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2025 REPORT TO THE GOVERNOR

AND STATE LEGISLATURE

"To get good government and to retain it, it is necessary that a liberty-loving, educated, intelligent people should be ever watchful, to carefully guard and protect their rights and liberties . . . . Publicity is the greatest cure for evils which may exist in government."

– Representative George Norris, *The Model Legislature*, 1934

NEW YORK STATE OF OPPORTUNITY. | Committee on Open Government

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I. INTRODUCTION

Over the last year, the Committee on Open Government (Committee) has continued to hear from hundreds of citizens who remain frustrated about persistent issues of compliance with the requirements of the Freedom of Information Law (FOIL) and Open Meetings Law (OML). We have also heard from many agencies complaining that FOIL is being used as a "weapon" to harass or unduly burden small agencies that have limited staff available to respond to requests. As in prior years, in our Report we aim to reinforce our commitment to strengthening government transparency while addressing legal and administrative challenges that can hinder progress toward that goal. This year, the Committee calls your attention to the following issues, some of which we have addressed for many years and some of which are newly-arising, and our recommendations and proposals to address them, including:

- prompt delivery to the Governor of an amendment that has passed both housed of the Legislature clarifying that agencies must produce non-exempt material contained in records that also contain exempt material, except under certain specified conditions;
- statutory clarification of recent amendments to FOIL to ensure that ambiguities in interpretation of these amendments do not lead to inconsistent outcomes, unfair application of the law, and continued frustration of the Legislative intent;
- requirements for FOIL data collection and proactive disclosure of records, which would ensure better tracking of FOIL requests, outcomes, and response times, leading to enhanced transparency; and
- clarification in the form of a proposed amendment to FOIL that, in light of personal privacy and cyber-security concerns, certain personal information provided voluntarily by citizens to their government should be withheld from disclosure to prevent significant and emerging harms.

II. PROPOSALS

A. Need to Clarify Aspects of FOIL

1. Timeframes for Agency Responses to FOIL Requests

The Committee has opined that a series of extensions providing progressively later dates by which an agency will respond to a FOIL request is inconsistent with the language and intent of FOIL, but New York courts by and large have not agreed. One of the most common complaints the Committee hears from members of the public continues to be that agencies take an unreasonable amount of time to fulfill FOIL requests and that the resulting delay undermines government transparency.

While the Committee agrees that disclosure can take too long under current law, our view remains that tinkering with statutory deadlines will do little to effectively improve compliance times. The varying administrative and financial needs of agencies and the differing scope of requests make "one size fits all" mandates unrealistic. We remain supportive of any proposal that ensures timely compliance while also ensuring that the administrative and financial needs of agencies are realistically accommodated.

2. Obligation to Redact Exempt Materials While Producing Non-Exempt Portions

As recommended in its 2024 Annual Report, the Committee feels that recent case law from the Appellate Division, First Department, which appears to permit agencies to withhold the *entire* record where the record contains *any* exempt material, misinterprets decisions by the Court of Appeals which hold that the law requires that where redactions of exempt material from a record will render the remainder of the record available and not subject to any FOIL exemption, agencies must provide the non-exempt portion of the record and redact the exempt portions. In response to this recommendation, S67 / A6613, sponsored by Senator Skoufis and Assemblyperson McDonald, clarifies that the First Department interpretation of FOIL in this regard is not what the legislature intended and amends § 87(2) to require – more explicitly – that agencies *may* redact exempt portions of records but *must* disclose the non-exempt portions.

This bill passed both houses in June 2025 and was delivered to the Governor on December 1, 2025. The Governor vetoed the bill on December 5, 2025, reasoning that the "bill is unnecessary and duplicative of current law, which already permits agencies to withhold records or portions of records that are otherwise exempt from disclosure under FOIL."

3. Disclosure of "Unsubstantiated" Law Enforcement Disciplinary Records

The 2024 Annual Report contained a detailed discussion of how access to unsubstantiated reports of police officer misconduct should be assessed in light of the 2020 repeal of Civil Rights Law § 50-a. At the time the Report was issued in December 2024, the Court of Appeals was considering this question in *New York Civil Liberties Union v. City of Rochester*, 43 N.Y.3d 543 (2025). In February 2025, the Court of Appeals held in that case that not all unsubstantiated allegations of police misconduct could be withheld as an unwarranted invasion of personal privacy. (A more detailed discussion of the Court of Appeals decisions is contained in Section IV of this report.) Consistent with this decision, the Committee continues to support the settled FOIL principle that a privacy analysis requires a case-specific weighing of the competing public and private interests. The Committee continues to believe that a mandatory exclusion from public disclosure of any "unsubstantiated" allegation is inappropriate because the circumstances of any given case will affect both the privacy interest and the public interest against which it must be balanced.

Sponsored by Senator Scarcella-Spanton and Assemblymember Berger, S4117B/A2074, would add § 845-f to Executive Law and deem defined terms "unfounded claims," "exonerated claims," and "pending claims" sealed to the public as a matter of law. Section 89(2-b) would be correspondingly amended to add these three categories of "claims" to the examples of content which, if disclosed, constitute an unwarranted invasion of personal privacy. Although the language within the bill does not acknowledge the impact of the amendment to Executive Law on FOIL accessibility, it does effectively require agencies to withhold such records pursuant to § 87(2)(a), as the statute deems the records inaccessible to the public as a matter of law. For the reasons explained above, the Committee does not support this bill.

S4568/A4868 would add subsection 4-c to § 87 to specify that in response to a request for law enforcement disciplinary records, access cannot be denied (i) as an unwarranted invasion of personal

privacy, including records containing unsubstantial or pending claims; (ii) for being compiled for law enforcement purposes; (iii) as constituting inter/intra-agency materials; (iv) as confidential by agreement; (v) because they were compiled prior to the bill's effective date. The amendment also modifies § 89(2-b) to require withholding the names or personally identifying information of a person alleged to be the victim of sexual misconduct, which is defined broadly.

The Committee also does not support this bill, as the inquiry into whether disclosure of particular content constitutes an unwarranted invasion of personal privacy is fact specific and creating blanket access or denials based on the category or classification of the record will likely result in outcomes that are inconsistent with the intent of FOIL.

B. Need for Improved 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 performs 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, would enable the Committee to monitor compliance, more readily identify problematic areas, and recommend specific changes to remedy 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 elements would allow the public to understand average response times within agencies and across agencies; this would greatly assist to reveal the extent of any perceived problem concerning FOIL related delays.

The Committee continues to support proposals that would require agencies to track certain FOIL metrics and either post them to their websites or report them annually to the Committee.

In January 2025, Senator Hoylman-Sigal and Assemblymember McDonald sponsored S452/A2321, which would amend § 90 to require all FOIL responsible agencies to submit a log to the Committee each year reflecting statutorily prescribed data fields pertaining to each request, appeal and Article 78 proceeding. The logs must be in machine-readable tabular spreadsheet format. The Committee and the Office of Information Technology Services (ITS) would be responsible for posting in specified public websites all logs received annually. The Committee would be required to include data from the logs in its annual report and publish a report including recommendations regarding the data fields within the logs. This bill passed the Assembly and was delivered to the Senate in March 2025. The Committee agrees in principle with the proposals in this bill, but notes that implementing its mandates could require additional resources.

C. Need for Additional Proactive Disclosure

The Committee on Open Government has long called for improved transparency through proactive disclosure. While the Legislature has passed and amended some laws to strengthen this aspect of government transparency, we continue to believe that New York must improve access to government records, and we support legislation seeking to broaden proactive disclosure.

