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**REPORT TO THE GOVERNOR
AND THE
STATE LEGISLATURE
2011**

“PUSH” v. “PULL”: REINVENTING FOIL

“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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“PUSH” v. “PULL”: REINVENTING FOIL

It is imperative that access to government records and meetings be enhanced through the utilization of resources available in the digital age. The Freedom of Information Law (“FOIL”) written during an era when little information was stored or transmitted electronically, requires significant updating to ensure that government capitalizes on technological advances and provides access in a useful and proactive manner. The potential exists for vastly improved transparency at a greatly reduced cost. Action is urgently needed to achieve this potential.

Consider the context in which FOIL was enacted in the 1970’s — high tech was an electric typewriter, and we used carbon paper to make copies — E-mail and the internet were unknown. None of us had PC’s, laptops, blackberries or I-phones. Information technology has completely transformed the world, but our rules governing access to information have yet to catch up and become part of our lives.

The framework of FOIL still starts with a request for a record held by an agency, and the effort on the part of users is likened to “pulling” records out of government. FOIL was built on the premise of agencies maintaining records that are copied and disclosed on paper. Today, records are largely stored and disclosed on electronic storage media, or via email. Many public and private entities are striving to become paperless, and the existing framework imposes costs that new technology and a new FOIL paradigm can reduce. FOIL needs updating to reflect these new realities and to make information available proactively.

I. PROACTIVE DISCLOSURE

A. Positive Impacts

Consistent with evolution of information technology and common practice, the phrase “freedom of information” should take on new meaning in the law. We are at a crossroads, and the time has come for government agencies to “push” records and information out to the public without a request whenever reasonable and able to do so. Such a step will increase citizens’ knowledge, promote economic development and create opportunities for government innovation. Those who want to know what the government is doing or has done should not be required to submit a FOIL request in writing to an agency of state or local government each and every time government information is sought.

It is time for government to engage in “proactive disclosure” — making information available on websites either before the public requests it, or when it is recognized that the information is clearly available and of interest to the public. When that occurs, there is benefit for the government, as well as the public. When government posts information online, it is no longer necessary for the public to submit FOIL requests or for government to expend time, effort and, therefore, money in responding to the requests.

Proactive disclosure, even though not generally required, is already occurring to some extent. The New York City Department of Buildings, for example, has begun posting

information online, including applications for permits and a variety of other materials, searchable by address. An attorney who has worked for years for municipalities was surprised when we advised that there is no requirement that minutes of municipal board meetings be posted online, surprised because so many are now posted as a matter of course. If our property taxes are raised, we might not have to look at paper records after traveling to the office of the assessor to attempt to ascertain whether we have been fairly assessed — we can often find what we need online without contacting the municipality.

B. Proactive Disclosure Internationally: We are Falling Behind

The need to update FOIL is underscored by a comparison of our current disclosure structure with those recently adopted in new democracies around the globe. FOI laws were primarily creations of law in the United States and Canada until the 1990's. With the fall of the Berlin Wall and the proliferation of information technology, the FOI floodgates opened. Today there are some 90 nations that have enacted access to information laws, many of which contain language that provides faster, more efficient disclosure.

1. Mexico

When it was recognized that eight decades of one party rule were likely to come to a close in Mexico, reformers studied our experience and developed a law that contains a series of requirements more modern than American laws enacted in the 1970's. New York has already borrowed from the Mexican experience. In 2006 a FOIL amendment was based directly on a provision in the Mexican law that requires government agencies to accept requests made via email and respond by making records available via email when it is possible to do so with reasonable effort.

Other features of the Mexican law warrant consideration. For example, Mexico has created the *Portal de Obligaciones de Transparencia*, a webpage that concentrates all public information that federal government agencies must proactively disclose electronically. Some of the categories of information accessible via the webpage include:

- Names and salaries of government officials
- Descriptions of agencies' routine functions
- Contracts
- Recipients of Subsidies

2. Brazil

Brazil's new law passed in October will apply to the executive, legislative and judicial branches, as well as non-profit, private entities that receive public funds directly from a government budget. Government bodies will be required to create a "citizens' information service", maintain information in user friendly electronic formats to guarantee access in "an objective, transparent, clear and easily understandable manner."

