STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Committee Members

Tedra L. Cobb
Ruth Noemí Colón
Carla Chiaro
Robert L. Megna
Richard Ravitch
Clifford Richner
David A. Schulz
Robert T. Simmelkjaer II, Chair

Executive Director
Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650
Albany, New York 12231
Tel (518) 474-2518
Fax (518) 474-1927
http://www.dos.ny.gov/coog/index.html

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REPORT TO THE GOVERNOR AND THE STATE LEGISLATURE 2010

BUILDING A CULTURE OF OPENNESS AND IMPROVING TRANSPARENCY

"Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or tragedy or perhaps both."

--James Madison, August 4, 1822

"Sunlight is said to be the best of disinfectants."

--Louis Brandeis, 1913

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In Memoriam: Janet Mercer

This is the first annual report of the Committee on Open Government in which Janet Mercer did not play a significant role. Although she held the title of Secretary, she carried out functions that far exceeded those of persons holding that position. For many, Janet was the foundation of this office, the first voice when they called on the telephone, and a willing guide to the practical realities of the open government laws.

Robert Freeman, the Committee's longstanding Executive Director, has suggested during many public events that Janet knew the law inside and out and remembered what he had forgotten.

Due to the sudden onset of ill health, Janet retired in September, and she passed away on December 4th. She is and will be missed by many. *We dedicate this report to Janet Mercer.*

COMMITTEE ON OPEN GOVERNMENT
2010 REPORT TO THE GOVERNOR
AND THE STATE LEGISLATURE

As we begin the second decade of the 21st century, we face difficult and often new issues and challenges, and that is so as the public demands and the government encourages more openness and transparency. Although New York's open government laws warrant alterations, their structure is solid and provide a foundation for public access and participation in ways that far exceed the nature or extent of access to government information when those laws were initially enacted.

The Freedom of Information Law, known by many New Yorkers as "FOIL", was first passed in 1974 on the heels of the events associated with the Watergate scandal and created what was then known as the Committee on Public Access to Records. Both the law and the Committee represented experiments in opening the government to the public, and the shortcomings of the new law were readily recognized. In consideration of its weaknesses and flaws, the original FOIL was repealed and replaced in 1978 with the essence of the current version of that law. The Open Meetings Law, the companion of FOIL, was enacted in 1976 and became effective in 1977.

Consider the 1970's: high tech was an electric typewriter, and we used carbon paper to make copies. Telephones had cords, and the internet and email were beyond our imagination. Information technology has changed our lives and the ways in which we communicate, and the use and utility of open government laws have increased and changed dramatically. In this report, we will attempt to focus attention on core issues of openness, as well as the realities associated with the continuing advances in information technology.

The Committee's Role

The primary function of the Committee on Open Government as specified in the FOIL, the Open Meetings Law, and the Personal Privacy Protection Law enacted in 1984 involves providing advice and opinions to any person concerning the implementation of those laws. We highlight "any person", for the Committee has become a source of guidance for representatives of state and local government, members of the public and the news media. Each year, and as later indicated in the description of services that it renders, the staff of the Committee responds to thousands of inquiries made by telephone and via the internet, prepares hundreds of written advisory opinions, and provides training and education at dozens of events.

When responding to questions, our only goal is to offer what we believe to be the correct answer according to the law, irrespective of the source of the question. That independence, coupled with its reputation for impartiality and expertise, is, in the Committee's view, the basis for its continued existence and success.

Although every state in the United States has enacted open records and open meetings laws, few have created governmental entities authorized to oversee those laws. We believe that the Committee has provided the public and the government with resources beneficial to all New Yorkers.

Concerns regarding the Committee's Effectiveness

We must note with some concern that the Committee's ability to perform its role has been diminished over the past year by its inability to meet on a regular basis. In 2010 the Committee did not meet until November, and then only to review a draft of the annual report prepared by staff. To function effectively in its role of advising the Governor and Legislature on matters of open government, the full Committee and sub-committees thereof must be able to meet quarterly.

The Committee's effectiveness is also threatened by continuing vacancies, with as many as four unfilled positions expected to exist after the new Governor and Legislature take office in January. This means that six of our seven sitting members must be available to attend a meeting in order to achieve a quorum. Of these unfilled positions, the Governor will have three and the Senate majority leader one. The position authorized for appointment by the Speaker of the Assembly is also vacant. We urge the incoming Governor and the leader of the State Legislature to fill these positions as soon as possible.

The Basis of the Law: A Presumption of Access

FOIL is based on a presumption of access. State and local government agencies are required to disclose their records, unless one or more exceptions to rights of access listed in the law can properly be asserted. In general, the exceptions are based on the potential for harm as a

consequence of disclosure. Harm might involve disclosure resulting in an unwarranted invasion of personal privacy, the inability of the government to carry out its duties effectively on behalf of the public, or injury to the competitive position of a commercial enterprise. Similarly, meetings of public bodies subject to the Open Meetings Law must be held open to the public, unless there is a basis for entry into executive session, a portion of a meeting during which the public may be excluded. Discomfort and embarrassment do not constitute appropriate grounds for denying access to government information.

HIGHLIGHTS OF 2010

Legislation amending the Open Meetings Law

Three bills to amend the Open Meetings Law described below were enacted in 2010. Two are based directly on recommendations offered in previous reports, and the third is apparently based on an advisory opinion prepared by the Committee that was cited in a judicial decision.

Recording and Broadcasting Open Meetings

Until the enactment of one of the bills, there had been no statute dealing with the ability to record or broadcast open meetings of public bodies subject to the Open Meetings Law. Judicial decisions, however, focused on two basic principles: first, that public bodies have the right to adopt rules and procedures concerning their own proceedings; and second, that those rules and procedures must be reasonable. The decisions uniformly reached the same conclusion, that any rule prohibiting or limiting the ability of a person to record or broadcast an open meeting must be reasonable. Opinions of the Committee and judicial decisions have indicated that the public may record and broadcast open meetings, so long as the use of recording or broadcasting equipment is neither disruptive nor obtrusive. The bill reflects that conclusion, indicating that the public may record or broadcast open meetings, that a public body may adopt rules concerning the ability to do so, and that the Committee will adopt model rules to be used as a guide for public bodies.

Enforcement of the Open Meetings Law

Last year, Governor Paterson vetoed a bill that would have given a court the authority to fine public bodies in those instances in which it was determined that they violated the Open Meetings Law. The rationale for the veto, in part, involved the reality that such fines would ultimately be borne by taxpayers. The bill was recast to offer a court a different, and in our opinion, more positive means of encouraging compliance with law. Rather than ordering payment of a fine, a court now has the authority to order a public body to attend a training session provided by the Committee on Open Government. Should a court issue such an order, the session would be open to the public, thereby offering an educational opportunity not only to members of the public body that is the subject to the order, but also to members of the public and

representatives of nearby governmental entities who choose to attend or view the session if it is recorded.

