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2016 REPORT TO THE GOVERNOR AND STATE LEGISLATURE

“Sunlight is the best disinfectant.” Those words, expressed by Judge Louis Brandeis more than a century ago, serve as the foundation of our open government laws, the Freedom of Information Law (FOIL) and the Open Meetings Law (OML). The current crisis in the public’s trust and confidence in government make those words more important than ever.

Consider that a state law prohibits the disclosure of an array of records pertaining to the conduct of police and correction officers, classes of public employees who have great authority over peoples’ lives. Consider the investigation and charges leveled by US Attorney Preet Bharara involving corruption in both New York State and New York City government. Consider the convictions of the most powerful state legislators. Consider that the state’s ethics watchdog, the Joint Commission on Public Ethics (JCOPE), is exempt from the requirements of FOIL and the OML. Consider the realities associated with information technology that result in what had been unimaginable access, but also substantial burden on government agencies. Consider the difficulty and cost when the public attempts to challenge an apparent failure to comply with those laws. Greater and more effective government transparency is urgently needed.

In the ensuing recommendations, the Committee on Open Government will address these issues as they relate to our open government laws in an effort to foster the government’s duty to be accountable to those that it serves.

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PROGRESS: Expediting the Appeal Process in Judicial Proceedings

The Committee is pleased that legislation based on its recommendation in previous reports has been signed into law, and we congratulate Assemblymember Buchwald and Senator Ranzenhofer for their efforts, as well as the Governor for his approval of the legislation.

The problem involved the delays encountered following judicial decisions requiring disclosure and the ability of agencies to wait as long as nine months to perfect an appeal. The legislation will require that an appeal to the Appellate Division be given preference, and that the appeal will be “deemed abandoned if the agency fails to serve and file a record and brief within sixty days after the date of service upon the petitioner of the notice of appeal...” In consideration of the Governor’s prior objections, the bill offers flexibility to the court and the parties to the proceeding when there is consent to an extension that “is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.”

The legislation will become effective 180 days from November 28, 2016.

CRITICAL LEGISLATIVE PROPOSALS

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 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 these government officials who exercise vast 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 and 2015 reports, 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. The time to repeal or significantly amend §50-a is now.

Recent events have led many others to support the essence of the Committee’s recommendation. As reported in the *New York Times* on September 6, 2016:

“A group of elected officials and activists in New York stood on the steps of City Hall on Tuesday to renew their call for officials to release basic findings of misconduct against the police officer who held Eric Garner in a chokehold.

A State Supreme Court judge ordered last year that summaries of misconduct findings against the officer, Daniel Pantaleo, from before Mr. Garner’s death in 2014 should be made public. The decision was viewed by some activists as a

significant strike against a provision of state law that has long been cited by city lawyers in shielding such information.

But a year later, as the city pursues an appeal, members of the City Council and activists are still pressing for the information.

‘The times that we’re in in this city, the times we’re in in this country, they call for urgent change’, Councilman Brad Lander, a Brooklyn Democrat, and a founder of the Progressive Caucus, told reporters outside City Hall. ‘If we’re going to have accountability, if there’s going to be justice, there simply must be transparency.’

On Tuesday, community organizations and elected officials — including members of the Progressive Caucus and the Black, Latino and Asian Caucus; the public advocate, Letitia James, a Democrat; and the Manhattan borough president, Gale A. Brewer, a Democrat — joined in amicus briefs opposing an appeal being pursued by the city. (Last month, a brief was also filed by the Reporters Committee for the Freedom of the Press, which was joined by The New York Times Company.)

Mr. de Blasio said on Tuesday that he was among those who took issue with the law. ‘I think the law should be changed, so we could release those kinds of documents, he said, adding, I’ll work with others who feel the same way to figure what the right strategy is to achieve that.’”

In an editorial of September 8, 2016, the Albany *Times Union* reported that “William Bratton, New York City’s retiring police commissioner, says he supports the repeal...”

The opposition to §50-a is not limited to New York City. In another *Times Union* editorial that appeared on November 7, 2016, the focus involved several events in the Capital District and emphasized the need for trust in our public employees:

“Personnel records, including disciplinary actions against officers, are protected by a cloak of secrecy under a section of the state’s Civil Rights Law, known as Section 50-A. Courts have expanded the statute to cover correction officers and firefighters, too, insulating all law enforcement officers who engage in misconduct from public scrutiny.

The state Committee on Open Government and other reform groups have argued for a revision or repeal of Section 50-A, but bills to do so have been blocked in the state Legislature under pressure from the politically powerful police union lobby.

After some recent high-profile incidents in New York City, including the 2014 chokehold death of Eric Garner, an unarmed black civilian, at the hands of city police, renewed calls are being made to change Section 50-A. In the Garner case, a grand jury declined to indict the officers involved, but we don’t know if they ever faced internal disciplinary action.”

The need to change the law is becoming more critical as the use of body-worn cameras, widely known as “bodycams,” is growing exponentially. Bodycams 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 video 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. The trust in law enforcement officers would be diminished and mistrust would grow.

If the general rules of FOIL govern access to the recordings and records (but which now may be exempt under §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. Repeal or narrowing of §50-a would clearly increase transparency and a sorely needed sense of accountability.

