacy, government should avail itself of new technology and make optimal use of its resources for continued growth and prosperity. Proactive digital disclosure increases government efficiency and unleashes innovation, economic growth, and cost savings.

In last year's annual report, we urged the Governor and the State Legislature to take action to "push" information to the public through the use of technologies that not only make government more efficient and accountable, but make large amounts of valuable government data more accessible and, therefore, usable in ways that foster community and economic development.

We are gratified by the efforts of Governor Cuomo and the Legislature to promote proactive disclosure. This approach moves from the "pull" environment of the Freedom of Information Law ("FOIL") to a "push" environment, in which agencies act on their own initiative to post records of interest on the web. We are also encouraged by news of the many state and local agencies that are expanding the volume and nature of resources, applications and information available online. We applaud and support the efforts of state and local agencies to make data available online for use in ways that may be, as yet, unimaginable. There is no better method of capitalizing on the potential of the vast amounts of data collected by government than to open it up to the marketplace of ideas, academia, entrepreneurs and the world.

A. Proactive Disclosure of Records

Increasingly, government utilizes its online presence to inform and interact with the public more efficiently.

The reasons to pre-empt FOIL requests with online postings have never been clearer. Many agencies now recognize the value of posting records that are frequently requested, important to the public and are otherwise available under FOIL. Although there is little legislation that mandates the posting of records, the number of local agencies that post minutes online, for example, continues to increase, alleviating the demand on the access officer's time to process requests, and permitting the public to inspect such records at will, free of charge.

Reliance on interactive applications and forms is constantly increasing to facilitate business outside of regular business hours. Many municipalities now have codes and regulations online, for example, searchable by index and keyword. Many counties have assessment and property data available in digital format, searchable by municipality, street and tax map identification number. Within its Geographic Information System (GIS) website, Westchester

¹ <http://eaves.ca/2013/10/20/access-to-information-technology-and-open-data-keynote-for-the-commissioners/>

County has an interactive map of all health navigators who can provide assistance comparing or enrolling in health care plans. Like other cities and counties, the City of Buffalo now provides an online GIS property viewer application free of charge, making property, council district, and census information available interactively.

Similarly, by leveraging the resources of a not-for-profit foundation, the Town of Huntington now offers its residents the ability to share responsibility for shoveling out fire hydrants after heavy snowfall. In the midst of winter snowstorms, buried hydrants cause dangerous delays for firefighters, but having town employees check and clear thousands of hydrants would be a timely, costly and burdensome process. Adopt-a-Hydrant lets governments look to community members for help. This map-based web app allows individuals, small businesses and community organizations to volunteer in shoveling out hydrants.²

Despite such progress, many records that are frequently requested, important to the public and clearly available under FOIL, are not posted online, and some agencies are reluctant to do so. Due to that resistance and the need for a catalyst to foster proactive disclosure, the Committee recommends enactment of legislation that embodies the goals and ingredients of proactive disclosure introduced by Assemblymember Kavanagh (A.107) and Senator Krueger (S.3438) during each of the past two years.

We emphasize that neither this bill nor any aspect of the Committee's recommendation constitutes a "mandate;" rather the legislation refers to making records available proactively "to the extent practicable." The bill offers government agencies flexibility in consideration of their resources and the needs of the public concerning the nature and duration of posting records on their websites.

B. Open Data

One aspect of proactive disclosure that is relatively new and unquestionably exciting is "open data", data made available in a digital format that can be retrieved, downloaded, indexed, searched and analyzed with commonly available software and web search applications. Maximizing the potential of government-collected data requires not only proactive disclosure, but disclosure whenever possible in a form that is readily usable by avoiding proprietary formats and taking advantage of standard systems and methods.

We applaud Governor Cuomo's efforts to share government data with the public and government agencies in <data.ny.gov>, a comprehensive data transparency website required to be created and operational pursuant to Executive Order No. 95. Data.ny.gov energizes the open data movement by providing user-friendly, one-stop access to data from agencies, and includes an array of information of great utility relating to economic development, recreation, health and public services. In addition to state agencies, data.ny.gov includes data from municipalities that are voluntarily making information resources available. The opportunity to share and use these existing resources in creative ways can help to reduce costs, improve efficiency, enhance transparency, foster research, promote informed decision-making and increase collaboration among government agencies and public participation.

² <http://www.huntingtonny.gov/content/13755/16473/17730/19800/19891/20099.aspx>

Private sector applications that build on publicly available data are on the rise, including one that maps vacant, city-owned land in Brooklyn. For each plot of land, information is presented detailing how to contact whoever controls it. Each entry can also become a message board, so that people can team up to make plans for the space, adding value to the data and the property.³ A mobile app for New York City residents to search for public pre-k and elementary schools is getting positive reviews. “Sage” provides a school's basic information, state exam results and NYC progress report grades, searchable by intersection, zip code or name. Tips about the admissions process are included.⁴

At the direction of the Executive, recent publication of the Open Data Handbook by the Office of Information Technology Services will provide valuable guidance to state agencies in posting their data in an open source platform and achieving the goals described in the Executive Order.

The Committee considers the action taken by the Governor a giant step forward in promoting the ability of the government, citizens and private sector organizations to recognize and use valuable information in ways that will improve the lives of New Yorkers and the state's economic climate.

Private sector application programming interfaces, or “API”s, are making it easier for the development of private sector applications in the world of campaign finance reform. As reported by the *Sunlight Foundation Blog* “The New York Times developed an API using Federal Election Commission data to help developers and journalists create apps that include ‘a snapshot of campaign finance data for a particular ZIP code.’ The API provides updated campaign finance data from the FEC within minutes after it is filed, allowing the apps that use it to provide the most recent information to users. That means media and their readers have access to timely information about what interests are funding political campaigns in their area.

