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COMMITTEE ON OPEN GOVERNMENT**

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**REPORT TO THE GOVERNOR  
AND THE  
STATE LEGISLATURE  
DECEMBER, 2012**

**Open Data: Key to the Future**

*“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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## **I. E-Government and Open Data: Our Highest Priority**

Not long ago, the term “E-Government” meant “electronic” government and referred to the use of new technologies to increase government transparency. It encompassed primarily the adoption of e-mail and other electronic means to facilitate government’s response to public inquiries. Today the term has a new, far broader meaning. “E-Government” now represents the proactive use of technologies to make the vast amounts of valuable government-held information more widely available, and to facilitate its ready use by policy makers and the public alike. Understood in this sense, E-Government transforms the foundations of open government: transparency, participation and collaboration.

In last year’s report to the Governor and the State Legislature, we highlighted the international trend toward proactive disclosure of government information, and stressed the need for New York agencies similarly to develop the capacity to “push” information to the public. Since its enactment in 1974, users of the Freedom of Information Law, widely known as “FOIL,” have been able to submit written requests to “pull” records out of government agencies. In many areas of government, however, new technologies have made this approach unduly burdensome, costly and slow.

The concept of proactive disclosure upends the current FOIL model by facilitating the release of relevant information through agency websites and other techniques, without the need for any specific request. Several state and local government agencies in New York now routinely post records online, and this trend should be embraced and encouraged. Fully embracing E-Government holds the potential to improve government efficiency and effectiveness, to educate and empower citizens, and to unleash public and private sector creativity and innovation. Adopting the principles of E-Government in New York remains our strongest goal and most urgent recommendation. And the important next step in this evolutionary process requires state and local government agencies to utilize “open data” wherever possible.

### **A. Open Data: The Essential Next Phase**

As we continue to analyze the potential benefits of proactive disclosure, we have become increasingly aware of the importance of “open data” to attaining these benefits. An open or free file format refers to the way digital data is stored. Open data is information made available in a digital format that can be retrieved, downloaded, indexed, searched and used with commonly available software and web search applications.

Maximizing the potential of E-Government requires not only pro-active disclosure, but disclosure wherever possible in a form that is readily useable—avoiding proprietary formats in favor of standard systems and methods. This objective should be embraced in the provisions of FOIL itself, which can readily be achieved within the current structure of the statute.

First, the term “record” is defined to mean “any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature in any physical form whatsoever...” The provisions of FOIL already apply to databases and other compilations of information.

Second, in recognition of the reality that government datasets and databases often include some items or fields that must be publicly available by law, and others that may properly be withheld, FOIL currently requires agencies to extract the available data whenever they have the ability to do so with reasonable effort.

Third, following amendments over the past few years, FOIL already requires agencies to think and plan for disclosure when they develop electronic information systems. To the extent practicable, electronic information systems already must be designed to permit the identification and segregation of those items that are public from those that may properly be withheld (§89[9]). By so doing, agencies maximize disclosure in a manner consistent with the intent of FOIL, while automatically shielding items and data that are deniable by law.

What remains to be clarified is the importance of using “open data” wherever possible in electronic datasets and databases maintained by government agencies. The potential efficiencies of proactive disclosure, and the potential value of government data in unleashing innovation and economic growth, cannot fully be realized without public access to open data using open source software. Collecting data and making it available in a format that is cleared of incongruities or inconsistencies does not limit government’s use of that information to any extent, but it can create real societal value by allowing that same information to be studied, compared and contrasted with other information by those outside of government. In an era of ever-tightening government resources, it is perhaps the most productive means to allow government information to be used to support the economy and advance understanding.

**Recommendation: Amend FOIL to promote the use of open data formats wherever possible.**

The Committee encourages the Legislature to adopt a statutory requirement that all agencies make available their information of public significance in an open data format, to the extent practicable. We also encourage the Governor to promote the use of open data at the state agency level through an Executive Order or policy directive.

Recommendation: Amend Section 89(9) as follows:

9. When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing or upgrading its data storage or retrieval systems ~~information retrieval methods~~, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access, utilizing open source software and open data formats.

