

COMMITTEE ON OPEN GOVERNMENT

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FRANKLIN H. STONE
STEPHEN B. WATERS

EXECUTIVE DIRECTOR

SHOSHANAH BEWLAY

MEETING AGENDA NYS COMMITTEE ON OPEN GOVERNMENT November 30, 2022

1. Welcome and Roll Call
2. Approval of minutes of October 19, 2022, meeting
3. Discussion of DRAFT 2022 Annual Report
4. Public Comment
5. Other or New Business

Adjourn

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DRAFT MINUTES

MEETING OF NYS COMMITTEE ON OPEN GOVERNMENT

October 19, 2022, 10 a.m.

Members Present:

Albany: Ian MacCallum (OGS), Peter Grimm, Amanda De Santis (Lt. Governor), Stephen Waters

New York City: Zoila Del Castillo (Secretary of State)

Buffalo: Hadley Horrigan

Quorum present.

Executive Director's Staff Present In-Person:

Shoshanah Bewlay, Christen Smith, Candace Watson

Executive Director's Staff Present Virtually:

Kristin O'Neill, Jake Forken

Welcome:

Introduction of Members and Director's staff.

Approval of Minutes:

On motion to discuss and approve the minutes of the September 15, 2022, meeting of the Committee, all were in favor with the ministerial correction of a typo and the minutes were approved. The approved minutes will replace the draft minutes posted on the Committee website.

Discussion of Draft Annual Report:

Algorithmic Accountability

Members reached consensus that algorithmic accountability is likely an imminent issue that is worthy of attention. All agreed that the annual report should identify the potential issue and recommend that it be studied in order to better judge the scope of the problem and potential remedies.

Need for Effective FOIL Oversight and FOIL data reporting

Members will review substantive edits to the existing section on this issue and comment on next draft. Members also discussed the New York Coalition on Open Government proposal that the Committee receive annual reports of certain FOIL statistics from agencies and use that collected information to formulate an overall recommendation regarding any need for FOIL amendments related to agency responsiveness. All were in favor of including a recommendation in the report that agencies submit or publicly post some form of annual report.

Need for: Additional Proactive Disclosure and Clarity Regarding Repeal of CRL § 50-a

Members will review substantive edits to existing sections on these topics and will comment on next draft.

Definition of Public Body

Members reached consensus that a section on this issue should be included in the annual report with a recommendation that the Legislature clarify its intent.

Mandate Live Streaming of Local Government Meetings

On a proposal made by the New York State Coalition for Open Government, after discussion of some of the barriers to mandating live streaming of all open meetings, members reached consensus that a discussion of the issue should be included in the report.

Public Comment:

The Committee heard comments from Paul Wolf and Michelle Allen of the New York Coalition on Open Government.

Other or New Business:

The Executive Director will propose possible dates for a meeting to be held in November 2022. She will circulate a draft report incorporating discussions and comments prior to the next meeting.

Adjourned at 11:22 am

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EXECUTIVE DIRECTOR

SHOSHANAH BEWLAY

December 2022

2022 REPORT TO THE GOVERNOR AND STATE LEGISLATURE

“A fundamental premise of American democratic theory is that government exists to serve the people.
. . . Public records are one portal through which the people observe their government, ensuring its
accountability, integrity, and equity while minimizing sovereign mischief and malfeasance.”

– Sandra Day O’Connor



**Committee on
Open Government**

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I. INTRODUCTION

Many hoped that 2022 would usher in a return to “normalcy” in all governmental operations after two years of challenge and uncertainty. However, with respect to the open government laws, the Committee on Open Government (“Committee”) has certainly observed what we may safely call a “new normal.” The new normal involves a large-scale uptick in virtual meetings and remote work, both of which have highlighted some challenges with respect to open government laws compliance by agencies. As we have before emphasized, the Committee fully supports the leveraging of technology to make government more transparent and accountable, but we must point out that many observers and correspondents have alerted us to ways in which remote work and virtual meetings may in fact be achieving the opposite.

In this Report, we will focus on ways in which agencies can deliver more transparency in the new normal. The Committee supports initiatives and makes proposals as follows:

- The Freedom of Information Law (“FOIL”) needs an overhaul, involving more effective oversight, to ensure better compliance.
- FOIL-responsible agencies should be required to publicly report FOIL statistics yearly.
- The Legislature should clarify its intentions concerning ambiguities associated with: (i) the 2020 repeal of § 50-a of the Civil Rights Law and associated FOIL amendments; (ii) the timeline for agency FOIL compliance; and (iii) the definition of “public body” pursuant to the Open Meetings Law (“OML”).
- FOIL-responsible agencies should be required to make additional proactive disclosures of records.
- Subject to resource availability, all public bodies should be required to stream their open meetings on the Internet so that more citizens can view the operations of government.
- Agencies using automated decision-making for governmental functions must ensure that such “algorithms” in use are not improperly designated “secret” resulting in decisions that are not transparent.

II. PROPOSALS

A. Need for Effective FOIL Oversight

When the Legislature adopted the Freedom of Information Law (FOIL) nearly fifty years ago, it simultaneously created the Committee and charged it with developing regulations for the implementation of FOIL and authorized it to issue advisory opinions to promote the uniform and efficient implementation of the new disclosure obligations across various state agencies. This system worked well for many years, but as both the law and technology have evolved and volumes of FOIL requests have increased, so too have delays and disputes over FOIL compliance. The current structure of administrative oversight of FOIL compliance does ensure the prompt and efficient disposition of such disputes. The Committee itself has no enforcement powers but is aware of the need for a more efficient and inexpensive way to process and resolve disputes concerning FOIL compliance. The current statutory construct for appeal and enforcement places an expensive and time-consuming burden on private citizens seeking redress for perceived violations of the open government statutes.

Proposals currently before the Senate and Assembly noted below recognize these concerns and propose alternative mechanisms to minimize the burden of open government statutory enforcement. As seen in these proposals, and in examples of streamlined enforcement mechanisms adopted in other states in recent years, there are multiple ways to achieve the desired expertise, uniformity and efficiency in the resolution of disputes. The Committee does not recommend a specific oversight approach for New York State but encourages the Legislature to investigate the benefits and drawbacks, including possible bureaucratic delay or interference, that may result from a system of increased or different oversight.

The Committee believes that this issue deserves the immediate attention of the Governor and the Legislature. A revised framework for providing government transparency in New York that leverages new technology, simplifies procedures, and allows prompt dispute resolution at an administrative level can reduce costs, increase citizen engagement, and promote government accountability. The Committee lacks sufficient information on the ramifications for state and local governmental agencies of various possible revisions to recommend a specific oversight approach for New York State. But improved enforcement measures are needed. We urge the Legislature to investigate new ways for achieving timely and cost-effective access to government information through improved oversight and enforcement mechanisms. After nearly fifty years, the time for such a comprehensive review and overhaul is long overdue.

