Spring 2016 Case Law Summary Update

FOIL Major Cases

- **Matter of Acme Bus Corp. v. County of Suffolk** – 136 A.D.3d 896 (2nd Dept. 2016). February 17, 2016
    - The petitioner bus company submitted a proposal in response to respondents request for proposals for transportation services but was not successful. Sought records relating to the request for proposals, but was denied access because it "would impair present or imminent contract awards or collective bargaining negotiations." Petitioner filed an Article 78 but prior to the decision the respondents disclosed the documents, which left only attorney's fees issue to be decided. Held that a petitioner may be entitled to attorney's fees when it substantially prevails and the agency had no reasonable basis for the denial or did not respond within the statutory time. In this case, since all the proposals were submitted and acted upon at the time of the request, there was no reasonable basis for denial and attorney's fees were awarded. INDEX- Attorney's Fees; Contract Impairment of RFP's.
- **Matter of Bottom v. Fischer**, 129 A.D.3d 1604, 10 N.Y.S.3d 786 (4th Dept. 2015).
    - Petitioner appeals the decision of the lower court granting his FOIL requests for documents but denying his request for attorney's fees. Held that a petitioner who "substantially prevails" against a petitioner who lacked a "reasonable basis" for it is denial entitled to reasonable attorney's fees incurred. INDEX- Attorney's Fees, new provision
- **Matter of Cook v. Nassau County Police Dept.**, 110 A.D.3d 718 (2nd Dept. 2013) October 2, 2013
    - Petitioner wanted unredacted documents of an internal affairs investigation of an officer but was denied under §50-a. Held that when access to an officer's personnel records is sought, nondisclosure is limited to the extent reasonably necessary to prevent potential use of information in litigation to "degrade, embarrass, harass or impeach the integrity of the officer."
- **Matter of County of Suffolk v. Long Island Power Authority**, 119 A.D.3d 940, 989 N.Y.S.2d 888 (2nd Dept. 2014).
    - The county requested records from the Authority, which admitted that records existed but denied disclosure because they were stored with outdated technology and the process to recover them would be long and tedious. Held that programming necessary to retrieve a record maintained in a computer system and to transfer a record to the requested medium to allow the record to be read or printed is not the preparation or creation of a new record. Also a request cannot be denied because it is too voluminous or burdensome if the request can be satisfied by engaging outside services.
- **In re Crawford v. The New York City Department of Information Technology and Telecommunications**, Supreme Court, New York County, March 20, 2014.
    - Petitioners asserted that low-income minority neighborhoods have either limited or no access to Internet, unlike high-income neighborhoods that receive high-speed Internet speeds. To support these assertions, petitioners requested information on conduits owned and operated by Empire City Subway, a subsidiary of Verizon, and contracts between New York City and Empire City Subway. The requests were denied by the respondent citing Public Officers Law §§ 87(2)(f) and 87(2)(i), contending that disclosure could endanger life or safety and that it would jeopardize the agency's ability to guarantee the security of information technology assets. The maps requested had information that would jeopardize the safety of information technology. Held that if information requested need not be disclosed due to safety concerns, the agency is required to conduct a diligent search to locate other responsive documents that contain

non-sensitive and non-exempt general information. INDEX- Diligent Search; Information Technology Assets

- **Matter of Davids v. King**, Supreme Court, Albany County, February 5, 2014.
    - Parents of children attending New York City schools challenged the sharing of student's personal information with outside contractors for the purpose of creating the mandated student portal. Held that personal information can be disclosed in the exercise of discretion of the agency if it is necessary to the performance of the duties and purpose of the agency. However, a reasonable basis must be shown for entering into the agreement and that the disclosure and transfer of data is for a legitimate purpose. INDEX- Personal Privacy Protection Law
- **Matter of Delvecchio Family v. City of Cortland** – Supreme Court, Chenango County, July 20, 2012
    - Petitioner sought access to a file regarding property at a certain address and attorney fees after access was wrongly denied. After a denial of access to the records, respondent appealed but was constructively denied access after not receiving a determination. Held that failure to respond in writing within ten business days to a written appeal constitutes a denial which may be reviewed in an Article 78 proceeding. Held that a court may assess attorney's fees when a petitioner substantially prevails and an agency had no reasonable basis for denying access or the agency failed to respond within the statutory time period. Held that both conditions were present and attorney fees were awarded. INDEX- Attorney's Fees; Delay.
- **Matter of Empire Ctr. For New York State Policy v. New York State Teacher's Retirement Sys**. – 23 N.Y.3d 438, 15 N.E.3d 271, 991 N.Y.S.2d 516 (2014) – May 6, 2014
    - Held that FOIL only exempts home addresses, not names, of retirees who receive benefits from the public employee's retirement system. INDEX- Pension Information; Home Address.
- **Matter of Empire Wine & Spirits, LLC v. New York State Liquor Authority**, Supreme Court, Albany County, October 28, 2015.
    - After being served a Notice of Pleading for allegedly shipping wine to customers in different states, the petitioner submitted a FOIL request for communications in various forms pertaining to the petitioner and the interstate shipment of alcohol. The request was partially denied under §87 (2)(a), that it was material that constituted attorney work product for pending litigation. Held that to be considered attorney work product and therefore exempt under FOIL, the record must be a confidential communication that reflects legal analysis, conclusions, theory or strategy. Emails unrelated to a pending investigation or judicial proceeding are not exempt. Also to be considered an "agency" for purposes of inter-agency exception, an agency must be an entity of state or local government; see Waterford. INDEX- Attorney Work Product; Inter/Intra-Agency Materials; Agency
- **Matter of Exoneration Initiative v. New York City Police Dept.**, 39 Mis.3d 962, Supreme Court, New York County, June 11, 2013
    - Petitioner was entitled to attorney fees after substantially prevailing in the July and March cases against the Department. The NYPD contended that petitioner was a pro se litigant and not entitled to attorney fees and that the fees charged were excessive in both time and amount per hour. Held that public interest legal organizations are entitled to receive attorney fees after substantially prevailing as a named litigant. Also held that rates charged far attorney's fees must fall within the range of hourly rates charged by private sector attorneys of similar experience in the community. The petitioner was awarded all but $780 for which they billed. Note: reversed on other grounds.
- **The Exoneration Initiative v. The New York City Police Dept.** – 114 A.D.3d 436, 980 N.Y.S.2d 73 (1st Dept. 2014). February 6, 2014

    - Held that disclosure of identities of witnesses could endanger life or safety, INDEX- Witness Statements
- **Matter of Gallogly v. City of New York** – Supreme Court, New York County, January 8, 2016
    - Petitioner, a retired NYPD sergeant, requested his personnel file and any internal affairs reports, in which he was a named subject. NYPD denied the request claiming they are investigative records that would reveal investigative techniques and procedure. Subsequently NYPD constructively denied petitioner's appeal by not responding, and petitioner commenced an Article 78. Held that while an internal affairs records may be considered personnel records, if the person seeking the records is the subject, confidentiality is not an issue and must be disclosed. Also held that when a petitioner substantially prevails and an agency has no reasonable basis for the denial or delay then the court may award attorney's fees. Here the petitioner was given access to all the requested records with other officers' and witness' personal information redacted and was awarded attorney's fees. INDEX- Police and Corrections Officers; Personnel Records; Attorney's Fees; Privacy.
- **Matter of Gannett Satellite Information Network, Inc., v. County of Putnam**, Supreme Court, Westchester County, March 5, 2014.
    - Under Penal Law §400.00, names and addresses of pistol permit holders are a matter of "public record" and may be "publically disclosed", but that they may "opt-out" and are entitled to request an exemption from disclosure. Petitioner requested the names and addresses of pistol permit holders who did not opt out of disclosure. The Respondent denied the request on the basis of §87(2)(f) and as an unwarranted invasion of personal privacy. Held that since the statute on which the request was based contains an opt-out provision, FOIL exceptions are inapplicable. INDEX- Pistol License Information
- **Matter of Hearst Corporation et al. v. New York State Police**, 132 A.D.3d 1128, 18 N.Y.S.3d 470, 2015 N.Y. Slip Op. 07729 (3rd Dept. 2015).
    - Journalist sought records concerning to a hit-and-run committed an off duty State Trooper. Respondents claimed exemption under Civil Rights Law §50-a (1) as "personnel records", but during the investigation the officer involved resigned. Held that if the individual whom records are being requested is not a current employee, the records are not used to evaluate "continued employment or promotion", and therefore are neither "personnel records" nor exempt under FOIL. INDEX- Police & Correction Officers' Personnel Records.
- **Lassin v. Krumpter** – Supreme Court, Nassau County, March 17, 2016
    - The FOIL Officer allegedly gave inconsistent statements about the existence of records that had been requested. Held that to determine whether the inconsistencies were an honest mistake court ordered the access officer be deposed. INDEX- New- Depositions.
- **Matter of Legal Aid Society v. New York State Dept. of Corrections and Community Supervision**¸ 105 A.D.3d 1120 (3rd Dept. 2013) April 4, 2013
    - The petitioner sought attorney fees after a full year of FOIL requests went unanswered until this action was filed. The agency acknowledged receipt of the request twice but did not respond any further or to an appeal. When the department finally answered, it claimed a diligent search was conducted and no responsive documents were discovered. Held that an agency must either disclose the record sought, deny the request and claim a specific exemption, or certify that it does not possess the requested documents and could not be found after a diligent search. Also held that when an agency fails to respond to a request or appeal within the statutory time, the Court may award attorney fees and costs to petitioner who substantially prevails in the proceeding. The petitioner was awarded attorney fees since the respondent was required to certify that none of the requested documents existed after numerous delays