## **B. Open Data: Untold Potential**

We are not alone in our efforts to achieve more effective ways to operate while increasing transparency and the societal value of government data. Government agencies around

the world are inspiring and adopting creative approaches to capitalize on capabilities of the digital age, including crowd sourcing, application development challenges, and open data events.

Federal, state and local governments now hold application development events, through which private and public sector developers coordinate to envision and develop applications that utilize freely available government data. Examples abound. The US Congress held an event with Facebook engineers and independent developers, bringing together lawmakers, academics and developers to find ways to make Congress more transparent and accessible.<sup>1</sup>

Within the last month, representatives of both the Senate and Assembly here in New York conducted events that focused on the potential uses of information technology and open data to improve the operation of government and the lives of ordinary citizens. Participation by executive branch agencies at those events indicates that both the Legislature and the Governor recognize the need to move forward in how our state uses technology.

It is not hard to find examples, both within New York and around the country, that illustrate the huge potential of proactive disclosure and open data. To identify just a few:

### **1. New York State Department of Health: METRIX**

The Department of Health has been a trailblazer in developing accessible open datasets that have produced unforeseen benefits and generated substantial cost savings. Through its METRIX project, the Department has made numerous datasets available through the same open data platform known as data.gov.<sup>2</sup> Use of the data has resulted in the recognition of untapped resources and to the improvement in public health and health care delivery systems.

Ready access to the Department's datasets has made them more useful to those within government, those in the private health care sector, and average citizens. For example, if someone has a need for information about nursing homes, they can now go online to locate nursing homes within a certain region, the availability of rooms, the cost, and a facility's track record pertaining to complaints, safety and care. If you want to know more about a particular restaurant, inspection and violation information is available, along with links to other agencies that post related information.

In addition to its utility to the public, posting "FOILable" datasets on METRIX has resulted in savings of time, effort and, therefore, taxpayers' money. The Department of Health has been able to reap "immediate benefits" by reducing the effort required to respond to FOIL requests.

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<sup>1</sup> <http://majorityleader.gov/uploadedfiles/hackathonreport.pdf>

<sup>2</sup> <https://apps.health.ny.gov/METRIX/main.action>

## **2. Metropolitan Transportation Authority (MTA): Countdown Clocks**

By the end of 2012, real time arrival data for all numbered subway lines will be accessible through an application available for smartphones and home computers, or on the MTA website. It is information especially valuable to those who ride during off hours when trains run less frequently.<sup>3</sup>

## **3. The Los Angeles Times: Crime Mapping**

By making crime data available on a daily basis, the Los Angeles County Sheriff's Department and the Los Angeles Police Department enabled the *Los Angeles Times* to create a filterable, mapped database of county crime, including current and long term information relating to more than 200 neighborhoods and localities. The database is built entirely from open source software. When violent or property crimes rise sharply in a particular neighborhood, the system delivers a crime alert. Adopting open data had other benefits for the LAPD. During the process of building the site, the *Times* discovered significant omissions and errors in the LAPD's data file. After the *Times* published those findings, the LAPD's data contractor eliminated many of the flaws and improved its processing.<sup>4</sup>

## **4. Federal Government Data: Economic Benefit**

The World Bank recently reported that some 400 companies owe their existence to an open government database maintained by the U.S. National Weather Service. This free source of real-time government collected weather data has enabled those companies to create an estimated 4,000 jobs.<sup>5</sup> Similarly, the GPS data system maintained by the United States government has become the backbone of the international transportation system and is now valued at \$90 billion. It makes data freely accessible to anyone with a GPS receiver.<sup>6</sup>

## **5. New York: Project Sunlight II**

Enhancing the searchable information related to campaign finance, legislation, lobbying activity and recipients of state government contracts available online, including legislative "member items", the Office of General Services plans to launch a database that will capture all "appearances" before state agencies regarding procurement contracts for real property, goods or services, regulatory reform, rate making, and judicial or quasi-judicial proceedings.<sup>7</sup> It is our understanding that the database will be accessible to and searchable by the general public.

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<sup>3</sup> [www.nydailynews.com/new-york/mta-countdown-clocks-coming-smartphones-article1.1191659](http://www.nydailynews.com/new-york/mta-countdown-clocks-coming-smartphones-article1.1191659)

<sup>4</sup> <http://projects.latimes.com/mapping-la/neighborhoods/>

<sup>5</sup> Samia Melhem, Senior Information Officer, Global ICT Department, World Bank, 6<sup>th</sup> International Conference on Theory and Practice of Electronic Governance, Albany, New York, October 22-25, 2012.

