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ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE

**MEETING THE PUBLIC'S LEGITIMATE RIGHT
TO INFORMATION CONCERNING GOVERNMENT
IS GOOD GOVERNMENT**

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2015: A YEAR OF ACHIEVEMENT, BUT CONTINUING UNMET NEED

The Committee on Open Government continued to build on its history of success and service. With a staff never greater than three, thousands of telephone inquiries were answered; nearly a thousand written opinions,; some brief, others detailed, were rendered, more than ninety presentations were given before 4,500 attendees, and for several years running, the Committee's website has received millions of hits.

We appreciate the serious consideration given by the Legislature regarding legislative proposals offered in last year's report. Three of those recommendations were approved by both houses and became law. Three of those recommendations were passed in both houses, and (one or two) are now law. Although the proposals concerning the award of attorney's fees and accelerating the appeals process in litigation involving FOIL were vetoed, we will work with the Governor and the Legislature to overcome his objections and continue to press for changes to advance the public's right to know.

There remains an overwhelming public desire and democratic need for greater transparency of law enforcement agencies. This undeniable fact was reaffirmed in 2015 by the rise of the Black Lives Matter movement and recent events in Chicago, where a policeman stands accused of murder more than a year after the fact, but the same day that dash-cam video of the deadly event was made public. We highlighted the serious impediment to public oversight created by §50-a of the Civil Rights Law, in last year's report. Events of the last 12 months have done nothing to diminish the need to repeal or amend §50-a, and we urge the Governor and the Legislature to address this issue promptly. No other State imposes such an impenetrable restriction on information about the activities of police, and New York should not either.

Although it will be discussed later in greater detail, **our foremost recommendation in 2015 is the same as that offered in last year's report: changing the law to remove the shield of confidentiality that now exists and requiring the same level of accountability regarding law enforcement officials as all other public employees. We also recommend the state's ethics agency, the Joint Commission on Public Ethics (JCOPE), be subject to those statutes.**

OVERALL HISTORY AND GOALS

Open government laws, in effect for four decades in New York, are clearly integral to the relationship between the public and government. The Freedom of Information Law, known as "FOIL", and the Open Meetings Law are based on a presumption of openness. The former requires that all government agency records be available, except those records or portions of records that fall with one or more exceptions to rights of access listed in the law. The latter requires that meetings of public bodies be conducted open to the public, unless one of the grounds for entry into executive session specified in the law can properly be asserted to close a meeting.

The Committee on Open Government, created as part of the original version of FOIL in 1974, is one of few agencies of its kind in the United States. Although every state has enacted open records and open meetings laws, in most jurisdictions members of the public who have questions or difficulties have no one to call. In New York, the Committee receives thousands of inquiries annually, and its website, which includes an immense amount of useful material, receives millions of hits. The Committee's service, reputation for expertise and receptiveness to every sector of society are evidenced by the fact that its staff, which has consisted of no more than three employees, has engaged in some 90 presentations, addresses, and in depth interviews during the past year.

The Committee's longstanding goal has been simple: to offer advice and assistance based on the language of the law and its judicial interpretation to anyone having a question. We respond to questions from representatives of state and local government, the public and members of the news media. We aim to provide proper guidance, regardless of the source of the question. Statistics indicating the level and nature of inquiries that appear in the final section of this report.

Additionally, the Committee offers recommendations to the Governor and the State Legislature designed to improve open government laws and enhance the public's right to know about its government in a balanced and reasonable manner.

PROGRESS IN E-GOVERNMENT

A primary goal expressed by the Committee in recent years involved "e-government", using information technology in a manner that increases public access to and the utility of government information, thereby improving the lives of New Yorkers.

In a November news release, the Governor reported "record-breaking growth in digital service, one year after the launch of the official New York State website", www.ny.gov. The number of users of the site increased from 2.3 million to 6 million; mobile sessions more than tripled from just over a half million to nearly 2 million; page views increased from under 4 million to more than 17 million.

The Committee applauds the Governor for his leadership in improving the public's ability to gain access electronically to an array of government information useful to our citizens.