- **Matter of Luongo v. Records Access Officer**, Supreme Court, New York County, July 17, 2015.
    - Petitioner requested a summary of a police officer's personnel record following Eric Garner's death which was denied under §50-a. Held that a summary of a police officer's personnel record, which only consists of rudimentary information, is not exempt from disclosure under §50-a if the information cannot be used to degrade, embarrass, harass or impeach the integrity of the officer. INDEX- Police and Correction Officers' Personnel Records
- **Matter of Madera v. Elmont Pub. Lib.** – 101 A.D.3d 726, 957 N.Y.S.2d 129 (2nd Dept. 2012). December 5, 2012
    - Petitioner requested the contents of a report prepared for the library by an outside attorney. The library denied the request claiming the report was exempt from disclosure under the intra-agency material exemption or the attorney-client exemption. Held that by voluntarily and deliberately disclosing a report to someone outside of the agency, the agency affirmatively waives its right to claim either the intra-agency exemption or the attorney-client privilege. In this case, since the records were previously shown to the subject of the report the records were ordered disclosed. INDEX- Attorney-Client Privilege; Inter/Intra-Agency Materials.
- **McGee v. Carmel Police Chief Johnson**, Supreme Court, Putnam County, September 26, 2013.
    - Petitioner requested voluminous documents and was told it would take six months to one year to compile them based on the nature of information sought and the Department's record-keeping system. Based on that system, the documents requested were not reasonably described. Held that whether a request reasonably describes the records sought may be dependent upon the terms of a request as well as the nature of an agency's filing and record-keeping system. INDEX- Records Reasonable Described
- **Matter of New York Civil Liberties Union v. Erie County Sheriff's Office**, Supreme Court, Erie County, March 17, 2015.
    - Requests for information regarding the purchase and use of cell site simulators owned and operated by the Department was denied under §87(2)(e). Held that a law enforcement agency can only deny access to document if it is compiled for law enforcement purposes discussed in §87(2)(e). Also documents that set forth instructions to staff that affect the public are not exempt. INDEX- Certification; Law Enforcement Purpose v. Ordinary Course of Business; Inter/Intra-Agency Instructions to Staff; Attorney's Fees, new provision;
- **Newsday LLC, v. Nassau County Police Department**, Supreme Court, Nassau County, January 16, 2014.
    - Petitioner made five different FOIL requests in relation to criminal investigations, tracking, payments to confidential informants, and information regarding a case concerning a third party accused of a crime. Held that a denial of access to records must be adequately supported by specific explanations that the records fit into exemptions, and provide specific reasons why redaction of details would fail to protect the individuals involved; 308 of the County Law does not include records prepared after receipt of 911 calls. INDEX- Burden of Proof; Law Enforcement; Witness Statements, endangerment.
- **Newsday LLC v. Suffolk County Dept. of Public Works** – Supreme Court, Suffolk County, February 28, 2012
    - Petitioner sent several requests for records related to the selection and award of contracts to contractors and consultants regarding a new correctional facility. The respondent disclosed some of the requested documents but claimed the rest could either not be located, or were exempt based on a state or federal statute or as inter-agency/intra-agency material. Held that an "assertion" regarding search is insufficient and

that an agency must "certify" the record cannot be located after a diligent search. INDEX- Certification; Inter-agency & Intra-agency material.

- **Schwartz v. Micera**, District Court, Suffolk County, December 13, 2011.
    - Petitioner requested an internal affairs report regarding an accident he was involved in with the respondents. The County denied petitioner's FOIL request as an unwarranted invasion of personal privacy as well as the police personnel record exemption under Civil Rights Law §50-a(1). Held that internal affairs records and any other disciplinary records of a police officer are confidential under 50-a and disclosure would constitute an unwarranted invasion of personal privacy. INDEX- Police & Correction Officers, personnel records.
- **Matter of Smith v. New York State Office of the Attorney General**, Supreme Court, Albany County, April 16, 2010
    - Petitioner, a former AIG senior employee with a pending enforcement action against him, requested "actual and proposed correspondence and communications" between the Office of the Attorney General, AIG and their representatives. The request was rejected for several reasons, one being that the documents sought were not reasonably described. Held that whether records requested are reasonably described may be "dependent on the nature of the agency's filing, indexing or records retrieval mechanism" and the agency is not required to follow "a path not already trodden" in order to locate the records. Since the OAG does not maintain the draft correspondence in any meaningful way employees would have to sift through 400 to 500 boxes of documents pertaining to the case, and that records were not reasonably described.
- **Matter of South Shore Press Inc. v. Havemeyer** – 136 A.D.3d 929 (2nd Dept. 2016). February 17, 2016
    - A newspaper requested the banking and financial records of certain Town Trustees of the Town of Southampton. Petitioner did not receive a response, until sending a follow-up letter inquiring about the initial constructive denial that the respondent formally denied the request as "unduly broad or voluminous" and would interfere with the agency's operations. Petitioner was granted access to the requested records but was denied attorney's fees which he appealed. On appeal attorney fees were awarded since there was no reasonable basis for the denial and there was a delay in response past the statutory time period and in order to "promote the purpose of and policy behind FOIL." INDEX- Time Limits for Response; Attorney's Fees.
- **Matter of TJS of New York Inc. v. New York State Dept. of Taxation & Fin.**, 89 A.D.3d 239 (3rd Dept. 2011) November 3, 2011
    - Petitioner sought to compel the Tax Dept. to release the computer program needed in order to be able to view other records already released. Respondent contended the software was not a record because it contained no information. Held that software that enables an agency to manipulate data is a record.
- **Matter of the Town of Waterford v. New York State Dept. of Envtl. Conservation** 18 N.Y.3d 652, 967 N.E.2d 652, 944 N.Y.S.2d 429 (2012) March 22, 2012.
    - The town petitioner sought documents concerning a joint investigation by the respondent and the Environmental Protection Agency ("EPA") about PCBs in the Hudson River and the town's water supply. The respondent denied the request asserting that the EPA was an "agency" and the shared communications would be exempt under the inter-agency/intra-agency material exemption. The court agreed with the Committee on Open Government and held that where a federal government agency is not retained as a consultant by a state agency, and since a federal government agency is not an "agency" under the FOIL definition, communications between the federal government agency and the agency do not fall under the inter-agency/intra-agency exception. Let stand appellate division holding that settlement materials not subject to discovery under CPLR §4547 are nonetheless subject to rights conferred by FOIL. INDEX-