Local governments are finding ways to contextualize their campaign finance data in apps, too. New York City, for example, created an NYC Votes app that lets users search through campaign contributions, among many other functions. Michigan has an app that lets users explore campaign finance information for candidates running at the state level. This all means people with mobile phones can access this information, whereas years ago it might have been accessible only by viewing paper documents in government buildings.”⁵

We note that the movement towards open data is captured in legislation proposed by Assemblymembers Englebright and Hevesi (A.8197), a bill that incorporates many of the attributes of the Executive Order.

³ [596 Acres](#)

⁴ <http://nycbigapps2011.challengepost.com/submissions/5837-sage-pre-k-and-elementary-schools-search>

⁵ The Impact of Opening Up Municipal Campaign Finance Data, by Alisha Green, Oct. 25, 2013
<http://sunlightfoundation.com/blog/2013/10/25/the-impact-of-opening-up-municipal-campaign-finance-data/>

II. Civil Rights Law §50-a: A Shield Against Accountability

Imagine that an off duty police officer lied about shooting a cab driver after the cabbie stopped to complain when he was forced off the road by the officer's late night reckless driving, and that the officer was later found by his department to have committed multiple criminal acts, including assault, misuse of a firearm and driving while ability impaired, in addition to having violated numerous departmental rules. And imagine that despite those findings, the officer was neither disciplined for his misconduct nor charged with any criminal violation... and that the public was kept completely in the dark about the findings that the officer had acted criminally and then lied to cover it up.

Such secrecy makes public accountability impossible; yet, this in fact describes the actual situation in one Long Island community last year. The only reason we know about it today is that a Newsday reporter, purely by chance, obtained copy of the internal police report after it was attached to papers filed in a federal lawsuit brought by the cabbie, and mistakenly placed in the public file by the court. See <http://data.newsday.com/long-island/crime/huntington-station-shooting/>.

To this day, no disclosure has been made by the department that employs the police officer, which routinely denies requests for such information. This is not an isolated practice in New York State.

Recently, a reporter called the Committee to ask why disciplinary records of a police officer who was newly appointed to police chief weren't required to be made public. She had obtained and published information that this officer had "lost" his service weapon on two occasions twenty years ago, and is currently under investigation by the FBI for his involvement in a situation stemming from a similar act. Apparently in response to her reporting, the police union has brought suit against the police department for failing to protect the officer's records, a legal cause of action which has previously been found to be non-existent. See <http://www.newsday.com/long-island/suffolk/suffolk-police-report-as-sergeant-chief-james-burke-twice-lost-gun-1.6283153?print=true>.

In another case this year, reporters were refused access to information about the failure of a police department to enforce an order of protection. The police failings resulted in the death of a young woman the police had a duty to protect and a \$7.7 million payout of taxpayer funds to settle a wrongful death action – a settlement made without disclosing to the public the police conduct that produced such a large settlement. See In an earlier incident that grabbed public attention upstate, a number of off-duty police officers threw eggs at passersby as they traveled home from a fellow officer's bachelor party in a bus. Eighteen of the officers were reprimanded, but the public was never allowed to know which ones. Although many in the community wanted to know the names of those officers, the Court of Appeals said that current New York law required the department to withhold the names.

The law blocking the public from the important information about police conduct in each of these examples is §50-a of the Civil Rights Law, which prohibits the disclosure of personnel records "used to evaluate performance toward continued employment or promotion" pertaining

to police and correction officers, peace officers, professional firefighters and paramedics. Enacted in 1976, the law was intended to protect police officers from harassing or vexatious cross-examination by defense counsel in criminal prosecutions, based on unproven or irrelevant material contained in police personnel files. Legislative memoranda in support of the law objected to instances in which discovery during the course of litigation resulted in the disclosure of unverified allegations, medical records and home addresses, that ought not be used against police officers called as witnesses.

The problem is that the courts have construed §50-a to encompass far more than materials traditionally prepared and used for personnel decisions, and have found it appropriate to withhold virtually any information that could potentially reflect upon a future decision to promote or retain an officer.⁶ And the secrecy imposed on police information by §50-a was extended by the legislature to include correction officers in 1981, professional firefighters and paramedics in 1986, and peace officers in 2002.

Under current law, §50-a serves as an impediment to citizens' ability to monitor the actions of vital public agencies and to exercise democratic oversight. The goal of §50-a to protect against abusive discovery and cross-examination can be achieved through other measures already existing in New York State law – a judge has full control over the records that are sought in litigation and that are used in court proceedings. Section 50-a undermines the core purpose of the Freedom of Information Law, and does so without meaningfully advancing a countervailing public interest.

A. Privacy, Safety and Security

The Committee has the utmost respect for those who function daily to serve and protect every New Yorker and recognize the need to ensure their safety and security. The effect of §50-a, however, is to make the public employees who have often the greatest impact on the lives of New York's citizens the least accountable to the public.

New York is virtually unique among the states in its refusal to facilitate transparency of police and other uniformed services. A study of the laws of all fifty states reveals that the great majority treat records pertaining to police officers in exactly the same manner as the treatment of records pertaining to all other public employees. No other state provides the unique protection afforded in §50-a.

More importantly, the other exceptions already contained in FOIL provide protection for the privacy, safety and security of all public employees, including those covered by §50-a.

Section 87(2)(b) of FOIL authorizes agencies to deny access when disclosure would result in **"an unwarranted invasion of personal privacy."** As that provision relates to records concerning public employees, the courts have determined that items pertaining to public

⁶ See, e.g. Gannett Co v James, 86 AD2d 744, 447 NYS2d 781 (4th Dept. 1982); Daily Gazette Co v City of Schenectady, 93 NY2d 145, 688 NYS2d 472 (1999); Stuart v NYS Department of Correctional Services, Supreme Court, Chemung County, August 30, 2001; Capital Newspapers v City of Albany, 15 NY3d 759, 906 NYS2d 808 (2010); Hearst v New York State Police, 109 AD3d 32, 966 NYS2d 557 (3rd Dept. 2013).

employees that are unrelated to their duties, such as home addresses, social security numbers, deductions claimed and the like may be withheld. Significantly, it has also been held that items of great concern to police and correction officers, unsubstantiated allegations, charges or complaints, would if disclosed constitute an unwarranted invasion of personal privacy and may be withheld under FOIL.