<sup>6</sup> Dean Hill, Open Projects Manager, Capitol Camp 2012, November 16, 2012, and Wikipedia.

<sup>7</sup> Executive Chamber Memorandum from Howard Glaser, Director of State Operations, October 24, 2012.

## **6. New York: Language Access**

Approximately two and a half million New Yorkers do not speak English as their primary language and have limited ability to read, speak, write, or understand English. This presents potential barriers when trying to access important government benefits or services. To increase access to State government, Governor Andrew M. Cuomo issued an Executive Order in October 2011 requiring state executive agencies that provide direct public services to offer free interpretation and translation services to members of the public for vital forms and instructions. Based on census data, the services are being provided in Spanish, Chinese, Italian, Russian, French, and French Créole. In 2012, each executive branch agency affected by the Executive Order created and implemented an agency-specific Language Access Plan. Today, each of these agencies is providing vital documents and services to the public in six languages.

## **7. New York: Web Accessibility Policy**

Recently updated, the New York State's Web Accessibility Policy promulgated by the Office of Information Technology Services (ITS) establishes minimum accessibility requirements for web-based information and applications developed, procured, maintained or used by state agencies. Pursuant to such policy, the Committee's advisory opinions are available online in "html", which is, both open format and open standard. This report will be available in "html" also.

These examples hint at potential benefits of widespread adoption of open data. It is an engine to drive public participation, spur economic growth, fight corruption and crime.

# **II. Proactive Disclosure**

## **A. Freedom of Information Law**

Those who want to know what 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 time government information is sought.

Beyond rethinking how data is maintained, it is time for government fully to embrace "proactive disclosure" — making records available on websites before the public requests them whenever it is recognized that records available under FOIL are of general interest to the public. When government posts information online, the inconvenience and burden for the public is reduced, as is the time, effort and expense spent responding to FOIL requests.

Consistent with the provisions of FOIL, legislation should require proactive disclosure of records and data that are clearly accessible under FOIL and:

- are frequently requested by citizens; or
- reflect matters of significant public interest; or

- can proactively be disclosed at a lower administrative cost than responding to a specific FOIL request.

In each of these situations proactive disclosure can be expected to deter and diminish corruption, enhance and encourage citizen involvement, and promote economic innovation.

Although several bills have been introduced regarding proactive disclosure, we believe the most reasonable approach is presented in A.5867-B/S.393-B introduced by Assemblymember Kavanagh and Senator Krueger. Recommendations for minor alterations to the bill, offered in the Committee's 2011 report, were added to the legislation, which now provides as follows:

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

## **B. A Move Toward Proactive Disclosure: Records Discussed During Open Meetings**

The Committee had for years written to express the frustration of those who attended open meetings but had no ability to see the records being discussed by public bodies during those meetings. On February 2, 2012 the frustration began to ebb.

On that date, §103(e) of the Open Meetings Law became effective and now requires public bodies to make two categories of records available in advance of their meetings, when it is "practicable" to do so. Those categories are (1) any records to be discussed that are accessible

under FOIL, and (2) proposed resolutions, policies, laws and regulations. The records must be made available either in response to a FOIL request or on an agency's website.<sup>8</sup>

The value of the legislation is obvious. The public can often know in advance of a meeting the specific content of records that are scheduled to be discussed in public. With that knowledge, many have and will offer points of view and perhaps solutions to problems that would not otherwise be considered. The public can become engaged with the work of their government, thereby creating more harmonious relationships, as well as increased trust and confidence in the individuals and entities that serve them. In addition, when government officials know that the public has the opportunity to gain access and study records in advance of meetings, they are often better prepared, thereby resulting in better government.

It should be noted that the legislation came to fruition as the result of ongoing and intense negotiations between local government organizations and the prime sponsors of the bill, Senator Stephen Saland and Assemblymember Amy Paulin. We express our gratitude to them and to Governor Cuomo for approving the legislation.

### **III. Additional Legislative Proposals**

#### **A. Access to Records of the State Legislature**

In years past, the Committee has recommended that records of the State Legislature be subject to a presumption of access in a manner analogous to those maintained by state and local agencies.