- **Matter of Verizon New York, Inc. v. New York State Public Service Commission**, Supreme Court, Appellate Division, Third Department, January 14, 2016.
    - Verizon proposed the replacement of wireline telephone and Internet communications with a fully wireless network. In the course of the proposal Verizon New York requested that certain documents not be disclosed to the general public on the ground they constituted trade secrets and were therefore exempt under § 87 (2)(d). Held that there are two separate considerations under §87(2)(d); those that are bona fide trade secrets are automatically exempt and non-trade secrets are exempt when it is shown there will be an substantial competitive injury if disclosed. INDEX- Trade Secrets
- **Matter of Weslowski v. Vanderhoef**, 98 A.D.3d 1123, 951 N.Y.S.2d 538 (2nd Dept. 2012).
    - Numerous voluminous requests for documents by the petitioner, and the respondent conditioned disclosure of the documents on payment of a fee to cover the costs of producing the requested documents of between $239.89 and $156,112.00. Held that an agency may only recover the "actual cost" of reproducing the record, including "an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy, which does not include search time, or administrative costs." When an agency conditions disclosure on prepayment of fees, it carries the burden of "articulating a particularized and specific justification", for contending that they are authorized under FOIL. INDEX- Fees, actual cost; Fee For Search; Fee Paid In Advance.
- **Matter of West Harlem Business Group v. Empire State Development Corp.**, 13 N.Y.3d 882, 921 N.E.2d 592, 893 N.Y.S.2d 825 (2009) Dec. 15, 2009
    - Petitioner, an association of businesses in West Harlem, requested documents relating to an agreement between Columbia University and the respondent to expand Columbia's campus to West Harlem. Respondent was originally ordered to disclose all the requested records. On appeal, held that an agency has the burden of establishing through particularized and specific justification that records are exempt. Since the respondent used conclusory characterizations to support its basis for denial it was insufficient and the lower court decision was affirmed.

FOIL Minor Cases

- **Matter of the 91st St. Crane Collapse Litig.**, 930 N.Y.S.2d 175, 31 Misc.3d 1207(A) Supreme Court, New York County, October 21, 2010
    - Families of the deceased and injured after the 91st Street crane collapse sought records concerning the collapse. The request was denied bas on five grounds: attorney-client privilege, attorney work product, deliberative process, public interest and law enforcement exception. Held that for the attorney-client privilege to apply the communication must be primarily or predominately of legal character to be exempt from disclosure. Also held that documents prepared by counsel acting as such, materials uniquely the product of a lawyer's learning and professional skills is privileged but data received while investigation on behalf of the client is not. The court also confirmed that there is no deliberative process privilege, but related contention to the inter-agency intra-agency material exemption but hat must be applied as such. Also held that a defendant's interest in preserving the confidentiality of the requested documents must outweigh the plaintiff's interest in obtaining records to involve the public interest privilege. Note: There's no police interest privilege relating to FOIL.
- **Abdur-Rashid v. New York City Police Dept.**, 45 Misc.3d 888, Supreme Court, New York County, September 11, 2014
    - A mosque requested documents related to the surveillance and investigations of the mosque. The Department replied claiming they could not confirm nor deny the existence of the requested records. This response is known as the Glomar doctrine under the Federal FOIA. Held that to establish the Glomar response an agency has to describe the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption and are not controverted by evidence in the record or evidence of bad faith. However, FOIA only applies to federal and not state agencies. In this case the department was allowed to withhold whether the requested documents existed because there was a rational basis under the law.
- **Matter of Anderson v. New York State Dept. of Taxation and Fin.**¸ Supreme Court, Ulster County, September 30, 2013
    - Petitioner sought tax assessment information but was denied access. Held that exemptions are narrowly interpreted for maximum public access to government records and an agency seeking to avoid disclosure bears the burden of demonstrating an exemption with particularized and specific justification.
- **Matter of Archdeacon v. Town of Oyster Bay**, Supreme Court, Nassau County, January 7, 2016.
    - Petitioner requested the full names of all holders of boat slips in the Town, which denied access as an unwarranted invasion of personal privacy to release full names. The Court held that the release of full names was not an unwarranted invasion of personal privacy. INDEX- License Information; Privacy
- **Matter of Berger v New York City Dept. of Health & Mental Hygiene** – (2nd Dept. 2016). March 9, 2016
    - After an infant baby was infected with the herpes simplex virus during his circumcision petitioner, journalist requested the name of the mohel who performed the ceremony. Since even disclosure of the mohel's name would indicate that he has the disease, which could be characterized as part of a medical history, it is exempt from disclosure.
- **Matter of Catskill Heritage Alliance, Inc. v. Office of the Governor**, Supreme Court, Albany County, September 13, 2010
    - Petitioner contended that the documents he requested were wrongly found exempt and motioned for leave to reargue. The documents in question were viewed in camera by the

court and the exempt documents were classified as inter-agency or intra-agency material. Held that only when it is found that a court overlooked or misapprehended the facts of the earlier decision will reargument be granted.

- **Matter of Cook v. Nassau County Police Dept.**, Supreme Court, Nassau County, January 20, 2015
    - Petitioner sought reasonable attorney fees after being given access to almost all the records he requested in the Article 78 hearing. Held that if a petitioner can demonstrate it substantially prevailed, a court may award attorney fees if the agency had no reasonable basis to deny access. Since the respondent here only received the responsive documents after a blanket denial and the commencement of the current case they were awarded attorney fees.
- **Empire Center for Public Policy Inc. v. New York City Employees' Retirement System**, Supreme Court, Kings County, January 27, 2016
    - Petitioner requested documents concerning retired members of the respondent organization, specifically pension information. The respondent provided some of the information but redacted the names of retired law enforcement personnel claiming it would endanger the life or safety of the retired officers. Held that mere speculation that harm will result from disclosure is not a basis to claim a FOIL exemption. Here the respondent was ordered to disclose the names of all the retired officers except those who worked undercover prior to retirement.
- **Matter of Exoneration Initiative v. New York City Police Dept.**¸114 A.D.3d 436 (1st Dept. 2014) February 6, 2014
    - The petitioner sought records concerning a murder case including the DD5s and witness statement for a potential client. The respondent originally redacted or withheld seven pages from the report but was ordered to disclose all seven pages unredacted by the lower court. On appeal held that when the records concern a homicide investigation, there does not have to be a specific showing that a petitioner, who is currently incarcerated, has threatened or intimidated any witnesses in order to warrant redaction of identifying information. The petitioner was granted two of the seven documents but they were redacted. The dissent in this case sought to affirm the lower court's decision.
- **Matter of Exoneration Initiative v. New York City Police Department**, 132 A.D.3d 545, 22 N.Y.S.3d 1 (1st Dept. 2015).
    - A request for unredacted pages of a file pertaining to an attempted homicide investigation was denied by the Department as they would disclose identifying information about two witnesses. Held that if disclosure of documents could "endanger the life or safety" of the witnesses or would constitute an "unwarranted invasion of personal privacy" that information is exempt from disclosure. INDEX- Witness Statements, endangerment.
- **Gannett Co., Inc. v. County of Monroe**, 47 Misc.3d 898, Supreme Court, Monroe County, January 22, 2015
    - A journalist from petitioner's company requested information about 8 license plates gathered using license plate readers. Six of the license plates were employees of petitioner, one was registered to the county and the last to a city within the county. The request was denied by the county for being an unwarranted invasion of personal privacy and that the records were compiled for law enforcement purposes that disclosure could interfere with. Held that it is not an unwarranted invasion of personal privacy when the subject of the documents consents in writing, or when seeking records about one's self. Also held that while a recorded "read" itself does not invade personal privacy, the raw accumulated data is an invasion of privacy and can be withheld without consent. Finally, municipalities have no privacy right and their data can be disclosed unless it is assigned to a specific individual.