At a minimum, government bodies will be required to post the following, proactively, online:

- Records of expenditures
- Bids and contracts
- Descriptions of government projects
- Answers to frequently asked questions

3. China

The Chinese government has recognized that citizens should not be required to travel to request and obtain information. The emphasis instead is on proactive disclosure through government websites, particularly with respect to government spending. There is a requirement that certain items known as “the three public budgets”, be disclosed by 98 central government agencies online, including expenditures for:

- Overseas travel
- Receptions
- Vehicles

The point is that many nations – even those that are far from democratic – have had the opportunity to do what we could not have done in the 1970’s: they have built information technology into their laws for the benefit of their citizens and their economies.

C. Proactive Disclosure in Washington, DC and New York: Steps in the Right Direction

In conjunction with President Obama’s directive to federal agencies (January 21, 2009) to function in a more transparent and open manner, the Office of Management and Budget has prescribed guidance for agencies to inform and facilitate online access through what it characterizes as “smart disclosure” (September 8, 2011). Elements of “smart disclosure” include making data machine readable, allowing the information to be processed and analyzed; standardizing vocabularies relating to information issues and the formats in which it is presented to allow for meaningful comparisons; and making information available as rapidly as necessary, sometimes in or near real time.

We congratulate Governor Cuomo for developing an “electronic town hall” known as “CitizenConnects” that encourages the public to participate in state government and share ideas through multiple interactive platforms. That website also provides access to information concerning the Governor’s activities, as well as those involving executive branch agencies. We applaud the leaders of the Senate and Assembly for making information concerning their functions available online. What had been difficult for average New Yorkers to obtain is now available at their fingertips through use of a pc at home, in the office, or at the public library.

D. Building Blocks for Legislation and Proactive Disclosure

Legislation to require proactive disclosure should involve records and data that:

- are clearly accessible under FOIL
- are frequently requested by citizens
- reflect matters of significant public interest
- reduce administrative costs to comply with FOIL

If that series of goals is recognized, proactive disclosure will:

- deter and diminish corruption
- enhance and encourage citizen involvement
- promote economic innovation

Although several bills have been introduced regarding proactive disclosure, most reasonable is the thrust of A. 5867-A introduced by Assemblymembers Kavanagh and Stevenson. The Committee recommends minor alterations in the bill that are included in italics.

In addition to a statement of legislative intent concerning the advances in technology, the bill provides as follows:

7 Records of public interest. 1. Each agency and house of the
8 state legislature shall publish, on its internet website, to the extent
9 practicable, records or portions of records that are available to the
10 public pursuant to the provisions of this article, or which, in consid-
11 eration of their nature, content or subject matter, are *determined by the agency*
to be of substantial
12 interest to the public. Any such records may be removed from the inter-
13 net website when *the agency determines that they are no longer of substantial*
interest to the
14 public. Any such records may be removed from the internet website when
15 they have reached the end of their legal retention period. Guidance on
16 creating records in accessible formats and ensuring their continuing
17 accessibility shall be available from the office for technology and the
18 state archives.
19 2. The provisions of subdivision one of this section shall not apply
20 to records or portions of records the disclosure of which would consti-
21 tute an unwarranted invasion of personal privacy in accordance with
22 subdivision two of section eighty-nine of this article.
23 3. The committee on open government shall promulgate regulations to
24 effectuate this section.
25 4. Nothing in this section shall be construed as to limit or abridge
26 the power of an agency or house of the state legislature to publish

27 records on its internet website that are subject to the provisions of
28 this article prior to a written request or prior to a frequent request.

E. Personal Privacy Issues and Records of County Clerks

The Committee recognizes concern regarding the need to protect personal privacy, the limited resources of agencies, and the absence of an infrastructure in some locations that would preclude implementation.

Social security numbers and home addresses are included in records that have historically been and remain accessible to the public. Those records are found primarily in the offices of county clerks and include records involving mortgages, liens and financial filings. Years ago, before the era of the proliferation of computers, disclosure of social security numbers was innocuous. They were used as identification numbers in the military and often as student ID numbers. Because they have become universal identifiers and can be used to link to numerous items of personal information, they are frequently cited as the entry ways to identity theft.