If, however, a public employee has been found to have engaged in misconduct or has admitted to misconduct, a record of that kind of determination has been determined to be available under FOIL with respect to all government employees, except those protected under §50-a.

Section 87(2)(f) of FOIL states that agencies may withhold records insofar as disclosure “**could endanger the life or safety of any person.**” A representative of the correction officers’ union has stressed the need for ensuring the safety and security of the officers, and FOIL clearly provides agencies with the ability to protect against disclosures that could result in jeopardy.

Section 87(2)(e) pertains to records “**compiled for law enforcement purposes**” and authorizes agencies to deny access when disclosure would interfere with a law enforcement investigation or judicial proceeding, deprive a person of a fair trial or impartial adjudication, identify a confidential source, or reveal non-routine criminal investigative techniques and procedures.

Section 87(2)(g) deals with internal governmental communications, and it was determined more than thirty years ago that an agency’s internal charges against an employee that have not yet been proven constitute “**intra-agency material**” that can be withheld.

In short, **FOIL provides those employees subject to §50-a, and all public employees, with the protection necessary to guard against unwarranted invasions of privacy or disclosure that could jeopardize their security or safety.**

Members of the Committee have discussed and debated the merits and need for the continued existence of §50-a over the past several months. Most members support the repeal of §50-a as an unneeded and counterproductive provision; others would leave §50-a as it is. All of the members agree that §50-a of the Civil Rights Law is ripe for reconsideration by the Governor and the State Legislature. As it is currently interpreted by the courts, that law does not encourage trust and confidence in government, nor does it foster the public policy goals of FOIL – making government agencies and their employees accountable to the public.

III. Ancillary Matter: Questionable Interpretation of FOIL

We call to the attention of the Governor and the Legislature judicial decisions that we believe have misconstrued certain aspects of FOIL, to the detriment of the public.

A. Time Limit For Responding To Requests

In New York Times Company v. City of New York Police Department, the Appellate Division, First Department, this year interpreted FOIL in a manner that rejects specific amendments enacted in 2008, but relied upon judicial precedent that no longer applies due to the amendments.

Section 89(3)(a) of FOIL as amended five years ago requires agencies to respond to requests for records within periods of time specified by the Legislature. In brief, when an agency needs more than five business days to respond, it must acknowledge receipt of the request. If more than twenty additional business days will be needed to determine rights of access, it must provide an explanation for the delay in writing and a “date certain”, a self-imposed deadline, indicating when the records sought will be made available in whole or in part. The same provision also states that a delay in disclosure must be reasonable based on attendant facts and circumstances.

Despite the direction in FOIL concerning the establishment of a “date certain” for response, the Court concluded that “§89(3) mandates no time period for denying or granting a FOIL request...” (103 AD3d 405, 407, 959 NYS2d 171, 173 [2013]). This is plainly incorrect under current law.

B. Statute of Limitations

The time within which a person denied access to records under FOIL may initiate a challenge to the denial in court is four months, which is the statute of limitations applicable when a proceeding is brought pursuant to Article 78 of the Civil Practice Law and Rules. That is so, in all but one circumstance.

A unique provision in FOIL pertains to the situation in which a commercial enterprise that has submitted records to a state agency asks the agency to keep the records confidential. If a request is made for those records, and the agency believes that they should be public, the commercial enterprise, based on §89(5) of FOIL, has fifteen days to initiate a proceeding to challenge the “adverse determination” and block disclosure. In that event, the entity seeking to preclude release of the record has the burden of proving that disclosure “would cause substantial injury” to its competitive position in accordance with the “trade secret” exception, §87(2)(d).

Although the “fifteen day” provision applies only in that circumstance, the Appellate Division, Third Department, concluded this year that “§89(5)(d) provides that a party seeking to challenge a FOIL request has 15 days from the date of ‘service of the written notice containing the adverse determination’ within which to do so” (MacKenzie v. Seiden, as Records Access Officer, Albany County District Attorney’s Office, 106 AD3d 1140, 964 NYS2d 702 [2013]). The office of a district attorney is not a state agency, and records at issue had nothing to do with competitive injury to a commercial enterprise. In short, we believe the Court misapplied §89(5) and improperly suggested that the ability to challenge a denial in court is fifteen days, rather than four months.

IV. Continuing Legislative Priorities

A. Access to Records of the State Legislature

In years past, the Committee has recommended that records of the State Legislature be subject to a presumption of access in a manner analogous to those maintained by state and local agencies.

FOIL is generally applicable to records of an “agency”, a term defined in §86(3) that excludes the judiciary and the State Legislature. Unless a statute confers confidentiality, most court records are available under other provisions of law (e.g., Judiciary Law §255, Uniform Justice Court Act §2019-a) and administrative records of the courts are subject to FOIL as records of the Office of Court Administration.

The State Legislature is required, pursuant to §88(2) of FOIL, to make certain records public, including bills, introducers’ bill memoranda, formal opinions, final reports of legislative committees and commissions, and similar documents. Not all of these types of records, if maintained by agencies, would be required to be made available pursuant to FOIL.

Because the Legislature has hundreds of employees, a substantial budget and a variety of administrative functions, the Committee believes that FOIL should be amended to require the State Legislature to meet standards of accountability and disclosure consistent with those applicable to agencies.

Concern has been raised about access to communications with constituents who contact legislators to express concerns in their personal or private capacity. It is our opinion that the Legislature would have authority to withhold such communications on the ground that such disclosure would constitute an unwarranted invasion of personal privacy. To offer clarification, §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. Communications with those who write on behalf of corporate or business interests should be subject to disclosure, for there is nothing “personal” about them.