LEGISLATION

Port Authority now subject to FOIL

We are gratified that one of our proposals from 2014 was enacted, to close a loophole that permitted the Port Authority of New York and New Jersey to fall beyond the coverage of either state's open records laws. Both New York and New Jersey now require the Port Authority to follow their laws requiring disclosure.

Awarding attorney's fees under FOIL

A.1438/S.533 introduced respectively by Assemblymember Paulin and Senator Ranzenhofer was approved by both houses of the Legislature. When a court determines that an agency failed to comply with law and had no reasonable basis for denying access to records, FOIL would have required an award of reasonable attorney fees to the person denied access if the bill was approved. The intent of the legislation is not to penalize, but rather, to encourage compliance.

Expediting appeals in judicial proceedings

A.114/S.533 introduced respectively by Assemblymember Buchwald and Senator Gallivan was also approved by the Assembly and the Senate. If a court has determined that FOIL requires disclosure, an agency can delay perfecting an appeal for up to nine months following its filing of a notice of appeal. The time to do so would have been shortened to sixty days.

The bills were vetoed by the Governor, who indicated that the absence of standards would leave courts and litigants “without any clarity” relating to the award of attorney’s fees. The other bill “would substantially alter the balance of appellate rights between state agencies and non-state agency requestors.” We will work with the Governor and the Legislature to develop language that fosters the purposes of FOIL, while recognizing the Governor’s objections.

I. LEGISLATIVE PROPOSALS

A. Repeal or Amend Section 50-a of the Civil Rights Law

Section 50-a of the Civil Rights Law should be repealed or amended. The law now prohibits the disclosure of personnel records pertaining to police and correction officers that “are used to evaluate performance toward continued employment or promotion.” The public needs and deserves transparency surrounding the government officials who exercise power over peoples’ lives.

The Committee recognizes that our police and other law enforcement officers perform a remarkable service for the citizens of New York, but the corrosive absence of transparency about the activities of those public employees undermines accountability and diminishes public trust. In the Committee’s 2014 report, reference was made to reactions across the nation to events involving the use of force by police officers. We have witnessed more such events during the past year and the time has come to repeal or significantly amend §50-a.

The New York Times has called for reform in three editorials in the past year. In an editorial of February 13, 2015, the New York *Times* referred to §50-a as “a uniquely strict disclosure law [that] has shielded from public view the records of individual officers, even

those who committed crimes.” Citing the Committee’s 2014 report, the *Times* concluded that “It is way past time to rescind this law.”

In an editorial published on July 29, 2015, the *Times* pointed again “to the distressing fact that New York’s disclosure law gives the public far less access to information about police officers than workers in virtually any other public agency.” It urged the State Legislature to bring New York’s law “in line with the 41 other states that apply the same standard to all state employee misconduct records, including police officers.”

A third editorial on October 12, 2015, concerning §50-a focused on misconduct proceedings against an officer “who brutalized the retired tennis player James Blake during a mistaken arrest” and indicated that “had Mr. Blake’s lawyer not released the information, the public would still be in the dark.” Citing broad judicial interpretations of § 50-a, the commentary states that “police officers, who have more authority over the public than any other public-sector employees, are actually the least accountable” and again cited the Committee, which “has rightly called for the Legislature to repeal that statute.”

Other news organizations have called for similar reform. *Newsday* referred to that provision in a September 9, 2015 editorial as “an unwise state law”, as “a travesty” that “must be changed.” The Albany *Times-Union* put the issue in perspective in an editorial of December 31, 2014:

“We recognize that this is a sensitive time, with many police feeling on the defensive over the protests and public discussion surrounding the killings of unarmed African Americans and police accountability and relations in general. Some public figures suggested that any criticism of police is a threat to an orderly society. In such a polarized climate, a move to open up police disciplinary records is a heavy political lift.”

“But it is the right thing to do. It would end this excessive secrecy, and help foster reconciliation and trust between police and the public, especially minorities. In the long run, that can only benefit law enforcement and police, who can best do their jobs when the public is fully behind them.”

Repeal or amendment of §50-a is also necessary for the effective use of body-worn cameras, widely known as “bodycams.” Their mandatory use by police has been considered 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.