New York Proposals

[NY State Senate Bill S8926](#)

Introduced by Senator Skoufis, S8926 empowers the Committee to assign appeals officers to review appeals of decisions by agencies, removing the appeal process from the agency level. The appeals officers assigned by the Committee would have the power to issue orders and opinions and, if necessary, to hold hearings. Additionally, the bill directs the Committee to establish an informal mediation program to resolve disputes.

[NY State Senate Bill S5752](#)

Introduced by Senator Tedisco and Assemblymember Lawler, S5752/A8186 provides an agency thirty days to grant or deny a FOIL request, and where such request is granted, a maximum of ninety days from the date of the request to make the requested record available. When a state agency grants a request for records from a person and the records are not made available within thirty days of such request, the head of such agency shall have a duty to review such request and direct such agency, in writing, to make the records available to the person who made the request no later than ninety days from the date of such request, and to ensure such records are made available. When a state agency receives a request for records and provides a statement of the approximate date when such request will be granted or denied, the head of such agency shall have a duty to direct such agency, in writing, to make such determination no later than thirty days from the date of such request, and to ensure such determination is made by such agency within such time. When a state agency has not denied a request for records or made records available within thirty days of a request for records, the head of such agency shall sign a certification affirming certain actions taken by the head of the agency, under penalty of perjury, which shall be signed and posted on the agency's website within forty-five days of the date of the request.



If such state agency fails to determine to grant or deny a request within forty-five days of the request, or fails to make the requested records available within ninety days of the request, the governor, and any senior appointed staff member of the governor, shall each sign a separate certification, under penalty of perjury, which shall be signed and posted on the governor's website within sixty days after the record request and shall state whether the governor, or any senior appointed staff member, directed such state agency, in writing, to determine within forty-five days of the request and whether the governor, or any senior appointed staff member, directed such state agency to make the requested records available within ninety days of the request, if such agency granted such request.

Additionally, the proposal amends the penal law to criminalize as a class B misdemeanor a failure to comply with FOIL where the governor, any senior appointed staff member of the governor, or the head of a state agency has a duty to review a request for records, to direct a state agency to make a determination, to direct a state agency to make records available in response to a request for records, or a duty to provide a signed certification, and such person, with intent, fails to do one or more of the above duties imposed by law.

Other States

There are several different models for effective and increased oversight that have been adopted over recent years in other states. Across the country, more states are empowering entities independent from the agencies responsible for receiving requests for public records to resolve disputes through fact-finding and mediation.

Independent Legal Enforcement

For example, in Connecticut a person seeking documents who believes an agency has failed to disclose material required by law to be public, instead of appealing to the agency that made the decision can appeal to a Freedom of Information Commission, an independent body appointed by the Governor. The FOI Commission has the power to do any necessary fact-finding, including the authority to review the disputed documents *in camera*, and then issue an opinion on the administrative appeal of the agency's action. A ruling by the Commission can then be taken to court, in the same manner that the denial of an administrative agency appeal can be litigated currently in New York. However, the centralized review by an independent agency with FOI expertise has reduced the number of appeals that end up in court in Connecticut and promoted uniformity and timeliness in the application of the law by agencies. CONN. GEN. STAT. § 1-205 (2022).

In Maryland, the Public Information Act Compliance Board reviews and resolves complaints related to disputes that arise under the Public Information Act. Before filing a complaint with the Board, a requestor must first attempt to resolve their dispute through a Public Access Ombudsman mediation process. At the conclusion of the mediation, the Ombudsman issues a final determination stating the dispute was either resolved, not resolved, or partially resolved. For disputes that remain unresolved after mediation, the requester or custodian of the records may file a complaint with the Board. MD. CODE ANN., GEN. PROV. §§ 4-101 – 4-1B-04 (LexisNexis 2022).

In South Dakota, if a public record officer denies a written request in whole or in part, or if the requestor objects to the public record officer's estimate of fees or time to respond to the request, a requestor may, within ninety days of the denial, commence a civil action by summons or, in the alternative, file a written notice of review with the Office of Hearing Examiners. S.D. CODIFIED LAWS § 1-27-38 (2022).



In Utah, a requestor can appeal a denial to the chief administrative officer of an agency. If that appeal is denied, the requestor can further appeal the denial to the State Records Committee or can petition for judicial review of the decision in district court. Additionally, a public employee who intentionally refuses to release a record, the disclosure of which the employee knows is required by law, is guilty of a class B misdemeanor. UTAH CODE ANN. §§ 63G-2-4; 63G-2-8 (LexisNexis 2022).

Attorney General Enforcement

In Illinois, a Public Access Counselor is part of the Public Access Bureau (PAC) in the Attorney General's Office. The PAC has the authority to review requests for documents under the state's freedom of information act (FOIA) and determine whether those documents should have been produced. The PAC also has the authority to determine whether a public body has violated the state's Open Meetings Act. As part of this work, PAC has subpoena power, may issue advisory opinions to guide public bodies, may issue binding opinions in FOIA disputes and may sue to enforce binding opinions. 5 ILL. COMP. STAT. 140 / 9-9.5 (2022); 5 ILL. COMP. STAT. 120 / 3-3.5 (2022).

In Massachusetts, individuals who allege a violation of open government statutes must first file a complaint with the public body alleged to have committed the violation. The public body has fourteen business days from the date of receipt to review the complainant's allegations, take remedial action if appropriate, notify the complainant of the remedial action, and forward a copy of the complaint and its response, including a description of any remedial action taken, to the Attorney General's Office. After this step, a complainant seeking further review of the complaint by the Division of Open Government must file the complaint with the Attorney General, who will review the complaint and the public body's response. MASS. GEN. LAWS. ch. 940, § 29.05 (2022).

In Rhode Island, an open government unit within the Attorney General's office investigates complaints against public bodies for alleged violations of open government statutes, issues findings, and files lawsuits to enforce the statutes when appropriate. 38 R.I. GEN. LAWS § 38-2-8 (2022); 42 R.I. GEN. LAWS § 42-46-8 (2022).

Mediation

In New Jersey, the Open Public Records Act requires the Government Records Council to establish an informal mediation program to facilitate the resolution of disputes regarding access to government records. The mediation process is the first step after a formal complaint of denial of access is filed with the Council. N.J. STAT. ANN. § 47:1A-7 (2022).

In Oregon, the Public Records Advocate, established by a Public Records Advisory Council, is responsible for providing dispute resolution services at the request of government bodies or public records requesters. OR. REV. STAT. §§ 192.461 – 192.483 (2022).

In Wyoming, the requester of public records has the option to file a complaint with the Public Records Ombudsman who may mediate the dispute, prescribe timelines for release of the information, and/or waive any fees charged by the governmental entity. WYO. STAT. ANN. § 16-4-202 (2022).