Recommendation: Amend FOIL to Create a Presumption of Access to Records of the State Legislature

Statutory guarantees of access would increase public confidence in the State Legislature as an institution. Accordingly, we support the intent of legislation introduced by Assembly Member Kavanagh and Senator Squadron (A.2015/S.176) with the following recommendations:

- Include both houses of the State Legislature in the definition of “agency” in §86(3), and amend §89(2)(b) to protect communications of a personal nature between state legislators and their constituents.

- Where FOIL imposes distinct requirements on “state agencies”, add “or house of the state legislature” (see §§ 87[4] and 89[5]).
- Maintain §88 of the FOIL, which requires each house to make available for public inspection and copying certain records that are unique to the State Legislature, such as those referenced earlier. Subdivision (1) should be removed as duplicative and misleading due to amendments made to the fee provisions contained in §87(1)(b) and (c).
- Environmental Conservation Law §70-0113 should be repealed.
- Executive Law §713(3) should be amended to reference Article 6 of the Public Officers Law, not a particular section within Article 6.

B. The Port Authority of New York and New Jersey: Closing a Gap in the Law

The Committee has received many comments regarding the status of the Port Authority of New York and New Jersey (the PA) under the Freedom of Information Law. Because it is a bi-state agency, it falls through the cracks, for neither New York nor New Jersey can impose its laws beyond its borders. There is judicial precedent in this state indicating that FOIL does not apply to bi-state or international entities, and a New Jersey court recently determined that the PA is not subject to that state’s access to records law. In 2012 the issue took on added significance as a result of the PA’s critical role in the aftermath of Superstorm Sandy.

The PA years ago adopted a policy regarding disclosure of its records that is based largely on the New York FOIL. Nevertheless, because it is policy rather than law, it can be altered in a manner inconsistent with laws of both New York and New Jersey or even ignored in instances in which there may be controversy or reluctance. Perhaps more important is the apparent inability to challenge a denial of access to records by the PA. No state court appears to have jurisdiction authorizing or requiring a remedy if the PA fails to respond or denies access when action or inaction of that nature would be unjustifiable under the laws of either or both states if a state law applied.

It is our understanding that both New York and New Jersey would have to enact identical statutes to confer a right of public access to the PA’s records. Based on the assumption that is so, we urge the New York State Legislature and its New Jersey counterpart to enact laws obligating the PA to comply with requests submitted under either NY FOIL or NJ Open Public Records Act (OPRA).

C. Awarding Attorney’s Fees Under FOIL

FOIL is intended to promote accountability and the public’s right to gain access to government records, unless there is a valid reason based on one or more of the exceptions to rights of access appearing in §87(2). Most of the exceptions are designed authorize agencies to deny access when disclosure would create some sort of harm. Moreover, the courts have held

time and again that the exceptions must be construed narrowly, and that there must be clear justification for denying access.

When an agency denies access and there is no reasonable basis for the denial, the person seeking the records may have no alternative but to initiate a lawsuit to compel the agency to comply with law. In the Committee's view, the public should not have to go to court to gain access when FOIL clearly requires disclosure. If FOIL is amended to require that courts award the public attorney's fees payable by recalcitrant agencies when the public substantially prevails and the court finds that there was no reasonable basis for denying access, there would exist a clear deterrent to unreasonable denials of access. Compliance would improve, and costly and time-consuming litigation would diminish.

Recommendation: Require award of attorney's fees under FOIL when secrecy cannot be justified, and permit an award in other circumstances.

Section 89(4)(c) of FOIL authorizes a court to award attorney's fees in a lawsuit to a person denied access when the person has "substantially prevailed", and when the court finds either that (1) the agency had no reasonable basis for denying access, or (2) that the agency failed to abide by the time limits for responding to a request.

To encourage disclosure by focusing on the heart of FOIL, granting access to records, and to acknowledge the difficulties that agencies may face in their efforts to respond to requests and appeals in a timely manner, we recommend legislation that would recognize both of those elements.

The Committee believes that most agencies engage in their best efforts to comply with FOIL by responding to requests in a timely manner. There have been instances, however, in which agencies have failed to do so and have admitted as much. In a recent decision, New York Times v. City of New York Police Department, the court referred to "a pattern and practice" of failing to respond to requests in a timely manner, and the police department admitted that to be so (103 AD3d 405, 959 NYS2d 171 [2013]).

The Open Meetings Law as amended recently offers a reasonable model, for it distinguishes between a failure to comply involving secrecy and other situations in which failures to comply involve procedural matters. When a court finds substantial deliberations occurred in private that should have been discussed in public, it must award attorney's fees to the petitioner. When secrecy is not the issue, and in situations in which a public body fails to fully comply with notice requirements or prepare minutes of meetings within the statutory time of two weeks, a court has discretionary authority to award attorney's fees.

In like manner, FOIL should be amended to confirm that a court has discretionary authority to award attorneys fees when a petitioner has substantially prevailed, and provide that a court shall award attorney's fees when a petitioner has substantially prevailed and when the court finds that the agency had no reasonable basis for denying access.

To accomplish the foregoing, §89(4)(c) should be amended as follows:

In any proceeding brought pursuant to this article, the court may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in which such person has substantially prevailed, and shall award such fees and costs when the person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

D. Expediting Appeals in FOIL Litigation

Recommendation: Expedite Appeals in FOIL Litigation
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Legislative History: The language offered in this proposal has been introduced in both houses of the Legislature. Its enactment would encourage agencies to comply with FOIL, thereby saving the taxpayers' money through the development of judicial precedent that negates the necessity to initiate lawsuits.

Recent amendments provide the courts with wider discretionary authority to award attorney's fees to persons denied access to records due to a failure to comply with FOIL or closing meetings in violation of the Open Meetings Law, however, most members of the public are reluctant to challenge even clear violations of law. Initiating a judicial proceeding involves time and money, and merely a possibility, but not a guarantee, that there will be an award of attorney's fees.