The legislation also closed a loophole in the enforceability of the Open Meetings Law. Section 107 had given a court the authority to invalidate action taken in private in violation of law. The problem involved the reality that substantial deliberations might have occurred in private that should have been conducted in public, followed by a public vote. Because the vote occurred in public, it had been held that the ability to invalidate did not exist. Under the new provision, a court is given the authority, albeit discretionary, to invalidate action, even if a vote is taken in public, when the vote was preceded by secret discussions held in contravention of law.

We offer special congratulations to Assemblymember RoAnn Destito, who sponsored both bills referenced above and has been a constant proponent of open government laws in her capacity as Chair of the Assembly Committee on Government Operations.

Site of Meetings

Due to events critical in a community, there may be substantial interest in attending meetings of public bodies. In some instances, more would like to attend than the usual meeting facility will accommodate. This new provision is based on common sense, as well as common courtesy. In brief, if it is known in advance of a meeting that more people will likely want to attend than the usual site of the meeting will accommodate, a public body must make reasonable efforts to conduct the meeting in a location that will accommodate those likely interested in attending.

We continue to grapple with those issues and seek reasonable means of giving effect to FOIL while concurrently recognizing the burdens imposed on government agencies. It is noted that other jurisdictions are facing the same kinds of issues, and we will continue to attempt to develop reasonable solutions.

International Consultation

Freedom of information has become an international movement, and there are now approximately 80 nations that have enacted access to information laws. Because the Committee is one of the few governmental entities of its kind in the United States, and due to its reputation for expertise, its Executive Director and Assistant Director, respectively Robert Freeman and Camille Jobin-Davis, as well as one of its members, David Schulz, have frequently been asked to share their experience with government officials and representatives of non-governmental organizations and the news media from other nations.

This year they met with representatives from Azerbaijan, Afghanistan, and Mexico. Freeman spoke recently during his second visit to the Mexican state of San Luis Potosi, where there is interest in taking steps beyond common open government efforts. The concept of an open meetings law is largely limited to the United States, but government officials there sought

information concerning the New York experience relative to its Open Meetings Law. He also shared his views regarding efforts in San Luis Potosi to make open government laws "pro-poor" by encouraging the use of the infrastructure of its libraries by those who lack resources or skills needed to improve their lives.

Freeman also prepared an article for the International Senior Lawyers Project, a non-profit organization that seeks to bring a variety of skills and experience to those in need throughout the world. The article described his work in fostering the enactment and implementation of access to information laws over the course of years in Japan, China, Eastern Europe, South America and Mexico.

Continuing Legal Education (CLE)

Attorneys in New York are required to partake in a certain number of hours of continuing legal education to maintain their license to practice law. Both Freeman and Jobin-Davis have been certified by the New York State CLE Board to provide courses to attorneys.

Although CLE courses are given throughout the year, often at the request of government agencies or associations, the Committee for several years has conducted a program with an offer of CLE credit to state agency attorneys, free of charge, and others who have a need for training relating to open government laws. This year, we had the opportunity to conduct a program for approximately 250 people who physically attended, as well as remote attendance by means of a webcast for assistant attorneys general throughout the state. Additionally, the program was video recorded and is available for CLE credit to all state agency attorneys on the Attorney General's website.

FOIL Continues To Save Money

In a recent edition of *Newsweek* regarding the "best countries" based on a variety of measures, one of the articles involved transparency entitled "Pulling the Hand Out of the Till." The first and best method of cracking down on waste and fraudulent expenses according to Transparency International, the Basel Institute on Governance and the Brookings Institution, is to "get government out of the shadows." The nation at the top of the list is "Sweden, a star performer in the corruption rankings, [which] has cleaned up government by opening virtually all government records to the public."

We read nearly every day of instances in which public money is expended. In the great majority of circumstances, it is wisely spent. In others, however, there may be questionable or even fraudulent expenditures or claims. Often we learn of those matters as a result of requests made pursuant to FOIL. As the Court of Appeals has recognized, FOIL is a primary tool used to expose waste, fraud and abuse [Capital Newspapers v. Burns, 67 NY2d 50, 565-566 (1986)].

A clear example of the use of FOIL to discover fraud involved articles published by the *New York Times* several years ago concerning fraudulent claims by Medicaid providers. The

series was based on an analysis of data acquired from the State Department of Health in response to a FOIL request. Earlier this year, the Office of the Attorney General reported that in 2009 it recovered more than $283 million and recorded 148 Medicaid-related convictions. It also reported that the Medicaid Fraud Unit recovered more than $660 million in the past three years.

Those recoveries emanated from a single FOIL request and proves the statement appearing on the cover page of this report: Sunlight is the best disinfectant.

Symposium: E-FOIL: Issues of Access in the Digital Age

Developments in information technology coupled with amendments to FOIL enacted in 2008 have created new issues. FOIL has since 1978 required that an applicant must "reasonably describe" the records sought, and in 1986, the Court of Appeals held that the requirement is met when an agency has the ability to locate and identify requested records, irrespective of the volume of the material that can be found (Konigsberg v. Coughlin, 68 NY2d 245). Today, however, due to advances in technology, requests have been made, particularly for email communications pertaining to a named individual or subject, that has led to the identification and retrieval of thousands of records. Review of those records to determine the extent to which they must be disclosed is time consuming and, therefore, costly.

In an effort to bring together representatives of government agencies that have dealt with onerous requests involving records maintained electronically, those who have made the requests, and experts in information technology, a symposium was held on E-FOIL issues on December 4, 2009 at the Albany Law School. Miriam Nisbet, appointed at the National Archives and Records Administration to the newly created position of Director of the Office of Government Information Services served as keynote speaker. The Symposium was developed by the Committee and the Law School's Government Law Center, and joining them as co-sponsors of the event were the New York State Bar Association's Committee on Attorneys in Public Service and its Municipal Law Section.

We continue to grapple with these issues and seek reasonable means of growing effect to FOIL while concurrently recognizing the burdens imposed on government agencies. It is noted that other jurisdictions are facing the same kinds of issues, and we will continue to attempt to develop reasonable solutions.