S387/A1288 was reintroduced by Senator Skoufis and Assemblymember Vanel this year and would add language to the legislative declaration, § 84, encouraging agencies to proactively disclose records which are available under FOIL and of public interest. It requires that all state agencies publish all "publishable state data" on its webpage or that of ITS. It defines "publishable state data" as

> Data collected by a state agency that the agency is permitted, required or able to make available to the public, consistent with any and all applicable laws, rules, regulations, ordinances, resolutions, policies or other restrictions, requirements or rights associated with the state data, including but not limited to contractual or other legal orders, restrictions or requirements. Data shall not be publishable stat data if making such data available on a website would violate statute or regulation, including disclosure that would constitute an unwarranted invasion of personal privacy, endanger the public health, safety or welfare, hinder the operation of government, including criminal and civil investigations, or impose an undue financial, operational or administrative burden on the state agency or state.

It also requires that every agency post its current fiscal year budget to its homepage. The Committee supports this proposal to the extent that it requires additional proactive disclosure of records that are not exempt pursuant to properly-invoked FOIL exemptions.

D. Statutory Exemptions

S387/A1288, discussed in part above, also significantly changes some of the exemptions to disclosure found in § 87(2):

> (d) Trade Secrets: for the exemption to apply, commercial entities must have submitted the material "under compulsion of law or regulation." This is a significant departure from the current language which covers materials that entities voluntarily submit, theoretically as material necessary to the process or purpose for which they are interacting with an agency. Such language would likely be a disincentive for commercial entities to submit information voluntarily to ensure agencies have what they need to make decisions and generally make it more difficult for agencies to contract with competitive entities.

(e) Law Enforcement: would limit the exemption set forth in § 87(2)(e) to records where disclosure "interfere with SUCH AGENCY'S law enforcement investigations . . . ." Limiting this exemption in this way would likely not the interests that the exemption is intended to protect as it important for a law enforcement agency to retain the ability to withhold on this basis even if the investigation has been turned over to another law enforcement agency.

(g) Inter/intra-agency: changes the introductory language to "are inter-agency or intra-agency deliberative materials, including recommendations, proposals, suggestions, and other subjective documents reflecting the personal opinions of the writer or writers rather than the policy of the agency . . . ." To the extent that this change introduces an ambiguity as to whether the term "writer or writers" applies only to the originator of an opinion as opposed to the originator *or* scribe of the opinion, we suggest that "writer or writers" should apply to both the originator and the scribe consistent with long-standing interpretations of the intent of the exemption. The Committee does not believe that this exemption requires this amendment.

The bill provides that any agency response denying access, invoking exemptions, or stating that records do not exist must be sworn under penalty of perjury. To the extent that the proposal increases the potential criminal liability for FOIL officers, the Committee notes that it could become a serious disincentive for any public employee to take on this role.

S5000/A1410 would require agencies seeking a trade secret exemption to disclosure to reapply for the exemption every three years. If the entity does not, the agency may release the material in response to a FOIL request without further correspondence with the entity. As in prior years when this proposal has pended, the Committee does not have information sufficient to draw a conclusion about the impact this new requirement might have. We support efforts to ensure that the trade secret exemption does not unnecessarily restrict access to information for which confidentiality no longer serves a compelling purpose while also balancing the need for agencies to have access to private sector services.

E. Structure and Responsibilities of the Committee on Open Government

S387/A1288, discussed in part above, would also change the composition and responsibilities of the Committee. Under the proposal, the Committee would consist of: two representatives of the media or a nongovernmental nonprofit; two representatives of local government, who at the time of appointment are duly elected; three private citizens, none of whom may be custodians of public records, members of the media or a nonprofit, or a staff member or spokesperson for a custodian of public records. Two members must be attorneys. Two members must be experts on electronic records. The candidates must be selected from a pool after publishing qualifications on the webpage of the Governor. The Governor

would select all members from the pool, subject to the advice and consent of the Senate. Under the proposal, the Committee would have no member who is a member of state government.

Rather than meet at least twice per year as is currently required, the Committee would be required to meet monthly. The proposal also limits and restricts the role of the Committee:

a. Rather than providing "guidelines, opinions or other appropriate information," the Committee would be limited to providing advisory opinions and publishing those opinions to the webpage.
b. Provide annual training to agencies, public officials, and public employees.
c. Employing or contracting with appeals officers to issue appeal determinations and hold hearings, when necessary. Appeal determination must, among other requirements, be issued within fifteen days. Records provided to the Committee would be confidential.
d. Establish an informal mediation program.
e. Accept and track complaints, determinations and recommended changes to the law.
f. Appoint the Executive Director, who may not be a state employee, to serve for five years, unless removed by the Committee.

The Committee is concerned that, with such strict criteria for membership, particularly the requirements that members receive Senate confirmation and meet at least monthly (especially if in-person quorum requirements continue), it will be difficult to find qualified, interested candidates. The Senate confirmation requirement may also have the unintended consequence of setting a cumbersome precedent for statutorily created public bodies going forward. Further, the legislation does not contemplate Committee membership by any representative of State government. In the opinion of the Committee, it is vital to maintain such representation as the experience of our State government members is critical to the guidance the Committee provides to the Governor and Legislature. Accordingly, the Committee does not support this portion of the proposal.

The bill also makes the Committee responsible for responding to FOIL appeals rather than the affected agency. The Committee understands that centralization of the appeals process into a single entity could have the laudatory effect of rendering consistency across decisions and eliminating delays or specific issues relating to outlier agencies. However, responding to an appeal requires subject matter expertise based on the types of records requested and, in many cases, a specialized understanding of the laws applicable to certain types of records. Further, this process may have the unintended consequence of waiving privileges and statutory confidentiality provisions if the agency is required to provide unredacted copies of records to the Committee for its review. In light of this, the Committee believes that proper and timely adjudication of many thousands of FOIL appeals for the many thousands of FOIL responsible agencies in New York would require a significant addition of staff and resources for the Committee and the mandatory cooperation of the thousands of FOIL officers statewide. Based on these

factors, the Committee currently does not yet have an understanding of the financial and other impacts of this proposal sufficient to render an opinion thereon.

Finally, this proposal creates a complaint process under which FOIL responsible agencies may file a complaint with the Committee regarding FOIL requests that it considers frivolous, vexatious or made in bad faith. The Committee would be required to request additional information from the requestor, to be provided within thirty days, and upon receipt of the requestor's response, the Committee would be required to issue a written decision within thirty days determining whether the requestor's request or patterns of requests is frivolous, vexatious, or made in bad faith. If such a decision is issued by the Committee, it shall issue an order to the agency ordering it to ignore the records request or respond to a less burdensome version of the request within a reasonable time as determined by the Committee. The bill would require the court to award attorney fees to the agency if it prevails in cases involving frivolous, vexatious or bad faith requests.

The Committee recognizes that agencies are frustrated with what they characterize as bad faith use of FOIL and sympathizes with the large burden large-scale FOIL requests place on them. However, the Committee would require significant additional resources to properly adjudicate fact-specific complaints of this nature made by agencies. Moreover, the Committee questions whether the introduction of a level of quasi-judicial review into the FOIL process would serve to hinder or delay the FOIL process further, creating additional problems requiring resolution.

F. Attorneys' Fees

Senator Liu and Assemblymember Steck introduced S1418A/A950A addressing attorney fees in response to data reported by the nonprofit organization Coalition on Open Government in 2022. This bill would amend § 89(4)(c) to remove judicial discretion in awarding attorney fees. It also removes the current qualifier of "substantially" to "prevailed," and clarifies that a person may prevail "via voluntary production of any records after the commencement of litigation, settlement resulting in production of any records, or judgement ordering production of any records." Finally, it defines when an agency has a "reasonable basis for denying access" as one "reasonably relied upon" based on a published appellate court decision or a published advisory opinion by the Committee.

