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December, 2017

2017 REPORT TO THE GOVERNOR AND STATE LEGISLATURE

“Secrecy is the linchpin of abuse of power,...its enabling force.
Transparency is the only real antidote.”

Glenn Greenwald, Journalist

With that message, Committee on Open Government continues to strive to ensure that New Yorkers have the right and the opportunity to improve their lives and the operation of their Government. Access to information acquired through the Freedom of Information, Open Meetings and Personal Privacy Protection Laws can serve as important vehicles used to achieve those goals. The proposals in this report provide sensible approaches designed to give effect to the intent of those laws.

The Committee on Open Government, created as part of the Freedom of Information Law (FOIL) in 1974, has consistently sought to identify areas in the law that warrant improvement. We have looked back to create remedies that address flaws in current laws. We also look forward by attempting to ensure that the law functions as optimally as possible as technology and societal values continue to change.

The past year has seen positive developments, but frustrations continue related to the lack of progress concerning disclosure of records critical to the relationship between the public and the government, particularly the law enforcement community. In addition, all parties recognize the concerns relating to the utility of FOIL as agencies’ responsibilities grow due to the number and scope of requests. It is expected that those issues might gradually be resolved with system and technology enhancements.

In the ensuing sections of this 2017 Annual Report to the Governor and the State Legislature, the Committee will offer recommendations to improve access and accountability. Some are new; others reflect proposals offered in previous reports that we believe continue to be meritorious.



Department
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POSITIVE DEVELOPMENTS

The past year has seen positive trends in the areas of transparency and open government. Following are examples of those developments.

A. *Attorney Fees Legislation*

The Committee is gratified and offers congratulations to the Governor and the State Legislature regarding legislation to amend FOIL in a manner that encourages agencies to better comply with that statute. In short, a court now has discretionary authority to award attorney fees to a member of the public when the court finds that s/he has substantially prevailed and the agency failed to respond to a request or appeal within the statutory time, and an award of attorney fees would be mandatory when the petitioner has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

The intent is not to penalize the government for incidental or inadvertent behavior. On the contrary, the goal is to encourage compliance with FOIL and discouraging unlawful behavior, thereby diminishing the need for or likelihood of litigation due to a failure to comply in a manner consistent with law.

B. *Sealing of Court Records*

In October 2016, the Administrative Board of the Courts sought public comment on a proposed new Rule 11-h of the Rules of the Commercial Division (22 NYCRR §202.70[g]), Rule 11-h) proffered by the Commercial Division Advisory Council, addressing the sealing of court records for that Division.

Last year's report offered a warning regarding that proposal, which had been made to expand the authority of civil courts to seal records that come into their possession. We are pleased to report that the proposal was not adopted.

C. *Meeting the Burden of Proof*

Unlike some other jurisdictions, our courts have in most instances taken seriously enforcing agencies' obligation to comply with FOIL and the Open Meetings Law (OML). When an agency denies access to records and its determination is challenged in court, the agency has the burden of proving that the exceptions to rights of access were properly asserted.

Most exceptions reflect a need to withhold records where there is a likelihood that disclosure would result in harm. For example, an agency cannot merely assert that a record is "proprietary." Rather, it must prove that disclosure would create harm by causing "substantial injury to the competitive position" of a commercial enterprise. An agency cannot withhold records based on the blanket assertion that records were "compiled for law enforcement purposes." It must demonstrate to a court's satisfaction that disclosure would "interfere" with a law enforcement investigation or judicial proceeding, "deprive" a person of a right to a fair trial,

“identify” a confidential source or “reveal” other than routine criminal investigative techniques or procedures.

D. Interest in, Knowledge of, and Compliance with Law

As reflected in the statistics at the end of this report, the staff of the Committee is working constantly to educate government officials, members of the public, media organizations and students regarding open government laws. Several dozen presentations and similar efforts to educate at the request of interested organizations and groups indicate a persistent demand for education and training regarding those laws.