B. Improving FOIL Data Collection

Currently, FOIL requires agencies to send to the Committee a copy of each appeal received and the corresponding determination. *See* POL § 89(4)(a). While the Committee reviews each appeal determination for compliance with law and does outreach where there is an obvious opportunity for education, there is additional information, such as the number of requests received or average response time, that the Committee currently cannot track either due to lack of information provided or lack of resources.

Additional data collection regarding agency FOIL responses, including data concerning response times, number of requests, and request outcomes, will enable the Committee to recommend specific changes that may be necessary to remediate consistent or systemic misunderstandings or other issues. For example, the Committee hears public feedback suggesting that some requesters experience extended wait times for FOIL responses from some agencies. Requiring agencies to provide data concerning these data elements would allow the public to understand average response times within agencies and across agencies; this would show us the extent of any perceived problem concerning FOIL related delays.

For these reasons, to determine the extent to which a FOIL responsiveness issue exists, and thus which proposals for additional FOIL oversight can be effective, the Committee supports proposals from advocacy groups such as the New York Coalition for Open Government and Reinvent Albany which would require agencies to track certain FOIL metrics and either post them to their websites or report them annually to the Committee.¹

C. Need to Clarify Legislative Intent Concerning Perceived Ambiguities in FOIL and OML

I. Need for Clarity Regarding Repeal of Civil Rights Law § 50-a

As noted in our last two annual reports, on June 12, 2020, Chapter 96 of the Laws of 2020 repealed Civil Rights Law § 50-a and amended FOIL to add certain provisions relating to law enforcement disciplinary records. These provisions direct that certain “law enforcement agency” records that formerly were not subject to disclosure under FOIL now fall within the FOIL disclosure mandate, subject only to specific exemptions in FOIL. Briefly stated, pursuant to the 2020 amendments, law enforcement disciplinary records that had formerly enjoyed a blanket statutory exclusion from disclosure granted by Civil Rights Law § 50-a are no longer statutorily declared confidential and must be analyzed pursuant to the exemptions in Public Officers Law § 87(2)(b)-(r) to determine whether they may be withheld from the public.

In our 2020 and 2021 reports, the Committee identified two key concerns that arose in the aftermath of the repeal of § 50-a: (i) whether the repeal applies retroactively to records created before June 2020 and to former officers no longer employed by law enforcement agencies after June 2020, and (ii) whether unsubstantiated or pending complaints of misconduct can be withheld due to privacy

¹ It is worthy of note that the federal Freedom of Information Act requires each federal agency to submit a detailed annual report to the United States Attorney General each year. *See* 5 U.S.C. § 532(e)(1). These reports contain, among other data, detailed statistics on the number of requests received and processed by each agency, the time taken to respond, and the outcome of each request, as well as many other vital statistics regarding the administration of the FOIA at federal departments and agencies.

concerns? Both issues have given rise to significant litigation over the past two years, and the many cases still ongoing underscore the important need for the Legislature to act to clarify its intent.

1. Post-Repeal Litigation Regarding Law Enforcement Disciplinary Records

a. Retroactive application of provisions.

Since the repeal of § 50-a, the courts have reached conflicting decisions on whether the repeal of § 50-a applies retroactively to preexisting records. Neither an Appellate Division nor the Court of Appeals has reviewed these decisions. **The Committee believes that the repeal must be applied retroactively to fulfill the expressed intent of the Legislature to promote transparency and accountability for law enforcement agencies.** In light of the conflicting court decisions listed below, and a great deal of ongoing litigation, the Committee recommends that the Legislature confirm its intention that the repeal have retroactive application, and all law enforcement personnel records – whenever created – are subject to disclosure under FOIL unless they come within one of its statutory exemptions.

Gannett Co. v. Herkimer Police Department, 76 Misc.3d 557, 169 N.Y.S.3d 503 (Supr. Ct., Oneida Co. 2022): Court held that the repeal of § 50-a **should not be applied retroactively**. Court opined that giving retroactive effect to legislature’s repeal of statute making personnel records of police officers and other first responders confidential would be patently unfair, and was not supported by the legislative history, and such records created before the repeal date thus remained confidential in accordance with personnel-records statute in effect at the time of their creation (§ 50-a), and police department was thus entitled to withhold them.

People v. Francis, 74 Misc. 3d 808, 815-16, 164 N.Y.S.3d 358 (Supr. Ct. Monroe Co. 2022): This decision relates to discovery in a criminal case rather than FOIL, however, it is relevant in that the court concludes that the repeal of Civil Rights Law § 50-a **should not be applied retroactively**. The court noted that, “the Legislature made no express statement in the repeal itself, or in the limited legislative history concerning the same, as to whether the repeal was to be applied retroactively.”

Puig v. City of Middletown, 71 Misc.3d 1098, 147 N.Y.S.3d 348 (Supr. Ct. Orange Co. 2021): Repeal of Civil Rights Law § 50-a granting statutory exemptions to FOIL request for all personnel records of police officers used to evaluate performance toward continued employment or promotion applies retroactively. Although statutory construction that includes retroactive operation is not favored by courts, remedial legislation, or statutes governing procedural matters, **should be applied retroactively** in order to effectuate its beneficial purpose.

Schenectady Police Benevolent Association v. City of Schenectady, 2020 WL 7978093, 2020 NY Slip Op 34346(U) (Supr. Ct. Schenectady Co. 2020): There is strong evidence that the Legislature intended the repeal of Civil Rights Law § 50-a to **apply retroactively**.

Brighton Police Patrolman Association v. Town of Brighton, Index No. I2020002814 (Supr. Ct. Monroe Co. 2021): Repeal of § 50-a should **not be given retroactive effect** because, under the New York General Construction Law, legislation should not apply retroactively in the absence of clear legislative intent.

b. Unsubstantiated or Pending Complaints



Courts have recognized that the usual exemptions to FOIL apply to the disclosure of police personnel records that are no longer categorically exempt. Nevertheless, there is intense disagreement about how the FOIL privacy provisions apply to unsubstantiated or uninvestigated allegations of wrongdoing by law enforcement officers. While courts in the past have widely recognized that public employees of very limited expectations of privacy concerning how they perform their public functions. Were it otherwise, privacy concerns of public employees would thwart the meaningful public oversight FOIL itself seeks to promote. Nevertheless, since the repeal of § 50-a, FOIL privacy provisions have repeatedly been invoked to prevent disclosure of allegations concerning police misconduct unless those allegations have been both fully investigated and determined to be entirely correct. This is an untenable situation that threatens to undermine the purpose for the repeal – to increase police transparency and accountability.

This issue is framed by the recent court decisions and reflects efforts by some law enforcement agencies to assert a blanket exemption over records that concern what they call “unsubstantiated” allegations, without any precise definition for that term. This means that a failure to investigate an allegation, or an inability to definitively resolve all surrounding facts, becomes sufficient justification for withholding all information about the allegation and the officers’ conduct, regardless of the surrounding facts or their public importance.