FOIL is generally applicable to records of an “agency”, a term defined in §86(3) that excludes the judiciary and the State Legislature. Unless a statute confers confidentiality, most court records are available under other provisions of law (e.g., Judiciary Law §255, Uniform Justice Court Act §2019-a) and administrative records of the courts are subject to FOIL as records of the Office of Court Administration.

The State Legislature is required, pursuant to §88(2) of FOIL, to make certain records public, including bills, introducers’ bill memoranda, formal opinions, final reports of legislative committees and commissions, and similar documents. Not all of these types of records, if maintained by agencies, would be required to be made available pursuant to FOIL.

Because the Legislature has hundreds of employees, a substantial budget and a variety of administrative functions, the Committee believe that FOIL should be amended to require the State Legislature to meet standards of accountability and disclosure consistent with those applicable to agencies.

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<sup>8</sup> <http://www.dos.ny.gov/coog/RecordsDiscussedatMeetings.html>; <http://www.dos.ny.gov/coog/QA-2-12.html>

Concern has been raised about access to communications with constituents who contact legislators in their personal or private capacity to express concerns. It is our opinion that the Legislature would have authority to withhold such communications on the ground that such disclosure would constitute an unwarranted invasion of personal privacy. To offer clarification, §89(2)(b), which includes a series of examples of unwarranted invasions of personal privacy, could be amended to include reference to communications of a personal nature between legislators and their constituents. Communications with those who write on behalf of corporate or business interests should be subject to disclosure.

**Recommendation: Amend FOIL to create a Presumption of Access to Records of the State legislature**

Statutory guarantees of access would increase public confidence in the State Legislature as an institution. Accordingly, we support the intent of legislation introduced by Assembly Member Kavanagh and Senator Squadron (A.9069/S.48) with the following recommendations:

- Include both houses of the State Legislature in the definition of “agency” in §86(3), and amend §89(2)(b) to protect communications of a personal nature between state legislators and their constituents.
- Where FOIL imposes distinct requirements on “state agencies”, add “or house of the state legislature” (see §§ 87[4] and 89[5]).
- Maintain §88 of the FOIL, which requires each house to make available for public inspection and copying certain records that are unique to the State Legislature, such as those referenced earlier. Subdivision (1) should be removed as duplicative and misleading due to amendments made to the fee provisions contained in §87(1)(b) and (c).
- Environmental Conservation Law §70-0113 should be repealed.
- Executive Law §713(3) should be amended to reference Article 6 of the Public Officers Law, not a particular section within Article 6.

**B. The Port Authority of New York and New Jersey: Closing a Gap in the Law**

The Committee has received many comments regarding the status of the Port Authority of New York and New Jersey (the PA) under the Freedom of Information Law. Because it is a bi-state agency, it falls through the cracks, for neither New York nor New Jersey can impose its laws beyond its borders. There is judicial precedent in this state indicating that FOIL does not apply to bi-state or international entities, and a New Jersey court recently determined that the PA is not subject to that state’s access to records law. The issue has taken on added significance as a result of the PA’s critical role in the aftermath of Superstorm Sandy.

The PA years ago adopted a policy regarding disclosure of its records that is based largely on the New York FOIL. Nevertheless, because it is policy rather than law, it can be altered in a manner inconsistent with laws of both New York and New Jersey or even ignored in instances in which there may be controversy or reluctance. Perhaps more important is the apparent inability to challenge a denial of access to records by the PA. No state court appears to have jurisdiction authorizing or requiring a remedy if the PA fails to respond or denies access when action or inaction of that nature would be unjustifiable under the laws of either or both states if a state law applied.

It is our understanding that both New York and New Jersey would have to enact identical statutes to confer a right of public access to the PA's records. Based on the assumption that is so, we urge the New York State Legislature and its New Jersey counterpart to enact laws obligating the PA to comply with requests submitted under either NY FOIL or NJ Open Public Records Act (OPRA).