E. Law School Transparency Clinics

In another positive development, several law schools have created clinical programs for their students that are working in New York courts to promote government transparency and accountability. They include:

Civil Liberties and Transparency Clinic, SUNY/Buffalo
Human Rights Clinic, Columbia University
Brennan Center Public Policy Advocacy Clinic, New York University
Media Freedom and Information Access Clinic, Yale University
First Amendment Clinic (soon to be established), Cornell University

LEGISLATIVE PRIORITY

A. Section 50-a of the Civil Rights Law: A Growing Problem

For the past several years, the Committee has called for repeal or amendment of Civil Rights Law § 50-a as its highest legislative priority. A review of its legislative history indicates that the law was enacted in 1976 with a narrow purpose—to protect police officers from harassing cross-examination by defense counsel in criminal prosecutions based on unproven or irrelevant material contained in their personnel files. But its interpretation and application in the courts over the past 40 years has turned a narrow FOIL exception into a virtually impenetrable statutory bar to the disclosure of information about the conduct of law enforcement officers. Today, the courts’ broad reading of §50-a deprives the public of information essential to democratic oversight, and lends a shield of opacity to the very public State and local police agencies that have perhaps the greatest day-to-day impact over the lives of citizens—our State and local police.

Courts have permitted police departments to withhold virtually any information that could conceivably reflect upon a future decision to promote or retain an officer.¹ Our last four Annual Reports have each highlighted the alarming lack of public information about law enforcement agencies that these rulings have engendered, including:

¹ See, e.g. Gannett Co. v James, 86 AD2d 744, 447 NYS2d 781 (4th Dept. 1982); Daily Gazette Co. v City of Schenectady, 93 NY2d 145, 688 NYS2d 472 (1999).

- The withholding of records of an officer’s involvement in a hit and run accident while off-duty;²
- The withholding of basic information about police accrual and leave practices;³
- The withholding of information even in cases where departments have determined that their officers broke the law;⁴ and
- The withholding of a report about the failings of a police department that led to the death of a woman the police had a duty to protect, and a \$7.7 million payout of taxpayer funds to settle a wrongful death action.⁵

The imposition of such secrecy under §50-a was never intended. It is unwarranted as a matter of sound policy, and is affirmatively unhelpful in the current toxic environment of mistrust of law enforcement in many communities. This conclusion has been widely embraced by editorial writers across the State, as our past reports have also documented.⁶

The situation is only growing worse. Consider for example developments this year in New York City. The NYPD had a long history of publicly posting the basic outcome of disciplinary cases, an important disclosure for public trust and confidence in the police. But in May, even that basic disclosure stopped—NYPD brass now claims that §50-a precludes release of the information. Upon hearing of this change, an incredulous Manhattan Supreme Court judge asked NYPD lawyers: You mean “‘oops, we’ve been doing this for 40 years and maybe we’ve been messing this up, we don’t have to give this info out? Nobody ever complained about it before.”⁷ Nonetheless, the courts have upheld the new refusal to disclose.⁸ An appeal by the New York Civil Liberties Union from a holding that the NYPD is not required to release even redacted summaries of its disciplinary actions with officers’ names removed is currently pending before the Court of Appeals.⁹

² Hearst v New York State Police, 109 AD3d 32, 966 NYS2d 557 (3rd Dept. 2013).

³ Stuart v Department of Community and Correctional Services, Supreme Court, Chemung County, August 30, 2001 (permitted deletion of names of officers from accrual and leave statements, notwithstanding Capital Newspapers v Burns, 67 NY2d 562, 505 NYS2d 576 (1986), which required disclosure of lost time reports that include days and dates of sick leave used).

⁴ See, e.g., Gus Garcia Roberts and Sandra Peddie, “Unjustified,” *Newsday* (Dec. 18, 2013) available at <http://data.newsday.com/long-island/crime/huntington-station-shooting/> (discussing conclusions of illegal conduct by police in internal affairs reports that are typically withheld under Section 50-a).