Legislation has been introduced regarding both §50-a and the use of bodycams. In a bill introduced by Senator Parker and Assemblymember O’Donnell (S.4808, A.7611), §50-a would be amended to limit its application to those records “created and used solely” to evaluate performance toward continued employment or promotion. Assemblymember O’Donnell also introduced legislation (A.9332) to repeal §50-a.

We support enactment of changes in §50-a of that nature. They would enhance accountability and increase disclosure. Senator Squadron and Assemblymember Quart have introduced legislation removing bodycam and other video footage from the coverage of §50-a (S.6030, A.8368). That provision would be valuable in relation to the use of video recordings by police agencies, but if §50-a is either repealed or amended, the Squadron-Quart bill would be unnecessary.

Fostering Trust and Positive Behavior

An article appearing in *Time Magazine* on November 9, 2015 indicates that “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.”

The Committee recognizes and appreciates the critical service that our law enforcement and other uniformed employees perform. Nevertheless, in consideration of the nature of their duties and the original intent of §50-a, there is 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.

GOVERNMENT CREATED ENTITIES SHOULD BE SUBJECT TO FOIL

An entity created by a government agency or a subsidiary or affiliate of a government agency is, in reality, an extension of the government. The records of such an entity must fall within the coverage of FOIL.

A significant element of a recent investigation by the US Attorney for the Southern District of New York focused on non-profit entities associated with the State University (SUNY). Efforts by the news media to gain access to records of those entities have been rebuffed, despite our view that many are and have been required to comply with FOIL.

FOIL applies to agency records. To ensure that the records of entities created by government are subject to FOIL, the definition of “agency” in §86(3) should be amended to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, as well as entities created by an agency or that are governed by a board of directors or similar body a majority of which is designated by one or more state or local government officials, except the judiciary or the state legislature."

While profit or not-for-profit corporations would not in most instances be subject to FOIL because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are “agencies” that fall within the scope of FOIL.

It is emphasized that the receipt of government funding or entering into contractual relationships with a government agency does not transform a private entity into a government agency. Rather, the Committee’s proposal is limited to those entities which, despite their corporate status, are subsidiaries or affiliates of a government agency.

In the first decision in which it was held that a not-for-profit corporation may indeed be an “agency” required to comply with the FOIL, Westchester-Rockland Newspapers v. Kimball (50 NY2d 575 (1980)), a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to FOIL. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84)."

“The successful implementation of the policies motivating the enactment of FOIL centers on goals as broad as the achievement of a more informed

electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase ‘public accountability wherever and whenever feasible’ therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].”

In an advisory opinion rendered by the Committee in March, 2015, focusing on the status of the Fort Schuyler Management Corporation (FSMC) under FOIL, we referred to judicial precedent involving somewhat analogous underpinnings, notably in a decision involving a not-for-profit corporation, the Canandaigua Recreation Development Corporation (CRDC), which had an “intimate” relationship with an agency. In that decision, the court found that:

“...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged \$395,000 to finance capital improvements associated with the park...”

“Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, supra, the CRDC’s intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law...” (Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001).

The Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing (aff’d, 292 AD2d 835, 739 NYS 2d 509 (2002)).

In documentation that was located by conducting an internet search for “FSMC,” is the following statement:

“Fort Schuyler Management Corporation is a not-for-profit SUNY 501-c3 (IRS designation) affiliated corporation that was established by SUNY [that] acquires and manages properties on behalf of CSNE, as well as construct and operate facilities on those properties.”

The statement clearly indicates that FSMC is a “SUNY...affiliated corporation that was established by SUNY...”

To learn more about FSMC, its creation and its functions, Committee staff acquired its Certificate of Incorporation from the Department of State. The Certificate was filed by the Research Foundation of the State University of New York and states that service of process against FSMC is to be served on the Research Foundation and its Office of General Counsel. In that regard, it has been determined that the SUNY Research Foundation constitutes an “agency” that falls within the coverage of FOIL (see e.g., Siani v. Research Foundation of the State University of New York, Index No. 6976-06 (2007); Hearst Corporation v. The Research Foundation of the State University of New York, 24 Misc. 3d 611 (2010)).

The Certificate of Incorporation states that “The membership of the Corporation shall consist of two (2) members: (1) Institute of Technology Foundation at Utica/Rome, Inc., Route 12 North Horatio Street, Utica, New York, 13502 (the ‘IT Foundation’) and (2) The Research Foundation of the State University of New York...” The by-laws of the IT Foundation were acquired, and they specify that its purposes shall be carried out “exclusively for the benefit of SUNYIT” and to “assist in advancing the welfare and professional growth of the students, faculty and staff of SUNYIT.” Its “lawful public or quasi-public objective” is to “enhance” the ability of the State University of New York and its campus near Utica-Rome to achieve its academic, research and economic development goals. Its Chief Executive Officer is appointed by the President of SUNYIT, as are its treasurer and secretary, and at least seven others associated with SUNYIT, as well as him/herself as a member. Further, in the event of its dissolution or liquidation, all of its assets or proceeds from the sale of its assets “shall be distributed to SUNYIT...”