### **C. Continuing 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."

<p><b>Recommendation: Require award of attorney's fees when secrecy cannot be justified, and permit an award in other circumstances.</b></p>
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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 in 2011, *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. 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 by adding a new subdivision 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. Renewing Access to Public Pension Information

**Recommendation: Ensure that names of retirees who are receiving taxpayer-funded pensions continue to be disclosed to taxpayers.**

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, (1<sup>st</sup> 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 checks; 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 issue 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. We endorse the enactment of legislation sponsored by Assembly Member Englebright (A.9461-A) that was approved by the Assembly and introduced by Senator Golden (S.7598). The bill would amend §86 of the Freedom of Information Law by adding definitions of "retiree" and "beneficiary" as follows:

3 6. "Retiree" means a former officer or employee of an agency, the  
4 state legislature, or the judiciary who was a member of a public retire-  
5 ment system of the state, as such term is defined in subdivision twen-  
6 ty-three of section five hundred one of the retirement and social secu-  
7 rity law and is receiving, or entitled to receive, a benefit from such  
8 public retirement system.

9 7. "Beneficiary" means a person designated by a member or retiree of a  
10 public retirement system of the state to receive retirement or death  
11 benefits following the death of the member or retiree.

#### 4. Disclosing Tentative Collective Bargaining Agreements with Public Unions

**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-  
22 ments negotiated by the state of New York, on the website of the gover-  
23 nor's office of employee relations at least two weeks prior to approval  
24 or rejection of such proposed public employee union or school district  
25 proposed collective bargaining agreements or action taken to approve  
26 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 2013.

## **5. 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.

## **6. Uniform Access to “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.

## 7. Disclosures Concerning Sex Offenses

**Recommendation: Clarify 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."

## 8. Streamlining Trade Secret Protection

**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.

## IV. Services Rendered by the Committee

5492 TELEPHONE INQUIRIES  
504 EMAIL RESPONSES  
401 ADVISORY OPINIONS  
105 PRESENTATIONS\*  
3117 TRAINED

Committee staff offer advice and guidance orally and in writing to the public, representatives of state and local government, and to members of the news media. Each year we track telephone calls and advisory opinions rendered. This year, in an effort to be more comprehensive in our data collection, we began tracking email correspondence, which has become an important part of the services that we provide.

During the past year, with a staff of two, the Committee responded to almost 5,500 telephone inquiries and more than 500 email requests for guidance in the past five months. In addition, staff gave 105 presentations before government and news media organizations, on campus and in public forums, training and educating more than 3,000 people concerning public access to government information and meetings. We are grateful that many entities are now webcasting and/or recording presentations and making them available to others.

### A. Online Access

Since its creation in 1974, the Committee's staff 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 available online through searchable indices.

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

- Model forms for email requests and responses  
<http://www.dos.ny.gov/coog/emailrequest.html>  
<http://www.dos.ny.gov/coog/emailresponse.html>
- Regulations promulgated by the Committee (21 NYCRR Part 1401)  
<http://www.dos.ny.gov/coog/regSCOOG.html>
- "Your Right to Know", a guide to the FOI and Open Meetings Laws that includes sample letters of request and appeal  
[http://www.dos.ny.gov/coog/Right\\_to\\_know.html](http://www.dos.ny.gov/coog/Right_to_know.html)
- "You Should Know", which describes the Personal Privacy Protection Law

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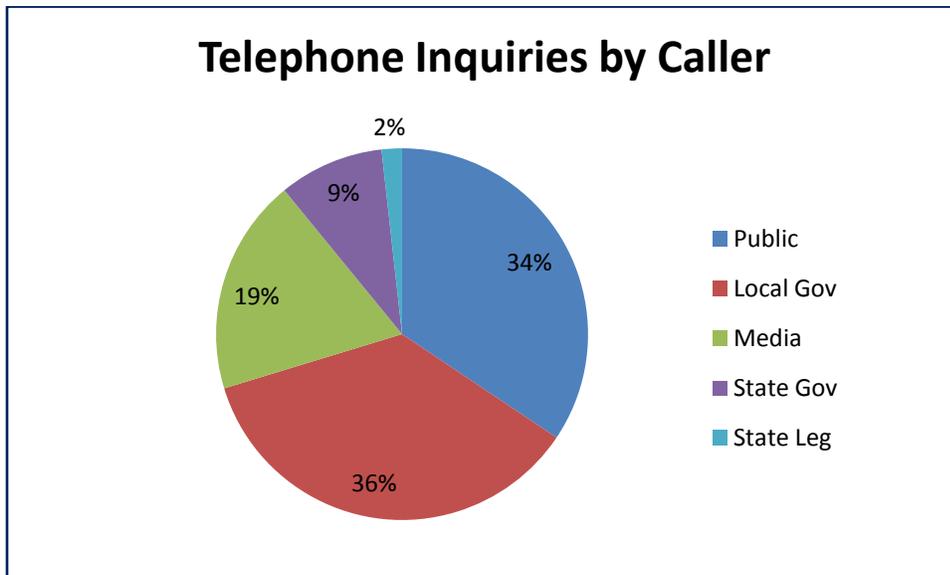
\* Inadvertently omitted from the 2011 Annual Report are 11 presentations conducted in October, 2011, through which staff trained approximately 825 people.

