



**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

December, 2014

ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE

Celebrating 40 Years of the Freedom of Information Law

and the Committee on Open Government ...

More to Be Done

Meeting the public's legitimate right
to information concerning government
is good government.

Table of Contents

I.	THE PUBLIC DESERVES AND URGENTLY NEEDS GREATER TRANSPARENCY SURROUNDING THE ACTIONS OF POLICE. IT IS TIME TO ACT	3
II.	OVERVIEW OF 2014	7
III.	FURTHER LEGISLATIVE PROPOSALS	9
A.	The Governors of New York and New Jersey Should Sign Legislation to Make the Port Authority Subject to Access Laws	9
B.	Awards of Attorney’s Fees Should Be Mandatory in Certain Circumstances	9
C.	FOIL Should Be Amended to Expedite Appeals	10
D.	Proactive Disclosure Should Be Codified	11
E.	FOIL Should Be Amended to Create a Presumption of Access to Records of the State Legislature	11
F.	Commercial Enterprises Should Be Required to Renew Requests that Records be Kept Confidential.....	12
G.	Once Disclosed to Public Employee Unions, Tentative Collective Bargaining Agreements Should Be Accessible	16
H.	E911 Records Should Be Disclosed or Withheld Pursuant to FOIL	17
I.	Civil Rights Law §50-b Should Be Amended to Clarify that Privacy of Victims of Sex Offenses, Not that of Defendants, is Protected	17
J.	The Reasonable Use of Cameras Should Be Authorized in Courtrooms	18
IV.	ANCILLARY MATTERS: QUESTIONABLE INTERPRETATIONS OF FOIL	20
A.	Time Limit for Responding to Requests Limitations	20
B.	Statute of Limitations	20
V.	SERVICES RENDERED BY THE COMMITTEE	22
A.	Online Access	22
B.	Telephone Assistance	23
C.	Assistance via Email	23
D.	Advisory Opinions	24
E.	Presentations	25

INTRODUCTION

The Freedom of Information Law has transformed government in New York over the past 40 years. Anchored by an all-encompassing definition of “record,” a presumption of access and a standard of reasonableness, the law has survived and evolved, in keeping with developments in culture, policy and information technology. This Report contains our recommendations to address the issues most relevant in 2014.

I. THE PUBLIC DESERVES AND URGENTLY NEEDS GREATER TRANSPARENCY SURROUNDING THE ACTIONS OF POLICE. IT IS TIME TO ACT.

Across the nation, there have been visceral reactions to events involving the use of force by police officers. Governor Cuomo and many others have called for a review of the practices of law enforcement agencies and greater transparency. We agree. The Committee recognizes that our police do a remarkable service for the citizens of this State, but current laws keep vital information about police activities from the public. This corrosive lack of transparency about police activities undermines accountability and diminishes public trust. Greater transparency is urgently needed.

If no other recommendation in this Report is implemented this coming year, the Legislature and the Governor should make it a top priority in 2015 to remove secrecy that currently surrounds some activities of police departments across this State. The Freedom of Information Law (FOIL) today affords the public far less access to information about the activities of police departments than virtually any other public agency—even though police interact with the public on a day-to-day basis in a more visceral and tangible way than any other public employees.

The cause of this disparity is §50-a of the Civil Rights Law, an exemption from the ordinary rules of disclosure that apply to other government agencies. Section 50-a permits law enforcement officers to refuse to disclose “personnel records used to evaluate performance toward continued employment or promotion.”¹ The Legislature adopted this exemption in 1976 for the narrow purpose of preventing criminal defense lawyers from rifling through police personnel folders in search of undocumented information to use in cross examination of police witnesses during criminal prosecutions. Over time this narrow exception has been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer. That means information about what an officer actually has done can be kept from the public in most cases. And it is.

¹ Over the years, §50-a has been expanded to protect personnel records of correction officers, professional firefighters and peace officers.

Courts have permitted police departments to withhold virtually any information that could potentially reflect upon a future decision to promote or retain an officer.² For example, courts have construed §50-a to allow police to withhold records of an officer's involvement in a hit and run accident while off-duty³ and, in direct contravention of a Court of Appeals ruling, information about police accrual and leave practices.⁴ Police have denied production of reports of misconduct, including instances where departments have determined that their officers have broken the law.⁵ Such secrecy is unwarranted and defeats FOIL's goal of transparency and accountability.