FOIL has, since its enactment, authorized agencies to withhold records to the extent that disclosure would constitute “an unwarranted invasion of personal privacy” [sections 87(2)(b) and 89(2)(b)]. Based on that exception, FOIL has always permitted agencies to deny access to portions of records containing social security numbers. Moreover, section 96-a, recently added to the Public Officers Law, prohibits state and local government agencies from intentionally disclosing social security numbers. The exception to that prohibition relates to records maintained by county clerks, for they maintain records, often thousands in a single office, that historically have been accessible to the public, but which contain social security numbers. Because that is so, section 96-a states that county clerks must withhold social security numbers only when a person asks that to be so, but that they may be disclosed in other instances. Realistically, most people may be unaware that their social security numbers appear in county clerks’ records, and it is likely that even fewer are aware that they can ask that their social security numbers be withheld prior to disclosure to the public.

While the Committee supports the ideals of the legislation referenced above, we recommend that subdivision (2) be amended by adding language that excludes county clerks from its coverage. By so directing, records of county clerks that contain social security numbers would be excluded from any requirement involving proactive disclosure on a website in consideration of the burden associated with reviewing records individually for the purpose of redacting/deleting social security numbers. If, however, social security numbers are maintained as a field within a database that includes a variety of other items that are accessible under FOIL, and the agency has the ability to redact that field, i.e., by redacting all social security numbers from the database electronically, the remaining items could be proactively disclosed on a website.

In short, the Committee contends that today and in the future, government agencies, when reasonably able to do so, should be required to “push” information out to the public, proactively, without an obligation on the public to “pull” the information out by submitting requests pursuant

to FOIL. Any such requirement, however, must be reasonable and designed to ensure the protection of personal privacy.

F. Infrastructure Issues

The Committee urges the Governor and the State Legislature to take all necessary steps to ensure that all of the state's residents can use information technology to improve their lives as individuals and for the economic benefit of their communities.

The Committee is fortunate to have as one of its *ex officio* members RoAnn Destito, who served for years as chair of the Assembly Committee on Governmental Operations and now as Commissioner of General Services. In her capacity as an Assemblymember, her committee had oversight of legislation relating to FOIL, as well as the Open Meetings and Personal Privacy Protection Laws. Moreover, she represented a district that included urban and rural areas. In her role as Commissioner, she has duties relating to information technology. In discussing the issue of proactive disclosure, Commissioner Destito emphasized that there continue to be large areas of the state that do not have broadband access, where the use of email and the internet may be all but impossible.

Proactive disclosure under FOIL is a worthwhile goal. Concurrently, every effort should be made to develop an infrastructure that enables all New Yorkers to take advantage of information technology.

G. Proactive Disclosure under the Open Meetings Law

The Open Meetings Law may be amended in a manner that will render that statute increasingly meaningful to thousands of New Yorkers. Over the years, the Committee received numerous comments and criticisms concerning the inability to effectively understand public discussions due to the lack of information relating to the topics considered. The Committee recommended legislation that would, when practicable to do so, encourage public bodies to make records scheduled to be discussed during open meetings accessible to the public online in advance of meetings, or via distribution of copies of the records prior or at meetings.

Irrespective of its enactment, the trend is in the direction of the legislation. With increasing frequency, government agencies are placing records pertaining to meetings on their websites, before and after meetings. In anticipation of the enactment of an amendment and to enhance that trend, the Committee was fortunate to have the services of an intern, Megan Sutherland, a student at the SUNY/Albany Graduate School of Information Science and Policy. She prepared a report, *Evaluating the Importance of Technology and the Role of Information Providers within Local Governments in New York*, useful to local government agencies throughout the state (available on the Committee's website).

The report emphasized that the "goal is to suggest efficient and easy methods of fostering public access" and includes a series of questions raised before clerks and IT professionals at local governments ranging in size from 300 to 100,000. Following an analysis of the data collected, Ms. Sutherland presented findings and recommendations involving several

components to the Committee's staff and offered "Inexpensive Solutions for Novices." Stated differently, the report provides guidance to municipalities that can be used to further the goals of the legislation, particularly those entities that lack funds or expertise.