<http://www.dos.ny.gov/coog/shldno1.html>

- An educational video concerning the Freedom of Information and Open Meetings Laws consisting of 27 independently accessible subject areas  
<http://www.dos.ny.gov/video/coog.html>
- Responses to “FAQ’s” (frequently asked questions)  
<http://www.dos.ny.gov/coog/freedomfaq.html>  
<http://www.dos.ny.gov/coog/openmeetinglawfaq.html>
- The Committee’s latest annual report to the Governor and the Legislature  
<http://www.dos.ny.gov/coog/pdfs/AnnualReport.pdf>
- “News” that describes matters of broad public interest and significant developments in legislation or judicial decisions  
<http://www.dos.ny.gov/coog/news.html>

## B. Telephone Assistance

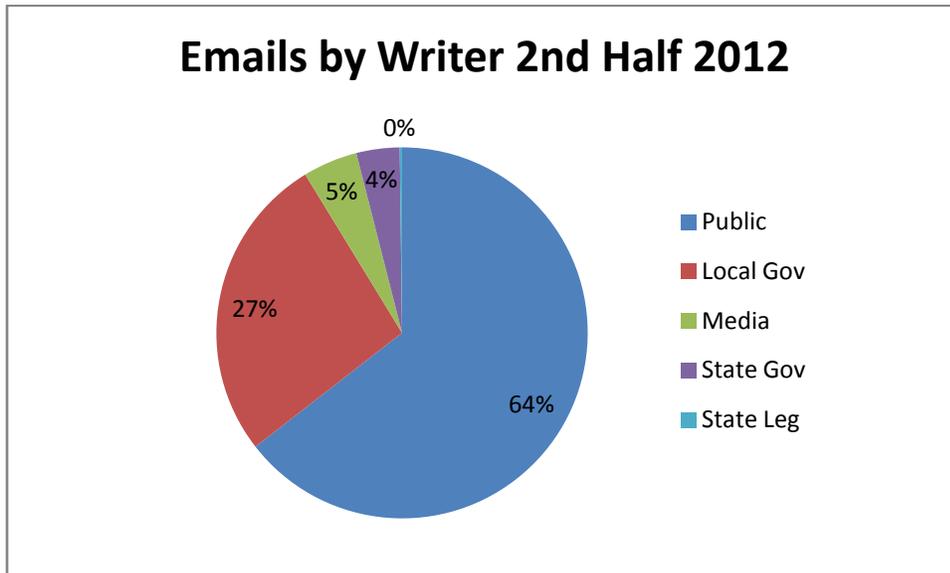
This year, Committee staff answered 5492 telephone inquiries, more than half of which pertained to the Freedom of Information Law.



## C. Assistance via Email

Approximately half way through the year, Committee staff began tracking email requests in much the same way it tracks telephone statistics, by caller and subject. Because tracking only commenced in June, statistics for this year do not reflect email responses for over the course of a full year. Routine or mundane office business emails are not included.