To suggest that FSMC, despite its corporate status, is not governmental in nature or does not perform its functions solely for the State University elevates form over substance. The membership of FSMC consists of entities that are themselves subject to FOIL and that carry out their functions for or on behalf of SUNY. It would not exist but for its relationship with the State University.

In other instances, the Committee has advised and courts have determined that not-for-profit corporations, often those created to encourage economic development, fall within the coverage of FOIL when they are creations of the government or where a majority of their boards of directors are designated by a government official or officials. (See also Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488, 619 NYS2d 695 (1994))

AWARDING ATTORNEYS’ FEES: REACHING A SENSIBLE JUDGMENT

FOIL now gives a court discretionary authority to award attorneys’ fees to a person denied access when that person has “substantially prevailed”, and the court finds either that the agency had no reasonable basis for denying access, or the agency failed to abide by the time limits for responding to a request or an appeal.

The Committee has in previous reports recommended amendments that would in some cases require a court to award attorneys' fees to a successful petitioner. The intent of those proposals is to encourage compliance, not to penalize government agencies.

In his veto message relating to legislation approved by both houses last year, the Governor contended that the bill "would allow attorney's fees to be assessed against a state agency, even if the state agency ultimately prevails." That bill, according to the veto message, would also have required a trial court to assess attorney's fees against an agency when a request is denied in "material violation of FOIL and with no reasonable basis for denying such access," but it "fails to define what a 'material violation' is," thereby leaving courts and litigants "without any clarity."

To address these concerns, we propose a "two-tiered" approach to the issue. The first tier would *permit* a court to award attorney's fees when a person denied access "has substantially prevailed and when the agency failed to respond to a request or appeal within the statutory time." The second tier would *require* the award of attorneys' fees when a person denied access "has substantially prevailed" and the court finds that "the agency had no reasonable basis for denying access." The proposal would never result in an assessment of attorneys' fees against an agency when the agency ultimately prevails; rather, an assessment could only be made when a person denied access "substantially prevails."

To implement this proposal, §89(4)(c) of FOIL should be amended as follows:

(c) The court in such a proceeding may assess, against such agency involved, reasonable [attorney's] attorneys' 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, [when:]

[i. the agency had no reasonable basis for denying access; or]

[ii.] and when the agency failed to respond to a request or appeal within the statutory time. The court in such proceeding shall assess, against such agency involved, reasonable attorneys' 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.

ADDITIONAL LEGISLATIVE PROPOSALS

Note: Several of the following proposals have been offered in previous reports. The Committee continues to believe that they are meritorious and warrant serious consideration. The substance of proposals A, B, C and D appeared in the 2016 Governor's budget bill.

A. [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 OML.

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 OML, and 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 OML, 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.

B. 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 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.

C. 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.

D. 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 below proposed amendment to Public Officers Law Section 87(2)(c) 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.

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 FOIL, 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 and 2013 (A.610), when it was introduced in both houses and passed by the Assembly (A.9022/S.7816).

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.”

We urge that the legislation be enacted in 2016.

G. [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.

This proposal was introduced as S.1175 (Senator Hoylman). 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.

H. [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."

I. 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.

J. Technical Amendments

The following proposed technical amendments reflect an effort to clarify existing provisions in FOIL. For instance, there are two provisions of FOIL that state that an unwarranted invasion of personal privacy includes the disclosure of a list of names and addresses if a list would be used for solicitation or fund-raising purposes. Because the language involves personal privacy, it has long been advised by the Committee that the ability to deny access pertains to a list of natural persons and their residential addresses. The exception does not apply to a list of vendors or others engaged in a business or professional activity.

Also included is a recommendation dealing with the “preparation” of records. No one clearly knows what that means, and to clarify, the term “prepare” should be replaced by “create.” The principle is that FOIL pertains to existing records and does not require that an agency create new records to respond to a request. The term “prepare” has been interpreted far more broadly and led to inconsistency of interpretation.

Finally, we are proposing technical amendments to the law to clarify the existing provisions relating to the time in which an agency is required to respond to a FOIL request.

Subparagraph (iii) of paragraph (b) of subdivision (2) of section 89 of the public officers law is amended as follows:

iii. sale or release of lists of names of natural persons and residential addresses if such lists would be used for solicitation or fund-raising purposes;

Paragraph (a) of subdivision (3) of section 89 of the public officers law is amended, paragraph (b) is renumbered as paragraph (g), and new paragraphs (b-f) are added to read as follows:

3. (a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when ~~such request will be granted or denied~~ a response will be given, including, where appropriate, a statement

that access to the record will be determined in accordance with subdivision five of this section.

(b) An agency shall not deny a request on the basis that the request is voluminous or that locating, generating, or reviewing the requested record or records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article.

(c) An agency may require a person requesting lists of names of natural persons and residential addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes.

(d) ~~If an agency determines to grant a request in whole or in part, and if~~ circumstances prevent an agency from notifying the person requesting the record or records of the agency's determination regarding rights of access and disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to ~~grant the request~~ do so within twenty business days and a date certain within a reasonable period, depending on the circumstances, ~~when the request will be granted in whole or in part~~ when a determination regarding disclosure will be rendered.

(e) Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search.