Obtaining any information from some departments has become notoriously difficult. To take one significant example, a report issued last year by then Public Advocate Bill de Blasio graded eighteen New York City agencies on their FOIL compliance. Of the agencies that received more than 1,000 annual requests, NYPD ranked dead last.⁶ NYPD is the nation's largest police department. It employs over 34,000 police officers, controls an annual budget of over \$4.4 billion, and exercises jurisdiction over eight million city residents.⁷ The interactions between the public and the police can be filled with tension, more so than any other public agency.⁸ The disclosure provisions of FOIL are crucial to citizen oversight of NYPD, and police departments statewide.

It is time to correct this regrettable situation and require the same level of public disclosure for police departments as is required from other public agencies. FOIL provides all public employees with the protections necessary to guard against unwarranted invasions of privacy and from disclosures that could jeopardize their security or safety. While police officers

² 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).

³ Hearst v New York State Police, 109 AD3d 32, 966 NYS2d 557 (3rd Dept. 2013).

⁴ Stuart v Department of Community and Correctional Services, Supreme Court, Chemung County, August 30, 2001 (permitted deletion of names of officers from accrual and leave statements); Capital Newspapers v Burns, 67 NY2d 562, 505 NYS2d 576 (1986)(required disclosure of lost time reports that include days and dates of sick leave used).

⁵ See, e.g., Gus Garcia Roberts and Sandra Peddie, "Unjustified," *Newsday* (Dec. 18, 2013) available at <http://data.newsday.com/long-island/crime/huntington-station-shooting/> (discussing conclusions of illegal conduct by police in internal affairs reports that are typically withheld under Section 50-a).

⁶ Bill de Blasio, *BREAKING THROUGH BUREAUCRACY: EVALUATING GOVERNMENT RESPONSIVENESS TO INFORMATION REQUESTS IN NEW YORK CITY* at 18 (2013), available at <http://www.streetsblog.org/wp-content/pdf/deBlasioFOILReport.pdf>

⁷ See Mayor's Office of Operations, *Preliminary Mayor's Management Report, New York City Police Department*, 1-6 (Feb. 2013), available at http://www.nyc.gov/html/ops/downloads/pdf/pmmr2013/2013_pmmr.pdf (accessed Nov. 17, 2014).

⁸ In 2011, for example, NYPD officers stopped and questioned New Yorkers almost 700,000 times. See NYCLU, *Stop-and-Frisk Data*, <http://www.nyclu.org/content/stop-and-frisk-data> (accessed Nov. 17, 2014).

have unique need for such protections, the general FOIL exemptions are already sufficient to safeguard the legitimate privacy and safety concerns of law enforcement officers. Moreover, the courts are adequately equipped to protect against improper cross-examination and determine when records regarding a police officer's behavior are admissible in a trial, without the blanket denial of public access to information about police activity that is imposed by §50-a.

The Committee has the utmost respect for those who function daily to serve and protect every New Yorker. We 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 power over the lives of New York's residents the least accountable to the public.

New York is virtually unique among the states in its refusal to apply the same transparency to police and other uniformed services as applies to all other public employees. Our 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 other public employees. No other state provides the unique protection afforded in §50-a.

Moreover, so long as §50-a remains on the books, other efforts to increase police accountability that have been proposed are less likely to be effective. For example, the mandatory use of "bodycams" by police has been discussed and in some instances initiated. These video cameras capture the events in which law enforcement officers are involved and may provide useful investigative tools, insure the accuracy of interviews with witnesses, or create evidentiary material for use at trial, but they are unlikely to provide greater transparency and accountability if the videotape recordings can be kept from the public under §50-a in cases where no privacy or safety concerns would otherwise justify withholding them. Under current application of §50-a, many law enforcement agencies would surely contend that a recording can, in the words of §50-a, be "used to evaluate performance toward continued employment or promotion" and, therefore, is exempt from disclosure. If the video can only be seen by the internal affairs unit within a police department, and there is no public disclosure, a primary purpose of the bodycam would be defeated.

If, on the other hand, the general rules of FOIL govern access to the recordings, the nature, the content and the effects of disclosure in consideration of the statutory exceptions to rights of access would be the determining factors. There may be many instances in which disclosure would constitute an unwarranted invasion of privacy. There would be others in which disclosure would interfere with a law enforcement investigation. In those cases, as in others relating to law enforcement activities, exceptions to FOIL's right of access could properly be asserted. But in many situations, without §50-a there would be no proper basis for denying public access—increasing transparency and a sorely needed sense of accountability.