Such a blanket application of the privacy exemption will bring back the large-scale withholding of information that occurred before the repeal of § 50-a, seriously impede public oversight of law enforcement agencies, and further erode public confidence in them. The contention that the FOIL privacy exemption can be applied on such a blanket basis appears to contradict the legislative purpose in repealing § 50-a. It is also inconsistent with settled FOIL principles that require a case-specific weighing of the competing public and private interests when the privacy exemption is invoked. A mandatory exclusion from public disclosure of any “unsubstantiated” allegation is clearly inappropriate, because the circumstances of any given case will affect both the privacy interest and the public interest against which it must be balanced.

Given the proliferation of litigation on this issue, the Committee requests the Legislature to restate and reaffirm the substantial public interest in transparency around misconduct allegations and discipline decisions that lead to the repeal of § 50-a, and clarify that this public interest can only properly be overcome – and information of alleged misconduct withheld – in an extraordinary case where there is a demonstrated privacy interest compelling enough to overcome the general rule that public employees have no substantial privacy interest in how they perform their public functions.

Buffalo Police Benevolent Association v. Brown, 69 Misc.3d 998, 134 N.Y.S.3d 150, 2020 N.Y. Slip Op. 20257 (Supr. Ct. Erie Co. 2021): Declined to find the release of information concerning unsubstantiated and pending allegations would violate police officers’ constitutional rights because acts of the Legislature are entitled to a strong presumption of constitutionality and any harm alleged by police union is speculative.

Gannett Co. v. Herkimer Police Department, 169 N.Y.S.3d 503 (Supreme Court, Oneida County, 2022): Supreme Court held that disclosure by police department of records related to unsubstantiated disciplinary claims would constitute an unwarranted invasion of officers’ personal privacy, even though the legislature had repealed Civil Rights Law § 50-a, which had made personnel records of police officers confidential. Court opined that the public interest in the release of unsubstantiated claims did not outweigh the privacy concerns of individual officers.



New York Civil Liberties Union v. City of Syracuse, 72 Misc.3d 458, 148 N.Y.S.3d 866 (Supr. Ct. Onondaga Co. 2021): The city and its police department are not required to produce documents related to unsubstantiated complaints against police officers under FOIL to requester, even though Civil Rights Law § 50-a, which deemed police discipline records confidential as personnel records and limited disclosure thereof, has been repealed. Repeal of § 50-a did not alter previously existing privacy considerations and exemptions to public disclosure under FOIL: *i.e.*, disclosure of unsubstantiated claims may continue to constitute an unwarranted invasion of personal privacy.

Schenectady Police Benevolent Association v. City of Schenectady, 2020 WL 7978093, 2020 NY Slip Op 34346(U) (Supr. Ct. Schenectady Co. 2020): A particular officer's personnel record, or any portion thereof, would not be withheld or redacted on the basis that its release would constitute an unwarranted invasion of personal privacy. However, court specifically limited its ruling to the facts presented, holding that "notwithstanding any greater societal significance which any actual or interested party, or the media, may seek to ascribe to the instant ruling, it is, in actuality, narrowly confined to the particular FOIL requests outstanding as to [the officer] and the members of the Schenectady Police Department. Any broader applicability as to other locales or other FOIL requests will necessarily have to be determined on their own specific merits."

Uniformed Fire Officers Association v. De Blasio, 846 F. App'x 25 (2d Cir. 2021): Under New York law, uniformed officers' unions, seeking to enjoin the City's planned disclosures of disciplinary records following repeal of Civil Rights Law § 50-a failed to demonstrate City's decision to publish certain disciplinary records was arbitrary and capricious under Article 78, or alternatively, that it was arbitrary and capricious for City to change its established practice and that documents should be withheld pursuant to the unwarranted invasion of personal privacy exemption in FOIL. Specifically, the Court noted that the police unions had cited no examples that lent credence to their claim that publicizing these records would create a risk of harm to police officers. The Court carved out a narrow exception to its ruling for a specific subset of records that may implicate collective bargaining agreements and recognized specific FOIL exemptions that were designed to protect against unwarranted invasions of personal privacy or endangering a person's safety.

2. Civil Rights Law § 50-a Legislative Proposals

In January 2022, in response to the question about the treatment under FOIL of allegations of wrongdoing by law enforcement officers raised by these court decisions, Senator Bailey and Assemblymember Gonzalez-Rojas introduced Senate Bill 8428 and corresponding Assembly Bill 09050, which, according to the sponsors' memo, would amend FOIL to reaffirm and clarify the full scope of § 50-a repeal. The bills explicitly state that "law enforcement agencies cannot continue to withhold these records beyond the narrow categories defined in the earlier repeal legislation, and it will provide courts with an unambiguous declaration of the legislature's intent with respect to such records."

The bills add a new subdivision 4-c to § 87 of the Public Officers Law:

An agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall not deny access to such records or portions thereof on the grounds that such records:



- (a) constitute an unwarranted invasion of personal privacy as described in paragraph (b) of subdivision two of this section because such records concern complaints, allegations, or charges that have not yet been determined, did not result in disciplinary action, or resulted in a disposition or finding other than substantiated or guilty;
- (b) are compiled for law enforcement purposes as described in paragraph (e) of subdivision two of this section;
- (c) are inter-agency or intra-agency materials as described in paragraph (g) of subdivision two of this section;
- (d) are or were designated as confidential, secret, or otherwise private by a private agreement, including but not limited to a settlement, stipulation, contract, or collective bargaining agreement; or
- (e) were created prior to the effective date of this subdivision.

These bills have been referred to Governmental Operations Committee but have had no further action. The Committee continues to believe that every record must be individually evaluated for the applicability of exemptions to disclosure. To the extent that this bill removes such an individualized review for these categories of information and mandates disclosure in all cases, the Committee has concerns that such unreviewed disclosure of this category of records could result in many of the harms the thoughtful review to ensure applicability of appropriate statutory exemptions to disclosure was designed to mitigate or prevent.

II. Proposed Amendment to FOIL to More Strictly Define Period for Providing Records

In 2022, Senator Harkham and Assemblymember Zebrowski reintroduced bills (S04280/A07544) that would clarify the required response periods for FOIL requests. While the Committee has opined that a series of extensions providing progressively later dates certain by which an agency will respond to a FOIL request is inconsistent with the intent of FOIL, New York courts by and large have not agreed with this opinion. This bill addresses this issue (and some of the other technical concerns the Committee has raised relating to compliance with FOIL) and clarifies the intent of the legislature for FOIL requesters and governmental entities subject to FOIL by more strictly defining the time in which an agency is required to respond to FOIL request.

Senator Tedisco and Assemblymember Lawler reintroduced S05752/A08106, taking a different approach to this issue. Their bill would require, in part, that an agency grant or deny a request within 30 days, and if granted, produce the requested records within 90 days.