⁵ Sid Cassese, “Nassau Oks \$7.7M Jo’Anna Bird settlement,” *Newsday*, Jan. 30, 2012, available at <https://www.newsday.com/long-island/nassau/nassau-oks-7-7m-jo-anna-bird-settlement-1.3491132>

⁶ See, e.g., 2016 Annual Report at pp. 3-5.

⁷ Stephen Brown, *et al.*, “Board recommended discipline for Officer Daniel Pantaleo years before fatal Eric Garner chokehold: report,” *New York Daily News*, Mar. 21, 2017, available at <http://www.nydailynews.com/new-york/revelations-officer-pantaleo-record-eric-garner-article-1.3004217>

⁸ Matter of New York Civ. Liberties Union v New York City Police Dept., 148 AD3d 642, Appellate Division, First Department (March 30, 2017).

⁹ See Matter of New York Civil Liberties Union v. New York City Police Department, et al., Court of Appeals Docket No. 2017-00184.

The situation has deteriorated so dramatically that in some instances, citizens are relegated to reliance on the occasional leak by a whistleblower to receive any important negative information concerning the performance of a police officer. For example, since July 2014 the public has struggled to learn basic facts about NYPD Officer Daniel Pantaleo, who was filmed causing the death of Eric Garner by keeping him in a chokehold even as he pleaded, “I can’t breathe.” The NYPD has consistently refused to provide any information about past discipline of Officer Pantaleo, citing §50-a. Garner’s family finally sued under FOIL for information about whether the officer had faced previous misconduct charges, but the courts found that NYPD properly withheld the information under §50-a. It was only through an anonymous leak of records to a news site just last March that the public learned there had been 14 prior allegations of misconduct by the officer, four of which the Civilian Complaint Review Board (“CCRB”) had found to be “substantiated.” And then, the leaker of that information was fired.¹⁰

Even the CCRB is caught up in the demands for secrecy. It has long been recognized that discipline handed out by the NYPD must be accepted as fair “from the perspective of both the public and members of the department.”¹¹ But while the CCRB’s hearings on allegations of misconduct today are open to the public, its determinations of wrongdoing and its recommendations to the NYPD Commissioner for disciplinary action are now considered confidential under §50-a. So too is any discipline the Commissioner may ultimately choose to impose. Again, it is only due to another leak that the public recently learned that the CCRB had found Officer Pantaleo used a chokehold in violation of NYPD policy and proposed stiff disciplinary penalties.¹² Due to §50-a, the public may never know what discipline is actually imposed. Such secrecy only breeds contempt, and there is no justification for refusing to disclose basic information about the discipline of police officers.

No other State prohibits public oversight of its police in this manner. As noted, §50-a was never intended to impose such a broad blanket of secrecy, and its current prohibition against disclosure of basic information about the discipline of police is terrible policy—fueling public mistrust, resentment and anger. Both New York City Mayor Bill DeBlasio and New York City Police Commissioner James O’Neill have publicly labeled this situation unacceptable and asked the Legislature to change the law. Commissioner O’Neill has stressed his desire for “the department To become more transparent” in order to “build trust around the city,” but reportedly believes this cannot happen without a change to §50-a.¹³

¹⁰ Graham Rayman, “NYPD will keep withholding cops’ disciplinary records after appeals court overturns Pantaleo file ruling,” New York Daily News, Mar. 31, 2017, available at <http://www.nydailynews.com/new-york/nypd-leaving-cops-disciplinary-records-wraps-article-1.3015407>

¹¹ Commission to Combat Police Corruption, “The New York City Police department’s Disciplinary System: How the Department Disciplines Its Members Who Engage in Serious off-Duty Misconduct,” August 1998, available at <http://www1.nyc.gov/assets/ccpc/downloads/pdf/The-NYPDs-Disciplinary-System-How-Who-Engage-in-Serious-Off-Duty-Misconduct-August-1998.pdf>