An article appearing in *Time Magazine* on November 9, 2015 indicates that “Some recent studies suggest that technology [the use of bodycams] makes the relationship between police and communities better, not worse. When the entire force in Rialto, Calif., began donning body-worn cameras in 2012, complaints against cops plunged; use-of-force cases fell 60%.” Referring to a study by the University of South Florida regarding the Orlando police department’s use of bodycams, its conclusion was “that cameras produced better behavior and happier communities.”

A Whitepaper prepared by The Media Freedom & Information Access Clinic at Yale Law School and published in December 2015, stated that:

“Policymakers, law enforcement officials, and public commentators argue that body cams can limit the risk of police abuse in three ways:

1. Knowing their actions are being recorded, police officers will be less likely to deviate from proper procedure;
2. The footage will expose community members to the hard decisions police face and improve civilian-police relations as a result;
3. The footage will provide a means for the public to work toward accountability and change after a troubling encounter.

Body cam programs can only fulfill this promise, however, if the public has access to the footage. Without public access, police officers lose the incentive to improve their behavior, abuses remain unseen or contested, and, at worst, the footage turns into a tool of surveillance. With public access, on the other hand, observers can monitor police conduct, the media can serve as a watchdog, the public can encourage police departments to adopt reasonable policies regarding video footage retention, and the nation as a whole can identify and stop entrenched systems of misconduct or abuse.”

Moreover, citing the findings of the study by the University of South Florida referenced earlier, the Whitepaper contends that disclosure is beneficial in several ways, suggesting that:

“In addition, public access to body cam footage can help bolster and legitimate the use of body cams by police departments to *defend* themselves. Given recent events, it is easy to think of public access to body cams as a promising method to achieve greater levels of police accountability. But the very presence of body cams can have civilizing effects on the individuals with whom police are dealing. Agitated individuals frequently calm down when they realize they are being recorded. Body cams also have the potential to speed up the process of exonerating police officers who have not committed misconduct and to reduce the frequency of frivolous complaints because those complainants will know that officers have good information with which to

exonerate themselves. Dashboard cameras have been found to exonerate police in 93% of complaints.”

Without disclosure of bodycam footage, a primary purpose of its use would be negated. If the general rules of FOIL govern access to the recordings and records now falling within the coverage of §50-a, the nature, the content and the effects of disclosure in consideration of the 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, but there would clearly be an increase in transparency and a sorely needed sense of accountability.

Legislation has been introduced regarding both §50-a and the use of body cams. In a bill introduced by Senator Parker and Assemblyman O’Donnell (S.4808, A.7611), that statute would be amended to apply to personnel records pertaining to the employees covered by §50-a by limiting its application to those records “created and used solely” to evaluate performance toward continued employment or promotion.

We support enactment of an amendment of that nature, for it would go a long way toward enhancing accountability and increasing disclosure. Senator Squadron and Assemblyman Quart have introduced legislation removing bodycam and other video footage from the coverage of §50-a, (S.6030, A.8368). Such a provision would be valuable in relation to the use of video recordings by police agencies. However, if §50-a is either repealed or amended, the Squadron-Quart bill would be unnecessary.

As initially enacted, we note that §50-a of the Civil Rights Law pertained only to police officers. Despite that limited focus, §50-a has been amended several times over the course of years to include other classes of public employees, including correction officers, professional firefighters and firefighters/paramedics and certain peace officers. According to the sponsor’s memorandum in support of the legislation, its narrow intent involved preventing criminal defense lawyers from riffling through police personnel files in search of information, after unsubstantiated allegations, to use in cross-examination of police witnesses during criminal prosecutions.

Again, the Committee recognizes and appreciates the critical service that those public employees perform. Nevertheless, in consideration of the nature of their duties and the original intent of §50-a, there is simply no reason for requiring a different standard of accountability for those public employees than others.

We reiterate that if the reforms suggested here become law, FOIL would apply, and that law offers the protection necessary to protect against unwarranted invasions of personal privacy and preserve an agency’s authority to withhold records in relation to existing law enforcement and public safety exceptions to rights of access.