- **In re Grabell v. New York City Police Department**, Supreme Court, New York County, December 9, 2014.
    - Petitioner sought certain records with regard to Z-backscatter vans purchased by the Department and the radiation danger to the public. The Respondent denied the entire request based on POL §87(2)(e)(iv), that the records, if disclosed could reveal criminal investigative techniques and procedures and §87(2)(g), the intra-agency correspondence exemption. Held that blanket denial regarding policies and procedures unjustified, that agency's must assert a "factual basis", not merely an assumption, that the documents requested fall squarely within an exemption. INDEX- Law Enforcement Manual; Investigative Techniques and Procedures.
- **Matter of Guerico & Guerico, LLP v. Nassau University Medical Center**, Supreme Court, Nassau County, December 18, 2015.
    - Records relating to an incident with petitioner's client and the respondent's employees were requested and all but one were denied in writing or constructively denied due to the respondent's delayed responses. Due to these blanket and constructive denials, petitioners also requested attorney fees. Held that agency must meet the burden of proof. To obtain reasonable attorney fees, it must be established that the petitioner "substantially prevailed", that the record involved was "of clearly significant interest" to the general public and that the agency lack a reasonable basis within the law for withholding the record. The respondents were required to furnish the requested documents and pay reasonable attorney fees, even though court applied standard inaccurately. INDEX- Attorney's Fees
- **Hagan v. City of New York**, Supreme Court, Kings County, April 2, 2015
    - Petitioner sought to enjoin the City from disclosing the names, gross benefits, years of service, last employer, retirement date and commencement of retirement system membership of pension fund members. The petitioner claimed that such disclosure would be an unwarranted invasion of personal privacy, and could endanger the life and safety of fund members. Held that wh9ile an agency need only demonstrate a possibility of endangerment, the exemption may not be invoked by "mere speculation that harm will result." Also held, public employees do not enjoy the same privacy rights as employees who work in the private sector, and since tax dollars are spend to pay public employees, the public has a right to know certain facts related thereto.
- **Hashmi v. New York City Police Dept.**, 992 N.Y.S.2d 870, 46 Misc.3d 712, Supreme Court, New York County, November 17, 2014
    - Petitioner requested records relating to any investigation or surveillance of which he was subject. The Department refused to confirm the existence of such records and noted that is they did exist they would fall under a FOIL exemption again invoking the Glomar response. However this court declined to adopt Glomar. Held that Glomar stifles adversary proceedings and engrafting Glomar into FOIL would change the balance between the need for disclosure and the need for secrecy.
- **Matter of Hayes v. Chestertown Volunteer Fire Co.** – 93 A.D.3d. 1117, 941 N.Y.S.2d. 734, (3rd Dept. 2012) March 29, 2012
    - Petitioner requested documents from the Chestertown Volunteer Fire Co. but the lower court only ordered the fire company to disclose records that were "firematic". Appellate Division held that company is an "agency" under FOIL that engaged in both governmental and private activities, and that FOIL's scope is not limited based on the "purpose for which the document was produced or the function to which it relates." Respondents were ordered to disclose the documents. INDEX- Volunteer Fire or Ambulance Co.
- **Matter of Hearst Corp. v. New York State Police**, 109 A.D.3d 32, 966 N.Y.S.2d 557 (3rd Dept. 2013) May 30, 2013

    - Journalist petitioner requested information concerning a hit-and-run accident committed by a then-employee of the respondent. Petitioner believed that since the officer involved resigned, records would not be used to evaluate performance toward continued employment and should no longer be exempt from disclosure. Held that a document, used at any time during an officer's employment, is exempt from disclosure as a personnel record because employment status has no bearing on whether the requested records were used to evaluate performance.
- **Matter of The Herald Company v. New York State Division of State Police**, Supreme Court, Albany County, February 21, 2008
    - Petitioner, newspaper, sought records concerning a murder-suicide. The first FOIL request was denied asserting that disclosure would interfere with a law enforcement investigation. The following year the petitioner submitted another request for the same records but was denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Held that records containing non-routine investigative techniques and procedures are exempt from disclosure. Also held that if the privacy interest at stake outweighs the public's interest in disclosure, then the privacy exception applies, is exempt. In this case most records were ordered disclosed with the exception of the records that contained non-routine investigative techniques.
- **Matter of Herbsman v. Murray, Supervisor of the Town of Hempstead**, Supreme Court, Nassau County, November 19, 2015.
    - Petitioner requested financial disclosure forms for three town employees, and was allowed to inspect the documents but request for copies was denied. Held that municipal agencies must make all records available for inspection **AND** copying unless they establish a legitimate statutory exemption; see Archdeacon. INDEX- Financial Disclosure Statement
- **Hurley v. Town of Tyrone**, Supreme Court, Schuyler County, 2015
    - There were two different alleged violations, one under the Open Meetings Law and the other under FOIL. Held that as FOIL applied to the sign-in sheet, is a public record but if it cannot be found, the agency must so certify that such record cannot be found after a diligent search. INDEX- Certification
- **Matter of Jones v. Town of Kent**, 46 Misc.3d 1227(A), Supreme Court, Putnam County, March 13, 2015
    - A private investigator was looking into the conviction of a client when the victim of a similar sex offense led him to another potential suspect. After giving the investigator the information about another suspect the victim committed suicide. The petitioner was then denied access to the police file on the victims case because it was an "ongoing investigation" and under §50-b as the crime committed against the victim was a sex crime. Held that there has to be some investigative activity currently happening on the case for it to be considered ongoing. It was also held that the intent of §50-b was to protect the privacy of the victim and that protection does not extend beyond the life of the victim.
- **Kairis v. Fischer**, 110 A.D.3d 1408, 973 N.Y.S.2d 887 (3rd Dept. 2013) October 20, 2013
    - A prison inmate requested document from his former correctional facility concerning his transfer and stolen property claim. Both requests were denied by the respondent. Held that an agency must conduct a "diligent search" for the documents, inform the requested of their status and take appropriate action.
- **Matter of Kessler v. New York State Dept. of Financial Services** – Supreme Court, Albany County, July 14, 2014
    - Petitioner sought records pertaining to the New York State Medical Indemnity Fund. The respondent granted some of the requests but denied or redacted others claiming exemption for trade secrets and inter-agency and intra-agency materials. Held that the

party claiming the exemption has the burden of present "specific, persuasive evidence" that the commercial enterprise is in actual competition with other entities and release of the information would cause substantial competitive harm, and may not rest on speculative conclusions of potential harm. Held that agencies may require opinions and recommendations from outside consultants, and predecisional material, prepared as part of the deliberative process to assist an agency decision maker arrive at a decision is exempt from disclosure. Here the petitioner was granted access to the commercial agency's bidding and contract documents since they did not seem to protest disclosure but denied access to the memorandum between the respondent and other state agencies. INDEX- Trade Secrets; Inter/Intra-Agency Material.

- **In re Kohler-Hausmann v. New York City Police Department**, 133 A.D.3d 437, 18 N.Y.S.3d 848 (1st Dept. 2015).
    - The attorney petitioner's self-representation does not preclude an award of attorney's fees and other litigation costs reasonably incurred. INDEX- Attorney's Fees
- **Matter of the Law Offices of Cory H. Morris v. County of Nassau**, Supreme Court, Nassau County, June 12, 2015.
    - Attorney sought records relating to speed cameras. The Nassau County Traffic and Parking Violations Agency denied access to the records because it is a branch of the Nassau County District Court and FOIL does not apply. Held that an entity established as a branch of a court with the ability to adjudicate matters is considered part of the judiciary and exempt from FOIL. INDEX- Judiciary
- **Matter of Loevy & Loevy v. New York City Police Dept.**¸ 38 Misc.3d 950 Supreme Court, New York County, January 19, 2013
    - Petitioner sought records concerning a murder from 1987. Respondents denied access because disclosure would either interfere with a law enforcement investigation or identify a victim of a sex crime, citing Civil Rights Law §50-b. Held that not every document in a law enforcement agency's criminal case file is automatically exempt simply because it is kept there, and that a conclusory statement that an entire category of documents is exempt is insufficient to qualify for an exemption. See Lesher
- **Matter of Loundon House LLC v. Town of Colonie**, 123 A.D.3d 1409 (3rd Dept. 2014). December 31, 2014
    - Petitioner developers sought records concerning the change in zoning that caused their condominium development to be rescinded. The developers submitted a FOIL request for a report prepared by outside counsel regarding the zone change. The request was denied as attorney-client privilege which the petitioner concedes. However at various public meetings outside counsel gave an oral presentation on his report which petitioner claims negated the privilege. Held that an agency who permits their attorney to testify regarding a privileged matter is deemed to have impliedly waived the attorney-client privilege. Here the court ordered a review of the report to determine if there was enough overlap between the report and the oral presentation to warrant waiver of the privilege and disclosure of the report.
- **Matter of Mackenzie v. Seiden**, 106 A.D.3d 1140 (3rd Dept. 2013) May 2, 2013
    - Inmate petitioner requested all electronic communications between another inmate and that inmate's victims that were introduced at the trial. The district attorney's office denied the request as exempt under Civil Rights Law §50-b, identifying the victim of a sex crime. Held that, if a document is protected by §50-b it may be categorically excluded in its entirety and not subject to redaction or deletion. The documents in this case were ordered an in camera review.
- **Matter of Madeiros v. New York State Education Department**, 133 A.D.3d 962, 18 N.Y.S.3d 782, 323 Ed. Law Rep. 985 (3rd Dept. 2015).