II. REMOVING ROADBLOCKS

While our highest priority for the Legislature is to engage in the modernization of FOIL, there are a number of specific “fixes” to FOIL that warrant specific attention.

A. Legislative Priorities

1. Awarding Attorney’s Fees under FOIL

In an editorial of November 7 entitled “Public secrecy gets a scolding”, the *Albany Times Union* referred to several recent judicial decisions in which the courts determined that agencies improperly withheld records sought under FOIL. Moreover, the courts opened the door to awards of attorney’s fees payable by those agencies to members of the public who successfully challenged their denials of access.

In 2008, in a case involving a denial of access to commercial information, the Court of Appeals directed that “To meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest upon a speculative conclusion that disclosure might potentially cause harm.” In the view of the courts and the Committee, FOIL is clearly based on a presumption of access, and exceptions to rights of access must be narrowly construed.

As stated in the editorial: “If err they must, it ought to be on the side of sunlight.”

Recommendation: Require award of attorney’s fees when secrecy cannot be justified, and permit an award in other circumstances.

Section 89(4)(c) of FOIL authorizes a court to award attorney’s fees in a lawsuit to a person denied access when the person has “substantially prevailed”, and when the court finds either that (1) the agency had no reasonable basis for denying access, or (2) that the agency failed to abide by the time limits for responding to a request.

To encourage disclosure by focusing on the heart of FOIL, granting access to records, and to acknowledge the difficulties that agencies may face in their efforts to respond to requests and appeals in a timely manner, we recommend legislation that would recognize both of those elements.

The Committee believes that most agencies engage in their best efforts to comply with FOIL by responding to requests in a timely manner. There have been instances, however, in which agencies have failed to do so and have admitted as much. In a recent decision, *New York Times v. City of New York Police Department* (Supreme Court, New York County, October 3,

2011), the court referred to “a pattern and practice” of failing to respond to requests in a timely manner, and the Police Department admitted that to be so.

In a decision rendered by the Appellate Division, Third Department, in July, *New York Civil Liberties Union v. City of Saratoga Springs* (87 AD3d 336, 926 NYS2d 732), the Court referred to tactics designed to delay disclosure, missing deadlines for response, failing to return telephone calls and the like and concluded that the agency’s failures must result in an award of attorney’s fees.

The Open Meetings Law as amended recently offers a reasonable model, for it distinguishes between a failure to comply involving secrecy and other situations in which failures to comply involve procedural matters. When a court finds substantial deliberations occurred in private that should have been discussed in public, it must award attorney’s fees to the petitioner. When secrecy is not the issue, and in situations in which a public body fails to fully comply with notice requirements or prepare minutes of meetings within the statutory time of two weeks, a court has discretionary authority to award attorney’s fees.

In like manner, FOIL should be amended to confirm that a court has discretionary authority to award attorneys fees when a petitioner has substantially prevailed, and provide that a court shall award attorney’s fees when a petitioner has substantially prevailed and when the court finds that the agency had no reasonable basis for denying access.

To accomplish the foregoing, §89(4)(c) should be amended as follows:

In any proceeding brought pursuant to this article, the court may assess, against such agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by such person in which such person has substantially prevailed, and shall award such fees and costs when the person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

2. 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 2011. 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.

Currently, 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.

3. Proposal in Response to Appellate Division Decision: Pension Information

Recommendation: Ensure that names of retirees are disclosed, and that the identities of their beneficiaries are protected.

The identities of former public employees who receive pensions should not be a secret. In light of a recent First Department, Appellate Division decision to the contrary, we recommend that the language of the statute be amended to clarify this issue which has been, since the inception of FOIL, not in dispute.

The introductory language of section 89(7) of FOIL states that:

“Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a

public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system..."

A plain reading of the first clause quoted above indicates that home addresses of public officers and employees, both present and former, need not be disclosed. The second clause refers to absence of a right of access to the name or the home address of a beneficiary of a retirement system.

In our view, the language of FOIL makes a clear distinction between a "retiree" and a "beneficiary". A retiree is a former public officer or employee; a beneficiary is a person who receives benefits due to a familial relationship with or legal designation by a former public officer or employee. With respect to retirees, home addresses need not be disclosed. With respect to beneficiaries, neither the names nor the addresses of those persons need be disclosed. Despite the distinction between these classes of persons in the statute, the Appellate Division has interpreted the statute to preclude access to names of retirees who receive pension benefits through the New York City Police Pension Fund (*Empire Center for New York State Policy v. New York City Police Pension Fund*, 88 AD3d 520, 930 NYS2d 576, (1st Dept, 2011).