B. Bring JCOPE within the coverage of FOIL and the Open Meetings Law

There is no logical rationale for exempting the Joint Committee on Public Ethics (JCOPE) from FOIL and the Open Meetings Law.

JCOPE and its predecessor, the Commission on Public Integrity, were created to offer guidance and opinions to public officers and employees concerning ethics and conflicts of interest, and to investigate possible breaches of law relating to statutes that contain standards concerning ethical conduct. Detailed financial disclosure statements are required to be submitted by elected state officials and policy making employees to JCOPE and had also been required by the Commission.

In its 2010 report to the Governor and the Legislature, the Committee recommended that the Commission on Public Integrity, which was also generally exempt from the disclosure provisions of FOIL and Open Meeting Law, should be subject to those laws. We offer the same recommendation now regarding the records and meetings of JCOPE.

Every municipal ethics body is required to comply with FOIL and the Open Meetings Law, and that those laws do not create a hindrance regarding their operation. On the contrary, the exceptions to rights of access provide those bodies with the flexibility necessary to function effectively. Moreover, the balance inherent in those laws serves to enhance the public's confidence in government.

Following the issuance of a report by the New York Ethics Review Commission critical of JCOPE's lack of transparency, the Albany *Times-Union* on November 7, 2015 referred to several deficiencies in the law applicable to that agency. Its editorial suggested that JCOPE should be subject to FOIL and the Open Meetings Law, for those laws "have ample exemptions to protect sensitive information and the integrity of investigations," adding that "Secrecy should not be JCOPE's default setting."

An area of particular criticism that would be corrected involves a basic element of government accountability: knowing how our government officials vote on issues. A requirement of FOIL since its enactment in 1974, §87(3)(a), is an obligation that agencies maintain records indicating the manner in which its members cast their votes. Because FOIL does not apply to JCOPE, the public has no way of knowing whether or how its members vote on matters that come before the Commission. The absence of accountability of that nature breeds mistrust and clearly warrants the change that we seek.

C. Codify Proactive Disclosure

Although there are few instances in which statutes require that information be posted on agency websites, it is clear that many agencies have chosen to do so. It simply makes sense to share and disclose government information online. Using our computers and phones to gain access to a variety of information has become part of life, and in recognition of that reality, many units of government provide online access to a variety of information. Nevertheless, we continue to believe that the law should require agencies to engage in proactive disclosure.

Legislation introduced 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.

D. Amend FOIL to Create a Presumption of Access to Records of the State Legislature

For clarity, timeliness and economy, 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 expressed 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 disclosure would constitute an unwarranted invasion of personal privacy. To confirm the existence of protection of those records, §89(2)(b), which includes a series of examples of unwarranted invasions of personal privacy, could be amended to include reference to communications of a personal nature between legislators and their constituents. 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 Senator Krueger and Assemblymember O’Donnell (S.4307, A6078) which embodies the following:

- 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.

E. Require Commercial Enterprises to Renew Requests that Records be Kept Confidential

Current laws can prevent disclosure of commercial information interminably and create a substantial burden on state agencies when that information is requested.

Specifically, 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.

F. Dealing with Lawsuits by Commercial Entities to Block Disclosure

Suits by Commercial Entities to Block Disclosure

For several years, Committee recommended legislation dealing with the ability of a commercial enterprise to attempt to preclude a state agency from disclosing records believed by that entity to cause substantial injury to its competitive position if disclosed. Under the current provision, §89(5) of FOIL, the entity has fifteen days after a state agency’s determination to disclose the records to initiate a proceeding to block disclosure.

As in other situations, the result often is a delay in disclosure, as well as the cost in time and effort to bring the proceeding to a conclusion. In the past, the Committee proposed that a commercial entity that does not prevail in such a proceeding should be required to reimburse the state agency, which, in essence, would be an award of attorney’s fees. The bill that would do so was introduced (A.327/Paulin; S.3390 Lupardo) but met with resistance. In short, those who opposed the bill expressed the view that private entities should not be penalized via an award of attorney’s fees payable to a state agency.