    - Request for documents related to audit guidelines, but with redactions. Held that that the redacted portions were compilations of investigative techniques and that denial was proper; see Fink. INDEX- Law Enforcement Manual
- **Malliotakis v. Port Authority of New York and New Jersey** –Supreme Court, Richmond County, September 13, 2012
    - Petitioner, Assemblywoman Malliotakis, requested from the Port Authority concerning the New York Container Terminal and its rising toll costs. The Port Authority initially denied the request but then submitted just the data from the study subsequent to a court order and eventually submitted the entire study for an in court review. The Port Authority claimed that disclosure was not required under its FOI code because it is a "draft report" and the Port Authority is not subject to New York State FOIL. Held that statistical and factual data contained in government documents are not exempt from disclosure even if contained in a "draft". INDEX- Inter/Intra Agency Materials, statistical and factual information.
- **Mantello v. Bugbee**, July 29, 2014
    - Petitioner initially requested electronic copies of the ballots from the 2013 City Council election but was informed the electronic ballots were not stored at the Boards of Elections and to receive copies would cost $2,500. Petitioner then requested access to the paper ballots but was again denied because to view paper ballots you need a court order. Held that as long as there is clear legislative intent to establish and preserve the confidentiality of records, a statute need not expressly establish a FOIL exemption. The court agreed with the COOG's advisory opinion and ordered the ballots to be available for petitioner to review.
- **Matter of Miller v. New York State Div. of Human Rights** – Supreme Court, Bronx County, December 4, 2012
    - Petitioner requested training videos as well as respondent's General Counsel legal opinions under FOIL, but was denied due to either a lack of responsive records or based on exceptions. Held that documents providing legal guidance are exempt from disclosure unless petitioner was not granted access to any of the requested documents. INDEX- Attorney Client Privilege
- **Matter of Mineo v. New York State Police** – 119 A.D.3d 1140, 990 N.Y.S.2d 147 (3rd Dept. 2014). July 10, 2014
    - Petitioner requested a police report she and her husband filed but was given a redacted copy due to personal privacy concerns of the respondent. In a lower court decision, the respondents were ordered to supply an unredacted copy of the report and refund most of the $15 statutory fee. Both parties appealed, the petitioners believed there were entitled to attorney fees and the respondents believed they should be able to keep the $15 fee. Held that an agency must have no reasonable basis, initially, for denying access to warrant an award of attorney fees. Also held that the charge for copies shall not exceed 25 cents except when a different fee is otherwise prescribed by statute. Here the court did not award attorney fees and allowed the $15 fee to stand based on POL § 66-a(2).
- **Matter of Nassau Community Coll. Fedn. Of Teachers, Local 3150 v. Nassau Community Coll.**, 127 A.D.3d 865 (2nd Dept. 2015) April 8, 2015
    - Petitioner requested documents from a not-for-profit who was set up specifically to support Nassau County Community College's mission. The respondent not-for-profit denied the request claiming they were not a government agency and therefore not subject to FOIL. Held that an entity must establish that they lack the attributes of a public entity to avoid being subject to FOIL. Here the respondent was found to be a public entity.
- **New York Central Mutual Fire Insurance Company v. Town of Cheektowaga**, 13 A.D.3d 1189, 787 N.Y.S.2d 582 (4th Dept. 2004). December 30, 2004

    - Petitioner requested invalidation of a local law charging $10 for computer-generated police and accident reports requested pursuant to FOIL. Held that the cost of copies of records requested pursuant to FOIL could not exceed twenty-five cents per nine inch by fourteen inch copy. See also Sheehan v. City of Syracuse
- **Matter of New York State United Teachers v. Brighter Choice Charter Schools**, 15 N.Y.3d 560 (2010) November 18, 2010
    - Petitioner requested payroll records, full names and addresses of the teachers and faculty at six charter schools. All of the charter schools denied the request as an unwarranted invasion of privacy. The petitioner then amended the request to exclude addresses to ensure privacy. The request was still denied under §89(2)(b)(iii), prohibiting the release of lists of names and addresses for solicitation or fundraising purposes. Held that since FOIL is to help the public formulate "intelligent informed choices with respect to the direction and scope of governmental activities" if no governmental purpose is served by disclosure records are therefore exempt. The dissent strongly disagreed and believed since the addresses could be redacted and the documents pertained to public employees, the information should have been disclosed. They also pointed out there is a reason for public disclosure - especially for a teacher's union – organization and collective bargaining by public employees.
- **Matter of Newsday LLC v. Nassau County Police Dept.**, Supreme Court, Nassau County, March 11, 2014
    - Internal affairs investigations are personnel records covered by §50-a and are therefore exempt from disclosure.
- **Oneida Indian Nation v. New York State Gaming Commission** – Supreme Court, Schenectady County, March 14, 2016
    - Petitioners sought access to the analyses and projections of an expert consultant which respondents relied on in selecting which proposed casinos would receive a gaming facility license. Held that material that contained statistical or factual tabulations or data are not exempt from disclosure under FOIL but also predecisional opinions, suggestions, advice and recommendations that could be withheld. INDEX- Inter/Intra-Agency Materials
- **Matter of Pflaum v. Grattan**, 116 A.D.3d 1103 (3rd Dept. 2013) January 10, 2013
    - Petitioner requested records from the County Attorney's Office concerning work a former employee had done prior to his leaving. The respondent denied the request since the records were not reasonably described the documents would be considered attorney work product. After another request for the same files suggesting a search through the first 50 files in certain categories to see if the employee in question worked on any of them, he was denied access again on the same grounds. Held that attorney work product and attorney-client communications are privileged. Also held that the burden is on appellant to reasonably describe the documents requested so they can be located. Here the petitioner did not reasonably describe the records sought.
- **Matter of Pflaum v. Naegeli** – Supreme Court, Columbia County, June 26, 2012
    - Petitioner filed several FOIL requests over a period of more than two years. In that time some requests were completely fulfilled, other partially and some were denied. While the petitioner did appeal some of the decisions, most of them went unanswered prompting him to "re-appeal" for months. It was not until more than a year later that he commenced the Article 78 proceeding. Held that there is no such thing as a "re-appeal", if an agency fails to respond to an appeal within ten business days of its receipt it is considered a constructive denial and an Article 78 proceeding must be commenced within four months. Here the petitioner's claims were dismissed because he did not commence a proceeding within four months of the constructive denials of his appeals. INDEX- Appeal; Statute of Limitations.