In circumstances in which delays in decision making create unfairness or a restriction of rights, the law includes an expedited process for determining appeals. Because access delayed is often the equivalent of access denied, we recommend that FOIL be amended.

Currently, if a denial of a request for records is overturned by a court, an agency may file a notice of appeal and take up to nine months to perfect the appeal. Such delay is unacceptable. When the process of appealing begins, there is a statutory stay of the court's judgment that remains in effect until the appeal is determined by the Appellate Division.

The Committee recommends that FOIL be amended by adding a new subdivision as follows:

§89(4)(d) Appeal to the appellate division of the supreme court must be made in accordance with law, and must be filed within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry. An appeal taken from an order of the court requiring disclosure of any or all records sought shall be given preference, shall be brought on for argument on such terms and conditions as the presiding justice may direct upon application of any

party to the proceeding, and shall be deemed abandoned when an agency fails to serve and file a record and brief within two months after the date of the notice of appeal.

E. Renewing Access to Public Pension Information

Recommendation: Ensure that names of retirees who are receiving taxpayer-funded pensions continue to be disclosed to taxpayers.

The identities of former public employees who receive pensions should not be a secret. In light of a recent First Department, Appellate Division decision to the contrary, we recommend that the language of the statute be amended to clarify this issue which has been, since the inception of FOIL, not in dispute.

The introductory language of section 89(7) of FOIL states that:

“Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees’ retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees’ retirement system...”

A plain reading of the first clause quoted above indicates that home addresses of public officers and employees, both present and former, need not be disclosed. The second clause refers to absence of a right of access to the name or the home address of a beneficiary of a retirement system.

In our view, the language of FOIL makes a clear distinction between a “retiree” and a “beneficiary”. A retiree is a former public officer or employee; a beneficiary is a person who receives benefits due to a familial relationship with or legal designation by a former public officer or employee. With respect to retirees, home addresses need not be disclosed. With respect to beneficiaries, neither the names nor the addresses of those persons need be disclosed. Despite the distinction between these classes of persons in the statute, the Appellate Division has interpreted the statute to preclude access to names of retirees who receive pension benefits through the New York City Police Pension Fund (Empire Center for New York State Policy v. New York City Police Pension Fund, 88 AD3d 520, 930 NYS2d 576, [1st Dept, 2011]).

The identities of former public employees who receive pensions should not be a secret. In light of the recent Appellate Division decision to the contrary, we recommend that the language of the statute be amended to clarify this issue which has been, since the inception of FOIL, not in dispute.

As suggested in a New York Daily News editorial published soon after the decision was rendered: “This is as basic as it gets. Government issues check; everyone and his brother gets to inspect its purpose and its payee. Pension benefits are no exception.” It pointed out that the

FOIL “states that the names of pension ‘beneficiaries’ are exempt from mandatory disclosure...The [pension] funds issue checks to two categories of people: retirees, who are former officers, and beneficiaries, who are generally surviving spouses and children.”

At this time, we do not know whether the issue will be reviewed by the Court of Appeals. Irrespective of that possibility, we believe that the identities of former employees and the amounts of their benefits should remain accessible to the public. Because that is so, the Committee recommends that FOIL be clarified to ensure rights of access to basic information concerning the allocation of public moneys. We endorse the enactment of legislation sponsored by Assemblymember Englebright (A.5171) that was approved by the Assembly in 2012 and 2013. The bill would amend §86 of the Freedom of Information Law by adding definitions of “retiree” and “beneficiary” as follows:

- 3 6. "Retiree" means a former officer or employee of an agency, the
4 state legislature, or the judiciary who was a member of a public retire-
5 ment system of the state, as such term is defined in subdivision twen-
6 ty-three of section five hundred one of the retirement and social secu-
7 urity law and is receiving, or entitled to receive, a benefit from such
8 public retirement system.
9 7. "Beneficiary" means a person designated by a member or retiree of a
10 public retirement system of the state to receive retirement or death
11 benefits following the death of the member or retiree.

F. Disclosing Tentative Collective Bargaining Agreements with Public Employee Unions

Recommendation: When tentative collective bargaining agreements have been reached and their terms distributed to union members for approval, they should be available to the public.

Legislative History: The following was introduced in the Assembly in 2013 (A.3746) and would confirm the advice rendered by the Committee on Open Government in several written opinions.

The Committee urges the enactment of the following amendment, which would provide that an agency may withhold records that:

- 4 (c) if disclosed would impair present or imminent contract awards or
5 collective bargaining negotiations: (i) provided, however, that records
6 indicating the proposed terms of a public employee union or school
7 district collective bargaining agreement together with facts describing
8 the economic impact and any new costs attributable to such agreement,
9 contract or amendment shall be made available to the public immediately
10 following approval of such proposed terms by a public employee union,
11 and at least two weeks prior to the approval or rejection of such

12 proposed terms by the public employer when such records are sent to
13 members of the public employee union for their approval or rejection;
14 and
15 (ii) that copies of all proposed public employee union or school
16 district collective bargaining agreements, employment contracts or
17 amendments to such contracts together with facts describing the economic
18 impact and any new costs attributable to such agreement, contract or
19 amendment be placed on the municipal or school district websites, if
20 such websites exist, and within the local public libraries and offices
21 of such school districts or in the case of collective bargaining agree-
22 ments negotiated by the state of New York, on the website of the gover-
23 nor's office of employee relations at least two weeks prior to approval
24 or rejection of such proposed public employee union or school district
25 proposed collective bargaining agreements or action taken to approve
26 other employment contracts or amendments thereto;

Many situations have arisen in which tentative collective bargaining agreements have been reached by a public employer, such as a school district, and a public employee union, such as a teachers' association. Even though those agreements may involve millions of dollars during the term of the agreement, rarely does the public have an opportunity to gain access to the agreement or, therefore, analyze its contents and offer constructive commentary. Despite the importance of those records, there are no judicial decisions dealing with access for a simple reason: before a court might hear and decide, the contract will have been signed and the issue moot with respect to rights of access.