An alternative approach developed with Assemblymember Paulin would be similar to legislation offered by the Committee dealing with the ability of an agency to delay perfecting an appeal, resulting in the reality that access delayed is access denied. The proposal is as follows:

“(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. **The proceeding shall be given preference and shall be brought on for argument on such terms and conditions as the presiding justice may direct, not to exceed forty-five days. Appeal to the appellate division of the Supreme Court must be made in accordance with law, and must be filed within fifteen 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 shall be given preference, shall be brought on for argument on such terms and conditions as the presiding justice may direct, not to exceed sixty days. This action shall be deemed abandoned when the party requesting an exclusion from disclosure fails to serve and file a record and brief within thirty days after the date of the notice of appeal. Failure by the party requesting an exclusion from disclosure to serve and file a record and brief within the allotted time shall result in the dismissal of the appeal.”**

G. Make Accessible Tentative Collective Bargaining Agreements once disclosed to Public Employee Unions

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

Disclosure of those negotiated contracts before ratification serves to protect and offer fairness to taxpayers. A cash basis accounting system has allowed governments to make financial commitments that future taxpayers may be unable to meet. Disclosure gives citizens an opportunity to point out that possibility, before ratification, when the long term welfare of the community may not be recognized as a priority. Disclosure under FOIL can save taxpayers' money.

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 2016.

H. Disclose or Withhold E911 Records Pursuant to FOIL

Records of 911 calls are, in most instances, confidential, even when it is in the public's

interest to disclose, when there is no valid basis for denying access, or when the caller wishes to access the record of his/her own words.

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. Clarify Civil Rights Law §50-b to Protect Privacy of Victims of Sex Offenses, Not that of Defendants

Section 50-b of the Civil Rights Law states that a record that identifies or tends to identify the victims of sex offenses cannot be disclosed, even if redactions would preclude identification of a victim.

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."

II. THE REASONABLE USE OF CAMERAS IN COURTROOMS

While several judges have determined that the statutory ban on the use of cameras is unconstitutional, legislation remains necessary. 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.

III. SERVICES RENDERED BY THE COMMITTEE

4444 TELEPHONE INQUIRIES
795 RESPONSES TO WRITTEN INQUIRIES
121 ADVISORY OPINIONS
91 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 4,500 telephone inquiries, close to 800 requests for guidance answered via email or U.S. mail and responded to over 120 request for detailed written opinions in regards to the FOIL and OML. In addition, staff gave 91 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.

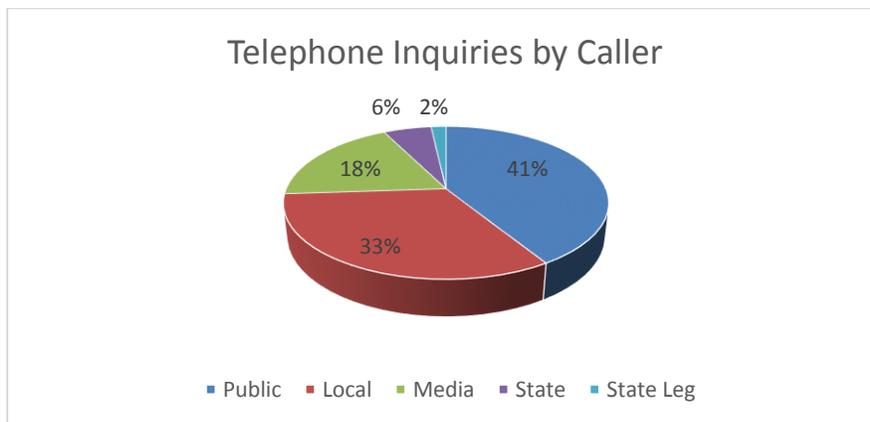
In addition to the text of open government statutes and the advisory opinions, the Committee's website also includes:

- 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/regskoog.html>

- “Your Right to Know”, a guide to the FOI and Open Meetings Laws that includes sample letters of request and appeal, as well as links to a variety of additional material. 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