¹² Benjamin Mueller, “Review Board Recommends Stiffest Punishment for Officer in Garner Case,” New York Times, Sep. 8, 2017, available at <https://www.nytimes.com/2017/09/08/nyregion/eric-garner-chokehold-review-board.html>

¹³ Graham Rayman, “NYPD will keep withholding cops’ disciplinary records after appeals court overturns Pantaleo file ruling,” New York Daily News, Mar. 31, 2017, available at <http://www.nydailynews.com/new-york/nypd-leaving-cops-disciplinary-records-wraps-article-1.3015407>

It is long past time to correct this regrettable situation and require the same level of public disclosure for police departments as is required from other public agencies. FOIL provides all public employees with the protections necessary to guard against unwarranted invasions of privacy and from disclosures that could jeopardize their security or safety. While police officers have a particular need for such protections, the general FOIL exemptions are already sufficient to safeguard their legitimate privacy and safety concerns. Moreover, the courts are already adequately equipped to protect against improper cross-examination and determine when records regarding a police officer's behavior are admissible in a trial. The blanket denial of public access to information about police activity that §50-a imposes is unnecessary.

The corrosive absence of transparency undermines accountability, increases public skepticism and foments distrust. All members of this Committee have long agreed that §50-a is ripe for reconsideration by the Governor and the State Legislature. It is long past time to act.

Outright repeal would serve as a positive step toward increasing transparency in law enforcement. At the very least, §50-a should be amended to make clear its narrower intent, such as with the insertion of the word "solely," as follows:

"All personnel records used solely to evaluate performance toward continued employment or promotion,..."

The Legislature should wait no longer.

FOOD FOR THOUGHT

Approaches to Transparency Built on Existing Law

A. The Permissive Aspect of FOIL

Last year's report encouraged thought and solicited recommendations relating to "changes brought by technology." Data is now routinely maintained electronically and agencies can retrieve volumes of material quickly and easily. This advance in technology enables agencies to locate and identify perhaps thousands of items, especially when a request involves email communications. Based on judicial precedent, when an agency can locate records with reasonable effort, it must disclose them to the extent required by FOIL, and therein lies a critical problem: agency staff will likely read the communications, one by one, to determine which records or portions of records must be disclosed to comply with FOIL, or conversely, which may properly be withheld.

The issue is particularly significant with respect to email. If a request is made to a town for all email communications within the past year, or two, or five between or among town board members (usually five), there are likely thousands of such communications, and all consist of "intra-agency materials" that fall within §87(2)(g) of FOIL, one of the exceptions to rights of access. That provision appears in the law as a double negative. Those materials may be withheld, except those portions consisting of "statistical or factual tabulations or data," instructions to staff that affect the public, final agency policies or determinations, or that are external audits. The remaining material to be withheld may reflect a deliberative process and

consist of advice, opinions, recommendations and the like. If the town supervisor writes to board members and asks for their advice or recommendations regarding a particular issue, those portions of their responses that consist of advice or recommendations may be withheld. However, often when advice is given, it is supported by statistics and facts that must be disclosed. Simple example: an opinion might be “I think the road needs to be repaved.” That portion of the communication may be withheld. “It was paved three years ago.” That’s a fact, and that portion of the communication must be disclosed.

Consider a request that involves thousands of similar communications. In that circumstance, an agency may choose to review each and every one and redact those portions consisting of an opinion, a recommendation or advice, regardless of how innocuous or inconsequential those portions of the communication might be.

Perhaps the leading decision concerning §87(2)(g) is Gould v. NYC Police Department, 89 NY2d 267 (1996), in which the Court of Appeals found that:

“Although the term ‘factual data’ is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is to ‘protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers’...Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of ‘statistical or factual tabulations or data’...Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*id.*, 276-277).

Would it be harmful to disclose the suggestion that a road needs repaving? Probably not. Would it be easier to disclose the entirety of communication, rather than redacting the suggestion? Probably so.