Senator Jackson introduced S6599 to amend FOIL § 89(4)(c) to clarify that the attorneys' fees section applies to the entire Article 6 as opposed to just § 89. Further, it affords the judiciary the discretion to award attorneys fees to a petitioner when the agency failed to respond to a request or an appeal within the statutory time limits, even if the petitioner has not substantially prevailed. Additionally, the proposal provides that "nothing contained herein shall be construed to abridge or deny any right or remedy available under [Article 86] of the [CPLR]." The drafter's notes relating to potential fiscal impact suggest that the proposed assessment of fees will encourage settlement "without court involvement and encourage reliance on the [Committee] for advice or as a mediator in a dispute." It is important to note that this bill does not amend the authorities granted to the Committee in this connection: the Committee is currently authorized to provide advice and guidance but is not authorized to serve as a mediator in FOIL disputes. It remains in Senate committee.

G. Changes to FOIL Definitions

Senator Skoufis and Assemblymember Otis introduced S349/A2642 in January. The bill passed the Senate in April but remains in committee in the Assembly. It would expand the current definition of "agency" to include "entities created by an agency and that are governed by a board of directors or similar body a majority of which is designated by one or more state or local government officials."

S6165/A173 was introduced in March and passed the Senate in June 2025. It generally amends the not-for-profit law. However, it also amends the public authorities law to redefine not-for-profit entities as "local authorities" if they have a majority of board members "appointed by elected officials of any municipal corporation or those which pay staff of a local or state government to provide administrative support." This would impact their status as agencies under FOIL. Additionally, it adds a new section providing that all state and local authorities are governed by the OML and FOIL, and must stream their meetings.

S387/A1288 also amends the definition of "agency" by adding school districts and "any other body, by whatever name, acting on behalf of government which, considered in its totality, is functionally equivalent to an agency . . . because it substantially possesses any of the following features and functions":

A. The body performs a governmental or proprietary function for the state or municipality;
B. The body's members have authority to make decisions or recommendations on policy and administration affecting the conduct of the business of the people in the governmental sector;
C. The body was created by a governmental or governmental-affiliated entity or the body's origin and authority may be traced to governmental action;
D. The body is controlled by, overseen or operationally managed by a governmental or governmental-affiliated entity;
E. The body receives substantial governmental financial or nonfinancial support;
F. The body's officers and employees are public employees or are nominated or appointed by public employees; or
G. The body was previously determined to be open to public access.

This definitional change has the potential to make thousands of formerly non-FOIL responsible entities into agencies for FOIL purposes. The Committee does not have enough information concerning the potential impact of this change to form an opinion about the proposed change.

This bill also deletes the current definition of "record" and redefines "record" as:

> Documents or electronically stored information, including but not limited to any writing, drawing, graph, chart, photograph, sound recording, video recording, image, and other data or data compilation, stored in any medium from which information can be obtained either directly or, if necessary, after translation by the agency into a reasonably usable form.

This redefinition of "record" as "documents or electronically stored information" is narrower than the current definition of "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever." The proposed definition, perhaps unintentionally, appears to limit or contract the broad intent of FOIL and introduces ambiguity as to what constitutes a "document" for FOIL purposes. It also omits statutory language extending FOIL to records "kept or held on the behalf of" an agency. To the extent that this limitation is intentional, the Committee does not support it. Further, the Committee notes that the proposed definition could elicit significant concern that many agencies may have with the requirement that it "translate" data in order to produce records. It is possible that the change could have significant financial impacts on agencies, especially small agencies.

The bill further declares that "business days" and "days" shall be calculated from the date of electronic submission or postmark date, if mailed, and requires both agencies and the Committee to publish new rules to conform with the Article. The Committee notes that such a calculation could have unintended consequences if the date in question is on a legal holiday or weekend.

H. Proposed Amendments to the OML

S455A/A3342 would amend § 103-a(2) to permit advisory bodies to hold meetings utilizing videoconferencing when the presiding officer and at least one quarter of its members are physically present at an in-person location. All other public bodies would continue to need a quorum of their membership physically present at an in-person location. It defines "advisory body" as one that is "involved in an advisory capacity only." The amendment is specifically proposed in response to community boards having difficulty obtaining an in-person quorum. This bill passed the Senate in June and remains in Assembly committee.

S647/A2329 would permit members of "committees and subcommittees that perform advisory functions only" to attend meetings remotely. The body would be required to have an in-person location from which the public may attend. This bill was proposed in January but remains in Senate committee.

S1027/A3615 would amend § 103-a to require that the videoconferencing technology utilized be web-based with the capability for closed captioning. Bodies "comprised of elected officials" must have an in-person quorum requirement. For videoconference meetings of other bodies, the presiding officer, or designee if unable to attend in-person, must be physically present. Meeting notices must, in addition to current posting requirements, be posted to the agency webpage as well as social media accounts. Notices must include additional information about how the public may attend and where to locate documents for the meeting. Every public body would be required to maintain an "official government

website." Sign language interpreters must be available upon request. This bill would assign funds from the "Municipal Hybrid Meeting Trust Fund" to the Committee and ITS to expend assisting municipalities in improving remote meeting capabilities. Additionally, this bill would amend the definition of a public body by removing the language defining a necessary function and add "formally chartered entit[ies] which [have] officially delegated duties and organizational attributes of a substantive nature."

S2598/A6487 amends the training requirements for members of public bodies to include one hour by the Committee on compliance with the requirements of the OML. The bill passed the Senate in May 2025 and sits in Assembly committee.

S1418A/A950A amends § 107(2) of the OML to remove judicial discretion and require that fees be awarded to the "successful petitioner," without the additional qualifying language in the current statute. It remains in committee.

I. Miscellaneous Legislative Proposals

S645/A3463 amends § 87(2)(e), commonly referred to as the law enforcement exemption, to include withholding content which would "reveal any statement made by a witness or victim relating to sexual abuse or misconduct."

S6990/A5912 would exempt exit surveys of employees of state civil service from disclosure under FOIL. This bill has passed the Assembly and remains in Senate committee.

A8960 would require redaction of the home address of candidates for public office prior to releasing designation or nomination petitions.

J. Legislation Recommended by the Committee Relating to the Availability of Email Addresses

The Committee has received many inquiries regarding whether agencies may appropriately withhold employee email addresses under § 87(2)(i), where disclosure would jeopardize the agency's ability "to guarantee the security of its information technology assets." Generally, email addresses used to conduct public business are publicly available and must be disclosed. However, requests for agency or department wide lists of employee email addresses have prompted some agencies to raise information technology (IT) security concerns. At least one case, *Matter of Freedom Foundation v NYC Dep't of Citywide Admin Services,* 229 A.D.3d 1203, 215 N.Y.S.3d 782 (4th Dep't 2024), raised this question to the judiciary. In that case, the Appellate Division, First Department, found that the agency articulated sufficient grounds to withhold the email addresses pursuant to that exemption. However, the Court of Appeals denied leave to appeal, making way for a potential split between New York's various appellate divisions regarding this issue. We urge the Legislature to consider crafting an answer to this question. The Committee believes that the *Freedom Foundation* decision assessed the issue correctly and notes that there are factual circumstances in which withholding employee email addresses could be appropriate to protect the IT security of the agency.

Agencies have also brought a second concern to the attention of the Committee relating to the availability of personal email addresses. Appellate Courts have held that disclosure of lists of *personal*

email addresses maintained by an agency comprised of data willingly provided to a government agency does not constitute an unwarranted invasion of personal privacy unless the requestor intends to use that information for solicitation or fundraising purposes. Several agencies have expressed concerns relating to privacy, identity theft, and online security (*e.g.*, phishing attempts) when obligated to disclose personal contact information. To clarify an agency's responsibility to protect the personal citizen data it maintains, the Committee recommends an amendment to Public Officers Law § 89(2)(b), the non-exhaustive list of examples of what constitutes an "unwarranted invasion of personal privacy" as a matter of law, to include:

> Disclosure of personal contact information furnished to an agency or any employee official of such agency. As used in this subdivision, "personal contact information" means the information provided to the agency including: (i) home address; (ii) personal email address; or (iii) personal telephone number, cellular number, or comparable number assigned to any other electronic communication device.