We discern no need to retain §50-a in the face of its overbroad anti-disclosure impact. As noted, a judge has control of the courtroom and the information that is publicly disclosed during

a judicial proceeding. If an item may be embarrassing or serve to harass a police officer that is irrelevant to the proceeding, the court has the authority to ensure that it is not disclosed. In terms of FOIL, it is clear that unsubstantiated allegations, charges or complaints concerning public employees, including those classes of public employees denominated in §50-a may be withheld. Disclosure would constitute an unwarranted invasion of privacy in those cases. Further, if the charges are initiated by a government agency, those records have been found to be “intra-agency materials” that may be withheld. Similarly, items such as medical information, home addresses and others that are either intimate or irrelevant to the performance of one’s duties may be withheld based on the privacy exception in FOIL.

All members agree that §50-a of the Civil Rights Law is ripe for reconsideration by the Governor and the State Legislature. As interpreted by the courts, rather than encourage trust and confidence in government, it does the opposite. It creates a legal shield that prohibits disclosure, even when it is known that misconduct has occurred. It undermines the public policy goals of FOIL, which are to make government agencies and their employees accountable to the public, and therefore, more deserving of the public’s trust.

Section 50-a as it is written and construed, defeats accountability, increases public skepticism and foments distrust. It is time to act. Outright repeal would serve as a positive step toward increasing transparency in law enforcement. Alternatively, §50-a should be amended to make clear its more narrow intent, such as with the insertion of the word “solely,” as follows:

“All personnel records used solely to evaluate performance toward continued employment or promotion,…”

We strongly recommend legislative action on §50-a of the Civil Rights Law in 2015.

II. OVERVIEW OF 2014

Early on, the Court of Appeals recognized FOIL's effectiveness for improving government accountability and exposing waste and abuse. Today, it is clear that the demand for accessible information has transformed the landscape of government websites, resulting in e-governance efficiencies, thousands of open data sets in standard formats, and untold numbers of documents available online.

Through the issuance of Executive Order No. 95 and the creation of <https://data.ny.gov/>, Governor Cuomo has propelled New York forward in the open data movement, energizing both the public and private sectors to build from the data that government gathers. By offering a standardized platform for access to information regarding economic development, recreation, health and an array of public services, government at the state and local level is empowered to evaluate its performance, focus its efforts and invest its resources more efficiently,

Through its METRIX program, for example, the NYS Health Department has made streams of data available along with powerful analytical tools, transforming information into user-friendly meaningful, real-time answers around the clock. Available beds at nursing homes and related health care information necessary to place patients, inspection reports from restaurants that can be organized by topics of choice, including whether safety violations have been addressed, are a few types of issues that can be addressed with this data.

The Metropolitan Transportation Authority has built a half-dozen applications to provide real-time schedule information in a manner that eases planning for travel and commuting. Through mobile applications, travelers can access information regarding service delays, connecting services, travel times and updates through their smartphones and tablets. Private sector entities have built this information into applications, enhancing the products and services that they offer with no additional cost to government.

Assessment rolls and real property records, historically only available during business hours in pre-printed bound volumes, are now available from practically every municipality in New York at any time, by anyone.

E-governance developments make interactions with government more efficient and less burdensome for consumers, parents, employees, and the business community. Examples by state and local governments abound. Filing documents, applying for benefits, registering complaints, enrolling in programs and signing up for automated alerts are a few of the ways in which we all now rely on electronic and partially automated interactions with government.

Government touches peoples' lives from birth to death, and proactive disclosure is an essential part of those intersections. Genealogical research, a pastime for millions, has fundamentally changed with the partnership between New York State Archives and ancestry.com, making millions of original scanned records available online and free of charge to New Yorkers. Not only does this effort enhance an individual's family research, but it permits academics to analyze information with ease heretofore not experienced.

Local governments make their records more accessible by placing them online. Minutes, agendas, schedules, applications, local ordinances and codes, calendars, contact information, and hours of operation, are available with any available search engine. Notices and guides for paying taxes, watching public meetings and learning of disruptions in trash collection are all now possible without visiting or calling town hall. Partnerships with cemeteries and religious organizations, and records maintenance grants from NYS Archives, are examples of how proactive disclosure has permeated our interactions with government.