Congress recently amended the federal Freedom of Information Act via enactment of FOIA Improvement Act of 2016 (Public Law No. 114-185). Part of the amendment involves an element of the federal Act that mirrors its New York counterpart, that an agency *may* withhold records or portions of records, even though an exception to rights of access can be asserted. As stated by the Court of Appeals:

“...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency’s discretion to disclose such records...if it so chooses” [*Capital Newspapers v. Burns*, 67 NY2d 562, 567 (1986)].

The new federal provision directs that federal agencies “shall withhold information” based on an exemption “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or when “disclosure is prohibited by law.”

Whether that standard is workable is questionable. If an agency denies access to certain records, and the denial is challenged by an applicant who contends that disclosure would not result in foreseeable harm, would the agency be required to prove that outcome? Will the new provision encourage the initiation of more litigation? How would a court make that judgement?

For the moment, the Committee intends to remind government agencies that even though they *may* withhold in certain instances, they are not required to do so, and that disclosure may often be more efficient and less costly in terms of time and effort than engaging in the laborious task of redacting records the disclosure of which would be largely innocuous or outdated. However, we also intend to monitor the new federal standard to determine if it is workable and whether a similar modification to New York's FOIL would be useful.

B. Partial Disclosure Enhanced Through Technology

Two other aspects of the amendment to the federal FOIA (Public Law No. 114-185) are already found in the New York FOIL (See §89). The Committee recommends that agencies recognize those existing provisions with a greater focus in an effort to improve the operation of the law.

One area of amendment states that agencies "shall consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible." The other requires that agencies "take reasonable steps necessary to segregate and release nonexempt information."

For several years, FOIL has stated in §89(3)(a) that "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." Even more significantly, §89(9) states that:

"When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access."

The new federal provisions reflect existing elements of the New York FOIL, and the Committee urges agencies to recognize and abide by them.

C. Proactive Disclosure

In previous reports, the Committee has recommended legislation requiring that agencies post records online, even before requests for the records are made pursuant to FOIL. The advantages of doing so are clear. When records are posted on an agency's website, members of the public need not request them under FOIL. Just as significant, an agency is not required to respond to a request.

Legislation was introduced by Assemblyman (now Senator-elect) Kavanagh (A.4356) and Senator Krueger (S.4586) that would create an obligation for government agencies to proactively disclose records, with reasonable limitations. We continue to believe that agencies should, “to the extent practicable” post records of significance to the public online.

D. Algorithmic Decision Making

Government and private sector entities are increasingly using computer algorithms to carry out their functions. An “algorithm” is a process or set of rules to be followed in calculations or other problem solving operations, usually by a computer. Human involvement, however, is critical in explaining the goal, purpose and intent of an algorithm. Important, too, are the variables used in an algorithm. It is in the public’s interest to know when an algorithm is being used and what the algorithm is. Explanations of their use might enhance trust, effectiveness, persuasiveness and efficiency, and records concerning the use of algorithms should in most instances be available to the public under FOIL. Importantly, agencies and private corporations should not be permitted to claim trade secret status over algorithms used to make important governmental decisions.

For example, the Office of Chief Medical Examiner in New York had been claiming trade secret status over the computer code used to match DNA to crime scenes, making it impossible for criminal defendants to assess the validity of a purported match. Fortunately, the Medical Examiner backed down when pushed by a court.¹⁴ But claims of trade secret should be fundamentally improper when they prevent disclosure under FOIL of algorithms used to make key governmental decisions. This is another area the Committee is monitoring to determine whether future legislative action is needed.

PREVIOUS RECOMMENDATIONS FOR CONTINUING CONSIDERATION

A. The Reasonable Use of Cameras in Courtrooms

While several judges have determined that the statutory ban on the use of cameras is unconstitutional, legislation remains necessary to ensure that court proceedings are meaningfully open to the public. 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 former Chief Judge Lippman expressed, “[t]he public has a right to observe the critical work that our courts do each and every day to see how our laws are being interpreted, how our rights are being adjudicated and how criminals are being punished, as well as how our taxpayer dollars are being spent.”