(f) Nothing in this article shall be construed to require any entity to ~~prepare~~ create any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. ~~Any programming necessary to~~ The retrieval of ~~retrieve~~ a record or data maintained in a computer storage system and ~~to the transfer of~~ that record to the medium requested by a person or to a medium that would allow the transferred record to be read or printed shall not be deemed to be the ~~preparation or~~ creation of a new record.

(g) ~~(b)~~ All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some

other form.

CHANGES BROUGHT BY TECHNOLOGY WARRANT REVIEW OF FOIL'S APPROACH TO TRANSPARENCY

Since the enactment of the Freedom of Information Law (FOIL) and the creation of the Committee on Open Government (initially named the "Committee on Public Access to Records") in 1974, the world and the use and utility of the law have changed in ways that deserve reassessment.

In 1974, we lived in a paper-based society. We often used carbon paper to make copies. There was no internet or email. Based on the Committee's recommendations, the original FOIL was repealed and replaced with a new law that in many ways remains as it was enacted in 1978.

The changes in the law emanated from the Committee's identification of problems and an effort to correct perceived deficiencies in the federal Freedom of Information Act (FOIA), which had been extensively revised in 1974. One of those deficiencies involved an absence of a definition of a government agency "record." The definition of the term "record" in the New York FOIL since 1978 has been a key element in determining the scope of that law and its utility, particularly in relation to dramatic advances in information technology.

For nearly forty years, FOIL has been based on a presumption of access, applied to all government agency records, and has defined the term "record" to mean "any information kept, held, produced or reproduced by, with, or for an agency or the state legislature in any physical form whatsoever..." Based on the definition, it is clear that FOIL applies to traditional paper records, as well as the content of a database, email, or, for example, video recordings maintained by or for an entity of state or local government.

In its initial form, an applicant was required to seek "identifiable" records. The problem was clear: if a person could not name or identify a record, that person could not make a valid request. In the 1978 revision, New York adopted the federal standard, that an applicant must "reasonably describe" the records sought, and that requirement remains today.

The Court of Appeals held that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" (*Konigsberg v. Coughlin*, 68 NY 2d 245, 249 (1986)). The Court in *Konigsberg* found that the agency could not reject the request due to its breadth and also stated that:

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. *National Cable Tel. Assn. v Federal Communications Commn.*, 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (*id.* at 250).

In consideration of the Court's holding that an agency is not required to create a path not already trodden in order to locate requested records, the Committee has advised that an agency is not required to search for the needle in the haystack, even if it is known that the needle is there, somewhere. An effort of that nature would be unreasonable.

But it is 2016, and data is routinely maintained electronically. By entering a query, an agency can now locate and extract volumes of material quickly and easily. But, processing tens of thousands of records to identify and redact appropriate information may often be unreasonable given the marginal relevance of the information to the request. Amendments to FOIL enacted in 2008, however, state that when an agency has the ability to extract or retrieve items stored in an electronic information system with reasonable effort, it is required to do so.

These statutory provisions are giving rise to multiple problems in light of new technologies. For example, many government officers and employees transmit and receive dozens of email communications each day. The advances in information technology enable us, at our computers, to enter a name or key word or phrase and locate all of the email communications that contain those identifiers that have been stored over the course of what may be years. If a name, a key word or phrase has appeared repeatedly, the ability exists to locate and retrieve perhaps thousands of communications containing those items.

When a government agency has the capacity to locate and retrieve those thousands of items with reasonable effort, based on the precedent offered by the Court of Appeals in 1986, a request would reasonably describe the records and would be valid under the existing law.

If an agency can locate the records, it must disclose them to the extent required by FOIL, and therein lies a critical problem: someone must read thousands of communications to determine which records or portions of records are required to be disclosed to comply with FOIL, or conversely, which may properly be withheld.

Several of the exceptions to rights of access appearing in section 87(2) of FOIL may be significant in figuring out what may be public and what either may or must be withheld.

One of the exceptions pertains to records or portions of records the disclosure of which would constitute "an unwarranted invasion of personal privacy." Communications between "X" and "Y" might generally be public, but depending on its nature, the portion of the record identifying "Z" might fall within the exception. Although FOIL is generally permissive, stating that an agency "may" deny access in accordance with the exceptions but is not required to do so, that may not be so when personally identifiable information is maintained by a state agency. State agencies (but not local governments) are required to give effect to the Personal Privacy Protection Law (Public Officers Law, Article 6-A), which often requires those agencies to withhold personally identifiable information insofar as disclosure would result in an unwarranted invasion of personal privacy.

The point is that review and redaction in that context may be arduous and time-consuming.

A second exception that creates complexity, section 87(2)(g) of FOIL, pertains to "inter-agency or intra-agency materials," communications between or among agency officials. Portions of those communications consisting of advice, opinions, recommendations and the like may be

withheld. The same provision, however, requires that other portions consisting of statistical or factual information, instructions to staff that affect the public or final agency policies or determinations must be disclosed. Within many internal governmental communications, there are recommendations or opinions coupled with statistics and/or facts. While an agency may choose to disclose the entirety of those communications, it is not required to do so and may delete or redact to the extent permitted by law.

Again, if a request involves hundreds or perhaps thousands of inter-agency or intra-agency communications, the process of review and redaction may be burdensome.