Kudos

Robert Freeman was "loaned" to the Committee in 1974 and has served as Executive Director since 1976. Based on his commitment to open government, he was honored as one of the "Heroes of the 50 States" by the Society of Professional Journalists and inducted by the National Freedom of Information Coalition into the Open Government Hall of Fame. He was also honored by the New York News Publishers Association through receipt of the John Peter Zenger Award.

THE FUTURE

While we cannot be certain of what lies ahead, it is clear that our open government laws have become an essential element in the relationship between the public and the government in New York. It is also clear that rights conferred by open government laws are being used increasingly by the public. As a consequence, the demand for the Committee's services is also increasing.

We have sought to provide our services more efficiently, effectively and cheaply via the use of information technology. Hundreds of thousands have visited our website, which includes a variety of material relating to open government laws, including the text of the laws and regulations, frequently asked questions, publications that describe those provisions, and even a video of a training session that includes 27 segments concerning FOIL and the Open Meetings Law.

Most important for many is online access to the written advisory opinions prepared by staff. Although the opinions are not binding, it is our hope that they are educational and persuasive, and that they enhance knowledge of, and compliance with, open government laws. Since the Committee's creation in 1974, approximately 23,000 opinions have been prepared, and those of value have been identified by key or word or phrase in alphabetical indices relating to FOIL and the Open Meetings Law. Those listings are intended to be intuitive. If a person has a question regarding access to payroll records, he/she can go to the FOIL listing, click on to "P" and scroll down to "Payroll information." The opinions prepared on that subject since 1993 are available in full text. If opinions cannot be found via the alphabetical key phrase listing, there is a search box in which a word or phrase can be entered in order to connect to the text of opinions containing those items.

Becoming more efficient has become critical, for the staff of the Committee has diminished and now consists of only two employees, the Executive Director and the Assistant Director. The Committee's support staff, which had been two, has been lost, and due to the hiring freeze, those positions have not been filled.

Due perhaps in part to its need to function more effectively, the staff has been fortunate to have engaged the resources of the Rockefeller Institute, the Graduate School of Public Administration at the State University at Albany. Three graduate students in a class conducted by Dr. Theresa Pardo, Executive Director of the University's Center for Technology in Government, have prepared recommendations designed to enable staff to carry out its tasks more efficiently and with better service to the public. We are grateful for their efforts and expect to implement their recommendations to the extent practicable.

LEGISLATIVE PRIORITIES FOR 2010

Proactive Disclosure

Recommendation: Require that Certain Records be Posted Online

LEGISLATIVE HISTORY: Legislation has been introduced that would require that records and data be posted on the internet. No bill, however, has as yet been reported from a committee of the Senate or Assembly to the floor for a vote by either house. It is likely in our view that legislation will be introduced, or perhaps that an executive order will be issued, that would require that agencies place records on their websites so that the public need not submit formal requests pursuant to FOIL, and agencies will not be burdened by their obligation to respond to requests. That is the essence of proactive disclosure. Many agencies have begun to post records on their websites, and we believe that process will continue and become widespread, even if no law imposes such a requirement.

> "The modern world is awash in information. And the flow of information is getting faster all the time. This has been developing for some time, thanks to wireless, optical and satellite networks. Now the speed standard and the public's expectation are being set by search engines that can return hundreds of millions of results in a fraction of a second. In everyday life, where it seems that any conceivable question can be answered with pages of data in less than a second, how do we justify government taking days, weeks or months to respond?
>
> "…Changing historical bureaucratic and legal practices won't be easy, but it's past time for the definition of response time to be extended beyond technical system transaction processing to include the full exchange of useful information. To put it another way, government must be able to answer questions faster. Getting there will take a change in mentality and the tools we use. It's a change that should be initiated from inside government, not forced upon it from the outside. We don't have long. It's time for government to start feeling 'the need for speed.' "
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> *Government Technology,* September, 2010

How do we accomplish the "need for speed", especially when, as the article indicated, "the current generation of Internet users armed with iPhones, iPads, BlackBerries and Androids aren't likely to grow more patient and understanding over time"? How can we ensure that the needs of the public in a changing world can be met?

There will always be requests for records made pursuant to FOIL, and there will always be a need to attend meetings of public bodies to understand the decision making process. Nevertheless, government can be a better partner with the public through proactive disclosure, by making records and data available online as a matter of practice and policy, if not law. When the government takes the initiative by placing records and data on their websites, the need for the public to formally request records under FOIL can be diminished or in some instances eliminated; concurrently, the need and obligation of a government agency to respond to a request may in many cases be eliminated.

Identifiable advantages of proactive disclosure are obvious. The public can gain access to information of importance quickly, easily, and at no cost; the government, by anticipating interest in certain information, eliminates the need to engage in the administrative tasks associated with receiving requests for records, locating the records, making them available after producing photocopies, printouts, or downloading information onto a computer tape or disk, calculating and collecting a fee for copying and finally, putting documents in the mail. In short, a requirement to engage in proactive disclosure would benefit both the public and the government. By disclosing data in easy to use formats, the public can create new sites and applications in ways that government agencies have never considered. Proactive disclosure can spur innovation, creativity and economic development.

Examples of records that might be required by such an amendment could be:

- Agendas and minutes of meetings;
- Agencies' most recent audits;
- Agency contracts that may involve matters of public interest or importance;
- Budget information;
- Names of licensees or permit holders; and
- Recipients of governmental grants.

Posting databases online can enable citizens to avoid areas of high crime, to find sidewalk cafes, property values, street cleaning schedules – numerous items of information that can enable the public to be safer, to enjoy greater convenience and to enrich their lives. Through relevant and timely disclosure, the relationship between the public and government can be strengthened, and the goal of achieving greater transparency enhanced.

We believe that there are key ingredients inherent in a program of proactive disclosure. In brief, records and data should be posted online when they are clearly accessible to the public under FOIL, and when they are of substantial public interest, need or utility. They should also be arranged in a manner in which even those without sophisticated computer skills can locate and retrieve information of interest.

While some have suggested that all records should be accessible under FOIL, or that all records that have been disclosed pursuant to FOIL requests should be posted, we do not believe that a program of proactive disclosure should be so extensive. The universe of records accessible

under FOIL is never ending and constantly expanding, and the burden of making all such records available online would be staggering. Moreover, many disclosures involve records of interest to a single individual or small group, and there may little need or justification for posting those records on the internet.

Records Discussed at Meetings

Recommendation: Records discussed at open meetings should generally be available prior to or at meetings.

LEGISLATIVE HISTORY: This proposal was the subject of a recommendation offered in past years, as well as legislation that was approved by the Assembly in 2010 but was stalled in the Senate. In the Committee's opinion, the language of its proposal would better serve the public than the bill.