¹⁴ See Lauren Kirchner, "Federal judge unseals New York crime lab's software for analyzing DNA evidence," ProPublica, Oct. 20, 2017, available at <https://www.propublica.org/article/federal-judge-unseals-new-york-crime-labs-software-for-analyzing-dna-evidence>.

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. Former 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.

B. Technical Amendments

The following proposed technical amendments reflect an effort to clarify existing provisions in FOIL. First, there are two provisions of FOIL that state that an unwarranted invasion of personal privacy includes the disclosure of a list of names and addresses if a list would be used for solicitation or fund-raising purposes. Because the language involves personal privacy, 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.

Second 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.

C. *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."

D. 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. Section 308(4) of County Law prohibits the disclosure of records of E911 calls. The law states:

"Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

However, that statute is either unknown to many law enforcement officials, or it is ignored. For example, soon after a Lake George tour boat sank and twenty people died, transcripts of 911 calls were published. While those who made the emergency calls were not identified, the disclosure of the transcripts clearly violated existing law.

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

This proposal was introduced as S.1175 (Senator Hoylman) in 2016. 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.

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

To promote accountability, transparency, and trust, the Committee urges 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) in 2015, 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.

F. Dealing with Lawsuits 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) in 2015 and 2016 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 2018.

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 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:

“(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations: (i) provided, however, that records indicating the proposed terms of a public employee union or school district collective bargaining agreement together with facts describing the economic impact and any new costs attributable to such agreement, contract or amendment shall be made available to the public immediately following approval of such proposed terms by a public employee union, and at least two weeks prior to the approval or rejection of such proposed terms by the public employer when such records are sent to members of the public employee union for their approval or

rejection; and (ii) that copies of all proposed public employee union or school district collective bargaining agreements, employment contracts or amendments to such contracts together with facts describing the economic impact and any new costs attributable to such agreement, contract or amendment be placed on the municipal or school district websites, if such websites exist, and within the local public libraries and offices of such school districts or in the case of collective bargaining agreements negotiated by the state of New York, on the website of the governor's office of employee relations at least two weeks prior to approval or rejection of such proposed public employee union or school district proposed collective bargaining agreements or action taken to approve 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.

H. 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).

LIST OF SERVICES RENDERED BY THE COMMITTEE

3,789 TELEPHONE INQUIRIES
1,457 RESPONSES TO WRITTEN INQUIRIES
179 ADVISORY OPINIONS
60 PRESENTATIONS
THOUSANDS ADDRESSED
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 1,500 requests for guidance answered via email or U.S. mail and responded to over 175 requests for detailed written opinions in regard to the FOIL, the OML and Personal Privacy Protection Law. In addition, staff gave 60 presentations before government and news media organizations, on campus and in public forums, training and educating more than 3,264 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 25,500 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 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>;

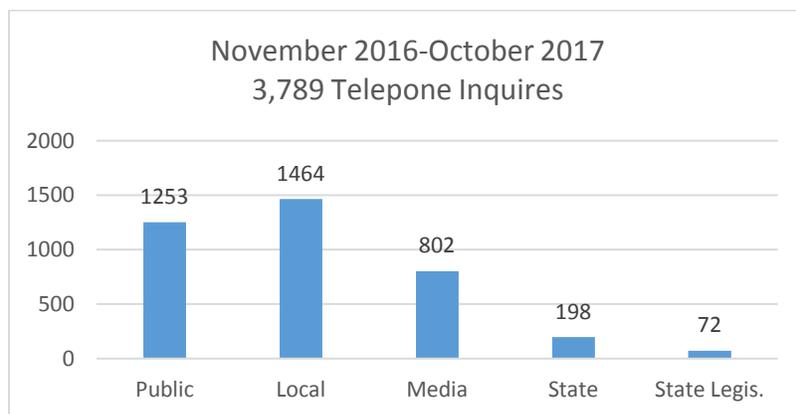
<http://www.dos.ny.gov/coog/openmeetinglawfaq.html>