A third exception relates to the possibility that some communications might be subject to the attorney-client privilege or similar provisions that require a denial of access unless there has been a waiver of the privilege by the client.

The Committee has begun the task of analyzing what can be done to deal with the reality that some requests are valid but unreasonably voluminous, and that agencies may currently be required to expend an inordinate amount of time, effort and resources to deal with them.

It is noted at this juncture that the Committee is one of the few agencies of its kind in the United States. The Committee considers issues that are not unique to New York. We have been fortunate to have had a legal intern who has engaged in extensive research in an effort to learn of the approaches of other governments. In this country, it seems that there have been two primary responses. One involves the imposition of substantial fees. When that is done, the utility of an access law for an average citizen may be severely diminished; it costs too much. Many simply cannot afford to pay substantial fees that cover the time needed to locate, review, redact and reproduce records. The other involves repeated extensions of the time to respond that may be needed to deal effectively with a request. The problem is that disclosure may occur too late for records to be of value or relevance.

Federal agencies subject to the FOIA are facing the same problems, as are the states. Our legal intern was unable to locate any American law that offers a reasonable approach to solving the problems in a manner that preserves the integrity of the law and a usable presumption of access while recognizing that government agencies are dealing with increasingly burdensome requests. High fees or substantial delays in disclosure defeat the utility of the law on the part of those who should be the primary beneficiaries – members of the public, individually and as represented by a free news media.

One sovereign jurisdiction that has adopted a creative approach is Australia. Australia considers the effort needed to process a request and whether that effort would “substantially and unreasonably divert resources of the agency.”

One important factor in the Australian approach is the obligation of an applicant to “reasonably describe” the records sought. Consideration of that standard involves the nature of an agency’s filing or record keeping systems, and consequently, its ability to locate, retrieve, generate or extract records or information sought.

Other factors involve the time needed to review records to determine the extent to which they may be withheld or, conversely, must be disclosed, including the need to consult with or seek guidance from agency staff or others; the time needed to delete or redact portions of

records, whether manually or electronically; and the time needed to copy, reproduce or transmit the records sought.

When an agency concludes that honoring a request would substantially divert an agency's resources, it is required to initiate a "request consultation process." That process includes providing the contact information for the person or persons at the agency whom the applicant may contact to arrange a consultation, and the time within which the applicant must contact any such person.

Over the coming year, the Committee intends to further evaluate the Australian approach and other options, and develop a workable approach in consultation with representatives of state and local agencies with the goal of providing a legislative solution next year.

We invite state legislators and all agencies to join in the effort to develop a reasonable and workable approach that preserves the integrity of FOIL, while concurrently recognizing the potential burden that may be borne by agencies.

PROPOSED RULE REGARDING SEALING OF COURT RECORDS

The Committee on Open Government has significant concerns about a proposed amendment to §216(1) of the Uniform Rules of the New York State Trial Courts, the rule governing public access to the records of civil proceedings in this State. The courts are not subject to the Freedom of Information Law (FOIL). Public access to judicial records, however, is widely recognized to be protected under most circumstances by the First Amendment to the United States Constitution, and the proposed rule change does not accurately reflect the public's *constitutional* right to inspect court records.

In Richmond Newspapers, Inc. v. Virginia (448 U.S. 555 (1980)), the United States Supreme Court more than 35 years ago held that the First Amendment's express protections of speech, press and the right to petition the government implicitly extend to the public a qualified right of access to certain government proceedings. This constitutional access right is a qualified right, not an absolute one, but it can only be overcome on factual findings that secrecy is essential to protect some compelling governmental interest. *Id.*; *see also, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986). Because "[s]ecrecy of judicial action can only breed ignorance and distrust of courts," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring), this constitutional access right plays a central role in maintaining public confidence in the judiciary.

Richmond Newspapers explicitly recognized the existence of a First Amendment access right in the context of a criminal trial, but the right has uniformly been held to apply to proceedings in civil litigation as well. The United States Court of Appeals for the Second Circuit has been particularly clear that "the First Amendment does secure to the public and to the press a right of access to civil proceedings." Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir.1984). Every federal Circuit Court to have addressed the issue agrees. *See, e.g., Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067-71 (3d Cir. 1984); In re Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178-79 (6th Cir. 1983).

This constitutional right of access to judicial proceedings also extends to the records relating to those proceedings; access to judicial records is a “necessary corollary of the capacity to attend the relevant proceedings.” Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93 (2d. Cir. 2004). This principle, too, is widely recognized in the federal courts, where the public’s qualified constitutional right to oppose sealing orders and to inspect judicial records is regularly enforced. *See, e.g., Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014); Lugosch v. Pyramid Co. of Onandaga, 435 F.3d 110, 124 (2d Cir. 2006); Associated Press v. United States District Court, 705 F.2d 1143, 1145 (9th Cir.1983). Indeed, without access to the records that form the substantive basis of a court proceeding, the public would be unable to vindicate its constitutional right of access to the proceeding itself.

This First Amendment right of access extends to the judicial records of the courts of this State, and the Committee is thus concerned that the proposed amendment to Section 216(1) fails to acknowledge and comply with the public’s qualified constitutional right of access to court records. The amendment should not be adopted in its current form.