III. Agency Obligations when Records are Available Through Other Avenues

Many government agencies, particularly municipal agencies such as Counties, Cities, Towns and Villages, voluntarily and proactively make some of their records available through avenues or platforms other than FOIL. These avenues may include:

- Search IQS or similar platform for County Property Records
- Copies of meeting minutes or agendas that are posted online
- Providing in-person access to County Clerk records at terminals

These alternative avenues have significant value and are appreciated by the public, but they cannot serve as a replacement for responding to FOIL requests.

The Committee believes that subscription services like Search IQS, for which fees for access to government records are higher than those authorized by FOIL, are not inconsistent with the Law because, by providing immediate online access to records, the services provide access beyond that required by FOIL. Essentially, because the subscription services offer online access that goes above and beyond what is required by law, the fee structure of FOIL does not apply to the services. However, an agency cannot replace its legal obligations under FOIL by providing records using these alternatives. While an agency can offer those services, it must also still accept and process requests for records through FOIL, consistent with the obligations imposed by Public Officers Law § 87(2), and may charge only those fees permitted by the statute.

IV. Court of Appeals Decisions Relating to the Repeal of Civil Rights Law § 50-a

As is well known, in June 2020, the legislature repealed Civil Rights Law (CRL) § 50-a and amended the Freedom of Information Law relating to the availability of law enforcement disciplinary records. These law changes removed a blanket, statutory grant of confidentiality that had been extended to law enforcement disciplinary records by CRL § 50-a and directed that those records now fall within the FOIL

disclosure mandate, subject only to the exemptions in FOIL itself. Essentially, as we have discussed in our opinions and reports since the 2020 amendments, the content of law enforcement disciplinary records now must be analyzed pursuant to the exemptions in Public Officers Law § 87(2)(b)-(u) to determine whether an agency may withhold them from FOIL disclosure.

Immediately upon these amendments to the law in 2020, the Committee on Open Government identified two key open questions: (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 an agency may withhold unsubstantiated or pending complaints of misconduct due to personal privacy concerns. Since 2020, we have issued multiple advisory opinions and issued five annual reports advising that in the absence of a Court of Appeals decision providing clarity, our belief is that the courts would hold that: (i) the repeal applies retroactively; and (ii) unsubstantiated reports are available subject to an individual analysis of each such record pursuant to the exemptions in FOIL.

The Court of Appeals has since issued two decisions consistent with our interpretations, answering these open questions in the affirmative and providing clarity and closure on those issues. Those cases are summarized below:

New York Civil Liberties Union v. City of Rochester, 43 N.Y.3d 543, 264 N.E.3d 1260 (2025): The Court of Appeals specifically held that, after the repeal of Civil Rights Law § 50-a, the broad duty imposed on government to make records available to the public and the presumption that all government records are available for public inspection and copying means that no blanket exemption exists to categorically withhold records relating to unsubstantiated complaints against law enforcement officers under FOIL. Instead, the Court of Appeals held that while law enforcement officers may still benefit from the exemption in POL § 87(2)(b) to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy, an agency must assert particularized and specific justification under that exemption to deny access any part of a record. The court therefore clarifies that POL § 87(2)(b) requires agencies to evaluate each record individually and where redactions would prevent an unwarranted invasion of privacy and can be made without unreasonable difficulty disclose those records with only those necessary redactions. The Court of Appeals also held that the definition of "[l]aw enforcement disciplinary records" in FOIL § 86(6)(a) does not distinguish between substantiated and unsubstantiated complaints and rejected the argument that the legislature intended to broadly exempt records related to unsubstantiated complaints.

NYP Holdings, Inc. v. New York City Police Department, 43 N.Y.3d 357, 263 N.E.3d 871 (2025): The Court of Appeals held that the repeal of Civil Rights Law § 50-a applies retroactively, so that law enforcement disciplinary records created prior to the repeal must be disclosed consistent with rights of access in FOIL. The Court of Appeals also held that the presumption of public access to records under FOIL generally operates without reference as to when a record was created and only requires that the record be possessed by the agency at the time of the request and found no indication that the repeal of Civil Rights Law § 50 was intended to act inconsistent with FOIL's usual operation and interpreting the remedial legislation as remedial in nature to support its retroactive application.

APPENDIX I

THE USE OF VIDEOCONFERENCING TO CONDUCT OPEN MEETINGS

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 2022-23 state fiscal year. Included in the bill is an amendment to the 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. In the spring of 2024, these amendments were extended and are set to expire and be deemed repealed on July 1, 2026, unless the Legislature takes further action.

In December 2023, the Committee issued a statutorily mandated report to the Governor and Legislative leaders 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. Given the uncertainty of the status of the "extraordinary circumstances" videoconferencing provision of the OML after July 2026, the Committee would like to take this opportunity to reintroduce its findings to the Governor and the Legislature.

To support the 2023 report, in addition to the many hundreds of comments on this topic received from correspondents making informal contact with our office over the year, the Committee undertook a separate organized survey of public bodies, advocacy groups, the media, and the general public to affirmatively solicit feedback and identify any trends. Based on information from correspondents to our office and this survey feedback, we made the following general conclusions:

- Since the pandemic began in 2020, many public bodies continue to struggle to meet the required in-person quorum to conduct an open meeting. This finding is perhaps partly attributable to two main factors: (i) many members of public bodies are new to serving in the last three years and do not "remember" a time when in-person attendance at a meeting was mandatory; and (ii) even long serving members of public bodies have become used to being able to participate in meetings from home, increasing convenience and saving time and the effort of traveling to a central location. (In the section just below, we make a suggestion for an amendment to the law that may ameliorate these concerns.)

- A significant majority of all correspondents and survey responders – public bodies, the media, public interest groups, and members of the general public – strongly support the broadened use of remote access technology to permit meetings to occur regardless of an in-person quorum. This finding may be attributable to the following common themes from the feedback we received: (i) remote meetings are easier to attend, regardless of your role in the meeting (as a participant or attendee); (ii) remote meetings are more convenient and enjoyable for everyone;

and (iii) remote meetings can be held regularly, and important business conducted, regardless of weather or other considerations, reducing scheduling concerns for participants and attendees.

In our report, we offered the following suggestions and general notes of caution relating to the continuation of the current statutory rubric (extraordinary circumstances) or any statutory expansion of circumstances under which remote meetings are permitted:

- Correspondents have observed that public bodies taking advantage of OML § 103-a extraordinary circumstances have not uniformly understood that, where a body is meeting with a member participating remotely, the body must permit remote attendees the same opportunity to make public comment as those persons attending the meeting in person. While this is an explicit requirement of the current statute, we believe that many public bodies may fundamentally misunderstand their obligations in this regard.

- The term "videoconferencing" is used in several places in the OML, and the use of the term, with the qualifier "extraordinary," in § 103-a has introduced confusion among public bodies and other groups. For example, some public bodies, on advice from their attorneys or other interest groups (offered notwithstanding contrary advice published by the Committee), believe that the use of the term videoconferencing in § 103-a now provides for the *only* permitted use of videoconferencing under the OML, essentially voiding the videoconferencing long permitted by § 104. The Committee believes that clarification – or the use of an alternative term in any extension or expansion of § 103-a – would be useful to ensure that the Legislature intends that the uses of videoconferencing that were common and permitted before the introduction of § 103-a remain so.

- Where a public body experiences a "technical difficulty" during a meeting where the body is making use of § 103-a and therefore there is a requirement that remote attendees be permitted and the meeting be live streamed, attendees may be precluded from attending. Such circumstances may make continued compliance with § 103-a during the affected meeting impossible. In addition, many correspondents identified what may be called a "skills gap" (in either a member of a public body or the administrator of the public body) or a financial gap (cost prohibition where a public body represents a very small municipality) concerning the proper implementation of remote meetings when using § 103-a.