State and local government agencies now routinely accept FOIL requests via semi-automated systems and email, and when possible, provide copies electronically. Digital communications simplify the transaction, permitting an efficient exchange of information and records, in most cases with no fees payable by the applicant. The public benefits: people can submit requests via email at any time of the day or night. Government benefits: employees need not search and retrieve paper records from filing cabinets, stand at the photocopier, or track payments, receipts or deposits. Everyone wins.

By taking the initiative to proactively disclose, offering data for analysis, and enhancing e-government offerings, New York has encouraged efficiency and transparency once again.

We are grateful to each of the seven governors in office during the past 40 years for their recognition of the necessity of the Committee's independence. While every state in the United States has enacted open records and open meetings laws, few have created agencies in any way similar to the Committee. Fewer have survived, as has the Committee, without political interference. In celebration of the anniversary, and in support of those who have worked to maintain the Committee's independent voice, appended to this report is a timeline of key events in the history of FOIL, including legislation, judicial determinations, and significant actors.

There is always more to be done.

As outlined in the following Legislative Recommendations, the Committee believes that there are certain changes to the law that should be made to enhance its application and interpretation. For example, awards of attorney's fees should be mandatory in certain instances; far too often we learn of resistance and delays that can defeat the intent of FOIL. Proactive disclosure requirements should be codified; government agencies at the state and local level, "to the extent practicable," should post records online that are clearly public and of general significance.

Much to celebrate, but more to be done.

III. FURTHER LEGISLATIVE PROPOSALS

A. The Governors of New York and New Jersey Should Sign Legislation to Make the Port Authority Subject to Access Laws

By passing identical bills, the New York and New Jersey legislatures have paved the way for enactment of a law that would require the Port Authority to comply with FOIL or the New Jersey Open Records Act, depending on the circumstances. In keeping with recommendations in our 2013 report, we applaud the efforts of Assemblymember Paulin (A.8785) and Senator Ranzenhofer (S.6718).

B. Awards of Attorney's Fees Should Be Mandatory in Certain Circumstances

When an agency denies access, the person seeking records may have no alternative but to initiate a lawsuit to compel the agency to comply with law. Lawsuits are expensive and time consuming.

FOIL now gives courts discretionary authority to award costs and reasonable attorney's fees when a person denied access substantially prevails and the courts find either that an agency had no reasonable basis for denying access, or that the agency dragged its feet and failed to abide by the time limits for responding to a request that are clearly indicated in the law.

The need for more stringent rules for awarding attorney's fees was underscored this year in a case in which a court refused even to consider a fee application after an agency delayed responding to a FOIL request for nearly a year. In Kohler-Hausmann v. New York City Police Department, the Department repeatedly delayed its response, and issued an "initial determination" granting the request *after* the requester filed a lawsuit to compel compliance (42 Misc. 3d 1214 [A][2014]). The Department then used its after-the-fact response as a means of arguing that the petitioner's lawsuit was not yet ripe, even though its lengthy delay constituted a "constructive denial" of the request. The court agreed with that contention and dismissed the action without considering the request for an award of attorney's fees. The decision is now on appeal, but this case illustrates the current unwillingness of courts to use fee awards as a tool to compel or encourage compliance with FOIL. Until awards of attorneys' fees become more than empty threats, some agencies will have no incentive to respond to FOIL requests in a meaningful and timely manner.

If FOIL is amended to require that courts award attorney's fees payable by recalcitrant agencies in certain cases, there would exist a clear deterrent to unreasonable denials of access. Compliance would improve, and costly and time-consuming litigation would diminish.

The Open Meetings Law ("OML") offers a reasonable model to amend the enforcement provisions of FOIL, for it distinguishes between a failure to comply involving secrecy and other situations in which a failure to comply involves procedural matters. When a court finds that substantial deliberations occurred in private that should have occurred in public, it must award attorney's fees to the petitioner. When secrecy is not the issue, i.e., 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 both situations, the court has further authority to require training given by the Committee.

In keeping with the proposals offered last year, we recommend that the FOIL attorney's fees provision be amended in a manner similar to the OML by distinguishing between those situations in which a failure to comply involved secrecy, and others involving the absence of procedural compliance.