- “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

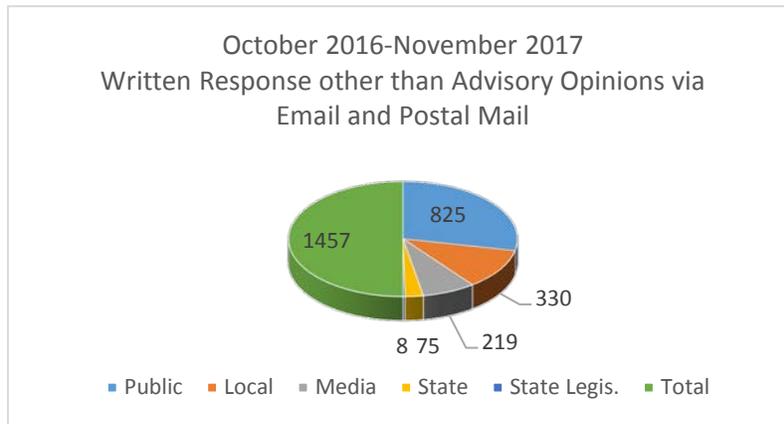
This year, Committee staff answered approximately 3,789 telephone inquiries, the majority of which pertained to the Freedom of Information Law. We recorded fewer telephone inquiries than in 2016, most likely due to an increased reliance on email and the website.



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.

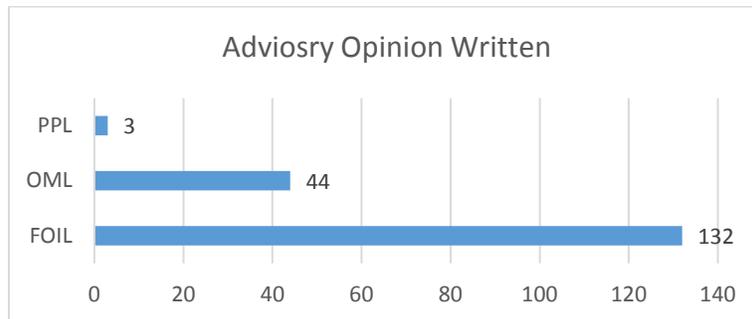
This past year, 1,457 written responses to inquiries other than advisory opinions via email and postal mail were prepared in regard to the FOIL and OML. Based on the data captured, the majority of the requests concern issues related to FOIL.



D. Advisory Opinions

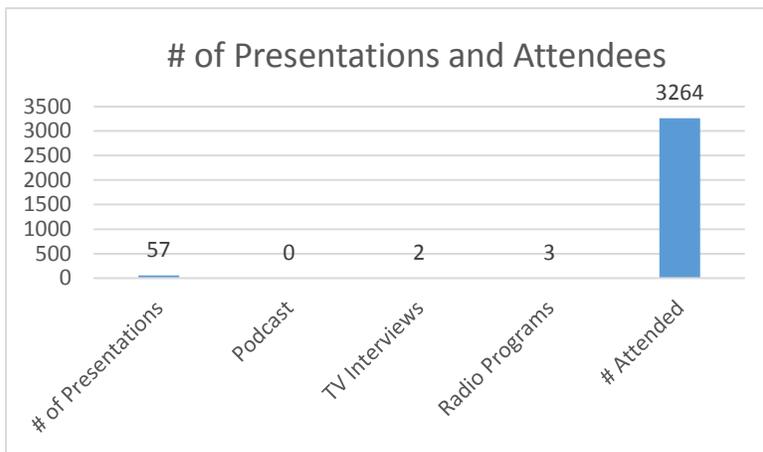
Committee staff is conscientious about providing guidance as efficiently as possible, including links to online advisory opinions when appropriate, and therefore, prepared fewer written advisory opinions than in previous years. When a written response from staff contained a substantive opinion with legal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