By way of background, often a public body will review and discuss a particular record at an open meeting, but the record is not available or distributed to people attending the meeting. For instance, a board in reviewing its expenditures might refer to an item appearing on "page 3, line 6". While that information is referenced at a meeting, the public may be unaware of the contents of the record that is the subject of the discussion. Therefore, although the meeting is open, the public is unable to know what the discussion specifically concerns.

In addition, there are occasions when public access to a record may be denied under the FOIL, but the discussion of the record must be conducted during an open meeting. For instance, if a school superintendent writes a memorandum suggesting changes in policy, the memorandum may be considered advisory. Therefore, it could be withheld under the FOIL [§87(2)(g)]. Nevertheless, when the school board initiates the discussion of the proposed policy changes, it must be done in public session, as there is no basis for entry into an executive session.

To enhance the public's right to observe the decision-making process and to make the Open Meetings Law more meaningful, it has been recommended that many of the records scheduled to be discussed or presented at open meetings be available to the public prior to or at a meeting.

The Committee's recommendation offered in last year's report suggested that §103 of the Open Meetings Law be amended to require, in general, that records scheduled to be discussed at open meetings be made available either prior to or at meetings. The governor vetoed similar legislation in 2008, and our 2009 proposal involved adding a new subdivision (d) to §103 of the Open Meetings Law as follows:

> "Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or amendment thereto, that are scheduled to be

> the subject of discussion by a public body during an open meeting shall be made available, to the extent practicable, prior to or at the meeting during which such records will be discussed. Such records shall be posted on the website of the agency with which the public body is affiliated, as soon as practicable, but not less than 24 hours prior to a meeting during which they will be discussed, and a reasonable number of copies of such records shall be made available, to the extent practicable, at or prior to the meeting."

The proposal appearing above was introduced in both the Assembly and the Senate, and in an effort to respond to misgivings expressed by local government associations and encourage its passage, it was amended and approved by the Assembly. The bill as amended would provide that:

> "(d) Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that are scheduled to be the subject of discussion by a public body during an open meeting shall be made available, to the extent practicable as determined by the agency or department, prior to or at the meeting during which such records will be discussed. If the agency in which a public body functions maintains a website, such records shall be posted on the website as soon as practicable, as determined by the agency or the department prior to the meeting."

Although the Committee applauds the efforts of the Assembly sponsor of the bill, Assemblymember Amy Paulin, we believe that the amended bill offers unnecessary discretion to agencies and their duty to make records available to the public in a meaningful manner. We urge the State Legislature to strengthen the bill to ensure its usefulness to the public.

Public Employee Payroll Records

Recommendation: Ensure that the names, titles, salaries and public office addresses of public employees are clearly accessible.

Section 87(3)(b) of the Freedom of Information Law has directed for more than 30 years that "Each agency shall maintain…a record setting forth the name, public office address, title and salary of every officer or employee of the agency…" In its original form, the requirement merely referred to an address, and when amended, the provision was clarified to refer to a "public office address", ensuring that it did not envision the disclosure of home addresses. Additionally, §89(7) specifies that home addresses of present or former public employees need not be disclosed pursuant to FOIL. We have consistently advised and agencies have routinely disclosed the payroll list; in fact, the names, titles, salaries of all state employees and the

agencies that employ them are accessible online, having first been posted by the Empire Center for New York State Policy, a non-profit think tank.

The Education Law specifies that charter schools are subject to both FOIL and the Open Meetings Law and, in a recent decision of the Court of Appeals, New York State United Teachers v. Brighter Choice Charter School, (November 18, 2010), the Court sustained the School's denial of access to the names of its employees on the basis of §89(2)(b)(iii). Ordinarily, the purpose of a request is irrelevant. Under §89(2)(b)(iii), however, the purpose or intended use become relevant; that is the only aspect of FOIL in which that is so. It appears in the provision that offers examples of unwarranted invasions of personal privacy and states that such an invasion includes "sale or release of lists of names and addresses, if such lists would be used for solicitation or fund-raising purposes…" The Court's majority cited an earlier decision, Federation of NY State Rifle & Pistol Clubs v. New York City Police Department [73 NY2d 92 (1989)] involving a request for a list that would have been used for solicitation of membership dues and likened this situation to that. That decision, like others involving the exception concerning lists of names and addresses, involved the identities of private citizens and their residence addresses.

The dissenting opinion by Judge Ciparick, which was joined by Judges Lippman and Jones, is, in our view, consistent with judicial precedent and the intent of FOIL, stating that:

> "…we…noted in the Federation case: "It is precisely because no governmental purpose is served by public disclosure of certain personal information about private citizens that the privacy exception…fits comfortably within FOIL's statutory scheme"….Two important points follow from this statement, which distinguish Federation from this case. First, here, the public disclosure of personal information is not about private citizens, but about public employees - - employees for whom charter schools are specifically required by FOIL to maintain certain information…" (emphasis added by Judge Ciparick).

The dissent also found that disclosure involved a public purpose involving the ability of employees to organize and form public employee organizations.

Rather than merely requiring that "Each agency shall maintain…" a payroll list as FOIL currently requires, §87(3) should be amended to provide as follows: "Notwithstanding any other provision in this article, each agency shall maintain and make available…a record setting forth the name, public office address, title and salary of every officer or employee of the agency…"

Recognizing that Access Delayed is Access Denied: Expediting Appeals in FOIL Litigation

Recommendation: Expedite Appeals in FOIL Litigation

LEGISLATIVE HISTORY: The language offered in this proposal was introduced in both houses of the Legislature in 2010. Its enactment would encourage agencies to comply with FOIL, thereby saving the taxpayers' money through the development of judicial precedent that negates the necessity to initiate lawsuits.

Recent amendments provide the courts with wider discretionary authority to award attorney's fees to persons denied access to records due to a failure to comply with FOIL or closing meetings in violation of the Open Meetings Law, however, most members of the public are reluctant to challenge even clear violations of law. Initiating a judicial proceeding involves time and money, and merely a possibility, but not a guarantee, that there will be an award of attorney's fees.

In circumstances in which delays in decision making create unfairness or a restriction of rights, the law includes an expedited process for determining appeals. Because access delayed is often the equivalent of access denied, we recommend that FOIL be amended.

If a denial of a request for records is overturned by a court, an agency may file a notice of appeal and take up to nine months to perfect the appeal. Such delay is unacceptable. When the process of appealing begins, there is a statutory stay of the court's judgment that remains in effect until the appeal is determined by the Appellate Division.