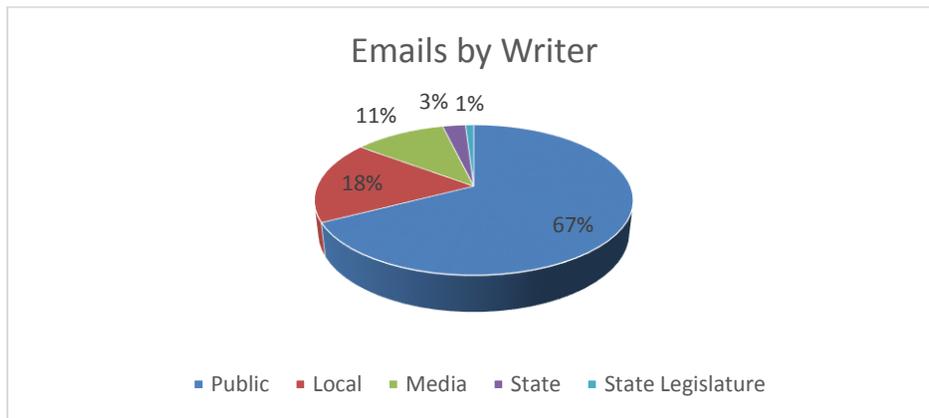
This year, Committee staff answered approximately 4,444 telephone inquiries, the majority of which pertained to the Freedom of Information Law. We recorded fewer telephone inquiries than in 2014, most likely due to an increased reliance on email and the website.



C. Assistance via Email and Written Correspondence

In 2012, Committee staff began tracking substantive email requests in much the same way it tracks telephone statistics, by writer and subject. Like telephone calls, routine and mundane office business emails were not tracked. Also in 2015, we replied to over 121 requests for detailed written opinions in regards to the FOIL and OML.

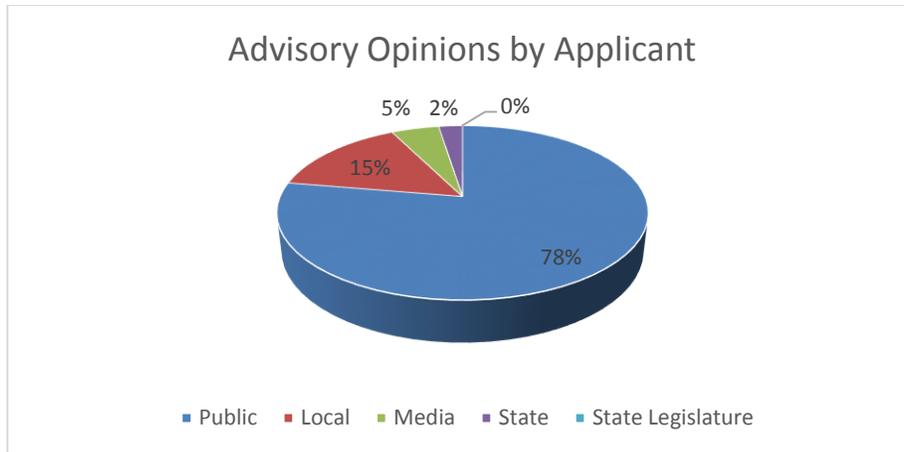
Based on the data captured this year (795 written responses), we learned that the majority of the requests concern issues related to FOIL, and like telephone inquiries, more than half of the inquiries originate from the public.



D. Advisory Opinions

Committee staff is 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 a written response from staff contained a substantive opinion with legal analysis, it was recorded as an advisory opinion as before.

Nevertheless, Committee staff prepared 121 advisory opinions in response to requests from across New York. As is true in years past, the bulk of the opinions (85) 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 91 presentations. The presentations are identified below by interest group for the period of November 1, 2014 to October 31, 2015. 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, materials posted on the website, as well as radio and television programs.