The amendment should provide that a court "shall award costs and reasonable attorney's fees when an agency had no reasonable basis for denying access to records, and may do so when an agency fails to respond within the proper time or otherwise fails to comply with this article."

As in the OML, we also recommend that courts be granted discretionary authority to require agency personnel to attend training conducted by staff of the Committee. In addition, due to the nature of FOIL requests, and as a way to measure the effectiveness of training provided, we recommend that courts be given the discretionary authority to require the agency to provide the Committee on Open Government with copies of all FOIL requests and responses for six months subsequent to undergoing training.

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

(c) The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and/or when the agency failed to respond to a request or appeal within the statutory time.

The court in such a proceeding shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

A court may also require agency personnel to attend training given by the Committee on Open Government and to report all FOIL requests and responses to the Committee for a period of six months subsequent to such training.

C. FOIL Should Be Amended to Expedite Appeals

Legislative History: The language offered in this proposal has been approved by the Assembly (A. 5306/Buchwald) and introduced in the Senate (S. 5673/Ranzehofer). 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.

D. Proactive Disclosure Should Be Codified

Legislation introduced in 2013 by Assemblymember Kavanagh (A.107) and Senator Krueger (S.3438) would create an obligation that government agencies proactively disclose records, with reasonable limitations. The bill was not approved, but we continue to believe that government agencies, "to the extent practicable", should post records of significance to the public online. Online access is beneficial to the public and the government. When records and data are available, citizens need not submit FOIL requests, and the government does not have to engage in the time and effort needed to respond; the records are simply there for the taking.

E. FOIL Should Be Amended to Create a Presumption of Access to Records of the State Legislature

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 in a manner analogous to those maintained by state and local 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.

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.

F. Commercial Enterprises Should Be Required to Renew Requests that Records be Kept Confidential

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.

G. Once Disclosed to Public Employee Unions, Tentative Collective Bargaining Agreements Should Be Accessible

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 2015.

H. E911 Records Should Be Disclosed or Withheld 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, for example, 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. Civil Rights Law §50-b Should Be Amended to 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 immuno-deficiency 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. The Reasonable Use of Cameras Should Be Authorized in Courtrooms

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.

As 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.”

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. Chief Judge Lippman’s proposal would give judges the discretion to limit camera coverage of trials and allow witnesses to request that their facial features be obscured when giving testimony.

IV. ANCILLARY MATTERS: QUESTIONABLE INTERPRETATIONS 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 relying on judicial precedent that no longer applies due to the amendments.

Section 89(3)(a) of FOIL as amended six 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 clearly not the intent of the 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 determines 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.

V. SERVICES RENDERED BY THE COMMITTEE

4766 TELEPHONE INQUIRIES
786 EMAIL RESPONSES
157 ADVISORY OPINIONS
85 PRESENTATIONS
4500+ 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 nearly 4,800 telephone inquiries and more than 750 requests for guidance answered via email. In addition, staff gave 85 presentations before government and news media organizations, on campus and in public forums, training and educating more than 4,500 people concerning public access to government information and meetings. We are grateful that many entities are now broadcasting, webcasting and/or recording our presentations, thereby making them available to others.

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.

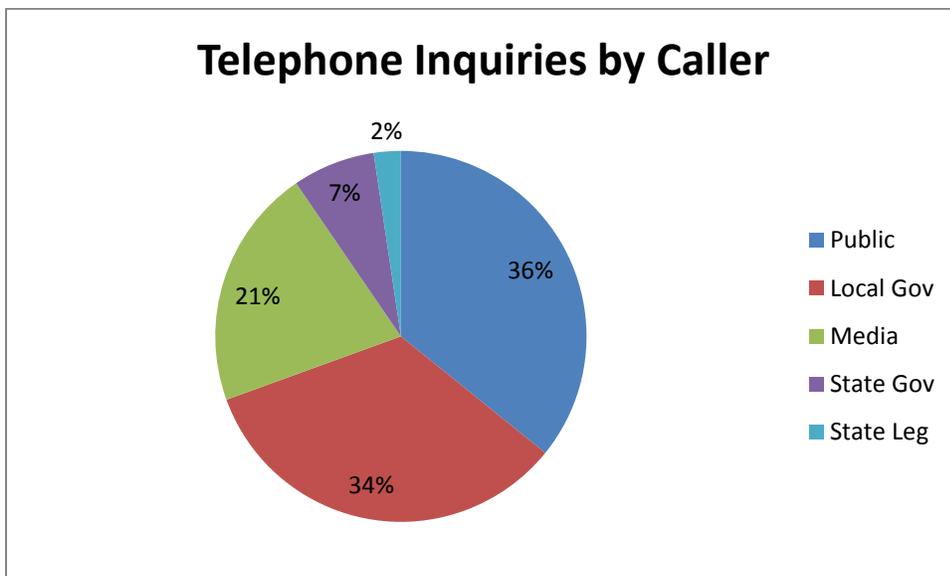
In addition to the text of open government statutes and the advisory opinions, the Committee's website also includes:

- 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>
- “News” that describes matters of broad public interest and significant developments in legislation or judicial decisions
<http://www.dos.ny.gov/coog/news.html>

B. Telephone Assistance

This year, Committee staff answered approximately 4,766 telephone inquiries, the majority of which pertained to the Freedom of Information Law. We recorded fewer telephone inquiries than in 2013, most likely due to an increased reliance on email and the website.

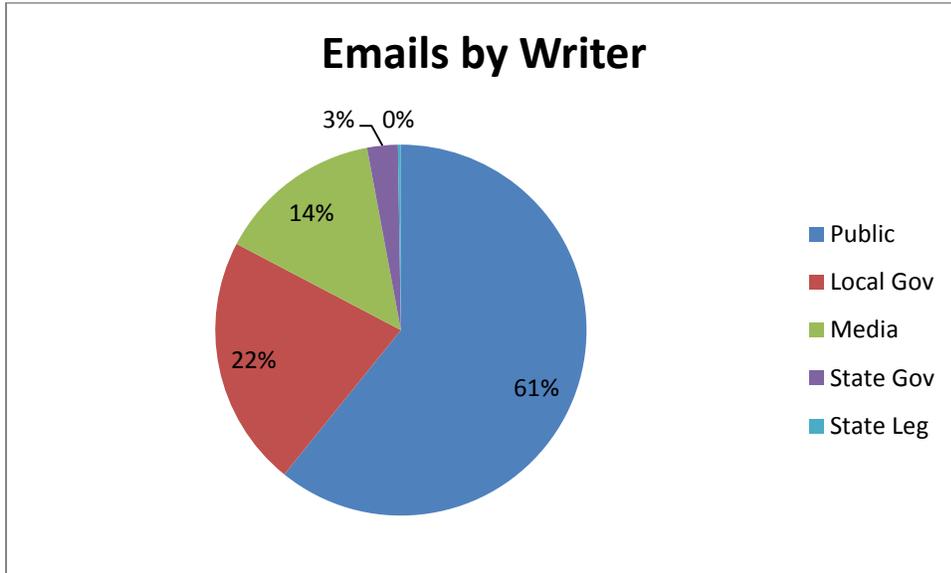


C. Assistance via Email

In 2012, Committee staff began tracking substantive email requests in much the same way it tracks telephone statistics, by writer and subject. 2014 is the second full year during which staff tracked email requests. Like telephone calls, routine and mundane office business emails were not tracked.

Based on the data captured this year (786 emails), we learned that approximately 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. Apparently, the public is more likely

to use email, and local government employees and officials are more likely to call on the telephone.

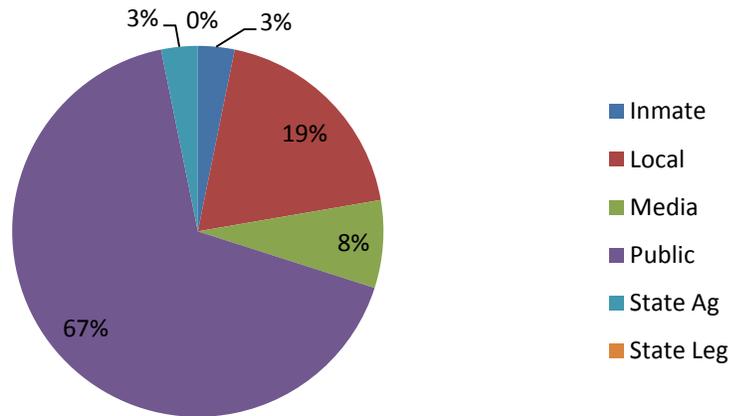


D. Advisory Opinions

Due to the tracking of emails, Committee staff was 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 157 advisory opinions in response to requests from across New York. As is true in years past, the bulk of the opinions (110) pertained to FOIL.