Senator Serino has reintroduced a bill, S2916, that would require agencies to grant or deny a request within twenty-five days from receipt and produce records within forty days from receipt.

None of these bills have advanced since being introduced. While the Committee agrees that disclosure too often takes too long under current law, in our view, tinkering with statutory deadlines will do little to effectively improve compliance times. **The needs of agencies and the scope of requests make “one size fits all” mandates unrealistic.** We believe that the creation of a centralized oversight authority to



handle FOIL appeals, as discussed above, is more likely to achieve quicker compliance with statutory deadlines without overtaxing the capacity of agencies to respond.

III. Definition of Public Body Introduces Ambiguity

The Open Meetings Law (OML) applies to public bodies as defined therein, in POL § 102(2). A public body has long been defined as “any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof.” Historically, for reasons outlined in published Committee opinions and reported court cases, both courts and the Committee have viewed entities created by state statute and which have both advisory functions and other functions which may or may not be incidental to the provision of advice to another governmental body, as a public body subject to the requirements of the OML.

In December 2021 in [Chapter 676 of the Laws of 2021](#), the Legislature added to the definition of public body: the definition now includes “an entity created or appointed to perform a necessary function in the decision-making process” but provides that “[a] necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof.” This amendment raises a question of whether this recent change to the definition of “public body” newly excludes advisory bodies created by statute from its previous status as clearly covered, in our opinion, by the law.

A review of the available [sponsor’s memorandum](#) supports a view that the Legislature did not intend to exclude from the definition a statutorily created advisory bodies previously covered by the Law:

Nevertheless, there are a number of bodies created by executive order or created to perform functions in the governmental decision-making process, that are not subject to the Open Meetings Law. Due to this, these bodies conduct business behind closed doors and have excluded interested parties who have attempted to attend its sessions. In keeping with recent legislative initiatives aimed at greater transparency, these bodies should be open to public scrutiny. The work of our state’s public bodies has a profound effect on the functioning of government and it is essential to our democratic process that members of the public are fully aware of and have the opportunity to observe the deliberations and decisions that go into the making of public policy. This legislation will ensure that those bodies which play a key role in the decision-making process are covered by the Open Meetings Law, even if they do not have the authority to make final and binding decisions.

However, this passage is not definitive and the fact that the Legislature chose to redefine public body in this way, based on the plain language of the addition and the placement of this sentence within the OML, raises a serious question of intent. No court has yet interpreted whether this change in the law now excludes from coverage by the OML all advisory bodies, including bodies which were created by statute and which both courts and the Committee have long believed to be covered by the law.

These potential ambiguities call for either the Legislature or the courts to weigh in on these open questions.

D. Need for Additional Proactive Disclosure

The Committee on Open Government has long encouraged improved transparency through proactive disclosure. Over that time, New York State has passed and amended some laws that strengthen government transparency. For example, in 2012, the Legislature required that, when practicable, records scheduled to be discussed at an open meeting be available for public inspection before the meeting. Last year, the Legislature amended that requirement and clarified that, to the extent practicable, records scheduled to be discussed during an open meeting must be posted to the public body webpage and available for public inspection at least twenty-four hours before the meeting. See POL § 103(e). However, we continue to believe that New York must improve access to government records, and **we continue to support a new legislative mandate for compelled, real-time disclosure of non-exempt data and information that the public routinely seeks pursuant to FOIL**. Improved technology makes the expanded use of online FOIL portals by state and local agencies efficient and more practical than ever before. The cost of proactive disclosure of routinely-requested, non-exempt documents is minimal considering the available online technology. Making information available on a website saves time and money that would otherwise be required to respond to specific FOIL requests.

Consistent with past years, there are bills pending before the Senate and Assembly that would increase public access to government records in different ways, and we continue to encourage the Legislature to prioritize funding technology resources to enable these changes. Senator Skoufis and Assemblywoman Paulin introduced bills, [S1821/A8357](#), requiring “each agency and house of the state legislature to publish records proactively on its internet website that are, or are likely to be of substantial interest to the public and that are already available under the freedom of information law.” Versions of these bills have been proposed since 2009, and as with the version introduced last year, the current version would only require such disclosure when the agency “has the ability to do so.” It also again leaves the decision of what constitutes a record of “substantial interest to the public” to the discretion of the agency and states that “[g]uidance on creating records in accessible formats and ensuring their continuing accessibility shall be available from the office [of information] technology [services] and state archives.”

There are several other bills that would only increase access to certain records or certain types of agencies. Senator Skoufis has also introduced a bill, [S8926](#), that would require state agencies to publish specific data on their websites and requires posting of collective bargaining documents. However, this bill includes many other amendments to the Public Officers Law, including substantial changes to the structure and role of this Committee, changes to some of the exceptions to disclosure, and changes to definitions. Senator Serrano introduced [S1402](#) which would require, among other things, that all state agency records be publicly available through a centralized web portal. Another Senate bill, [S1207](#), would require public authorities to make their annual and budget reports publicly available.

Additionally, Senator Kavanagh and Assemblywoman Rozic introduced [S3120/A484](#) which “[a]uthorizes and directs the committee on open government to study proactive disclosure as a means of increasing transparency and access to government information.” The Senate bill has passed the Senate but failed to advance in the Assembly.

None of these bills have advanced. We believe that while some of these limited expanded access bills might be a small step in the right direction, a bill of more general application to all agencies subject to FOIL would be both more efficient and more effective at expanding transparency.

E. Proposed Amendment to the OML to Require Local Governments to Livestream their Open Meetings and Public Hearings

In 2022, Senator Kaplan and Assemblymember Frontus reintroduced bills (S00539/A06640) that would amend the OML to require local governments “to the extent practicable, to stream all open meetings and public hearings on its website in real-time. Each local government shall post video recordings of all such open meetings and public hearings on its website within five business days of the meeting or hearing and shall maintain such recordings for a period of not less than five years.”

The Committee supports legislation that increases public access to open meetings; However, the Committee recognizes that there are concerns that this requirement could place a significant burden on municipalities with limited broadband services. The Committee recommends that the Legislature take these potential limitations into consideration when evaluating whether to move forward with these proposals.

F. Automated Decision-Making Must Be Transparent

The Committee suspects that agencies at all levels of government are increasingly using algorithms and machine learning technologies to conduct government business. As we understand them, computer algorithms in this context can be considered both: (i) automated sets of instructions and weights to be given to data sets for the purpose of rendering an automated decision based on the data available; and (ii) the codes, software programming, or other proprietary information utilized in the processing of the data inputs. Algorithms seem to be used to make decisions on everything from distributing social welfare benefits to allocating police resources, assigning families to public housing and students to magnet schools, setting bail and deciding who is eligible for parole across the United States. Both government agencies and the companies under contract with government agencies are likely using algorithms, or computer coding, to perform calculations that either make or inform such government decisions.