1. Presentations, addresses and training were given before the following groups associated with government:

- Continuing Legal Education (CLE) program sponsored by the Attorney General for state agency attorneys, Albany
- Excelsior Fellows (CLE), Albany
- Catskill-Ramapo Library System, Middletown;
- City of Yonkers Police Department
- City of Hudson
- East Ramapo Board of Education and staff
- Association of Towns, New York City
- International Institute of Municipal Clerks, Stockbridge, MA
- Assembly Committee on Governmental Operations, Albany
- Clarkstown Police Department
- Southern Tier Central Regional Planning Commission, Corning
- Columbia County School Boards Association, Chatham
- Monroe County Association of Village Clerks, Webster
- NYS Conservation District Employees’ Association, Syracuse
- NYS Association of Town Clerks, Rochester
- State Association of Municipal Purchasing Officials, Albany
- Madison County Planning officials, Morrisville
- NYS Department of Environmental Conservation, Continuing Legal Education, Albany

Westchester Library System Trustee Institute, Elmsford
NYS Department of Health, Continuing Legal Education program, Albany
Town of Huntington officials
Nassau County Attorney's office, Continuing Legal Education program, Mineola
Assembly Committees on Codes, Judiciary, Correction and NYS Black, Puerto Rican,
Hispanic and Asian Legislative Caucus
City of Yonkers Police Department
Broome County law enforcement officials, Johnson City
North Country Library System, Watertown
Dutchess County Association of Town Clerks, Millbrook
Senate Fellows, Albany
Cattaraugus County Municipal Clerks Association, West Valley
Empire Fellows, Albany
Land Use Training Program, Hofstra University, Uniondale
SUNY/Potsdam Local Government Conference (keynote and training program)
NY Conference of Mayors (2 presentations), Lake Placid
Jail Administrators Training Conference, Saratoga Springs
Town of Schuyler Regional Planning/Zoning Seminar, Schuyler
NYS School Boards Association (2 presentations), New York City
State Association of Municipal Purchasing Officials, Wading River
Nassau/Suffolk Water Commissioners Association, Woodbury

Presentations for students included:

CUNY Graduate School of Journalism, Albany
College of St. Rose, journalism students
SUNY/Albany, Graduate School of Public Administration
SUNY/Albany, Graduate School of Information Science and Policy
SUNY/Stony Brook, journalism students (teleconference)
SUNY/Albany, Graduate School of Information Science and Policy
Humphrey Fellows, Maxwell School, Syracuse University
Maxwell School, Syracuse University, Shenzhen, China law enforcement officials
Maxwell School, Syracuse University, Shanghai, China health officials
Albany Law School
College of St. Rose, Albany

2. Presentations for groups associated with the news media:

Long Island Press Club/Society of Professional Journalists Regional Conference,
Uniondale
Gannett Westchester-Rockland-Putnam, White Plains

3. Other presentations/public forums:

Capitol Pressroom, Albany
Albany Law School, Government Law Center
Public forum sponsored by City of Amsterdam
Public forum sponsored by Village of Croton-on Hudson

Public forum, East Ramapo School District
Public forum sponsored by City of Plattsburgh
Public forum sponsored by Village of Mamaroneck
International Center of the Capital Region, delegation from country of Georgia
Radio interview, WNBH, Binghamton
Radio interview, WXXI, Rochester
Investigative Post panel, Buffalo
Hardline radio interview, WBEN, Buffalo
Radio interview, WUTQ, Utica
Radio call in show, *We the People*, WGXC, Hudson
International Center of Capital Region, delegation from Tajikistan
Public forum, *A Candid Conversation*, State Academy of Public Administration,
Albany
Public forum, Port Jefferson
New York State Bar Association, Continuing Legal Education program, Albany
Public forum, Harpursville Central School District
Sen. George Latimer, weekly television conversation
Public forum sponsored by Clinton Community College, Plattsburgh
Public forum sponsored by City of Rome
Association of Brookhaven Community Organizations, Coram
Capitol Connection, interview, Albany
Television interview, WGRZ, Buffalo
Public forum sponsored by Central NY Waterways, Elbridge
International Center of the Capital Region, delegation from Bulgaria
NY Civil Liberties Union, Continuing Legal Education program, New York City
International Center of the Capital Region, Uzbekistan journalists
International Center of the Capital Region, Egyptian journalists
YNN interview (New York City)
WNYC radio interview
Public forum sponsored by Rochester area public interest groups
International Center of the Capital Region, multi-regional project for journalists
Public forum sponsored by Town of Corning
Public forum sponsored by Wappingers PTA Council, Wappingers Falls