- There is significant confusion concerning what constitutes an "extraordinary circumstance." Although the Committee has offered the advice that a public body may define this term as it chooses, many bodies remain confused and have identified this as a concern with the use of § 103-a.

- To the extent that bodies believe they do understand what an "extraordinary circumstance" is, many have suggested that the statutory parameters are "too strict" and that there should be no

limitation on the reason that a member might need to participate in an open meeting remotely from a non-public location. As a corollary to this observation, many correspondents have stated that, if a member has qualified to participate remotely because of a claimed "extraordinary circumstance" and because of this there is either "barely" a quorum at the public location(s) or no longer a quorum at the public location(s), that precludes another member from claiming an "extraordinary circumstance" and requires that an affected meeting be canceled. We understand from our correspondents that this result feels arbitrary and undercuts the purpose of recognizing that a member of a public body may be experiencing an "extraordinary circumstance" to begin with.

- Many public bodies have identified confusion and burden concerning the pre-requisite "hearing" before the implementation of a policy to adopt § 103-a (or, in the case of a municipality, the necessary hearing before the adoption of a local law). Despite the publication of guidance and templates, the Committee is aware that many bodies that may wish to make use of § 103-a have not done so due to the burden this requirement imposes. Anecdotally, however, we understand that some public bodies that have not held a hearing or adopted a policy or local law have been leveraging § 103-a anyway.

- In light of the increasingly reported challenges associated with convening an in-person quorum for open meetings given today's technological environment and otherwise changing views toward the power of technology, transparency and greater access may continue to be properly served by amending the OML to reduce the burden of the in-person quorum required by OML § 103-a. Reasons for considering this proposal include the: (i) logistical difficulties associated with gathering geographically-dispersed members in connected public locations for frequent, short meetings especially of advisory committees and subcommittees, resulting in delayed or cancelled meetings, delay of advice needed by the parent public body, and additional functions performed outside of the meeting context, lessening access; (ii) substantial improvements in remote access technology that better ensure public access and transparency even without a public meeting location; and (iii) evidence strongly suggesting that there has been a drastic *decrease* in "in person" attendance at open meetings by interested citizens and a concomitant significant increase in (and preference for) remote meeting attendance by such citizens.

APPENDIX II

2024-25 LEGISLATIVE AMENDMENTS TO THE OPEN GOVERNMENT STATUTES

None.

APPENDIX III

2024-25 COURT DECISIONS OF NOTE

A. Freedom of Information Law

Matter of Appellate Advocates v. New York State Department. of Corrections and Community Supervision, 233 A.D.3d 1130, 224 N.Y.S.3d 192 (3d Dep't 2024): The Third Department held that petitioner failed to demonstrate that it was entitled to a hearing on the existence of records in the possession of the respondent agency, the Department of Corrections and Community Supervision, in response to a valid certification that the agency possessed no further records and could not locate them after diligent search pursuant to POL § 89(3)(a). Petitioner relied on public statements from agency representatives referencing an agreement or other mutual understanding between respondent and other agencies to argue the existence of a written agreement, which the court found merely speculative as no reference could be found to a written agreement.

Aron Law, PLLC v. New York City Fire Department, --- N.Y.S.3d ----239 A.D.3d 972, 2025 WL 1749237, 2025 N.Y. Slip Op. 03806 (2d Dep't 2025): The Second Department held that attorney's fees under the Freedom of Information Law (FOIL) cannot include fees incurred seeking to enforce the attorney's fees provision in Public Officers Law (POL) § 89(4)(c), and that courts have discretion to award attorney's fees and to find hourly rates of attorney's reasonable.

Aron Law, PLLC v. New York City Fire Department, --- N.Y.S.3d ----, 2025 WL 2969815, 2025 N.Y. Slip Op. 05806 (2d Dep't 2025): The Second Department held that the agency in this case failed to provide a reasonable basis for denying the records sought because it did not respond within the timeframes of FOIL and its self-imposed acknowledgement deadlines, entitling the substantially prevailing petitioner to an award of reasonable attorneys' fees and litigation costs. The court rejected as a reasonable basis for denial the argument that the agency had no obligation to create new records, noting that the agency presented no evidence establishing that it did not possess the records sought.

Matter of Aron Law, PLLC v. New York City Health & Hospitals Corp., 232 A.D.3d 528, 223 N.Y.S.3d 627 (1st Dep't 2024): The First Department held that agency respondent need not support redaction of portions of records with admissible evidence, and that agencies may instead provide a detailed explanation of the nature of redacted information by affirmation in a verified pleading by the agency's deputy counsel and chief employment counsel.

Matter of Aron Law PLLC v. Rochester City School District, 236 A.D.3d 1398, 231 N.Y.S.3d 297 (4th Dep't 2025): The Fourth Department held that, specifically concerning video footage, when withholding records under the exemption in POL § 87(2) (a), (e), (i), or (f), an agency must disclose all portions of those records containing nonexempt materials but may withhold by redaction those portions which it can establish are exempt by articulating particularized and specific justifications for not disclosing. The court clarified that judicial review is limited to consideration of grounds invoked by the agency in denying the FOIL request and refused to consider a new argument that petitioner failed to reasonably describe the records sought.

Breighner v. Suffolk County, 237 A.D.3d 928, 233 N.Y.S.3d 96 (2d Dep't 2025): The Second Department held that a representation certifying that no further documents could be found after diligent search satisfied the agency FOIL obligations. Therefore, petitioner did not substantially prevail, and attorneys' fees could not be awarded.

Matter of Cuomo v. James, 235 A.D.3d 578, 228 N.Y.S.3d 452 (1st Dep't 2025): The First Department held that petitioner failed to establish a constructive denial of his FOIL request, finding that the respondent agency had a reasonable basis given the circumstances for the time period specified in its timely written acknowledgement. This court relied on *Matter of Save Monroe Ave. v New York State Dept. of Transp.*, 197 AD3d 808, 810 [3d Dept 2021], *lv denied* 38 NY3d 905 [2022]; Governor's Approval Memo, Bill Jacket, L 2005, ch 22 at 3; see also *Matter of New York Times Co.*, 103 AD3d at 406-407 to conclude that the agency had no obligation to issue a date certain under POL § 89(3)(a) because it had not determined whether to grant the request at the time of the acknowledgement.

Diocese of Buffalo v. Office of New York State Attorney General, --- N.Y.S.3d ----, 2025 WL 1763226, 2025 N.Y. Slip Op. 25147 (Supr. Ct. New York Co. 2025): In this reverse-FOIL case via POL § 89(5), the Diocese of Buffalo sought to bar release of records submitted to the Office of the Attorney General under § 87(2)(d) and (e). The New York County Supreme Court held that a commercial enterprise must demonstrate actual competition and the likelihood of substantial competitive injury to require withholding under § 87(2)(d). Lacking a statutory procedure parallel to § 89(5), the court declined to extend the meaning of "judicial proceedings" in § 87(2)(e)(i) to include any and all judicial proceedings and interprets the exemption only to apply to proceedings stemming from or related to the law enforcement investigation. The court additionally reads the exemption as applying only to a "law enforcement judicial proceeding" in accordance with that observation and the application of the parallel language in the federal Freedom of Information Act. The court held that the requirement that an agency seeking to assert an exemption must articulate a factual basis be shown for the assertion of any exemption asserted also applies to the party seeking to assert it, in this case the Diocese.

Matter of FDNY Local 2507, DC-37, AFSCME v. City of New York, 236 A.D.3d 591, 230 N.Y.S.3d 245 (1st Dep't 2025): The First Department held that a multi-step process to search for and extract data from multiple databases, review the resulting data, develop code to convert said data, and then aggregating the information into a report would constitute the creation of a new record which the agency respondent was not required to do in response to a FOIL request. The court also held that a request for a report matching records based on information contained in existing records in one database to existing records in another database which does not contain that information would be the creation of a new record which FOIL did not compel the agency to do.