The identities of former public employees who receive pensions should not be a secret. In light of the recent Appellate Division decision to the contrary, we recommend that the language of the statute be amended to clarify this issue which has been, since the inception of FOIL, not in dispute.

As suggested in a New York *Daily News* editorial published soon after the decision was rendered: "This is as basic as it gets. Government issues check; everyone and his brother gets to inspect its purpose and its payee. Pension benefits are no exception." It pointed out that the FOIL "states that the names of pension 'beneficiaries' are exempt from mandatory disclosure...The [pension] funds issue checks to two categories of people: retirees, who are former officers, and beneficiaries, who are generally surviving spouses and children."

At this time, we do not know whether the decision will be reviewed by the Court of Appeals. Irrespective of that possibility, we believe that the identities of former employees and the amounts of their benefits should remain accessible to the public. Because that is so, the Committee recommends that FOIL be clarified to ensure rights of access to basic information concerning the allocation of public moneys. Following the language of the portion of §89(7) quoted above, a new clause should be added:

"for purposes of this article, the term 'retiree' shall mean a former officer or employee, and the term 'beneficiary' shall mean a person chosen by a retiree to receive pension benefits following the death of the retiree."

B. Additional Legislative Proposals

1. Tentative Collective Bargaining Agreements

Recommendation: 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 2011 (A.4957-A/S.3218-A) and would confirm the advice rendered by the Committee on Open Government in several written opinions.

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

- 4 (c) if disclosed would impair present or imminent contract awards or
5 collective bargaining negotiations; (i) provided, however, that records
6 indicating the proposed terms of a public employee union or school
7 district collective bargaining agreement together with facts describing
8 the economic impact and any new costs attributable to such agreement,
9 contract or amendment shall be made available to the public immediately
10 following approval of such proposed terms by a public employee union,
11 and at least two weeks prior to the approval or rejection of such
12 proposed terms by the public employer when such records are sent to
13 members of the public employee union for their approval or rejection;
14 and
15 (ii) that copies of all proposed public employee union or school
16 district collective bargaining agreements, employment contracts or
17 amendments to such contracts together with facts describing the economic
18 impact and any new costs attributable to such agreement, contract or
19 amendment be placed on the municipal or school district websites, if
20 such websites exist, and within the local public libraries and offices
21 of such school districts or in the case of collective bargaining agree-
1 ments negotiated by the state of New York, on the website of the gover-
2 nor's office of employee relations at least two weeks prior to approval
3 or rejection of such proposed public employee union or school district
4 proposed collective bargaining agreements or action taken to approve
5 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 2012.

2. 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.

Although New York is often considered to be the media capital of the world, cameras are permitted, in some instances with limitations, in courts in 45 states. Few states, one of which is New York, expressly prohibit the use of cameras in trial courts.

3. “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.

4. 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 immunodeficiency virus, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

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

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

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

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

No portion of any report, paper,...which identifies such a victim shall be available for public inspection.

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

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

5. 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."

6. 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 provisionally except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be provisionally excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records provisionally except such information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be provisionally excepted from disclosure.

(2) The request for an exception shall be in writing, shall specifically identify which portions of the record are the subject of the request for exception and shall state the reasons why the information should be provisionally excepted from disclosure. Any such request for an exception shall be effective for a five-year period from the agency's receipt thereof. Provided, however, that not less than sixty days prior to the expiration of the then current term of the exception request, the submitter may apply to the agency for a two-year extension of its exception request. Upon timely receipt of a request for an extension of an exception request, an agency may either (A) perform a cursory review of the application and grant the extension should it find any justification for such determination, or (B) commence the procedure set forth in paragraph (b) of this subsection to make a final determination granting or terminating such exception.