- **The Plumbing Foundation of the City of New York v. Dept. of Buildings of the City of New York**, Supreme Court, New York County, December 14, 2010
    - The petitioner sought information gathered during an investigation conducted by the respondent with the help of WCBS TV. The WCBS story followed an individual believed to be installing plumbing without a license, and petitioner sought information collected regarding the individual. The request was denied as documents compiled for law enforcement purposes. The DOB eventually, after the commencement of this case, disclosed all the requested documents. Petitioner sought attorney fees but was denied. Held that a court may award attorney fees to a party that substantially prevailed if the record involved was of significant interest to the general public and the agency lacked a reasonable basis for withholding the record.
- **Matter of Pons v. New York City Police Department** – Supreme Court, New York County, January 6, 2012.
    - Petitioner requested documents from two agencies for records concerning his three previous arrests. One agency constructively denied the request by failing to respond and the other requested three additional months to fully respond. After petitioner appealed the length of time the request would take and initiated this Article 78 proceeding the police department provided 9 responsive documents and asserted it could not find any more. Despite failure to respond in a timely manner, certifications no additional records could be found rendered the matter moot. INDEX- Delay
- **Matter of Porco v. Fleischer** – 100 A.D.3d 639 (2nd Dept. 2012). September 20, 2012
    - Petitioner requested information obtained by the respondent concerning use of the EZ-Pass system. While the petitioner requested the make, model and color of cars that used the EZ-Pass on certain days and certain times at certain exits, he specified he was not seeking personally identifying information. The Thruway Authority denied the request and subsequent appeal based on unwarranted invasion of personal privacy, and a lower court agreed. Held that and agency carries the burden of demonstrating the requested information falls squarely within the exemption by articulating particularized and specific justification. This court found the respondent failed to establish the statutory exemption applied and ordered disclosure it contends was “speculative”. INDEX- Burden of Proof.
- **Estate of Rebello v. Dale, Commission Nassau County Police Department**, Supreme Court, Nassau County, April 1, 2014.
    - Concerned the shooting death of Andrea Rebello, in which an officer shot and killed Andrea Rebello while trying to apprehend the suspect burglarizing her home. Her estate requested the training information, 911 calls and police transmissions and reports in relation to the death. The agency denied the request on the grounds that the Homicide Squad was still conducting the investigation of the incident. Held that when attempting to use the on-going investigation exemption under FOIL, an agency carries the burden of “identifying the types of documents, their general content, and the risk associated with that . . . content” through evidentiary support in order to prevail. INDEX- Law Enforcement Purposes, generic denial; Burden of Proof.
- **Regenhard v. City of New York**, 102 A.D.3d 612 (1st Dept. 2011) October 25, 2011
    - Petitioner requested the names and addresses of the family members, next of kin and or authorized representatives of those killed in the World Trade Center to send them information about unidentified remains of the victims. The city denied the request but agreed to send a similar letter. Held that when a concern about unwarranted invasion of personal privacy arises, the court must balance the privacy interest at stake and the public interest in disclosure of the information. Since a letter was being sent out on the subject by the government, the privacy interest was overriding and disclosure was denied.

- **Matter of Richards v. Board of Fire Commissioners of the Brentwood Fire District** – Supreme Court, Suffolk County, January 12, 2012
    - Petitioner sent numerous requests for records to petitioner beginning in August 2010 and began receiving responsive documents in November 2010. Responsive records kept being sent until the initial request was fulfilled in March 2011. However, petitioner filed an Article 78 in August 2011 claiming the response was not complete. Held that a requester has four months from when the demand is finalized to initiate judicial proceedings. Since it took longer the proceeding was untimely and dismissed. INDEX- State of Limitations
- **Matter of Robinson v. Cuomo**, Supreme Court, Albany County, April 30, 2015
    - Petitioner requested information concerning registrations of firearms. The State Police denied the request, even though they acknowledged having possession of the records, because they were "derived from documents assembled or collected for inclusion in the State Police's database, . . . [and] not subject to disclosure under FOIL." Held that only data assembled or collected for inclusion into the database is exempt from disclosure, not data derived from it. Since the State Police acknowledged have the data derived from the database they had to disclose it.
- **Roth & Roth, LLP v. Krumpter, Acting Commissioner Nassau County Police Department**, Supreme Court, Nassau County, October 5, 2015.
    - Requests for parts of Department Manual were either denied or disclosed in redacted form. Held that information that does not tend to compromise the safety of officers and the public at large, negatively impact the security of facilities, organizations, procedures or investigations, place civilians at risk of harm or negatively impact security of restricted areas must be disclosed. INDEX- Law Enforcement Manual; Investigative Techniques/Procedures.
- **Matter of Ruggiero v. City of Cortland**, Supreme Court, Cortland County, September 16, 2014
    - Petitioner sought records referred to in a City of Cortland Action Summary. The request was originally denied as attorney-client privilege and attorney work product. It was then admitted, after an additional search was ordered by the court, that the requested letter could not be found. The petitioner also requested attorney fees which were awarded. Held that the fact that compliance is finally achieved in the form of a certification that the records could not be found does not preclude a finding that the petitioner substantially prevailed.
- **Matter of Ryan v. New York City Police Dept.**, Supreme Court, New York County, October 22, 2014
    - Due to respondents lack of response to an administrative appeal within the requisite time frame the petitioner treated such as a constructive denial and commenced this proceeding. Once the Article 78 was commenced respondents disclosed the responsive documents and motioned to dismiss the petition. Held that a response to the record request subsequent to the commencement of an Article 78 proceeding, requires the remand of the case to the agency involved.
- **Matter of Sawma v. Collins** - 93 A.D.3d 1248, 939 N.Y.S.2d 922 (4th Dept. 2012). March 16, 2012
    - Held that an agency met the burden of establishing that the requested documents were used as consultative and predecisional material as part of a governmental-decision making process and therefore exempt as inter-agency or intra-agency material. INDEX- Inter/Intra Agency Material.
- **Matter of Saxton v. New York State Dept. of Taxation Fin.**, 107 A.D.3d 1104 (3rd Dept. 2013) June 6, 2013
    - Petitioner sought attorney fees after finally given 3 of 18 requested documents and almost 135 records that were thought no to have existed. Held that a petitioner must substantially prevail to be entitled to counsel fees.

- **In re Sell v. New York City Department of Education**, Supreme Court, Appellate Division, First Department, January 21, 2016.
    - Records sought concerning an investigation by the Office of Special Investigations into a complaint the petitioner filed alleging school administrators improperly influenced the re-scoring of Regents examinations. The Department denied the request as an unwarranted invasion of personal privacy and inter- and intra-agency material. Held that privacy interests must be balanced against the public interest in disclosure of the information. Also held that documents or portions of documents that are not "factual tabulations or data" or "final agency policy or determinations" are exempt from disclosure. In this case, the court believed there was significant public interest in proper academic assessment of public school students and insufficient privacy concerns to warrant exemption. Also all records, except those that consisted of "opinions, ideas, or advice exchanged as part of the consultative or deliberative process . . ." were ordered disclosed. INDEX- Privacy, Public Interest; Privacy, Public Employee.
- **Matter of Siani v. Farmingdale Coll. Found., Inc.**, Supreme Court, Suffolk County, November 3, 2010
    - Petitioner sought documents from both SUNY Farmingdale and the Farmingdale College Foundation concerning financial transactions and minutes of meetings where the financial transactions may have been discussed. The Foundation denied the request on the basis that both FOIL and the OML did not apply to it. Held that private, not-for-profit corporations are not subject to FOIL or the OML. See also – Hearst v. SUNY Foundation
- **Siani v. The State University of New York College at Farmingdale**, Supreme Court, Suffolk County, September 28, 2011.
    - Petitioner requested certain email activity logs for 5 current SUNY employees and 1 former SUNY employee. The documents were received with redactions; petitioner appealed claiming the redactions were overbroad and not particularized. Held that so long as a responsible local official provides a rational basis, supported by substantial evidence, to a decision will be sustained.
- **Matter of Smith v. The New York State Office of the Attorney General** – Supreme Court, Albany County, 2014
    - Petitioner requested e-mails to and from former Attorney General Elliot Spitzer's private e-mail account, generated while he was in office and pertaining to official agency business. The request was denied because the Office of the Attorney General did not have physical possession of the requested records. Held that when documents sought pertain to official agency business generated or acquired by an employee in their official capacity, no matter where such documents are generated or located they are subject to FOIL. The Office of the Attorney General was ordered to obtain the records and determine whether they were responsive to the request. INDEX- E-mail; Record; Custody of Records.
- **Matter of Smith v. New York State Office of the Attorney General**, 116 A.D.3d 1209, 984 N.Y.S.2d 190 (3rd Dept. 2014).
    - Petitioner requested intra-agency correspondence relating to the then current litigation with American International Group (AIG). Held that exception regarding intra-agency and inter-agency material does not distinguish between "routine operating decisions" and "important public policy", and that the exchange of advice, opinions and ideas as a part of the deliberative process is "predecisional" in nature and not subject to disclosure. INDEX- Inter/Intra-Agency Material, predecisional information.
- **Matter of Solutions Economics, LLC v. Long Island Power Authority** – 97 A.D.3d 593, 948 N.Y.S.2d 100
    - Petitioner sought records concerning a project to replace power transmission cable which crosses the Long Island Sound. The Power Authority acknowledged the receipt of the

request and notified the petitioner of the need to allow the third-party businesses involved to request and explain their need for confidential treatment of the documents. Two of the third-party entities responded and alleged that the documentation was confidential and proprietary and should not be disclosed. The court agreed and redacted the documents. Held that records if disclosed would cause substantial injury to the competitive position of the subject enterprise are not subject to disclosure. Also upheld certification regarding existence of records. INDEX- trade secrets