The Committee recommends that FOIL be amended as follows:

> §89(4)(d) Appeal to the appellate division of the supreme court must be made in accordance with law, and must be filed within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry. An appeal taken from an order of the court requiring disclosure of any or all records sought shall be given preference, shall be brought on for argument on such terms and conditions as the presiding justice may direct upon application of any party to the proceeding, and shall be deemed abandoned when an agency fails to serve and file a record and brief within two months after the date of the notice of appeal.

Tentative Collective Bargaining Agreements

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

LEGISLATIVE HISTORY: The following was introduced in both houses of the Legislature in 2010 and would confirm the advice rendered by the Committee on Open Government in several written opinions.

The Committee urges the enactment of the following amendment, which would provide that an agency may withhold records that:

> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations*:*
>
> (i) *provided, however, that records indicating the proposed terms of a public employee union or school district collective bargaining agreement together with facts describing the economic impact and any new costs attributable to such agreement, contract or amendment shall be made available to the public immediately following approval of such proposed terms by a public employee union, and at least two weeks prior to the approval or rejection of such proposed terms by the public employer when such records are sent to the members of the public employee union for their approval or rejection; and*
>
> (ii) *that copies of all proposed public employee union or school district collective bargaining agreements, employment contracts or amendments to such contracts together with facts describing the economic impact and any new costs attributable to such agreement, contract or amendment be placed on the municipal or school district websites, if such websites exist, and within the local public libraries and offices of such school districts at least two weeks prior to approval or rejection of such proposed public employee union or school district proposed collective bargaining agreements or action taken to approve other employment contracts or amendments thereto…"*

Many situations have arisen in which tentative collective bargaining agreements have been reached by a public employer, such as a school district, and a public employee union, such as a teachers' association. Even though those agreements may involve millions of dollars during the term of the agreement, rarely does the public have an opportunity to gain access to the agreement or, therefore, analyze its contents and offer constructive commentary. Despite the importance of those records, there are no judicial decisions dealing with access for a simple

reason: before a court might hear and decide, the contract will have been signed and the issue moot with respect to rights of access.

We point out that § 87(2)(c) of FOIL authorizes an agency to withhold records when disclosure would "impair present or imminent contract awards or collective bargaining negotiations." It has been advised that the exception does not apply in the situation envisioned by the legislation, for negotiations are no longer "present or imminent"; they have ended. More significantly, the purpose of the exception is to enable the government to withhold records when disclosure would place it, and consequently the taxpayer, at a disadvantage at the bargaining table. It has been held, however, that § 87(2)(c) does not apply when both parties to negotiations have possession of and can be familiar with the same records, when there is "no inequality of knowledge" regarding the content of records. When a proposed or tentative agreement has been distributed to union members, perhaps hundreds of employees, knowledge of the terms of the agreement is widespread, but the public is often kept in the dark.

We urge that the legislation be enacted in 2011.

ADDITIONAL LEGISLATIVE PROPOSALS

Police Officers' and Certain Others' Personnel Records

Repeal § 50-a of the Civil Rights Law, bringing records of police and correction officers and professional firefighters, firefighter/paramedics and peace officers employed by the Division of Parole within the coverage of FOIL.

A statute enacted more than 30 years ago, §50-a of the Civil Rights Law prohibits the disclosure of "personnel records" concerning police officers that "are used to evaluate performance toward continued employment or promotion." In our view, that law should never have been enacted, and it should be repealed.

FOIL states that a government agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Although that standard is subject to a variety of interpretations, and society's beliefs about privacy are constantly changing, the courts have determined time and again that public officers and employees enjoy less privacy than others, for those persons are required to be more accountable than others. Further, in a variety of circumstances, the courts have determined that disclosure of those items that are relevant to the performance of a public employee's duties are generally accessible, for disclosure in those instances would result in a permissible, not an unwarranted, invasion of personal privacy.

When a public employee is found to have engaged in or admitted to having engaged in misconduct, it has been held on numerous occasions that records reflective of those outcomes are accessible. That is so with respect to the great majority of public employees - - teachers, clerks,

sanitation workers, secretaries, even judges. But those same records as they relate to police officers are confidential; they cannot be disclosed unless a police officer consents or a court orders disclosure.

The Court of Appeals in construing § 50-a found that it "was designed to limit access to said personnel records by criminal defense counsel who used the contents of the records, including unsubstantiated and irrelevant complaints against officers to embarrass officers during cross-examination" (Capital Newspapers v. Burns, *supra*, 568). While the intent of the statute may have merit, it overlooks a critical reality: the judge has control over the courtroom, and lawyers and judges ensure that a jury and the public do not learn about the kind of material that is shielded by § 50-a.

Equally unfortunate are the amendments to that statute. Other employee groups have contended that if police officers enjoy confidentiality protection, they should as well, even though their work would rarely involve being placed on the stand in a litigation context, and they would rarely, if ever, be placed in a situation in which they would be victims of the embarrassment sought to be avoided. Those amendments now extend § 50-a to correction officers, professional firefighters, firefighter/paramedics and peace officers within the Division of Parole.

We point out that if a complaint, an allegation or a charge is made against a public employee, it has been held that those records, as well as opinions concerning performance, can be withheld. Those are the kinds of records that the Legislature sought to protect by enacting § 50-a, and they would remain beyond the scope of rights of access conferred by the FOIL if § 50-a is repealed.

Most importantly, because of § 50-a, those public employees who have the most power over our lives are the least accountable. If a police officer, a correction officer or a professional firefighter has broken the rules, the public should have the right to know.

In short, we call on the Legislature to repeal § 50-a of the Civil Rights Law.

Mandatory Award of Attorney's Fees Under FOIL

Recommendation: Mandatory Award of Attorney's Fees Under FOIL

The advisory opinions rendered by the Committee are persuasive and serve to educate and encourage compliance with open government laws, but they do not guarantee compliance.

The FOIL provides a court with discretionary authority to award attorney's fees in a lawsuit brought under FOIL. When a person denied access substantially prevails and the court

determines that the agency had no reasonable basis for denying access or failed to comply with the time limitations for responding to requests or appeals, a court may order an award.

The Committee recommends that the award of attorney's fees be mandatory, not discretionary, when a court finds the conditions described to be present.

Political Caucuses

Recommendation: Limit the exemption regarding political caucuses in order to guarantee that public business is discussed in public.

Since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. When a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply.

Section 108(2)(a) of the Open Meetings Law states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

The Committee has always agreed that discussions of political party business held by the quorum of a legislative body may properly be considered in private, and that the Open Meetings Law should not apply to those kinds of discussions. However, as a general matter, public business should be discussed in public.