(3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be provisionally excepted from disclosure and be maintained apart by the agency from all other records until the expiration of the submitter's exception request or fifteen days after the entitlement to such exception has been finally determined, or such further time as ordered by a court of competent jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

III. SERVICES RENDERED BY THE COMMITTEE

5059 TELEPHONE INQUIRIES
607 WRITTEN ADVISORY OPINIONS
96 PRESENTATIONS
4373 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. We point out that the statistics that follow may be misleading.

Although the number of telephone inquiries and written advisory opinions have diminished, thousands of email messages, inquiries and requests for information are received, and most are answered briefly and without delay. Often a response is given in a simple sentence and the attachment of one or more written opinions previously rendered. In reality, in consideration of email received and answered by staff, the number of those both within and outside of government, who contact the Committee and utilize its services is constantly increasing.

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. During the past year, with a staff of two, the Committee responded to more than five thousand telephone inquiries. Nearly 43% came from state and local government officials, 36% came from the public, and 19% from the news media. In addition, the staff gave 96 presentations before government and news media organizations, on campus and in public forums, training and educating thousands of persons concerning public access to government information.

A. Use of the Committee's Website

Since its creation in 1974, the Committee has prepared nearly 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 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 Committee's updated and improved user-friendly 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
- “News” that describes matters of broad public interest and significant developments in legislation or judicial decisions

B. 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.

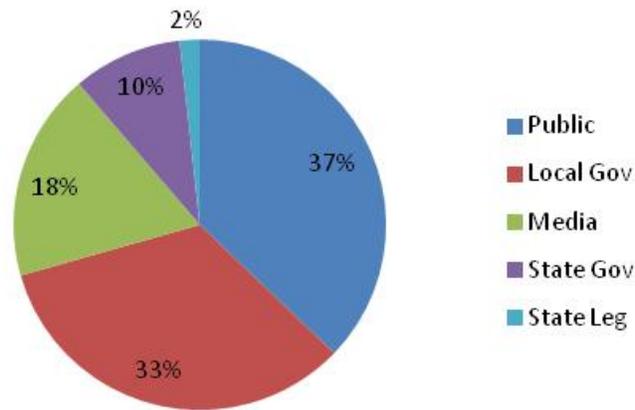
Most recently, the Committee collaborated with the Office of the Attorney General in a presentation physically attended by approximately 170 and webcast for another 200 state agencies attorneys throughout the state. The course is available online for attorneys employed by all state agencies.

C. Statistical Summary

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, local government officials and employees, members of the news media, state agency officials and employees, and state legislators. A similar breakdown is developed with respect to requests for written opinions, as shown in the following pie charts:

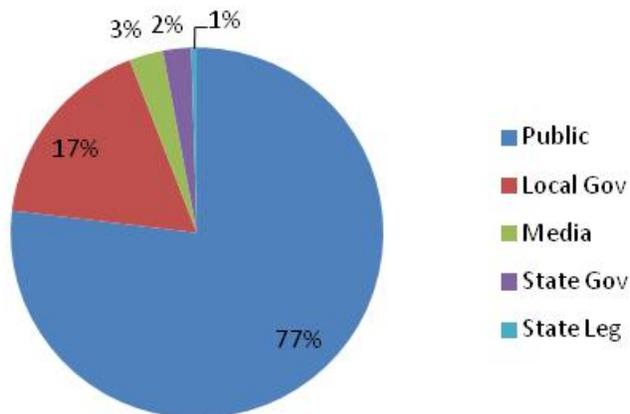
1. FOIL

FOIL Telephone Inquiries (3544)



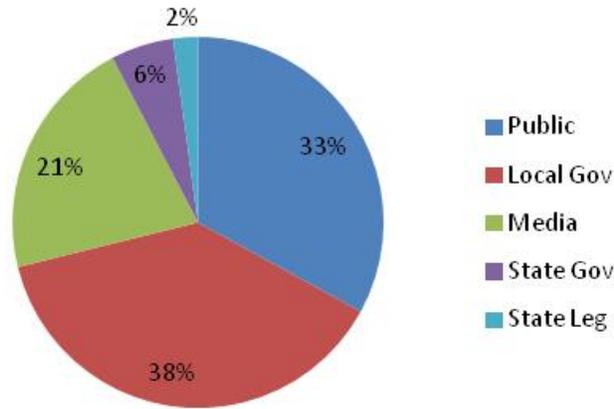
We note that the patterns of inquiries in terms of percentages relating to the groups of callers have generally been consistent during the past several years.