We point out that § 87(2)(c) of FOIL authorizes an agency to withhold records when disclosure would “impair present or imminent contract awards or collective bargaining negotiations.” It has been advised that the exception does not apply in the situation envisioned by the legislation, for negotiations are no longer “present or imminent”; they have ended. More significantly, the purpose of the exception is to enable the government to withhold records when disclosure would place it, and consequently the taxpayer, at a disadvantage at the bargaining table. It has been held, however, that § 87(2)(c) does not apply when both parties to negotiations have possession of and can be familiar with the same records, when there is “no inequality of knowledge” regarding the content of records. When a proposed or tentative agreement has been distributed to union members, perhaps hundreds of employees, knowledge of the terms of the agreement is widespread, but the public is often kept in the dark.

We urge that the legislation be enacted in 2014.

G. Streamlining Trade Secret Protection

Recommendation: Require a commercial enterprise to periodically renew its request that records be kept confidential.

The FOIL includes unique and innovative provisions concerning the treatment of records

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

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

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

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

The request for confidentiality remains in effect without expiration, unless and until an agency seeks to disclose on its own initiative or until a FOIL request is made. Because there is no expiration, agencies are required to implement the procedure in §89(5), often years after a request for confidentiality was made.

To streamline the procedure and reduce the burden on state agencies, §89(5) should be amended as follows:

5.(a)(1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency provisionally except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be provisionally excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records provisionally except such

information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be provisionally excepted from disclosure.

(2) The request for an exception shall be in writing, shall specifically identify which portions of the record are the subject of the request for exception and shall state the reasons why the information should be provisionally excepted from disclosure. Any such request for an exception shall be effective for a five-year period from the agency's receipt thereof. Provided, however, that not less than sixty days prior to the expiration of the then current term of the exception request, the submitter may apply to the agency for a two-year extension of its exception request. Upon timely receipt of a request for an extension of an exception request, an agency may either (A) perform a cursory review of the application and grant the extension should it find any justification for such determination, or (B) commence the procedure set forth in paragraph (b) of this subsection to make a final determination granting or terminating such exception.

(3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be provisionally excepted from disclosure and be maintained apart by the agency from all other records until the expiration of the submitter's exception request or fifteen days after the entitlement to such exception has been finally determined, or such further time as ordered by a court of competent jurisdiction.

(b) During the effective period of an exception request under this subdivision, on the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;

(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;

(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any,

requesting the record, the person who requested the exception, and the committee on ~~public access to records~~ open government.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision:

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.

(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on ~~public access to records~~ open government. The notice shall contain a statement of the reasons for the determination.

(d) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision.

(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.

(f) Where the agency denies access to a record pursuant to paragraph (b) of this subdivision in conjunction with ~~(d)~~ of subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.

(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.

(h) As used in this subdivision the term “agency” or “state agency” means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

This recommendation was proposed by the Legislature in years past, including in 2012, when it was introduced in both houses and passed by the Assembly (A.9022/S.7816). It is currently pending in the Assembly (A.6110), introduced by Assembly Member Englebright.

H. Uniform Access to "E911" Records

Recommendation: Disclose or withhold E911 records pursuant to FOIL.

E911 is the term used to describe an "enhanced" 911 emergency system. Using that system, the recipient of the emergency call has the ability to know the phone number used to make the call and the location from which the call was made. A section of County Law prohibits the disclosure of records of E911 calls. However, that statute is either unknown to many law enforcement officials, or it is ignored. Soon after the Lake George tour boat sank and twenty people died, transcripts of 911 calls were published. While those who made the emergency calls were not identified, the disclosure of the transcripts clearly violated existing law.

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

We note that the County Law does not apply to New York City, which has for years granted or denied access to records of 911 calls as appropriate based on FOIL.

I. Disclosures Concerning Sex Offenses

Recommendation: Clarify that privacy of victims of sex offenses, not that of defendants, is protected.

Section 50-b of the Civil Rights Law pertains to victims of sex offenses, and subdivision (1) of that statute provides that:

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

two of this section."

In addition, §50-c of the Civil Rights Law states that:

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

Due to the breadth and vagueness of the language quoted above, public officials have been reluctant to disclose any information concerning sex offenses for fear of being sued.

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.

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

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

J. Cameras in the Courts

Recommendation: Authorize reasonable use of cameras.

Despite the issuance of several decisions indicating that the statutory ban on the use of cameras is unconstitutional, legislation remains necessary. Especially in consideration of the successful use of cameras in the Diallo trial, as well as other proceedings around the state, the Committee reaffirms its support for the concept, subject to reasonable restrictions considerate to the needs of witnesses.

Although New York is often considered to be the media capital of the world, cameras are permitted, in some instances with limitations, in courts in 45 states. Few states, one of which is New York, expressly prohibit the use of cameras in trial courts.

V. International Contributions and Recognition

The Committee on Open Government is one of the few state agencies of its kind in the United States. Consequently, over the years, its staff has been asked to share its experience with several nations and nonprofit groups around the world. Its executive director, Robert Freeman, has travelled to China, Japan, Eastern Europe, South America and Mexico to discuss concepts associated with freedom of information.

The executive director, at the request of the International Senior Lawyers Project, co-authored "*Breathing Life into Freedom of Information Laws: The Challenges of Implementation in the Democratizing World.*" The article, which was prepared through a grant from the National Endowment for Democracy and the Center for International Media Assistance, is intended to serve as a guide describing realistic methods of implementing access to information laws in developing democracies.

VI. Services Rendered by the Committee

4940 TELEPHONE INQUIRIES
850 EMAIL RESPONSES
141 ADVISORY OPINIONS
89 PRESENTATIONS
4626 TRAINED

Committee staff offer advice and guidance orally and in writing to the public, representatives of state and local government, and to members of the news media. Each year we track telephone calls and advisory opinions rendered. In 2012, in an effort to be more comprehensive in our data collection, we began tracking email responses to questions, which has become an important part of the services that we provide.