While the exemption is applicable to local legislative bodies as well as the State Legislature, it is clear that its impact is most significant at the local government level. The public has the ability to know when caucuses are held by the State Legislature, for the intent to hold a caucus is publicly announced, usually from the floor of the Senate or the Assembly. Further, there may be several opportunities for the public to express its views to the Legislature and the Governor prior to the approval of a bill. Those opportunities may not exist at the local government level due to the absence of checks and balances that exist in the State Legislature,

and due to the possibility that the public may never know that a caucus will be or has been held by a local legislative body.

The Committee supports efforts to narrow the application of the caucus exemption in relation to local legislative bodies. An example of legislation to amend §108 of the Open Meetings Law might provide:

> "the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, during the period of discussion of matters of political party business, including the development of political party policy on issues of public business, without regard to (i) [the subject matter under discussion, including discussions of public business, (ii)] the majority or minority status of such political committees, conferences and caucuses or [(iii)] (ii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

The Committee urges the enactment of the legislation and would support legislation that narrows the application of the exemption concerning political caucuses that permits partisan political matters to be discussed in private when those matters relate to public business, so long as it is clear that public business must be discussed in public and that the exemption is not inconsistent with the overall intent of the Open Meetings Law.

The Public Employees Reform Act/Commission on Public Integrity

Recommendation: Records and meetings of the Commission on Public Integrity should be subject to FOIL and the Open Meetings Law.

The "Public Employee Ethics Reform Act of 2007", formerly known as the Ethics in Government Act ("the Act"), establishes strong ethical standards concerning the conduct of public officials. The Act is intended to ensure that the public has confidence in those who govern.

Unlike the FOIL or the Open Meetings Law, both of which are based on a presumption of openness, the opposite presumption exists in the Act. Unquestionably, there are good and valid reasons for withholding records or closing meetings when issues arise concerning the conduct of public officers and employees. If the FOIL and the Open Meetings Law fully applied to the Commission, it would have the capacity to restrict access to records or close meetings in a manner that provides the Commission with the protection it needs to carry out its duties effectively. Ethics boards and committees at the local government level are subject to open

government laws, and they function effectively by protecting privacy as appropriate and enhancing the accountability of government. The records and meetings of the Commission on Public Integrity are, however, exempt from both FOIL and the Open Meetings Law.

Subdivision (17) of §94 of the Executive Law states that, notwithstanding the provisions of the FOIL, only certain enumerated records of the Commission on Public Integrity are accessible to the public. Similarly, paragraph (b) states that meetings and proceedings of the Commission are not subject to the Open Meetings Law. Based on the principles underlying the FOIL and the Open Meetings Law, the Committee on Open Government recommends that the records and meetings of the Commission on Public Integrity be subject to those laws. The exceptions in those laws authorizing denials of access to records or closed meetings provide the Commission with the ability to function without adverse effect.

Cameras in the Courts

Recommendation: Authorize reasonable use of cameras.

Despite the issuance of several decisions indicating that the statutory ban on the use of cameras is unconstitutional, legislation remains necessary. Especially in consideration of the successful use of cameras in the *Diallo* trial, as well as other proceedings around the state, the Committee reaffirms its support for the concept, subject to reasonable restrictions considerate to the needs of witnesses.

BALANCING PRIVACY AND ACCESS

"E911" Records

Recommendation: Disclose or withhold E911 records pursuant to FOIL.

E911 is the term used to describe an "enhanced" 911 emergency system. Using that system, the recipient of the emergency call has the ability to know the phone number used to make the call and the location from which the call was made. A section of County Law prohibits the disclosure of records of E911 calls. However, that statute is either unknown to many law enforcement officials, or it is ignored. Soon after the Lake George tour boat sank and twenty people died, transcripts of 911 calls were published. While those who made the emergency calls were not identified, the disclosure of the transcripts clearly violated existing law.

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

privacy, to protect victims of or witnesses to crimes, to preclude interference with a law enforcement investigation, FOIL clearly provides grounds for withholding the records.

We note that the County Law does not apply to New York City, which has for years granted or denied access to records of 911 calls as appropriate based on FOIL.

Sex Offenses

Recommendation: Ensure that privacy of victims of sex offenses, not that of defendants, is protected.

Section 50-b of the Civil Rights Law pertains to victims of sex offenses, and subdivision (1) of that statute provides that:

> "The identity of any victim of a sex offense, as defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law, or an offense involving the alleged transmission of the human immuno-deficiency virus, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

In addition, §50-c of the Civil Rights Law states that:

> "Private right of action. If the identity of the victim of a sex offense defined in subdivision one of section fifty-b of this article is disclosed in violation of such section, any person injured by such disclosure may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff."

Due to the breadth and vagueness of the language quoted above, public officials have been reluctant to disclose any information concerning sex offenses for fear of being sued.

The Committee recommends that the second sentence of §50-b be amended to state that:

> No <u>portion of any</u> report, paper,…which identifies such a victim shall be available for public inspection.

Finally, §50-c refers to any disclosure made in violation of §50-b, whether the disclosure is intentional or otherwise, inadvertent, or made after the victim's identity has been disclosed by other means. There should be standards that specify the circumstances under which a disclosure permits the initiation of litigation to recover damages, and we recommend that §50-c be amended as follows:

> "Private right of action. If the identity of the victim of an offense is disclosed in violation of section fifty-b of this article and has not otherwise been disclosed, such victim [any person injured by such disclosure] may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff."

TECHNICAL IMPROVEMENTS

Inappropriate Denials of Access: A Recommendation for Relief for the Taxpayer

Recommendation: An unsuccessful proceeding to stop disclosure should require payment of attorney's fees to the agency.

Section 89(5) of the FOIL concerning disclosures that would cause substantial injury to the competitive position of a commercial enterprise serves as the only instance in which a person or entity may attempt to prevent a government agency from disclosing records, even when the agency believes that the records must be disclosed. In that situation, the person or entity may initiate a judicial proceeding to block disclosure, and the government agency will be a party to the proceeding. In those cases, the agency will be required to expend government resources and public money.

If the person or entity initiates a judicial proceeding and fails to meet the burden of proof by demonstrating that disclosure would result in the harm described in one or more of the exceptions to rights of access, the government agency and the taxpayers it serves should not be penalized financially. On the contrary, the person or entity seeking to prevent disclosure should be required to reimburse the government for any litigation or associated costs.