While algorithms hold the promise to make government function more effectively, their rapidly growing use likely presents significant new issues for public accountability, data privacy and civil liberties across New York State. If government agencies in New York are using algorithms and artificial intelligence to conduct government business, the public must be able to determine whether the automated decisions are carrying out legislative policies correctly and fulfilling agency mandates in an unbiased manner. Many agencies are likely ill-equipped to evaluate the functioning of the algorithms they or the companies with which they contract use. We fear that the current approach of FOIL to promote government accountability through transparency does not work when the suppliers of algorithms conceal their inner workings with trade secret claims and confidential designations. However, we lack the data to specifically define the degree to which agencies in New York utilize automated governmental decision making, the degree to which access to that information is being denied by agencies in New York, and what appropriate solutions might be.

To the extent that agencies in New York are using computer coding and algorithms to make or inform decisions, any records reflecting such computerized automation should be available to the public, subject to any exemptions to disclosure, so they can understand how government decisions are being made. Currently, there are two exemptions agencies likely cite in withholding access to information concerning automated computer-aided decision-making: the “trade secret” exemption and the “information technology assets” exemption. See POL §§ 87(2)(d), (i). The first protects competitive advantage within the marketplace while the second generally serves to protect security. While the Committee believes both protections are necessary and important, it is unclear whether and how agencies are utilizing these exemptions to withhold algorithmic information or otherwise prevent access to information that would allow the public to assess whether specific governmental decisions are arbitrary, biased, or violative of due process or civil liberties in New York State. Accordingly, we believe that this issue must be further studied, either by the Legislature directly or by requiring more detailed agency data reporting regarding the use of these exemptions to disclosure to the Committee.

G. Evaluation of Chapter 56

On April 9, 2022, Governor Hochul signed Chapter 56 of the Laws of 2022 (“Chapter 56”) relating to the New York State budget for the 2022-2023 state fiscal year. Included in the bill is an amendment to the Open Meetings Law (OML) to allow for the expanded use of videoconferencing by public bodies to conduct open meetings, under extraordinary circumstances, regardless of a declaration of emergency. These amendments are primarily codified in Public Officers Law § 103-a. These amendments will expire and be deemed repealed on July 1, 2024, unless further action is taken by the Legislature.

As a threshold matter, it is our understanding that the new law is not meant to change or curtail what has always been required of public bodies complying with the Open Meetings Law. Public bodies may continue to operate now as they did before the onset of the pandemic in early 2020 when the “in person” aspects of the Open Meetings Law were first suspended. In other words, we believe that if a public body was permitted to do it before the pandemic, this law does not change that. As noted above, this law is intended to expand, in extraordinary circumstances only, the ability of public bodies to meet using remote access technology.

Shortly after passage of Chapter 56, the Committee prepared a series of questions and answers regarding the new statutory requirements as well as a model resolution and model procedures for public bodies. Those are available on the Committee website [here](#).

Chapter 56 requires that no later than January 1, 2024, the Committee issue a report to the Governor and Legislature concerning the application and implementation of the law and any further recommendations governing the use of videoconferencing by public bodies to conduct meetings pursuant to POL § 103-a. As the ability to hold fully remote meetings pursuant to Chapter 1 of the Laws of 2022 only recently expired (on September 12, 2022), many public bodies have yet to have significant practical experience with the new statutory obligations. We encourage members of public bodies as well as members of the public generally to bring any concerns regarding the implementation of Chapter 56 to our attention so that any feedback may be incorporated into the Committee report on this issue.

APPENDIX I

2022 LEGISLATIVE AMENDMENTS TO THE FREEDOM OF INFORMATION LAW

On December 29, 2021, Governor Hochul signed Chapter 808 of the Laws of 2021, making changes to how an agency must support a claim of an exception to rights of access to records pursuant to the Freedom of Information Law (FOIL). Most significant, Chapter 808 required that any agency claiming that a law enforcement record was exempt due to the pendency of a judicial proceeding need obtain from the relevant court a validation of the applicability of the exemption. In her approval memo, Governor Hochul identified the court validation requirement as potentially problematic and noted that a future amendment further clarifying or changing it would be agreed with the legislature.

On March 18, 2022, Governor Hochul signed Chapter 155 of the Laws of 2022 repealing the requirement under Chapter 808 that an agency claiming that disclosure of a law enforcement record would interfere with an ongoing investigation or judicial proceeding need obtain certification from a court. Rather, Chapter 155 provides that FOIL now requires that an agency (if it is not the agency conducting the relevant investigation) claiming an exemption based on § 87(2)(e) obtain a confirmation from the law enforcement agency that is conducting the investigation that disclosure of the record will interfere with its investigation.

2022 LEGISLATIVE AMENDMENTS TO THE OPEN MEETINGS LAW

On December 21, 2021, the Governor signed into law Chapter 676 of the Laws of 2021 which amends the definition of “public body” contained in the Open Meetings Law. The definition now reads:

“Public body” means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation as defined in section sixty-six of the general construction law.

Public Officers Law § 102(2).

On February 24, 2022, the Governor signed into law Chapter 115 of the Laws of 2022 which made changes to Chapter 676 of the Laws of 2021 (see above), to clarify the definition of “public body” for purposes of the Open Meetings Law. The amended definition now reads:

“Public body” means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process for which a quorum is required in order to conduct public business and which consists of two or

more members. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation as defined in section sixty-six of the general construction law.

On January 14, 2022, Governor Kathy Hochul signed into Law Chapter 1 of the Laws of 2022 amending Chapter 417 of the Laws of 2021 to authorize any public body (as that term is defined by [§ 102\(2\) of the Open Meetings Law](#)) “to meet and take such action authorized by law without permitting in public in-person access to meetings and authorize such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.”

Chapter 1 takes effect immediately and shall expire and be deemed repealed upon the expiration or termination of the state disaster emergency declared pursuant to [Governor Hochul’s Executive Order 11](#) or any extension or modification thereof. Executive Order 11 expired and Chapter 1 was deemed repealed on September 12, 2022.

On April 9, 2022, Governor Hochul signed Chapter 56 of the Laws of 2022 relating to the New York State budget for the 2022-2023 state fiscal year. Included in the bill is an amendment to the Open Meetings Law (OML) to make permanent (until July 1, 2024) the expanded use of videoconferencing by public bodies to conduct open meetings, under extraordinary circumstances, regardless of a declaration of emergency. As a threshold matter, it is our understanding that the new law is not meant to change or curtail what has always been required of public bodies complying with the Open Meetings Law. Public bodies may continue to operate now as they did before the onset of the pandemic in early 2020 when the “in person” aspects of the Open Meetings Law were first suspended. In other words, we believe that if a public body was permitted to do it before the pandemic, this law does not change that. As noted above, this law is intended to expand, in extraordinary circumstances only, the ability of public bodies to meet using remote access technology.