Matter of Howard v. New York City Police Department, 233 A.D.3d 479, 221 N.Y.S.3d 123 (1st Dep't 2024): The First Department held that, although the respondent agency administratively denied the petitioner's appeal, subsequent production of requested materials rendered the petition moot. The court declined to award costs.

Matter of Howard v. New York City Police Department, 232 A.D.3d 419, 219 N.Y.S.3d 660 (1st Dep't 2024): The First Department distinguished the records sought from a those sought in a separate,

unsuccessful Article 78 special proceeding by petitioner. Nevertheless, the court upheld the denial of unredacted copies of records which would result in an unwarranted invasion of personal privacy if disclosed pursuant to POL § 87(2)(b).

Matter of Lane v. County of Nassau, 234 A.D.3d 761, 226 N.Y.S.3d 118 (2d Dep't 2025): The Second Department held that the Supreme Court erred in determining that the petitioner failed to reasonably describe records as a matter of law, as the request was limited by subject matter and time period and no evidence was submitted showing that the respondent agency made any effort to assist in more precisely defining the records sought as required by Committee on Open Government regulation 21 NYCRR Part 1401.2(b)(2).

Matter of Lane v. County of Suffolk, 236 A.D.3d 791, 231 N.Y.S.3d 62 (2d Dep't 2025): The Second Department held here that, although the respondent agency submitted an affidavit asserting that the agency did not possess a particular record sought, the same affidavit raised questions of fact as to whether it may possess other records responsive to petitioner's FOIL request which must be resolved before denying the petition. The case was remitted to Supreme Court.

Matter of Law Offices of Abe George, P.C. v. Office of the Richmond County District Attorney, 238 A.D.3d 875, 235 N.Y.S.3d 99 (2d Dep't 2025): The Second Department upheld an order allowing petitioner to inspect in camera unredacted copies of records which were provided in redacted copy by the agency respondent. The court found that the agency failed to meet its burden to establish that the unredacted records fell under any exemptions to disclosure found in POL § 87(2).

Matter of Law Office of Cyrus Joubin, Esq. v. Manhattan District Attorney's Office, 234 A.D.3d 441, 223 N.Y.S.3d 113 (1st Dep't 2025): The First Department held that a datasheet constituting attorney work product was properly withheld in its entirety under POL § 87(2)(a) in conjunction with CPLR 3101(c), and need not be disclosed subject to redactions.

Matter of Lebowitz v. Suffolk County, 237 A.D.3d 938, 233 N.Y.S.3d 570 (2d Dep't 2025): The Second Department held that, as the appeal in this case was granted for a constructive denial from which the petitioner could have submitted a subsequent appeal for any withheld records, the appeals officer requested that the petitioner indicate whether the FOIL request had been satisfied, and no attempt was made by petitioner to seek further records or a certification that further records were within the possession of the agency, petitioner could not claim that disclosure by the agency-respondent was incomplete for the first time in an Article 78 proceeding.

Legal Aid Society v. Records Access Officer, 238 A.D.3d 17, 227 N.Y.S.3d 71 (1st Dep't 2025): The First Department held that the respondent New York City Police Department (NYPD) may not deny a request for records due only to the sheer volume of records requested, and must instead show in evidentiary form the undue burden caused by production of copies of records sought. In so holding, the court placed emphasis on the nonspecific nature of the agency's arguments, which failed to identify or even approximate the type and number of redactions which may need to be applied when reviewing the subject records, articulate a factual basis for exemptions the agency anticipated may apply, or provide evidence demonstrating the difficulty and extent of redactions due to contract provisions concerning

the records sought. Although approximately 165,000 pages of hard-copy documents would need to be reviewed, the court also relied on the fact that the records sought were located in one place which negated the need to perform a search to identify records and that records could be released on a rolling basis to find that disclosure would not be unduly burdensome.

Matter of McDevitt v. Suffolk County, 237 A.D.3d 940, 230 N.Y.S.3d 406 (2d Dep't 2025): The Second Department held that a categorical exemption for the unsubstantiated disciplinary records of law enforcement officers does not exist under FOIL, and that the respondent agency failed to meet its burden to establish that those records were exempt pursuant to POL § 87(2)(b) by not articulating any particularized and specific justification for the application of that exemption to those materials.

Meyer v. Nassau County Police Department, 235 A.D.3d 641, 227 N.Y.S.3d 379 (2d Dep't 2025): The Second Department held that petitioner exhausted his administrative remedies for the purpose of allowing the commencement of this Article 78 proceeding when the respondent agency issued a final determination in the form of a letter and time to respond after receiving his appeal expired.

Matter of Meyer v. Town of Hempstead, 237 A.D.3d 709, 232 N.Y.S.3d 187 (2d Dep't 2025): The Second Department held that disclosure of records post-commencement of an Article 78 special proceeding do not render said proceeding academic so long as an actual controversy between parties remains, including when a party continues to seek disclosure or exemption of remaining records or if a party seeks attorneys' fees and other costs in connection with the proceeding.

Meyer v. Town of Hempstead, 237 A.D.3d 709, 232 N.Y.S.3d 187 (2d Dep't 2025): The Second Department held that although some records were produced by the respondent agency post-commencement of this proceeding, the controversy was not mooted as petitioner credibly alleged the existence of responsive records which were not produced. The court also held that a mere representation from the agency that all documents had been provided, upon information and belief, did not satisfy FOIL; the agency needs to grant access , deny access and claim a specific exemption to disclosure, or certify that it does not possess the records sought and they could not be located after a diligent search.

Matter of Morris v. New York State Police, 233 A.D.3d 1415, 222 N.Y.S.3d 803 (3d Dep't 2024): The Third Department held that the duty to defend state agencies in FOIL litigation and an alleged authority to criminally prosecute violations of Penal Law § 240.65 and POL § 89(8) for willful concealment or destruction of records sought for inspection do not create a conflict of interest for that office, though the court declined to rule on whether the Attorney General has such prosecutorial authority. The court found that the substance of the FOIL denial was rendered moot due to a procedural deficiency failing to challenge the lower court's finding of mootness.

Matter of New York Civil Liberties Union v. Suffolk County, 237 A.D.3d 717, 232 N.Y.S.3d 190 (2d Dep't 2025): The Second Department held that no categorical exemption for records of unsubstantiated, unfounded, or exonerated allegations of police officer misconduct exists under FOIL. The court found that the agency respondent failed to articulate a particularized and specific justification to meet its

burden of establishing that the privacy exemption contained in POL § 87(2)(b) applied to the records in their entirety and thus upheld an order to disclose those records subject to any authorized redactions.

New York Civil Liberties Union v. City of Rochester, 43 N.Y.3d 543, 264 N.E.3d 1260 (Ct. App. 2025): The Court of Appeals specifically held that, after the repeal of Civil Rights Law § 50-a, the broad duty imposed on government to make records available to the public and the presumption that all government records are available for public inspection and copying means that no blanket exemption exists to categorically withhold records relating to unsubstantiated complaints against law enforcement officers under FOIL. Instead, the Court of Appeals held that while law enforcement officers may still benefit from the exemption in POL § 87(2)(b) to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy, an agency must assert that a particularized and specific justification under that exemption to deny access any part of a record. The court therefore clarifies that POL § 87(2)(b) requires agencies to evaluate each record individually and where redactions would prevent an unwarranted invasion of privacy and can be made without unreasonable difficulty disclose those records with only those necessary redactions. The Court of Appeals also held that the definition of "[l]aw enforcement disciplinary records" in FOIL § 86(6)(a) does not distinguish between substantiated and unsubstantiated complaints and rejected the argument that the legislature intended to broadly exempt records related to unsubstantiated complaints.