To achieve that goal, the Committee recommends that a new paragraph (i) be added to §89(5) as follows:

> "In any proceeding commenced to review an adverse determination pursuant to paragraph (c) of this subdivision in which the person or entity initiating such proceeding fails to substantially prevail by proving that the records at issue may properly be withheld from the public, the court in such proceeding

> shall direct such person or entity to remit to the agency involved reasonable attorney's fees and other litigation costs reasonably incurred by the agency."

Streamlining Trade Secret Protection Procedure

Recommendation: Require a commercial enterprise to periodically renew its request that records be kept confidential.

The FOIL includes unique and innovative provisions concerning the treatment of records required to be submitted to a state agency by a commercial enterprise pursuant to law or regulation. They are intended to provide a procedural framework for consideration of the so-called "trade secret" exception to rights of access.

Section 87(2)(d) of FOIL permits an agency to withhold records to the extent that they:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Under §89(5) of FOIL, a commercial enterprise that is required to submit records to a state agency may, at the time of submission, identify those portions of the records that it believes would fall within the scope of the exception. If the agency accepts the firm's contention, those aspects of the records are kept confidential. If and when a request for the records is made under the Freedom of Information Law, the agency is obliged to contact the firm to indicate that a request has been made and to enable the firm to explain why it continues to believe that disclosure would cause substantial injury to its competitive position. If the agency agrees with the firm's claim, the person requesting the records has the right to appeal the denial of access. If the determination to deny access is sustained, the applicant for the records may seek judicial review, in which case the agency bears the burden of proof. However, if the agency does not agree that disclosure would cause substantial injury to the firm's competitive position, the firm may appeal. If that appeal is denied, the firm has fifteen days to initiate a judicial proceeding to block disclosure. In such a case, the firm has the burden of proof.

The request for confidentiality remains in effect without expiration, unless and until an agency seeks to disclose on its own initiative or until a FOIL request is made. Because there is no expiration, agencies are required to implement the procedure in §89(5), often years after a request for confidentiality was made.

To streamline the procedure and reduce the burden on state agencies, §89(5) should be amended as follows:

> 5.(a)(1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency tentatively except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be tentatively excepted from disclosure.
>
> (1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records tentatively except such information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be tentatively excepted from disclosure.
>
> (2) The request for an exception shall be in writing, shall specifically identify which portions of the record are the subject of the request for exception and shall state the reasons why the information should be tentatively excepted from disclosure. Any such request for an exception shall be effective for a three-year period from the agency's receipt thereof. Provided, however, that not less than sixty days prior to the expiration of the then current term of the exception request, the submitter may apply to the agency for a two-year extension of its exception request. Upon timely receipt of a request for an extension of an exception request, an agency may either (A) perform a cursory review of the application and grant the extension should it find any justification for such determination, or (B) commence the procedure set forth in paragragh (b) of this subsection to make a final determination granting or terminating such exception.
>
> (3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be tentatively excepted from disclosure and be maintained apart by the agency from all other records until the expiration of the submitter's exception request or fifteen days after the entitlement to such exception has been finally

determined, or such further time as ordered by a court of competent jurisdiction.

(b) During the effective period of an exception request under this subdivision, on the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;

(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;

(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the committee on ~~public access to records~~ open government.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision:

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.

(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on ~~public access to records~~ open government. The notice shall contain a statement of the reasons for the determination.

(d) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision.

(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.

(f) Where the agency denies access to a record pursuant to paragraph (b) of this subdivision in conjunction with ~~(d) of~~ subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.

(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.

(h) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

SERVICES RENDERED BY THE COMMITTEE

6,001 TELEPHONE INQUIRIES

572 WRITTEN ADVISORY OPINIONS

90 PRESENTATIONS

THOUSANDS TRAINED

The Committee on Open Government offers advice and guidance orally and in writing to the public, representatives of state and local government, and to members of the news media. During the past year, with a staff three and recently, two, the Committee responded to more than 6,000 telephone inquiries. Nearly half came from state and local government officials, 32% came from the public, and 18% from the news media. Informal responses to many hundreds of email communications were also given.

Based on its reputation for fairness, impartiality and expertise, it is clear that the government, the public and the news media rely on the Committee on Open Government as a source of guidance. In addition, the staff gave 90 presentations, the most in its history, before government and news media organizations, on campus and in public forums, training and educating thousands of persons concerning public access to government information.

Use of the Committee's Website

Since its creation in 1974, the Committee has prepared more than 23,000 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 identified by means of a series of key phrases in separate listings pertaining to the FOIL and the Open Meetings Law. The full text of those opinions is available through the website, and the listings are updated periodically to insure that interested persons and government agencies have the ability to review opinions recently rendered.

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

- model forms for email requests and responses
- regulations promulgated by the Committee (21 NYCRR Part 1401)
- "Your Right to Know", a guide to the FOI and Open Meetings Laws that includes sample letters of request and appeal
- "You Should Know", which describes the Personal Privacy Protection Law
- An educational video concerning the Freedom of Information and Open Meetings Laws consisting of 27 independently accessible subject areas

- Responses to "FAQ's" (frequently asked questions)
- The Committee's latest annual report to the Governor and the Legislature
- "Issues of Interest", which describe matters of broad public interest and significant developments in legislation or judicial decisions

Continuing Legal Education

Attorneys are required to engage in continuing legal education (CLE) as a means of sustaining their licenses to practice law, and both the Committee's Executive and Assistant Directors have been certified as CLE providers and taught numerous courses for which attorneys have gained credit toward their requirements. As providers offering credit at no charge, they have taught courses for hundreds of state and municipal attorneys, thereby saving the taxpayers thousands of dollars.

Most recently, the Committee collaborated with the Office of the Attorney General in a presentation attended by approximately 250 and webcast for assistant attorneys general throughout the state. The course is also available online for attorneys employed by all state agencies.

STATISTICAL SUMMARY

6,001 Telephone Inquiries

572 Written Advisory Opinions

Since 1980, at the direction of the Committee, its staff has kept logs regarding telephone inquiries. To categorize the users of the Committee's services, the logs have characterized callers as members of the public, state agency officials, local government officials, state legislators and members of the news media. A similar breakdown is developed with respect to requests for written opinions.

Statistics – FOIL

414 Written Advisory Opinions

Public……..….314…..……76%
Local Government…….....63……15%
News Media…….....29……..7%
State Agency……...8……..2%

4,185 Telephone Inquiries

Public……1,420…….34%
Local government…….1,544…….37%

News Media…….708...……..17%
State Agency……414……..……...10%
State Legislators…….99……..……2%

We note that the patterns of inquiries in terms of percentages relating to the groups of callers have generally been consistent during the past several years.