- **State of New York v. Bennett**, Supreme Court, Kings County, July 10, 2013.
    - Defendant in a criminal trial claimed that there was a police report that would serve as an alibi. After requesting the police report and receiving no response from the department he received a sanction order against them. With the judgment the defendant tried to prove that the department destroyed the records and that he should be released. Held that the document requester must act in good faith when making a FOIL request. In this case the defendant was found to have acted in bad faith in requesting documents he knew did not exist. INDEX- News; Bad Faith
- **T-Mobile Northeast LLC v. The Town of Hempstead**, Supreme Court, Nassau County, January 10, 2014
    - Petitioner requested documents concerning real property and town legislation that was the subject of a lawsuit in which it was a party. The request was denied because the requested documents pertained to the pending criminal case. Respondent argued petitioner should not be able to circumvent discovery through a FOIL request. Held that just because discovery is permitted does not mean a FOIL request is barred. See Farbman
- **Matter of Tarantino v. New York City Police Dept.** – 136 A.D.3d 598 (1st Dept. 2016). February 25, 2016
    - Petitioner appealed the decision of the lower court after the case was dismissed relying on an affidavit signed by the respondent's attorney's affirmation that the respondent was not in possession of the requested documents. Held that when an agency certifies that the records sought are not in its possession, the request becomes moot, unless there is a "demonstrable factual basis" to support that the records are in the agency's possession. Here there was not demonstrable factual basis for the case was again dismissed. INDEX- Existence of Records
- **Matter of Thomas v. New York City Dept. of Educ.**¸ 103 A.D.3d 495 (1st Dept. 2013) February 19, 2013
    - Petitioner, a teacher, requested the records of an investigation commenced following a complaint filed by him against his employer. He claimed the CEP was not developed properly, and funds were misappropriated as well as other infractions. The Dept. of Education referred the document request to the Office of Special Investigations, which denied the request because the allegations were unsubstantiated and exempt as an unwarranted invasion of personal privacy. Held that records that are relevant to the performance of a public employee's official duties are discloseable as a permissible invasion of personal privacy.
- **Matter of Whitfield v. Bailey**, 80 A.D.3d 417 (1st Dept. 2011). January 4, 2011
    - Petitioner, inmate serving a sentence for 2nd-degree murder, requested the entire file related to a fellow inmate's arrest for petit larceny. After a denial of access and an in camera review of the documents, the court directed respondent to redact the names, address and birth dates of the civil witnesses and co-defendant and Doyle's address and date of birth. Held that an agency may deny access to records or portions thereof that if disclosed would constitute an unwarranted invasion of personal privacy or endanger the life or safety of any person, but may be required to prepare a redacted version with the exempt material removed for purposes of disclosure.

- **Wilcox v. Newark Val. Cent. School Dist**. – 107 A.D.3d 1127, 967 N.Y.S.2d 432, 293 Ed. Law Rep. 1017 (3rd Dept. 2013). June, 6 2013
    - In footnote, held that “statement of reasons for recommending termination” of probationary teacher was intra-agency material that could likely be withheld.
- **Matter of Wilkerson v. Annucci** – (3rd Dept. 2016). March 17, 2016
    - Petitioner, a prisoner, was charged with making threats, creating a disturbance and violent conduct and sought documents relating to the charges for an upcoming hearing. While he was given some of the documents he also appealed a denied FOIL request from the previous year. Held that a petitioner must timely commence an appeal of the denial of access to records. Since the appeal was brought over a year after the denial, it was not timely commenced and therefore dismissed. INDEX- Exhaustion of Administrative Remedies.

OML Cases

- **Matter of Ballard v. New York Safety Track LLC**, Supreme Court, Delaware County, January 15, 2014.
    - New York Safety Track LLC opened originally as a safety school for motorcyclists with only motorcycles being used per site plan approved by the Town of Harpersfield. In January 2013, the town code officer and the Planning Board entered into a new agreement with New York Safety Track that allowed uses inconsistent with the original site plan. During the process of negotiations between the Planning Board and New York Safety Track, the Board, on three separate occasions, went into executive session without providing a reason for doing so in the minutes. Held that to properly go into executive session, a motion must be made, and a reason must be given and recorded into the minutes, which do not have to be verbatim but at least an accurate summary; records scheduled to be discussed should have been disclosed pursuant to §103(e). Also, the attorney-client privilege does not extend when representatives from other entities are present. INDEX- Attorney-Client Privilege; Executive Session, motion to enter; Executive Session, adequacy of motion; Minutes; Records Scheduled to be Discussed, 103(e).
- **Matter of Cutler v. Town of Mamakating** – March 3, 2016
    - Petitioner asserts that respondent violated the OML while in executive session to discuss the efficiency of petitioner's supervisory job and the decision should be invalidated. Held that to invalidate a Town Board decision there must be a showing of good cause. Also held that a public body must adequately describe the reason for entering into executive session and votes in executive session should be recorded in the minutes even if it is unrelated to the appropriation of public moneys. Here since there was not the requisite good cause but rather mere negligence on the part of the Town Board, the decision was not invalidated. INDEX- Executive Session, motion to enter.
- **Matter of Dinielli v. Village of Freeport** – May 11, 2012
    - Village trustee was asked to testify concerning events during an executive session of the Trustees. Held that matters are not considered automatically "confidential but are merely beyond the scope of public access, and absent a specific statute prohibiting disclosure, information acquired during an executive session is not privileged or confidential. Court cited Committee opinions 3076 and 4649. INDEX- Executive Session, disclosure after.
- **Matter of Frigault v. Town of Richfield Planning Bd.** – 107 A.D.3d. 1347 (3rd Dept. 2013) June 27, 2013
    - Petitioners requested the annulment of a determination made based on an alleged violation of the OML. Held that Board's efforts in relocating meeting to accommodate the public and ensure public access were entirely reasonable. The court did not annul the determination in this case since the respondents moved the meeting to accommodate the large public presence and gave notice regarding the change in location. INDEX- Meeting, style; Board.
- **Greater New York Taxi Assn. v. New York City Taxi & Limousine Commn**. – July 11, 2013
    - Petitioner sought to annul decision of the respondents alleged to have been made in violation of the OML. Allegedly there was a private meeting at which public business was discussed. However it was not alleged that a quorum of the public body was present during the meeting. Since it was unclear whether there was a quorum at the private meeting, the respondent's decision was not annulled. INDEX- Quorum
- **Matter of Hayes v. Chestertown Volunteer Fire Co.** – 93 A.D.3d 1117, 941 N.Y.S.2d 734, (3rd Dept. 2012) March 29, 2012