Background to the proposed amendment: Section 4 of the Judiciary Law entitled “Sittings of courts to be public” has, since 1909, expressed the public policy in this State that judicial proceedings are to be open to the public, except “proceedings and trials in cases for divorce, seduction, abortion, rape, assault to commit rape, criminal sexual act, bastardy or filiation...” Section 255 of the Judiciary Law, also in effect since 1909, requires clerks of courts to make records in their possession available for public inspection. Section 216(1) of the Uniform Rules of the New York State Trial Courts, entitled “Sealing of Court Records in Civil Actions in the Trial Courts,” with the proposed new language underlined, provides as follows:

“Except where provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. Good cause may include the protection of proprietary or commercially sensitive information, including without limitation, (i) trade secrets, (ii) current or future business strategies, or (iii) other information that, if disclosed, is likely to cause economic injury or would otherwise be detrimental to the business of a party or third-party. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.”

According to the memorandum in support of the insertion of the proposed language submitted to the Unified Court System by Commercial Division Advisory Council:

“As Rule 216.1 has been interpreted by the court, litigators in commercial cases have found it particularly difficult to place under seal many kinds of commercial information, even information that is not directly relied upon by the court or litigants and which is only marginally or not at all, information of public interest. This includes such matters as price information, company information that is historical in nature, documents marked ‘confidential’ or ‘private,’ and this hold true even when both sides to the litigation have asked for sealing.”

The Committee’s concerns with the proposed amendment: As a threshold matter, the rationale for the proposed amendment to Section 216.1 wrongly suggests that court records need not be made available to the public when they are not “relied upon” by the court or do not clearly involve a matter of public interest. Both of these propositions are inconsistent with the proper application of the constitutional access right. The *existence* of the public’s constitutional right to inspect a document filed with the court does not depend on whether the court ultimately relies upon it; rather, documents brought to the attention of a judge are “assumed to play a role in the court’s deliberations” in order to avoid the inconsistent application of the public’s right and to eliminate the potential for abuse. Lugosch, 435 F.3d at 123; *see also*, United States v. Erie County, N.Y., 763 F.3d 235, 240 (2d Cir. 2015) (noting that even a court’s “inaction is subject to public accountability”).

Nor does the existence of the constitutional right to inspect judicial records depend upon the public interest in the particular issues presented. The right exists because there is a fundamental need for courts to have a measure of accountability and for the public to have confidence in the administration of justice. As explained in United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995):

“Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of [judicial] functions.”

The qualified constitutional access right therefore attaches to all “judicial records,” and what constitutes a judicial record should properly be determined by “the role of the document in the judicial process;” it depends upon whether the document “is ‘relevant to the performance of the judicial function and useful in the judicial process.’” United States v. Erie County, N.Y., 763 F.3d 235, 239 (2d Cir. 2015); *see also* , Lugosch, 435 F.3d at 119.

Where the constitutional right applies, the United States Supreme Court has articulated the clear standards that must be used to determine when the access right may be limited: To seal a judicial record that is subject to the constitutional right, a court must specifically find that there exists a substantial probability of prejudice to a compelling interest if the record is not sealed, and that there are no reasonable alternatives to prevent that prejudice other than limiting the public’s right of access. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14 (1986).

The Committee does not question that a need to protect trade secrets and other confidential commercial information will often justify sealing a judicial record under both the constitutional and statutory standards. But the “good cause” standard for sealing a judicial record that is provided in Section 216.1 must be applied by courts in a manner that conforms to the public’s constitutional right to inspect judicial records—the Uniform Rule and the constitutional standard for sealing court records are necessarily read as related thresholds that must both be met before sealing a judicial record. *See Pelosi v. Spota*, 607 F. Supp. 2d 366, 374 n.8 (E.D.N.Y. 2009).

If Section 216.1 is to be amended, the Committee recommends that it be revised to conform expressly to the governing constitutional standard and avoid confusion, along the following lines:

“Except where provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written findings that (a) there exists a substantial probability of prejudice to a compelling interest if the record is not sealed, and (b) there are no reasonable alternatives to prevent that prejudice other than sealing the record. of good cause, which shall specify the grounds thereof. A “compelling interest” may include, without limitation, the protection of (i) trade secrets, (ii) current or future business strategies, or (iii) other information that, if disclosed, would cause economic injury to the business of a party or third-party. In determining whether to seal good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may shall prescribe appropriate public notice and opportunity to be heard on any motion to seal.”

LIST OF SERVICES RENDERED BY THE COMMITTEE

3,861 TELEPHONE INQUIRIES
1,399 RESPONSES TO WRITTEN INQUIRIES
232 ADVISORY OPINIONS
88 PRESENTATIONS
4,257 TRAINED
THOUSANDS OF RADIO AND WEBINAR LISTENERS

Committee staff offers 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 element of the services that we provide.