APPENDIX II
2022 COURT DECISIONS OF NOTE

A. Freedom of Information Law (excluding cases dealing with repeal of CRL § 50-a)

Appellate Advocates v. New York State Department of Corrections and Community Supervision, 203 A.D.3d 1244, 163 N.Y.S.3d 314 (3d Dep't 2022): Third Department held that documents related to how Board of Parole determined applications for release were subject to attorney-client privilege and, thus, exempt from FOIL disclosure pursuant to § 87(2)(a) by DOCCS. Records were created by counsel and contained legal advice to Board regarding how Board should conduct interviews. Court-decision handouts provided counsel's summary and impression of recent case law to Board. Presentation slides were provided so Board could understand legal requirements and how to comply. Handouts concerning Board interviews, sample decision language, and hypothetical decisions involved legal advice on how to reach decisions on parole matters.

Carr v. Bill de Blasio, Mayor of the City of New York, et al., 197 A.D.3d 124, 152 N.Y.S.3d 1 (1st Dep't 2021): First Department affirmed the grant of a petition for summary inquiry pursuant to New York City Charter § 1109 regarding the fatal arrest of Eric Garner. In part, the Court held a previous FOIL request relating to the subject-matter of the summary inquiry petition did not preclude the use of a §1109 summary inquiry because § 1109 contained no restriction regarding the availability of FOIL and petitioners demonstrated respondents' lack of response to their FOIL requests. The Court further noted any material uncovered by a FOIL request would be subject to redactions and exemptions not applicable in a summary inquiry.

Getting the Word Out, Inc. v. New York State Olympic Regional Development Authority, 73 Misc. 3d 670, 153 N.Y.S.3d 824 (Supreme Court, Essex County, 2021): Trial Court held that the Olympic Regional Development Authority's (ORDA) disclosure of injury reports from sporting events held at its facility, after redaction of identifiers listed in Health Insurance Portability and Accountability Act (HIPAA), would not constitute unwarranted invasion of personal privacy sufficient to justify exemption from disclosure under FOIL, in requester's petition to compel ORDA to produce reports; ORDA did not have actual knowledge that unredacted information could be used to identify subjects of information, and only redacting identifiers would both maximize public access to records and minimize reasonable risk that subjects of reports would be identifiable. ORDA's claim that most of the injury reports from sporting events held at its facility involved elite athletes involved in unique activities did not establish exemption from disclosure for unwarranted invasion of personal privacy under Freedom of Information Act (FOIL), in requester's petition to compel ORDA to produce reports; persons who participate in public events and become injured voluntarily expose themselves to greater public notoriety and are not entitled to greater protection from disclosure of accident reports than someone injured in a non-public setting

Maldonado v Workers' Compensation Board, 197 A.D.3d 566, 148 N.Y.S.3d 913 (2d Dep't 2021): Second Department upheld trial court's dismissal of petitioner's Article 78 petition because petitioner failed to exhaust all administrative remedies after filing an untimely appeal of a denied FOIL request.

McFadden v. McDonald, 204 A.D.3d 672, 166 N.Y.S.3d 47, 51 (2d Dep't 2022): Second Department held that, in affirming the Nassau County Police Department's (NCPD's) denial of the petitioner's FOIL request, the Supreme Court improperly relied upon grounds that the NCPD did not assert in its administrative denial. To provide the NCPD the benefit of the additional justifications it did not advance



in the first instance contravenes Court of Appeals precedent “as well as the spirit and purpose of FOIL.”

National Lawyers Guild, Buffalo Chapter v. Erie County Sheriff's Office, 196 A.D.3d 1195, 148 N.Y.S.3d 816 (4th Dep't 2021): After conducting an in-camera review of the subject documents, the Fourth Department modified the trial court order in that it agreed with respondent that the trial court erred in ordering disclosure of certain record determined to constitute intra-agency or inter-agency material.

Oustatcher v. Clark, 198 A.D.3d 420, 155 N.Y.S.3d 12 (1st Dep't 2021): First Department found that respondents' contention that Executive Order 202.8 tolled all FOIL deadlines, is unpersuasive. By its terms, EO 202.8 tolled legal “process[es] or proceeding[s] as prescribed by the procedural laws of the state.” The FOIL framework and deadlines for agency responses to requests are not “prescribed by the procedural laws,” such as the CPLR and CPL. In the context of FOIL requests, legal “proceedings” ensue only when parties are unable to agree on a response to a request, and resort to the courts via CPLR Article 78 proceedings. The conduct of Article 78 proceedings are “prescribed by the procedural laws” of the CPLR. FOIL requests and responses are not so prescribed (see FOIL–AO–19780 [COOG Sept. 21, 2020]).

Sapienza et al. v. City of Buffalo, 197 A.D.3d 914, 150 N.Y.S.3d 657 (4th Dep't 2021): Fourth Department affirmed trial court's awarding of attorney's fees and costs in an Article 78 proceeding after respondent failed to meet the anticipated date for document production and ignored petitioners' additional FOIL requests, constituting a denial of access. Such denial provided petitioner grounds to commence the Article 78 proceeding after exhausting all administrative remedies by sending respondent timely letters objecting to the denial.

Save Monroe Ave., Inc. v. New York State Department of Transportation, 197 A.D.3d 808, 151 N.Y.S.3d 560 (3d Dep't 2021): Third Department reversed lower court's decision to grant access to certain documents and award attorney's fees because petitioner's Article 78 proceeding was premature, as agency's delays were reasonable and did not constitute a constructive denial. The Court clarified an assessment of reasonableness requires consideration of “the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency and similar factors,” and noted the respondent agency received over 1,250 FOIL requests in the last four months of the relevant period. Further, the Court overturned petitioner's award of counsel fees because respondent acted in good faith by specifying a reasonable basis for the delay and promptly released the documents upon completing its review and not just in response to the litigation.

Snyder v. Nassau County, 199 A.D.3d 923, 154 N.Y.S.3d 480 (2d Dep't 2021): Second Department held that since there was no dispute that the subject denial of the petitioner's FOIL request failed to advise the petitioner of the availability of an administrative appeal and the person to whom the appeal should be directed as required by 21 NYCRR 1401.7(b), the Supreme Court erred in dismissing the petition for failure to exhaust administrative remedies. Second Department ordered that petition be reinstated and the matter was remitted to Nassau County Supreme Court for a determination on the merits.