Matter of New York Civil Liberties Union v. New York State Office of Court Administration, --- N.E.3d ----, 2025 WL 2955709, 2025 N.Y. Slip Op. 05784 (Ct. App. 2025): The Court of Appeals held that the Office of Court Administration failed to establish an attorney-client relationship with all Unified Court System Judges, and could therefore not assert the attorney-client privilege as a blanket exemption to a whole category of records. Rather, the court, explicitly without assessing whether an attorney-client relationship could ever be established in this context, required that the agency identify all records responsive to the request and only raise an assertion of privilege as to the specific records which it claims they apply. The dissent in part contends that the Office of Court Administration may never establish an attorney-client relationship in the context of advising Unified Court System Judges in their adjudicatory capacity, and without the assertion of any other exemption the records sought should be disclosed without further analysis on a document-by-document basis.

Newsday, LLC v. Manhasset Union Free School District, 232 A.D.3d 678, 222 N.Y.S.3d 521 (2d Dep't 2024): The Second Department held that a failure to appeal a denial of access to records within 30 days as required by FOIL effectively prevents an applicant for records from exhausting all administrative remedies and prevents that person from seeking judicial review of the denial in an Article 78 special proceeding. The Second Department also held that the production of an incident form did not render the petitioner's claim as academic with respect to a request that sought multiple categories of records relating to that incident absent representation that no other responsive records exist in the agency's possession.

Matter of NYP Holdings, Inc. v. New York City Department of Social Services, 237 A.D.3d 439, 232 N.Y.S.3d 86 (1st Dep't 2025): The First Department held that Social Services Law § 136(1) prohibits disclosure of either the names or addresses of public benefit recipients, and that a homeless shelter or

other temporary housing constitutes the address of a person residing there which must be withheld in response to a FOIL request pursuant to Social Services Law.

NYP Holdings, Inc. v. New York City Police Department, 43 N.Y.3d 357, 263 N.E.3d 871 (Ct. App. 2025): The Court of Appeals held that the repeal of Civil Rights Law § 50-a applies retroactively, so that law enforcement disciplinary records created prior to the repeal must be disclosed consistent with rights of access in FOIL. The Court of Appeals also held that the presumption of public access to records under FOIL generally operates without reference as to when a record was created and only requires that the record be possessed by the agency at the time of the request and found no indication that the repeal of Civil Rights Law § 50 was intended to act inconsistent with FOIL's usual operation and interpreting the remedial legislation as remedial in nature to support its retroactive application.

Matter of Oustatcher v. Clark, 238 A.D.3d 416, 234 N.Y.S.3d 453 (1st Dep't 2025): The First Department held that res judicata required dismissal of this CPLR Article 78 special proceeding because it was the last of four such proceedings brought on overlapping, substantially similar factual and legal issues. The court noted that petitioner did not attempt to incorporate or amend these claims, nor did he disclose to the courts the related matters.

Matter of Puig v. New York State Police, --- N.Y.S.3d ----, 240 A.D.3d 1120, 2025 WL 20765112025, N.Y. Slip Op. 04292 (3d Dep't 2025): The Third Department held that the disclosure of records responsive to a FOIL request does not render a motion to hold the respondent agency in civil contempt for its interpretation of his FOIL request and the lower court order granting records moot. However, the court also denied the motion and found respondent not in contempt, as redactions made to the disclosed records were subject to redactions pursuant to the FOIL statute and the limiting language of the initial FOIL request.

Matter of Puig v. New York State Police, 233 A.D.3d 1121, 224 N.Y.S.3d 190 (3d Dep't 2024): The Third Department held that attorneys' fees and associated costs could be denied, as the respondent agency had reasonable basis to deny access to records of state troopers who had been disciplined both due to the then novel repeal of Civil Rights Law § 50-a requiring new interpretation of law and the fact that the agency's records indexing system had not been updated at the time of the denial to allow a search for such records.

Reclaim the Records v. City of New York, --- N.Y.S.3d ----, Index No. 156960/23, 2025 WL 2980867 (1st Dep't 2025): The First Department held that the trial court correctly found that the New York City Clerk properly withheld certain fields of data -- namely previous marriages, current place of residence, place of birth, parents' names and birthplaces, and spouses' forms of identification -- from any records produced from the last 50 years in the initial production responding to petitioner's FOIL request. However, the First Department also held that the trial court should have exempted those same fields of data for records 50 years and older because the same privacy concerns and potential for harm exists for marital parties in those records. Additionally, the withheld fields of data are of the type requiring a "proper purpose" for disclosure under Domestic Relations Law § 19 (*see also* Domestic Relations Law §§ 14, 15).

Matter of Reclaim the Records v. New York State Department of Health, --- N.E.3d ----, 2025 WL 1458089, 2025 N.Y. Slip Op. 03102 (Ct. App. 2025): The Court of Appeals held that Public Health Law § 4174(1)(a) limits access only to individual certified death records, not a death index or the information contained in death records. The Court of Appeals also held that the Department of Health's implementing regulations could not make death records confidential without a statutory basis. Concerning the application of the personal privacy exemption contained in POL § 87(2)(b), the Court of Appeals held that the Department of Health failed to meet its burden to show that disclosure of the name, date of death, age at death, gender, government assigned file number, and residence code concerning deceased individuals could be used to commit identity theft or fraud that would harm the living or how disclosure would harm an identified interest in privacy for the deceased. At the same time, the Court of Appeals held that a decedent's medical history, cause of death, location of their interment, and whether they were buried, cremated, or made an anatomical gift were personal, highly sensitive matters to either the deceased or any living survivors which could be withheld to prevent an unwarranted invasion of personal privacy. As the Department of Health maintains an online database making publicly available certain information contained in death records older than 50 years, the Court of Appeals also held that the categories of information routinely disclosed in those records could not be withheld under POL § 87(2)(b).

The dissenting opinion contends that FOIL is specifically designed to provide the public access to records of government operations, and that disclosure of the private information of individuals does not serve that purpose. The dissent also contends that the public interest served by disclosure, although it exists, does not outweigh the privacy interests of decedents and survivors because it does not relate to day-to-day government operations or government affairs, and that therefore the records should be withheld to prevent an unwarranted invasion of personal privacy pursuant to POL § 87(2)(b). The dissent also contends that Public Health Law § 4174(1)(a) is meant to protect the underlying information contained in death records and limits access to that information, not just certifications of those death records.

Rodriguez v. Caban, 85 Misc.3d 1259(A), 230 N.Y.S.3d 560 (Supr. Ct. New York Co. 2025): The New York County Supreme Court held that an appeal response that no records could be located after a diligent search violates lawful procedure triggering judicial review when a post-commencement search reveals thousands of responsive documents, showing the administrative decision was not based in fact. The New York County Supreme Court also held that agencies may not deny FOIL requests simply as voluminous and potentially requiring review of large numbers of records.

Matter of Roth & Roth, LLP v. Long Island Railroad, 237 A.D.3d 506, 233 N.Y.S.3d 10 (1st Dep't 2025): The First Department denied the petitioner's request for sanctions where an agency employee denied a FOIL request as not reasonably described based on personal knowledge that the agency only maintained those records in non-searchable hardcopy, but was unaware that a different department within the agency maintained searchable electronic copies of those records. The court notes that the agency promptly produced the records once its ability to perform a search became clear.

Matter of Roth & Roth, LLP v. Queens County District Attorney's Office, 239 A.D.3d 657, 235 N.Y.S.3d 655 (2d Dep't 2025): The Second Department held that the respondent agency failed to articulate any specific and particularized justifications for denying any of the records sought of convictions obtained by

the Queens County District Attorney's Office which were overturned due to prosecutorial misconduct, relying instead on categorical denials. The court emphasized that disclosure of disciplinary records do not categorically or automatically invade personal privacy to fall within the exemption contained in POL § 87(2)(b), and that records containing intra-agency materials must be produced to the extent that they contain material that cannot be redacted pursuant to § 87(2)(g).