During the past year, with a staff of three, the Committee responded to nearly 4,000 telephone inquiries, nearly 1,400 requests for guidance answered via email or U.S. mail and responded to over 230 requests for detailed written opinions in regard to the FOIL, the OML and Personal Privacy Protection Law. In addition, staff gave 88 presentations before government and news media organizations, on campus and in public forums, training and educating more than 4,257 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 more than 25,000 written advisory opinions in response to inquiries regarding New York’s open government laws. The

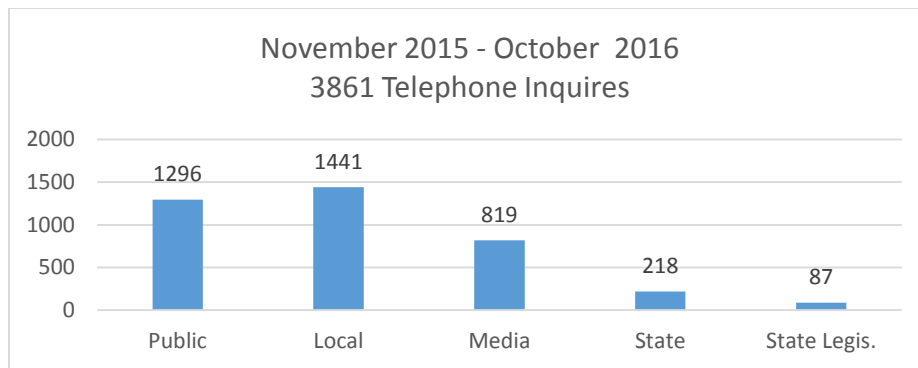
opinions prepared since early 1993 that have educational or precedential value are available online through searchable indices.

In 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 FOIL and OML 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 FOIL and OML 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

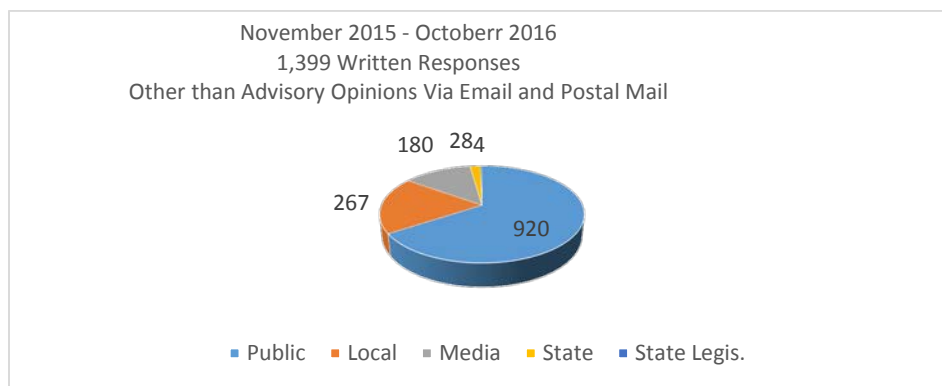
This year, Committee staff answered approximately 3,861 telephone inquiries, the majority of which pertained to the Freedom of Information Law. We recorded fewer telephone inquiries than in 2015, most likely due to an increased reliance on email and the website.



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.

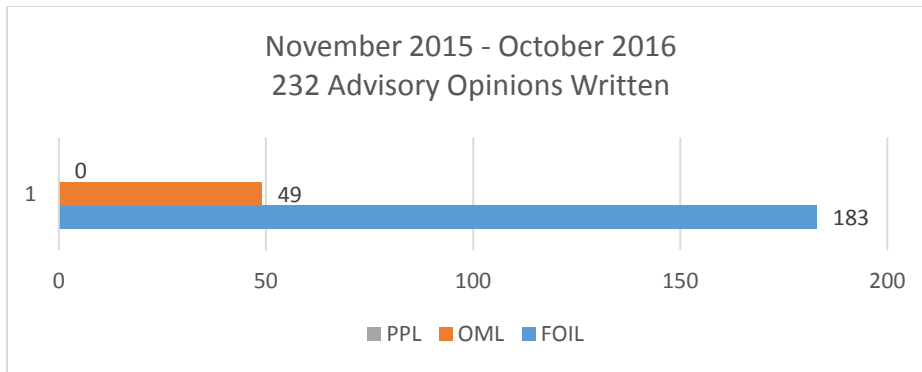
This past year, 1,399 written responses to inquiries other than advisory opinions via email and postal mail were prepared in regard to the FOIL and OML. Based on the data captured, the majority of the requests concern issues related to FOIL.



D. Advisory Opinions

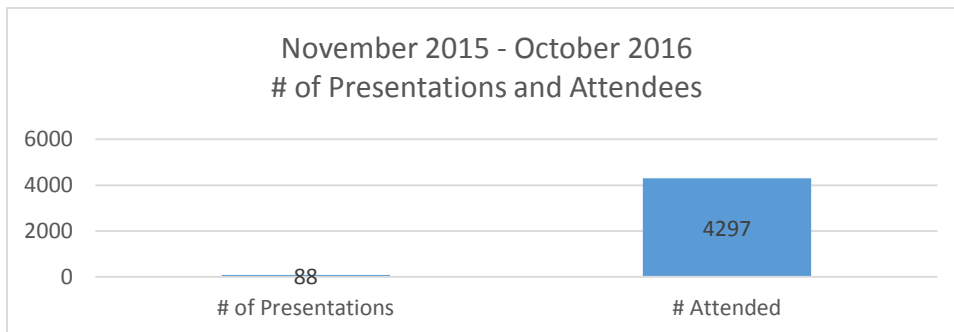
Committee staff is conscientious about providing guidance as efficiently as possible, including links to online advisory opinions when appropriate, and therefore, prepared fewer written advisory opinions than in previous years. When a written response from staff contained a substantive opinion with legal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

Nevertheless, Committee staff prepared 232 advisory opinions in response to requests from across New York. As is true in years past, the bulk of the opinions (183) pertained to FOIL.