Tatko v. Village of Granville, 207 A.D.3d 975, 172 N.Y.S.3d 233 (3d Dep't 2022): Third Department held that with respect to petitioner's requests for a list of individuals who had received and/or requested absentee ballots as well as the applications for those ballots, Election Law § 3–220(1) only permits “public inspection” of the “registration records, certificates, lists, and inventories referred to in, or required by” the Election Law. Court opines that the omission of a provision for copying was deliberate

by providing that “[n]o such records shall be handled at any time by any person other than a member of a registration board or board of inspectors of elections or board of elections except as provided by rules imposed by the board of elections.” With respect to petitioner’s request for copies of absentee ballot applications, Court held that those applications include intimate information about the applicant – most notably the reason for seeking an absentee ballot, which could involve the applicant’s medical conditions and disabilities – and respondents therefore demonstrated that the disclosure of the applications without redactions would lead to an unwarranted invasion of personal privacy. With respect to petitioner’s request for copies of absentee ballot envelopes and mailing envelopes, the Court held that Election Law “takes requests for access to ballots [and envelopes] out of the hands of FOIL officers during the restricted examination period, instead authorizing courts and legislative committees to supervise limited examination of the materials,” and respondents were therefore correct in determining that the envelopes sought by petitioner were specifically exempt from disclosure under FOIL by Election Law § 3–222.

B. Open Meetings Law

Gondolfo v. Town of Carmel, 76 Misc.3d 521, 174 N.Y.S.3d 197 (Supreme Court, Putnam County 2022): Supreme Court held that there should not be unfettered discretion on the part of the municipality as to whether to post documents online in advance of a meeting pursuant to § 103(e) of the Open Meetings Law. The Court opined that giving such unfettered discretion, without requiring so much as an explanation as to why it was not *practicable* to post the records in advance of the meeting, renders the word “shall” meaningless and that the only way to give meaning to the word “shall” in the OML is to put some onus on the municipality to demonstrate that it actually made a determination in advance of the meeting that it was not practicable to post the records in advance, and to explain why.

Lynch v. New York City Civilian Complaint Review Board, 206 A.D.3d 558, 171 N.Y.S.3d 482 (1st Dep’t 2022): First Department held that the trial court providently exercised its discretion in denying remedial relief to petitioners (NYC PBA) for city civilian complaint review board’s (CCRB) violation of Open Meetings Law when changing its rules regarding investigation of allegations of sexual misconduct by civilians against police; officers did not demonstrate that CCRB intentionally excluded them from its meetings or that they were aggrieved or prejudiced by violation

Save the Pine Bush, Inc. v. Town of Guilderland, 205 A.D.3d 1120, 168 N.Y.S.3d 561 (3d Dep’t 2022): Third Department held that unintentional and technical violation of Open Meetings Law from temporary inability to use one of several options for viewing public hearing while Executive Orders suspending the “in-person” requirement of the Law during the COVID-19 declared disaster emergency was in effect, did not amount to good cause for nullifying planning board’s ensuing site plan approval.

APPENDIX III

SERVICES RENDERED BY COMMITTEE

1825 TELEPHONE INQUIRIES

1879 INFORMAL ADVISORY OPINIONS

32 FORMAL ADVISORY OPINIONS

49 PRESENTATIONS

THOUSANDS OF CORRESPONDENTS ADDRESSED

THOUSANDS OF WEBINAR LISTENERS AND VIEWERS

Online Access

Since its creation in 1974, the Director's staff have 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 May 2021, the Committee website was modernized and assigned its own independent web address: www.opengovernment.ny.gov.

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

Model forms for email requests and responses:

<https://opengovernment.ny.gov/system/files/documents/2020/09/freedom-information-law-sample-letters.pdf> and <https://opengovernment.ny.gov/agency-response-email-request-records-sample>

Regulations promulgated by the Committee (21 NYCRR Part 1401) and "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. <https://opengovernment.ny.gov/freedom-information-law>

"You Should Know," which describes the Personal Privacy Protection Law:

<https://opengovernment.ny.gov/what-you-should-know-nys-personal-privacy-protection-law-pppl>

Responses to "FAQs" (frequently asked questions)

<https://opengovernment.ny.gov/system/files/documents/2021/05/freedom-information-law-faqs.pdf>; and <https://opengovernment.ny.gov/system/files/documents/2021/01/open-meetings-law-faqs.pdf>

"News" that describes matters of broad public interest and significant developments in legislation or judicial decisions <https://opengovernment.ny.gov/committee-news>

View recordings of meetings of the Committee on Open Government:

https://www.youtube.com/playlist?list=PLIjoYdAmWijZApq7uZkCJZ_irF0MSJgqk

View virtual training recordings and material: <https://opengovernment.ny.gov/training-materialsrecordings>



Telephone Assistance

This year, the Director's staff answered approximately 1800 telephone inquiries.

Informal Advisory Opinions

This past year, the Committee through the Director's staff issued 1879 informal advisory opinions and written inquiry responses by email and postal mail regarding FOIL, OML and the PPPL.

Formal Advisory Opinions

The Director's staff are conscientious about providing guidance as efficiently as possible, including links to online advisory opinions when appropriate. When a written response from staff contained a substantive opinion with legal analysis, it was recorded as an advisory opinion as before.

In the reporting period, the Director's staff prepared 32 formal advisory opinions in response to requests from across New York.

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 reporting year, staff gave 49 presentations to organizations and entities identified below by interest group. Although the number of individual presentations was lower than in past years due to restrictions on in-person gatherings, approximately 5000 individuals received contemporaneous training and education through those events, and countless additional individuals benefitted from recordings of these programs posted on entity websites and materials posted on the Committee website. This number compares favorably with pre-pandemic numbers. As mentioned above, the Director's staff began offering its own virtual open government educational programs on a near monthly basis. The contemporaneous versions of these programs were attended by nearly 3000 individuals. In addition, recordings of the programs have been posted to the Committee website for additional individuals or groups to review.

Organizations:

Adirondack Park Agency
Albany Community Police Review Board
Albany Law School Ethics in Government
Association of Towns Newly Elected Town Officials School
Cheektowaga Town Board
Committee on Open Government Sponsored FOIL Information Session (3 programs)
Committee on Open Government Sponsored OML Information Session (4 programs)
Cornell Cooperative Extension OML Update for Executive Directors
Department of Health CLE Recent Changes in NY Transparency Laws
Department of State Division of Building Standards and Codes
Dutchess County Town Clerks Association
Excelsior Fellow Open Government Presentation



Four County Library System
Hofstra University Law School 15th Annual Land Use Training Program for Municipal Planning and Zoning Officials
ICC - International Visitor Leadership Program (Pakistan)
International Center of the Capital Region/Moldova Legislative Staff
Lo-Hud Editors Meeting
Maxwell School of Citizenship and Public Affairs, Mandela Washington Fellows for Young African Leaders
Monroe County Town Clerks Association
Nassau Suffolk Town Clerks Association
New York Association of Counties (2 programs)
New York Conference of Legislative Clerks
NYALGRO
New York State Conference of Mayors
New York State County Attorneys Association
New York State Municipal Clerks Institute
New York State Sheriff's Association
New York State Town Clerks Association (3 programs)
New York State Town Clerks Association Regional
Rush Henrietta School Board
Saratoga County Town Clerks Association
Southern Tier Planning Regional Leadership Conference
SUNY Albany Journalism Class
Tug Hill Local Government Conference (2 programs)
Western Regional County Attorney's Meeting