During the past year, with a staff of two, the Committee responded to almost 5,000 telephone inquiries and more than 850 requests for guidance answered via email. In addition, staff gave 89 presentations before government and news media organizations, on campus and in public forums, training and educating more than 4600 people concerning public access to government information and meetings. We are grateful that many entities are now webcasting and/or recording our presentations and making them available to others.

A. Online Access

Since its creation in 1974, the Committee's staff has prepared nearly 25,000 written advisory opinions in response to inquiries regarding New York's open government laws. The opinions prepared since early 1993 that have educational or precedential value are available online through searchable indices.

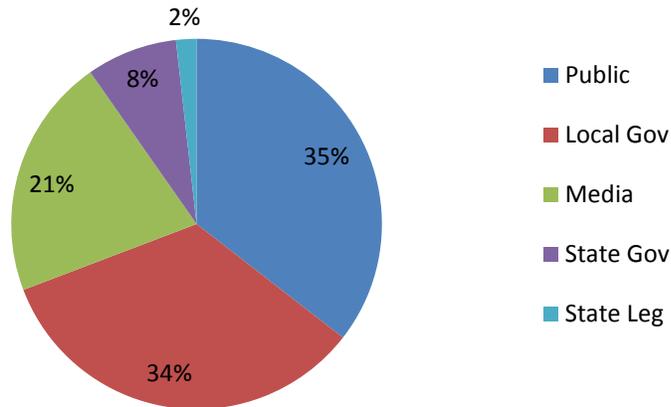
In addition to the text of open government statutes and the advisory opinions, the Committee's website also includes:

- Model forms for email requests and responses
<http://www.dos.ny.gov/coog/emailrequest.html>;
<http://www.dos.ny.gov/coog/emailresponse.html>
- Regulations promulgated by the Committee (21 NYCRR Part 1401)
<http://www.dos.ny.gov/coog/regSCOOG.html>
- “Your Right to Know”, a guide to the FOI and Open Meetings Laws that includes sample letters of request and appeal
http://www.dos.ny.gov/coog/Right_to_know.html
- “You Should Know”, which describes the Personal Privacy Protection Law
<http://www.dos.ny.gov/coog/shldno1.html>
- An educational video concerning the Freedom of Information and Open Meetings Laws consisting of 27 independently accessible subject areas
<http://www.dos.ny.gov/video/coog.html>
- Responses to “FAQ’s” (frequently asked questions)
<http://www.dos.ny.gov/coog/freedomfaq.html>;
<http://www.dos.ny.gov/coog/openmeetinglawfaq.html>
- The Committee’s latest annual report to the Governor and the Legislature
<http://www.dos.ny.gov/coog/pdfs/AnnualReport.pdf>
- “News” that describes matters of broad public interest and significant developments in legislation or judicial decisions
<http://www.dos.ny.gov/coog/news.html>

B. Telephone Assistance

This year, Committee staff answered 4940 telephone inquiries, the majority of which pertained to the Freedom of Information Law. We recorded fewer telephone inquiries than in 2012, most likely due to an increased reliance on email and the website.

Telephone Inquiries by Caller

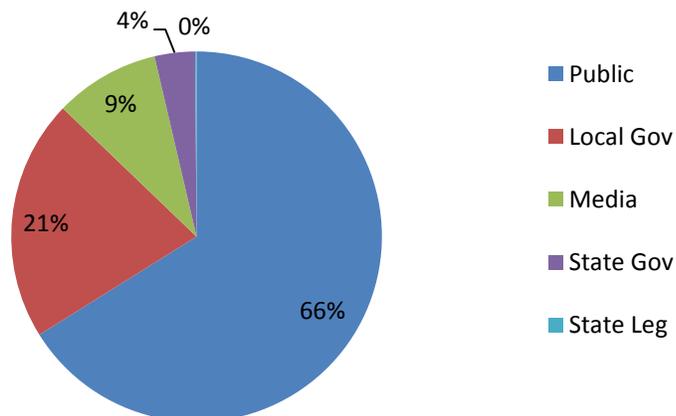


C. Assistance via Email

In 2012, Committee staff began tracking substantive email requests in much the same way it tracks telephone statistics, by writer and subject. 2013 is the first full year during which staff tracked email requests. Routine or mundane office business emails were not tracked.

Based on the data captured this year (850 emails), we learned that three-quarters of the email requests concern issues related to FOIL, and unlike telephone inquiries, two-thirds of the email inquiries originate from the public.

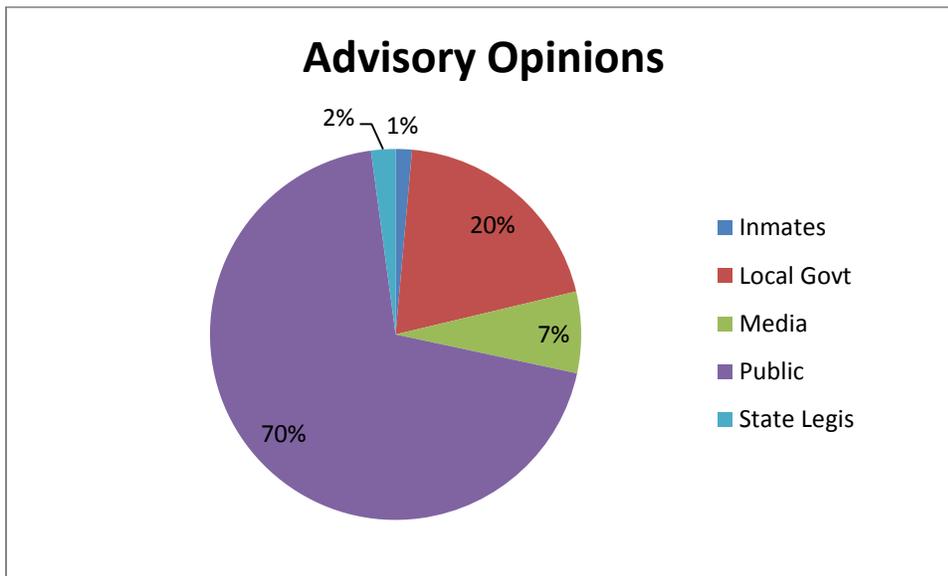
Emails by Writer



D. Advisory Opinions

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

Nevertheless, Committee staff prepared 141 advisory opinions in response to requests from across New York. As is true in years past, the bulk of the opinions (87) pertained to FOIL.