E. Presentations

An important aspect of the Committee’s work involves efforts to educate by means of seminars, workshops, radio and television interview programs, and various public presentations. During the past year, the staff gave 88 presentations. The presentations are identified below by interest group for the period of November 1, 2015 to October 31, 2016. More than 4,000 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.



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

- Orange County Planning Federation, Goshen
- Association of School Business Officials, Albany
- City of Saratoga Springs, training, Saratoga Springs
- Southern Tier Regional Planning Federation, training, Corning
- Excelsior Fellows, Albany
- Association of Towns, training, Rochester
- Association of Towns, training, Albany
- NYS Association of School Business Officials, webinar, Albany
- Association of Towns (2 presentations), New York City
- NYS Association of Counties, Albany
- Mid-Hudson Library Association, Poughkeepsie

Tug Hill Local Government Conference, Watertown
 Governor's Counsel staff, Albany
 Westchester County Municipal Officials Association, Peekskill
 NYS Planning Federation, Saratoga Springs
 NYS Town Clerks Association, Saratoga Springs
 Department of Financial Services (2 programs), CLE, New York City
 New York Conference of Mayors, Saratoga Springs
 BOCES Business Officials, Albany
 Westchester County Assessors Association, Chappaqua
 Southern Tier West Regional Planning, Houghton
 NYS Association of Municipal Purchasing Officials, Albany
 NYS Assembly Public Hearing regarding use of Body-worn cameras, New York City
 Southern Tier Regional Leadership Conference, Corning
 Tupper Lake Library forum for local officials, Tupper Lake
 NYS Association of Clerks of Legislative Boards, Cooperstown
 New York State Government Finance Officers, Albany
 NYS Tax Collectors Association, Lake Placid
 Syracuse Civilian Police Review Board, Syracuse
 Community Board 9, Brooklyn, training
 Community Board 8, Brooklyn, training
 Town of Bolton/Warren County training
 New York Conference of Mayors (2 programs), CLE, Saratoga Springs
 Town of Schuyler Annual Planning and Zoning Conference, Schuyler
 NYS Association of Real Property Tax Directors, Vernon
 New York City Department of Education, training for Community Education
 Councils, New York City
 NYS School Boards Association, Buffalo

1. Presentations for students included:

Syracuse University/Maxwell School, Shenzhen, China officials, Albany
 CUNY Graduate School of Journalism, New York City
 Syracuse University/Maxwell School, Beijing officials, Albany
 College of St. Rose, journalism, students, Albany
 NY Senate Student Interns, Albany
 SUNY/Albany, journalism students, Albany
 Syracuse University/Maxwell School, Humphrey Fellows, Syracuse
 Buffalo Law School, Buffalo
 Syracuse University/Maxwell School, Fudan University, Shanghai, students, Albany
 SUNY/Albany, Korean graduate students, Albany
 SUNY/Albany, journalism students, Albany
 NYS Senate Fellows, Albany
 College of St. Rose, journalism students, Albany
 Syracuse University, Maxwell School, Chinese students and local officials, Albany
 Columbia University Graduate School of Journalism

2. Presentations for groups associated with the news media:

Syracuse Press Club, Syracuse
Capitol Pressroom, Albany (3)
Utica Observer-Dispatch, training, Utica
WTBQ Radio, Orange County, interview program
Rochester Democrat & Chronicle, Rochester
New York Press Association, Saratoga Springs
Schenectady Gazette, training, Schenectady
WUTQ, Utica, "Talk of the Town", radio interview
WIBX, Utica, radio interview, Utica
WNYC radio, training, New York City
Statewatch, Podcast, Albany

3. Other presentations/public forums:

Federal Bar Association (CLE), Albany
New York Economic Council, Albany
Daily Gazette, Public Forum, Schenectady
NYS Trial Lawyers Association (CLE), New York City
Sen. George Latimer TV program, Westchester
Gannett News Service, radio/TV interview, Albany
WAMC radio interview, Albany
Woodstock Community Forum, Woodstock
Public forum sponsored by City of Auburn, Auburn
WXXI radio interview, Rochester
Public forum sponsored by town of Cape Vincent, Cape Vincent
Assemblymember Paulin TV program, Westchester
Public forum sponsored by St. Lawrence County, Canton
League of Women Voters, Rensselaer County Chapter, Troy
Monroe County Bar Association, CLE, Rochester
Columbia Univ. Grad. School of Journalism commemoration of 50th anniversary of
FOIA, New York City
International Center of the Capital Region, Uruguayan delegation, Albany
Public forum sponsored by Town of Bedford, Bedford
New York Law Journal, profile, New York City
Village Voice, profile, New York City