FOIL Written Advisory Opinions (405)



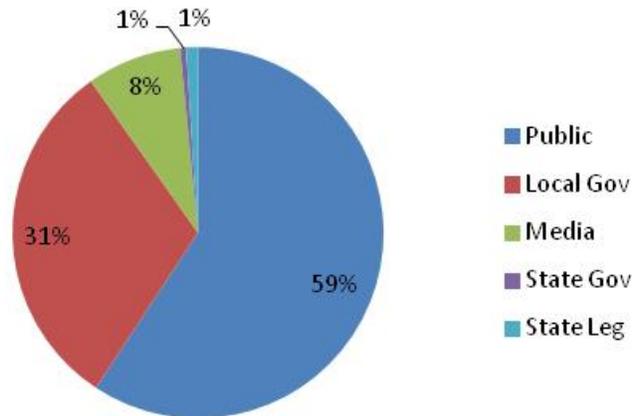
2. Open Meetings Law

OML Telephone Inquiries (1389)



As suggested earlier, government officials are frequent users of the Committee’s services, and in 2011, as in previous years, the greatest number of inquiries regarding the Open Meetings Law came from local government officials.

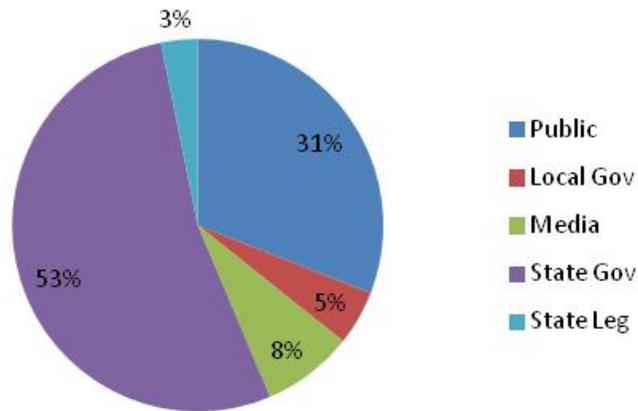
OML Written Advisory Opinions (194)



3. Personal Privacy Protection Law

Advisory services were also rendered in connection with the Personal Privacy Protection Law. Five written advisory opinions were prepared at the request of members of the public; one was prepared on behalf of a state agency. With respect to the oral inquiries made concerning that statute, they are categorized as follows:

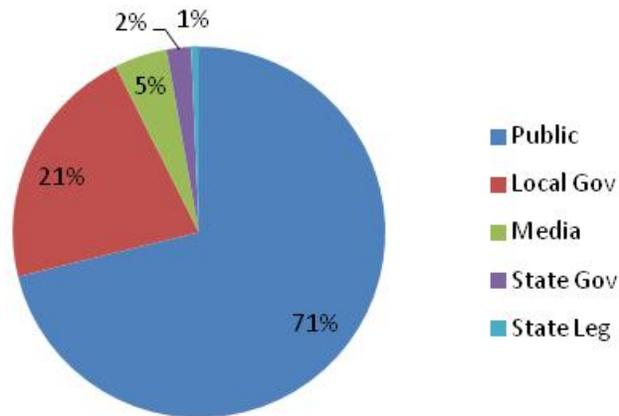
PPPL Telephone Inquiries (122)



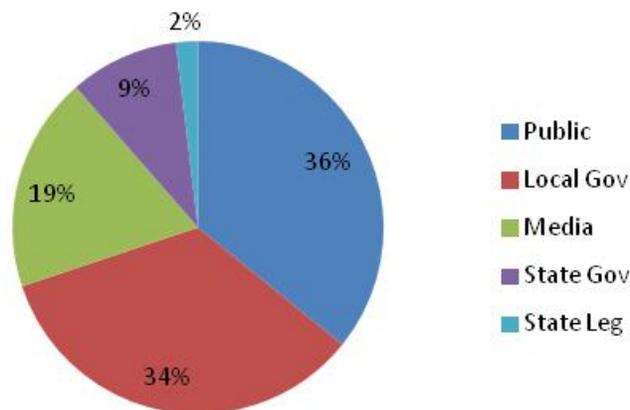
4. Combined Figures regarding the Three Laws

Viewing the statistics presented regarding the three statutes within the Committee's advisory jurisdiction, the 607 written advisory opinions prepared from November 1, 2010 through October 31, 2011 may be described as follows:

Written Advisory Opinions (607)



Telephone Inquiries (5059)



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.