E. Presentations

An important aspect of the Committee's work involves efforts to educate by means of seminars, workshops, and various public presentations. During the past year, the staff gave 89 presentations. The presentations are identified below by interest group for the period of November 1, 2012 to October 31, 2013. More than 4600 received training and education through those events, and countless others benefitted from the use of the Committee's training video online, as well as materials posted on the website.

1. Addresses were given before the following groups associated with government:

- Office of the Medicaid Inspector General, Albany
- Office of Temporary and Disability Assistance, Albany (CLE)
- Capitol Camp, Hackathon/Unconference, sponsored by NYS Senate and Office of Information Technology, Albany
- Henry Johnson Charter School, Albany

NYS Government Finance Officers Association, Hauppauge
 NYS Department of Transportation
 Westchester County Municipal Clerk and Finance Officers Assoc., Elmsford
 Rockland County officials, training, New Hempstead
 NYS Association of County Clerks, Albany
 Office of the Inspector General, training, Albany (CLE)
 New York Racing Association, training, New York City
 Mid-Hudson Library System, Poughkeepsie
 NYS Association of Counties, Albany
 NYS Department of Environmental Conservation, training, Albany (CLE)
 NYS Association of Towns (2 programs), New York City
 NYS Department of Agriculture and Markets, training, Colonie
 Monroe County Town Clerks, Tax Receivers and Collectors Association, Riga
 Monroe County Association of Chiefs of Police, Rochester
 Tug Hill Local Government Conference, Watertown
 Chemung-Schuyler Clerks Association, Horseheads
 Southern Tier Regional Planning and Development Conference, Corning
 Newburgh Preparatory Charter School, Newburgh
 Otsego County Local Government Training Workshop, Oneonta
 Finger Lakes Library System, Ithaca
 Connetquot School Board, training/public forum, Bohemia
 NYS Association of Fire Districts, Saratoga Springs
 Town of Schuyler Planning & Zoning Training Topics, Utica
 Dutchess County officials, training, Poughkeepsie (CLE)
 City of New Rochelle, training, New Rochelle
 Western New York Regional Planning Conference, Bushnell's Basin
 Southern Adirondack Library Association, Queensbury
 NYS School Boards Association, webinar, Latham
 Orange County Planning Federation, Chester
 NYS Library, training for library directors/boards of trustees, webinar, Albany
 NY Conf. of Mayors Ann. Training School (2 programs), Saratoga Springs (CLE)
 Village of Ossining, training, Ossining
 New York Library Association, Niagara Falls
 Hudson City School District, Hudson
 NYS Association of Counties, Saratoga Springs
 NYS Office of the Attorney General, Albany (CLE)
 NYS School Boards Association (2 programs), Rochester
 Open Government Webinar with LexisNexis and HB Litigation (CLE)
 NYS Association of Counties, Newly Elected Officials, training, Albany

2. Addresses were given before the following groups associated with the news media:

Legislative Gazette, Albany
 WUTQ, talk , Newburgh
 College of St. Rose, Journalism, Albany
 WBNF, talk radio, Binghamton

Poughkeepsie Journal, training
Capitol Tonight, Albany
SUNY/Albany, Journalism
Capitol Express, WUTQ radio, Albany forum
New York Press Association, Saratoga Springs
Syracuse Press Club, Syracuse
National Endowment for Democracy/Center for Int'l Media Assistance, *Breathing Life Into Freedom of Information Laws*, Washington, DC

3. Presentations for students included:

SUNY/Albany, Graduate School of Information Science and Computing
Syracuse University, Maxwell School (2 programs)
SUNY/Albany, Graduate School of Information Science and Computing
Albany Law School, Government Ethics Seminar, Albany
Center for Women in Government and Civil Society, Rockefeller College, Albany
Syracuse University, Maxwell School, Shanghai City Officials, Albany
Syracuse University, Maxwell School, Zhejiang Prov. Govt. officials, Albany
NYS Senate Fellows, Albany
Syracuse University, Maxwell School, Suzhou City Govt. officials, Albany
Empire State Fellows, Albany
Syracuse University, Maxwell School, Fudan University/Shanghai, Albany
SUNY/Albany, Graduate School of Information Science and Computing
Syracuse University, Newhouse School of Public Communication, Syracuse
Syracuse University, Maxwell School, Shenzhen City officials, Albany
Ithaca College, Park School of Communications, Ithaca
Schenectady High School, senior debate on freedom of the press, Albany (remote)

4. Presentations association with the public interest included:

Nassau-Suffolk County Bar Assoc./School Law Conference, Hauppauge (CLE)
Center for Sustainable Rural Communities, Cobleskill
Public Forum sponsored by m3pmedia, DeRuyter
Public Forum sponsored by Port Byron Teachers' Association, Port Byron
Public Forum sponsored by WRVO, Utica
Public Forum sponsored by Wappingers PTA
NYS Bar Association, Municipal Law Section, New York City (CLE)
Public Forum sponsored by Halston Media, Mahopac
League of Women Voters/Students Inside Albany, Albany
Public Forum, sponsored by League of Women Voters, Orleans County, Albion
Schodack Planning and Development Association, Castleton
Association of Brookhaven Civic Organizations Summer Forum, Coram
Public Forum sponsored by Guernsey Memorial Library, Norwich
NYS Bar Association, Albany (CLE)
Assoc. of the Bar of the City of New York, Crim. Justice Section, New York City