Advisory Opinions by Applicant



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 85 presentations. The presentations are identified below by interest group for the period of November 1, 2013 to October 31, 2014. More than 4,500 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:

- Excelsior Fellows, Albany
- Association of School District Clerks, Albany
- Town of Geddes, training
- Upper Hudson Library System, Guilderland
- Department of Transportation CLE/training
- Westchester Village Clerks & Finance Officers, Elmsford
- Putnam County Sheriff’s Department, training, Carmel
- Election Commissioners Association, Albany
- NYS Department of Financial Services, CLE/training, New York City
- NY Association of Towns, newly elected officials, Albany
- NY Association of Towns, newly elected officials, Rochester
- Tupper Lake area school officials, training, Tupper Lake
- NY Association of Towns, New York City
- Southern Tier Regional Planning Conference, Corning
- Battery Park City Authority, CLE/training, New York City
- NYS Association of Town Clerks, Saratoga Springs
- NY Conference of Mayors, Saratoga Springs
- NYS Association of Clerks of Legislative Boards, Ogdensburg
- Police Conference of New York, Buffalo

Dutchess County Association of Town Clerks, Millbrook
Monroe County School Boards Association, Rochester
Orange County Association of Towns, Villages & Cities, Newburgh
NY Senate Fellows, Albany
NY Conference of Mayors, Lake Placid (2 programs), CLE/training
Onondaga Association of Town Clerks, Cicero
Hudson City School District Board of Education, training, Hudson
New York State School Boards Association (2), Rochester
Council on Governmental Ethics Laws, Quebec City, QC
NYS Association of Counties, Orientation for Newly Elected and Appointed Officials,
Albany
New York State Legislature, Open Data Roundtable, Albany
US Department of State, IVLF, Armenian Guests, Albany
New York Association of Local Government Records Officers, Lake George
Local Government Conference, Potsdam
New York State Sheriff's Association, Saratoga Springs
SUNY Records Management Officers, Saratoga Springs

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

Long Island Press Association, Melville
New York Press Association, Saratoga Springs
Long Island Press Association, Hofstra University, Uniondale
Deadline Club, New York City
Society of Professional Journalists, Nashville, TN

3. Presentations for students included:

Ithaca College (2)
CUNY Graduation School of Journalism
SUNY Albany Graduate School of Public Administration
College of St. Rose (2)
Syracuse University, Humphrey Fellows, Maxwell School
SUNY/Cortland, Students and public forum
Albany Law School (2)
SUNY/Stony Brook (teleconference)
Fudan University, Shanghai, through Syracuse University, Maxwell School
SUNY Graduate School of Information Science and Policy
Shenzhen, China government officials through Syracuse University, Maxwell School
Schenectady County Community College, Paralegal Class
Rockefeller College, Foundations of Government Information Strategy and Management
Class

4. Presentations associated with the public interest included:

Albany Law School CLE for recent graduates

League of Women Voters – Students Inside Albany, Albany
Adirondack Paralegal Association, Queensbury
New York State Bar Association CLE, Albany
Gas Free Seneca, Tyrone
Cayuga County Community College Faculty Association, Auburn
New York State Bar Association, Public Utility Law Project CLE, Albany

5. Other presentations/public forums:

WICD, “Ithaca Now”, radio
Cobleskill-Richmondville School District, training/public forum, Cobleskill
WTBQ, Utica, radio
Madison County public forum sponsored by Madison County Courier
WTBQ, Orange County, radio
WUTQ, Utica, radio
Town of New Lebanon/training, public forum, New Lebanon
Town of Wilton, training/public forum, Wilton
Village of Cold Spring, training/public forum, Cold Spring
WTBQ, Orange County, radio
WUTQ, “Roundtable”, Utica radio
Marlboro School District, training, public forum, Marlboro
WENY, Elmira Corning, radio
Town of Butternuts, training/public forum, Gilbertsville
Sullivan County, training/public forum, Monticello
Roosevelt Public Library, training, public forum, Roosevelt
Citizens for Hudson, Hudson
Commack School District, training/public forum, Commack
Capitol Now, TV interview, Albany
City of Amsterdam, training/public forum
The Jewish View, TV interview, Albany