Statistics – Open Meetings Law

152 Written Advisory Opinions

Public…….94……...62%
Local Government…….43…..…….……28%
News Media……4……3%
State Agency…….11…..……..7%

1,670 Telephone Inquiries

Public……467……28%
Local Government……..…..712……43%
News Media……..351……21%
State Agency……..87……..…….5%
State Legislators…….53……..…….3%

As suggested earlier, government officials are frequent users of the Committee's services, and in 2010, as in previous years, the greatest number of inquiries regarding the Open Meetings Law came from local government officials.

Statistics -- Personal Privacy Protection Law

Advisory services were also rendered in connection with the Personal Privacy Protection Law. Six written advisory opinions were prepared at the request of members of the public. With respect to the 146 oral inquiries made concerning that statute, they are as follows:
Public……..43……..29%
Local Government……..13……....9%
News Media……16……..11.5%
State Agency……...66……..45.5%
State Legislators…….....8……..……..5%

Combined Figures regarding the Three Laws

Viewing the statistics presented regarding the three statutes within the Committee's advisory jurisdiction, the 572 written advisory opinions prepared from November 1, 2009 through October 31, 2010 may be categorized as follows:

572 Written Advisory Opinions

Public……408……..…71%
Local Government……...106…….18.5%
News Media……...33……..…….……6%
State Agency……..25……..…….…4.5%

6,001 Telephone Inquiries

Public…….…1,930……32%
Local Government…….……2,269……38%
News Media……..….1,075……....18%
State Agency…….……567……..…9%
State Legislators…….…...160…….....3%

As noted in previous reports, many more inquiries are made regarding the FOIL than the Open Meetings Law. From the Committee's perspective, the reason is clear. In short, state and local government maintain thousands of different types of records. Those records may be the subjects of rights of access under the FOIL, as well as numerous other provisions of law that focus on particular records.

Under the Open Meetings Law, due to its structure and application, the breadth or variety of questions raised is not as significant as those that continually arise in relation to the FOIL. Further, many state agencies fall outside the scope of that law, for they are headed by executives rather than public bodies.

PRESENTATIONS

EDUCATING THE PUBLIC AND GOVERNMENT OFFICIALS

An important aspect of the Committee's work involves efforts to educate by means of seminars, workshops, and various public presentations. During the past year, the staff gave 90 presentations, the most in its history in any given year. The presentations are identified below by interest group for the period of November 1, 2009 to October 31, 2010. Thousands received training and education through those events, and countless others benefitted from the use of the Committee's training video online, as well as materials posted on the website.

Addresses were given before the following groups associated with government:

Central New York Library Association, Utica
Cortland area law enforcement officials, Cortland
Westchester/Putnam School Boards Association, Valhalla
Charter Schools Association, New York City
Association of Towns, Albany
Association of Towns, Rochester
Internal Control Association, Albany
Association of Soil and Water Conservation Districts, Cortland
NYS Association of Counties, Albany (2 presentations)
Dutchess County Association of Town Clerks, Millbrook
Sullivan County Assessors Association, Thompson
Westchester School Boards Association, White Plains
Association of Towns, New York City (2 presentations)
Village of Fairport officials, Fairport
Mid-Hudson Association of School District Clerks, Newburgh
Rockland County Officials, New City
Open Government Summit, CIO/OFT, Albany
NYS Association of Fire Districts, Altamont
Elmira Area Law Enforcement Officials, Elmira
Tug Hill North Country Local Government Conference (2 presentations)
NYS Association of Town Clerks, Saratoga Springs
Sullivan County Officials, Monticello
NY Conference of Mayors, Saratoga Springs
Symposium on Public Records of the Executive, Albany
Local Government Conference sponsored by Assemblyman Hawley, Albany
NYS Association of Clerks of County Legislatures, Wyoming County
Office of the Attorney General, CLE Training, New York City
NYS Association of Personnel and Civil Service Officers, Syracuse
Westchester Library System, White Plains
NYS School Boards Association, Ithaca
Rockland County, Office of the County Attorney (CLE), New City
City of Jamestown, Training, Jamestown
NYS School Boards Association, Islandia
Western New York School Law Conference, Buffalo
NYS School Boards Association, Rochester
Training sponsored by State Archives (CLE), Wheatley Heights
NYS School Boards Association, White Plains
NYS Association of Counties, Buffalo
Northeast Association of Tax Collectors, Lancaster, PA
City of Cortland, training, Cortland
NYS School Boards Association, Lake Placid
NY Conference of Mayors, Training School (2 presentations, CLE)
NYS School Boards Association, Albany
Training sponsored by State Archives (CLE), Brooklyn
NYS School Boards Association, New York City
Delaware-Chenango-Madison-Otsego BOCES, Norwich
CLE co-sponsored by Office of the Attorney General, Albany

Addresses were given before the following groups associated with the news media:

Spotlight Newspapers, Delmar
Cortland Standard, Cortland
New York Press Association, Saratoga Springs
Society of Professional Journalists, New York City
New York News Publishers Association, Albany
Gannett Newspapers, White Plains
Newsday, Melville
Albany area high school journalists sponsored by Times-Union, Albany

Presentations for students include:

Graduate School of Journalism, City University of New York, New York City
Graduate School of Library and Information Science, SUNY/Albany
Graduate School of Journalism, New York University, New York City
Syracuse University, Graduate Schools – Maxwell, Newhouse, Law
Albany Law School
SUNY/Albany
Syracuse University, Maxwell School, Syracuse
Shenzhen government officials, Maxwell School program, Albany

Other presentations include:

New York Civil Liberties Union, Albany
Public Forum, Durham
"Capitol Pressroom", Albany
League of Women Voters, Hamilton County
Beverwyck Senior Citizens Center, Slingerlands
League of Women Voters, Schenectady
Dutchess County Officials (CLE), Poughkeepsie
League of Women Voters – "Students Inside Albany", Albany
Public Forum, Bayport/Blue Point
Public Forum, sponsored by Town of Copake
"Capitol Pressroom", Albany
Public Forum sponsored by Village of Victory
Public Forum, Madison County
League of Women Voters, Warren County
Public Forum sponsored by Town of Greenburgh
Affiliated Brookhaven Civic Organizations, Coram
Assemblyman Latimer – TV program
Assemblymember Paulin – TV program
League of Women Voters, Buffalo
Suffolk Law School, Symposium on MA FOI Law, Boston
Forums sponsored by State of San Luis Potosi, Mexico (2 presentations)
Public Forum sponsored by Town of Southampton, Southampton
Public Forum sponsored by Town of Phillipstown