Russell v. Town of Mount Pleasant, 227 A.D.3d 1083, 212 N.Y.S.3d 677 (2d Dep't 2024), *leave to appeal granted*, 42 N.Y.3d 912, 250 N.E.3d 1205 (Ct. App. 2025): The Second Department held that disclosure of the names and email addresses of persons who have willingly divulged that information to the respondent municipality did not constitute an unwarranted invasion of personal privacy which could be withheld pursuant to POL § 87(2)(b) and § 89(2)(b).

Matter of Sethi v. Town of Hempstead, 233 A.D.3d 787, 224 N.Y.S.3d 439 (2d Dep't 2024): The Second Department held that an award of attorneys' fees was available where the lower court ordered disclosure of all records sought in the FOIL request, less redactions necessary to protect the identities of certain agency employees, and may include fees incurred in connection with a motion to hold the agency in contempt for excessive redactions and failure to produce records.

Matter of Standardbred Owners Association, Inc. v. New York State Gaming Commission, 237 A.D.3d 1354, 233 N.Y.S.3d 185 (3d Dep't 2025): The Third Department held that, in the question of whether attorneys' fees may be awarded to a substantially prevailing petitioner, the agency respondent could not rely solely on the request of commercial enterprises to withhold certain records or portions thereof as trade secrets as a reasonable basis for denying access.

Matter of Stone v. Montgomery County Board of Elections, 234 A.D.3d 1075, 225 N.Y.S.3d 748 (3d Dep't 2025): The Third Department held that petitioner's affidavit averring a belief that the same or similar ballot processing software used in other states allows for the production of the Cast Vote Records sought did not create a factual basis to support the contention that those records existed and were in the agency respondent's control, especially as his own affidavit admits that agency employees attempted to produce those records but were unable to do so without an administrative password. Respondent provided affidavits that a diligent search was performed and the agency had no responsive records, and that the version of software in use cannot create the records sought.

Supinsky, v. Town of Huntington, 234 A.D.3d 857, 225 N.Y.S.3d 672 (2d Dep't 2025): The Second Department held that the Supreme Court erred in denying a motion for an in camera inspection of a memorandum withheld under the intra-agency exemption of POL § 87(2)(g), reasoning that the Supreme Court could not determine which portions of the memorandum sought contained statistical or factual tabulations or data which must be disclosed without an examination of that record.

Matter of Tsunis Gasparis, LLP v. Stony Brook Fire District, 238 A.D.3d 1059, 235 N.Y.S.3d 140 (2d Dep't 2025): The Second Department held, when considering the award of attorneys' fees and litigation costs, that petitioner substantially prevails where responsive records are produced after commencement of an Article 78 special proceeding and that the respondent agency has no reasonable basis to constructively

deny a request when it is shown to have been aware of the FOIL request before commencement of the proceeding.

Matter of Verizon New York Inc. v. New York State Public Service Commission, 239 A.D.3d 1110, 236 N.Y.S.3d 396 (3d Dep't 2025): The Third Department held that petitioner, as a commercial enterprise, successfully demonstrated that records submitted to the respondent agency would cause substantial injury to its competitive position for the purposes of invoking the trade secret exemption contained in POL § 87(2)(d) by showing that the information contained therein was unavailable through means besides FOIL and affirmatively specifying the harm competitors could foreseeably inflict on petitioners using that proprietary information.

Matter of Wagner v. New York City Department of Education, --- N.E.3d ----, 2025 WL 2955704, 2025 N.Y. Slip Op. 05783 (Ct. App. 2025): The Court of Appeals held that the requirement that requests reasonably describe the records sought is distinct from an agency's obligation to retrieve requested documents if it can do so given reasonable effort, noting that conflation of those requirements and the adoption of a single test merging those elements by decisions of the appellate division have led to inconsistent results. The court held that a request reasonably describes records where the description enables the agency to understand what records are sought and where they are located in the agency's possession, and that agencies have the burden to demonstrate in an Article 78 special proceeding that they cannot retrieve records with reasonable effort if denying access on that basis.

Waldman v. County of Rockland, --- N.Y.S.3d ----, 2025 WL 2609375, 2025 N.Y. Slip Op. 04908 (2d Dep't 2025): The Second Department held that the respondent agency satisfied its FOIL obligations by presenting testimony that all responsive records were disclosed and that a diligent search was conducted. The initial response from the agency specified that responsive exempt records were withheld, but in response to an appeal the County certified that no records responsive to his request were found. The petitioner did not challenge the lower court's determination that certain records disclosed to the court were exempt from disclosure, and the Second Department's analysis does not reach whether those records were exempt or non-responsive.

Matter of Weiss v. County of Suffolk, 237 A.D.3d 949, 233 N.Y.S.3d 116 (2d Dep't 2025): The Second Department held that dismissal for defective personal service was inappropriate as respondent failed to raise lack of personal jurisdiction as an affirmative defense.

B. Open Meetings Law

In the Matter of Michael A. Brandi v. City of Saratoga Springs, Index No. EF20232999 (Supr. Ct. Saratoga Co. 2024): The Saratoga County Supreme Court held that a public body demonstrating a shared belief in the need for a vote to act and which attempts to take said vote via email, even if one may ultimately be unnecessary, violates the Open Meetings Law.

Ebermann v. Board of Education of Mount Vernon City School District, 86 Misc.3d 1219(A), 234 N.Y.S.3d 783 (Supr. Ct. Westchester Co. 2025): The Westchester County Supreme Court held, pursuant to POL § 103-a(2), that a quorum of the public body be physically present in the same physical location or

locations where the public can attend in order for a public body to conduct a meeting using videoconferencing. However, the court clarified that an order of prohibition is not an available remedy for business which is neither judicial nor quasi-judicial in nature such as adoption of a funding resolution for purchase of a property by a public body.

Nathan v. Town of Pound Ridge, 86 Misc.3d 1240(A), 236 N.Y.S.3d 574 (Supr. Ct. Westchester Co. 2025): The Westchester County Supreme Court held that the plaintiff failed to allege facts showing a secret meeting held via email in violation of the OML, as only the Town Supervisor participated in email communications with non-board members concerning the Town's right to opt-out of the Marijuana Regulation & Taxation Act.

APPENDIX IV

SERVICES RENDERED BY COMMITTEE

1566 TELEPHONE INQUIRIES
3770 ADVISORY OPINIONS
44 PRESENTATIONS
THOUSANDS OF CORRESPONDENTS ADDRESSED
THOUSANDS OF LIVE AND 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: https://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

"What 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/frequently-asked-questions-0; 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 over 1500 telephone inquiries.

Informal Advisory Opinions

This past year, the Committee through the Director's staff issued over 3700 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 10 formal advisory opinions in response to requests from across New York.

Presentations

An important aspect of the work of the Committee involves efforts to educate by means of seminars, workshops, and various public presentations. During the reporting year, staff gave 43 presentations to organizations and entities identified below. Over 2000 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 throughout the year. In addition, recordings of the programs have been posted to the Committee website for additional individuals or groups to review.

If your organization would like to request training, you may contact us by telephone at (518) 474-2518 or by e-mail at training@opengovernment.ny.gov.

Organizations:

Auburn Police Department

Chenango County Sheriff's Office

Citizens Propomoting Community Engagement

City of Rochester

International Visitor Leadership Program (Eastern Europe)

International Visitor Leadership Program (Kazakhstan)

Nassau BOCES

Nassau County Library Consortium

New York Association of Local Government Records Officers

New York Community College Trustees

New York State Association of Clerks of County Legislative Boards

New York State Association of Municipality Purchasing Officials

New York State Bar Association

New York State Sheriffs' Association Civil Supervisors Conference

New York State Sheriffs' Association Undersheriffs Training Conference

New York State Town Clerks Association

Oneida County

State Commission on Restoration of the Capitol

State University of New York at Albany

Steuben County Legislature

Suffolk County Library Consortium

Town of East Hampton

Town of Niskayuna

Town of Whitestown

Troy Business Improvement District