D. Presentations

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 96 presentations, the most in its history in any given year. The presentations are identified below by interest group for the period of November 1, 2010 to October 31, 2011. Approximately More than four thousand 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.

1. Addresses were given before the following groups associated with government:

NYS Department of Transportation (CLE), Albany
Training, Town/Village of Ossining, Ossining
State Education Department, executive staff, Albany
Adirondack School Boards Association, Glens Falls
Battery Park City Authority (CLE), New York City
Association of Towns (2 presentations), New York City
New Roots Charter School, court ordered training, Ithaca
Assembly Committee on Governmental Operations
NYS Department of Labor (CLE), Albany
Tug Hill Leadership Conference, Oneida County
NYS Association of Housing Authorities, Turning Stone
NYS Association of Municipal Finance Officers, Lake George
NYS Association of Clerks of County Legislative Boards, Auburn
Rockland County officials, training, New City
Town of Islip, training (CLE)
Office of the Attorney General, Albany (CLE)
NY Association of Local Government Records Officers, Turning Stone
NYS Association of Tax Collectors, Lake George
Johnson Community Charter School, Buffalo
Western New York Education Law Conference, Depew
Training sponsored by NYC Economic Development Corporation and NYS Archives, New York City (CLE)
Training for state agency attorneys sponsored by Office of the Attorney General, Albany
Training, Jordan-Elbridge School District, Jordan
NY Planning Federation, Albany
Unemployment Insurance Appeals Board, training, Troy

NYS Association of Tax Receivers and Collectors, Lake Placid
NYS Education Department, training, Albany
NYS Association of School Business Officials (2 programs), Colonie
New York Conference of Mayors, Saratoga Springs (2 programs, CLE)
City of Rome, training
Office of Counsel to the Governor, training

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

Ithaca Journal, Ithaca
New York Press Association, Saratoga Springs
Gannett Editors Conference, Rochester
Deadline Club, New York City
New York Associated Press Association, Rochester

3. Presentations for students included:

Touro Law School, Hauppauge
SUNY/Albany, Graduate School of Information Science and Policy
SUNY/Albany, Graduate School of Information Science and Policy
Union College, Graduate School of Public Administration
SUNY/Albany, journalism
League of Women Voters, Students Inside Albany
SUNY/Albany, journalism
Syracuse University, Maxwell School
Syracuse University, Maxwell School, Chinese students/government officials
Albany Law School
Syracuse University, Newhouse School of Public Communications
SUNY/Albany, Graduate School of Public Administration
College of St. Rose, journalism, Albany
City University of New York, Graduate School of Journalism

4. Other presentations included:

Syracuse University, Maxwell School, Chinese government officials
Public forum, Utica
Public forum sponsored by Shoreham-Wading River School District
Albany County Bar Association (CLE), Albany
WGDJ, Albany — radio talk show
Public forum, Herkimer
Public forum, sponsored by Town of Berne
Public forum, Town of Horicon
Public forum sponsored by League of Women Voters and *Saratogian*, Saratoga Springs
WLVL, radio talk show, Lockport
Capitol Pressroom, radio talk show Albany
Assemblyman George Latimer, public access TV program

Public forum, sponsored by Town of Stuyvesant
NYS Bar Association, Albany (CLE)
Public forum sponsored by WLVL, Lockport
Yonkers Committee for Smart Development, Bronxville — May 26
NYS United Teachers, Latham
Public forum sponsored by Assemblyman Latimer and League of Women Voters,
Mamaroneck
Capitol Pressroom, radio talk show, Albany
International Center of the Capital District, Thai delegation, Albany
MTV Brazil, interview for documentary, New York City
New York State Bar Association, Albany (CLE)
Public forum sponsored by SUNY/Oswego
Capitol Tonight, TV interview, Albany
Nassau County Bar Association, Mineola (CLE)
Yonkers Parents United, Yonkers