Nevertheless, Committee staff prepared 179 advisory opinions in response to requests from across New York. As is true in years past, the bulk of the opinions (132) 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 62 presentations. The presentations are identified below by interest group for the period of November 1, 2016 to October 31, 2017. More than 3,200 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:

- Association of School Business Officials, Albany
- Rockland County Clerks and Finance Officers Association, New City
- Dutchess County officials (CLE), Poughkeepsie
- Association of School Business Officials, Management Workshop
- Excelsior Fellows (CLE), Albany
- Community Education Council, Long Island City
- NYS Association of Towns, New York City
- Monroe County Clerks and Tax Collectors Association, Sweden
- Tompkins County Shared Services Program, Ithaca
- NYS Planning Federation, Saratoga Springs
- Oneida-Madison-Herkimer BOCES, District Clerk Workshop, New Hartford
- Adirondack Park Local Government Day Conference, Lake Placid
- Southern Tier Central Leadership Conference, Corning
- NYS Town Clerks Association, Rochester
- State Association of Municipal Purchasing Officials, Albany (2 presentations)
- Columbia-Greene Town Clerks Association, New Baltimore
- Livingston County Local Government Training, Mt. Morris
- NYS County Clerks Association, Lake Placid
- Suffolk County Cooperative Library System, Bellport

Cohoes Board of Education Training, Cohoes
NY State Agency Interns, New York City
Community Board Training, Brooklyn
Nassau-Suffolk Water Commissioners Training, Westbury
New York Conference of Mayors (2 programs), Saratoga Springs
New York State School Boards Association, Lake Placid
Poughkeepsie Police Department, Law Enforcement Training, Poughkeepsie
Gloversville Police Department Training for Local Government Officials, Gloversville
Empire Fellows, Training, Albany
Stillwater Public Library Board, Training, Stillwater
Ramapo-Catskill Library System, Training, Middletown
Capital District Regional Planning Commission, Local Government Workshop, Troy

2. Presentations for students:

CUNY Graduate School of Journalism, New York City
Ithaca College, Journalism program, Ithaca
Syracuse University, Maxwell School, Seminar for Indian Administrative Service Officers,
Syracuse
Syracuse University, Maxwell School, Chinese Government Officials and Students, New York
City
Syracuse University, Maxwell School, Shanghai Graduate Students and Faculty, Albany
NY News Publishers Association, Participation in Government Class, Bethlehem Central High
School
SUNY/Albany, Journalism Students, Albany

3. Presentations for groups associated with the news media:

Daily Gazette, Schenectady
Newswhistle interview
WVOX (Westchester) Radio Interview
Buffalo Broadcasters Association, Buffalo
News 12 Investigative Team, Yonkers
Buffalo News Training, Buffalo

4. Other presentations/public forums:

International Center of the Capital Region/Nigerian delegation, Albany

NYS Bar Association, Media Law Committee, New York City

Public Forum, Greenlawn

Public Forum sponsored by Village of Croton-on-Hudson, Croton-on-Hudson

Public Forum sponsored by Central Valley Teachers Association, Ilion

International Center of the Capital Region/Ukrainian delegation, Albany

NYS Bar Association (CLE), Albany

Public Forum, Saugerties

Public Defense Investigator Training, New York City

Public Forum sponsored by Ithaca College, Ithaca

Public Forum sponsored by Village of Mamaroneck Democratic Committee, Mamaroneck

International Center for the Capital Region, Multinational Forum, Albany

Public Forum, Southern Tier Transparency Project, Binghamton

International Center of the Capital Region, Tunisian Delegation, Albany

Buffalo Niagara Coalition for Open Government and League of Women Voters, Buffalo

International Center of the Capital Region, Croatian Information Commissioners, Albany