    - Petitioner entered the public firehouse to attempt to attend the meeting of the Chestertown Volunteer Fire Company but was asked to leave and was escorted out of the meeting. The fire company believed it was not subject to the OML and would not allow the petitioner to attend the meeting. Held that whether an entity is a "public body" is determined by "the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to the affected parties and constituencies." Being an "agency" under FOIL is not demonstrative of whether it is a "public body" under the OML. Here while the respondent was an "agency under FOIL, they were not a "public body" subject to the OML. [NOTE; Committee on Open Government disagrees with the outcome of this case.]
- **Hurley v. Town of Tyrone**, Supreme Court, Schuyler County, 2015
    - There were two different alleged violations, one under the Open Meetings Law and the other under FOIL. Alleged that there was a meeting of the town board started half an hour prior to the scheduled start time and that the town board did not properly certify that a requested sign-in sheet from a town board meeting could not be located. Held that, since the public was not excluded and no official acts were taken, an informal, unofficial review before the meeting does not constitute a meeting or executive session.
- **Matter of Max v. Ward** – 107 A.D.3d. 1597 (4th Dept. 2013). June 14, 2013
    - Petitioner alleged that the respondents violated the OML during a re-districting meeting and asked that the re-districting plan be voided. Held that not every breach of the OML automatically triggers enforcement sanctions, and an agency must show good cause to warrant voiding a decision or plan. Here the petitioner failed to do so. INDEX- Action Not Invalidated; Good Cause.
- **The New York State Nurses Association v. State University of New York** – March 14, 2013
    - Petitioners alleged that the SUNY Board of Trustees violated the OML and asserted the decision to shut down Long Island College Hospital subsequent to the meeting should be annulled. Went into executive session immediately after commencing referring to "§105 (e), (f) and (h) and [POL] §108." Held that to ensure transparency, a public body is not permitted to conduct business in executive session absent a motion identifying the general area of subjects to be discussed, with some degree of particularity. Since the Board of Trustees merely referenced various exceptions without more, it seemed to have "intentionally designed" its motion to "shield the purpose of the meeting…" the court found the respondents violated the OML and had good cause to annul the decision. INDEX- Executive Session, entry procedure; Board; Action Invalidated.
- **New Yorkers for Constitutional Freedoms v. New York State Senate**, 98 A.D.3d 285 (4th Dept. 2012) July 6, 2012
    - Stems from the passage of the Marriage Equality Act and the meetings and lobbying it took to do so. Plaintiffs allege that at two different times a quorum of senators, all republicans, met behind closed doors with two individuals who were not member of the Republican Party to discuss the Marriage Equality Act. The plaintiff sought a declaration that the senate violated the OML and to void the Act as well as all marriages performed pursuant to it. The court declined to do either. Held that members of a political caucus may entertain a guest from a different political party, provided the guest is not a member of the same public body.
- **News 12 Westchester Inc. v. Monroe-Woodbury Central School Dist. Board of Educ.** – Supreme Court, Orange County, June 6, 2011
    - Petitioner attended two Board of Education meetings where they wanted to record the events. While they were allowed access and given the ability to record most portions, they were asked not to record the portion concerning teen-suicide. The initial reason given was to "protect the health, welfare and safety of the children . . Held that an agency cannot exclude a camera from a meeting based on an ad-hoc, content-based

determination that coverage may adversely affect the health and safety of the public, and that it may impose reasonable rules regarding on the ground that the equipment or operator is either physically obtrusive or physically interfere with the meeting. It was found that the respondent violated the OML. INDEX- Recording Devices, audio or video.

- **Matter of Petersen v. Incorporated Village of Saltaire** – 77 A.D.3d 954, 909 N.Y.S.2d 750 (2nd Dept. 2010). October 26, 2010
    - The Village's Board of Trustees amended the Village Code to allow meetings to be held outside the village's geographical boundaries under certain conditions. The petitioners sought mandamus to compel the Board to meet within the geographical boundaries. Held that there is no requirement that village meetings take place within the village borders. INDEX- Meeting, site of
- **Matter of Rowe v. Town of Chautauqua** – 84 A.D.3d 1728 (4th Dept. 2011). May 6, 2011
    - Petitioners sought annulment of a determination made by respondents due to a violation of the OML when the determination was made. The Chautauqua Institute, which was established by the state legislature, decided to demolish a house on its property to build another. Held that while an entity must be authorized pursuant to state law to be within the ambit of the OML, not every entity with power derived from state law is deemed to be performing a governmental function and that Institute is not a "public body". INDEX- Public Body
- **Schrauth Forcucci v. Board of Educ. Of Hamburg Central School District**, Supreme Court, Erie County, June 19, 2014
    - A school board member was under investigation for official misconduct and wanted the hearing to be conducted in open session but was denied. Held that when dealing with elected public officials election and removal is defined by the public's role so questions of seat retention and removal should be overseen by the public. The judge ordered the defendant to hold the hearing and vote in open session but allowed discussion and deliberation on the facts to happen in executive session after the public hearing.
- **Matter of Siani v. Farmingdale Coll. Found., Inc.**, November 3, 2010
    - Petitioner sought documents from both SUNY Farmingdale and the Farmingdale College Foundation concerning documentation of financial transactions and minutes from meetings where the financial transactions may have been discussed. The Foundation denied the request on the basis that both FOIL and the OML did not apply to it. Held that private, not-for-profit corporations are not subject to FOIL or the OML.
- **Snyder v. Walsh** – October 16, 2013
    - Petitioner sought to void the results of an election regarding a proposed state constitutional amendment to allow the state to regulate casino gambling. The petitioner alleged that the staff added the "purposes Language" after the public meeting in a manner exceeding the Board's action. Held that nothing prohibits an agency from sub-delegate its statutory authority if it retains sufficient control of the process. Here, since there was a video of the meeting, it was clear that the respondent was merely sub-delegating authority and the claim was dismissed. INDEX- Delegation of Authority.
- **Matter of Stephenson v. The Board of Educ. Of the Hamburg Central School District** – 31 Misc.3d 1227(A) Supreme Court, Erie County, April 12, 2011
    - Petitioner alleged violations of the OML, based procedure for conducting meetings and executive session. Held that an executive session needs to be held within a regularly commenced and noticed meeting, and must end the executive session and close the regular meeting. Also held that a reason for executive session must be given to give the members guidance on what business may be discussed in the session. In this case, the judge did not annul the decision made at the meetings but did award attorney's fees. INDEX- Action Not Invalidated

- **Thomas v. New York City Department of Education**, Supreme Court, New York County, April 23, 2015.
    - Petitioner on several occasions attempted to gain access to School Leadership Team meetings in different schools but was denied each time. Held that because School Leadership Teams are established by the Education Law and they have a role in school governance, play a crucial role in the school's power distribution, and they touch on core functions of the public schools, they constitute public bodies subject to OML. INDEX- Advisory Body
- **Matter of Thorne v. Village of Millbrook Planning Bd.** – 83 A.D.3d 723 (2nd Dept. 2011) April 5, 2011.
    - The respondent Planning Board met to schedule a public hearing on a proposed land development project that the petitioner sought to have voided due to a violation of the OML. Held that notice does not have to be given of a meeting merely to schedule a public hearing. INDEX- Action Not Invalidated; Notice
- **Matter of Tuxedo Land Trust Inc. v. Town of Tuxedo** – 112 A.D.3d 726 (2nd Dept. 2012). December 11, 2013
    - Violations of the OML stemming from a land use application and subsequent meetings and site visits that the Town Board and Town Planner participated in leading up to the application's approval. It was alleged that the Town Supervisor, the Town Planner and a Town Board member traveled to Florida to tour a similar property the applicant had developed at the applicant's expense. Held that "a trip undertaken by the members of a public body to gather information that will provide them with a greater understanding of the issues involved in their determination of an application before them does not violate the [OML]." INDEX- Site Visit.
- **Matter of Zehner v. The Board of Educ. Of the Jordan-Elbridge Cent. School Dist.** – 29 Misc.3d 1206(A) Supreme Court, Onondaga County, October 1, 2010
    - Petitioner sought to void a decision to appoint an interim superintendent by the respondent while allegedly violating the OML. Petitioner alleged a violation occurred when there was not notice given at the meeting or prior to it that an interim superintendent was to be appointed. Also, all discussions regarding that topic occurred during an executive session which was not properly adjourned. Held that policy discussions by the public body are not matter for executive session. Only when addressing matters about a particular individual and their perspective employment may the body conduct an executive session. The appointment was voided due to the violations of the OML. INDEX- Action Invalidated; Executive Session, entry procedure; Attorney's Fees; Executive Session, particular person.
- **Matter of Zehner v. Board of Education of Jordan-Elbridge Central School District**, 91 A.D.3d 1349, 937 N.Y.S.2d 510 (4th Dept. 2012).
    - Board, following a previous Article 78 decision, continued to use "statutory boiler plate language" when going into executive session after the court advised it was a failure to comply with the OML. Court again found that the Board was using boiler plate language to justify executive session against its direct order and awarded petitioner attorney fees. The Board appealed asserting an abuse of discretion in awarding attorney fees. Held that it is a matter of judicial discretion determining an appropriate remedy, and that there was no abuse of discretion. INDEX- Attorney's Fees; Executive Session; Adequacy of Motion.