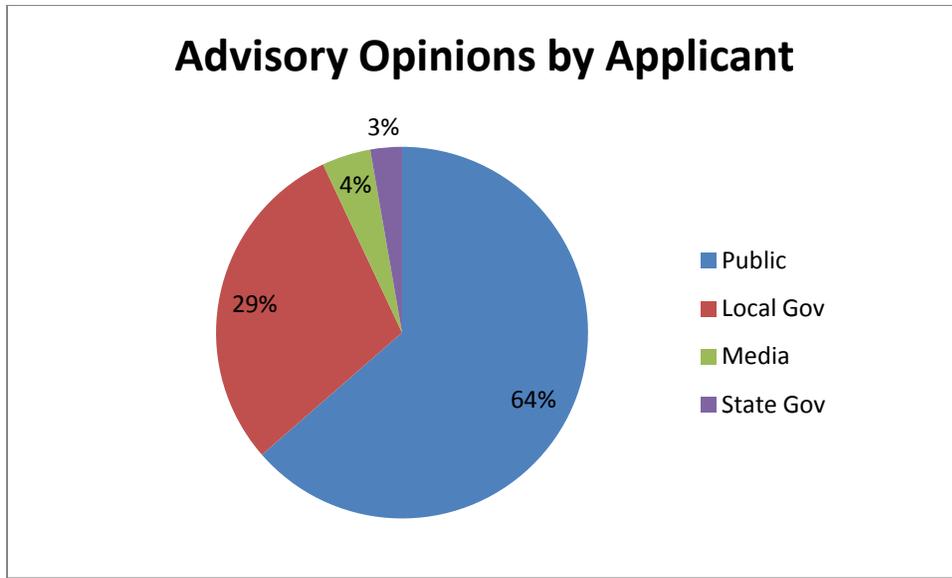
Based on the data captured in the preceding five months (504 emails), we learned that although almost 70 percent of email requests concern issues related to FOIL, and, unlike telephone inquiries, the majority of email inquiries originate from the public.



#### D. Advisory Opinions

Due to the tracking of emails, Committee staff were conscientious about providing guidance as efficiently as possible, including links to online advisory opinions when appropriate, and therefore, prepared fewer written advisory opinions than in previous years. When an email response from staff contained a substantive opinion with legal analysis, it was recorded as an advisory opinion as before.

Nevertheless, Committee staff prepared 401 advisory opinions in response to requests from across New York. More than two-thirds of the requests for written opinions pertained to FOIL.



## E. 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 105 presentations. The presentations are identified below by interest group for the period of November 1, 2011 to October 31, 2012. More than three 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:

Municipal and school district finance officers, Buffalo  
 SUNY attorneys and records access officers (CLE), Albany  
 NYS Association of Soil and Water Conservation Districts, Lafayette  
 Broome County Municipal Clerks Association, Binghamton  
 Eastern Suffolk BOCES, Patchogue  
 Catskill region local government, Belleayre  
 Onondaga Association of Town Clerks, Lysander  
 Association of Towns, newly elected officials, Rochester  
 Association of Towns, newly elected officials, Albany  
 Town of Yorktown, Yorktown  
 Association of Towns (2 presentations), New York City  
 New York Power Authority (CLE), White Plains  
 Local government training sponsored by Senator Bonacic, Albany  
 Nassau County and other municipal officials (CLE), Mineola  
 Association of Soil and Water Conservation Districts, Geneva  
 Orange County School District Clerks Association, Newburgh  
 Oneida BOCES, New Hartford  
 Association of Town Clerks, Geneva

Rockland County officials (CLE), New Hempstead  
 Southern Tier Local Government Conference, Corning  
 Tompkins County Coalition of Local Governments, Ithaca  
 NYS Planning Federation, Keynote, Saratoga Springs  
 Local Govt. Education Committee of Herkimer & Oneida Counties, Marcy  
 NYS Association of Town Clerks, Saratoga Springs  
 Office of Children and Family Services, Albany  
 NYS Association Counties, Syracuse  
 Southern Tier West, Houghton  
 Chautauqua-Cattaraugus Library System, Jamestown  
 Orange-Sullivan Municipal Clerks Association, Wallkill  
 NYS Association of Clerks of Legislative Boards, Utica  
 Westchester Tax Receivers Association, White Plains  
 NYS Government Finance Officers Association, White Plains  
 NYS Energy Research and Development Authority, Albany  
 Office of Counsel to the Governor, Albany  
 NYS Association of Personnel Officers, Geneva  
 NYS Sheriffs Association, Saratoga Springs  
 Department of Tax and Finance, Albany  
 Town of Huntington, Huntington  
 Nassau-Suffolk Water Commissioners Association, Westbury  
 NYS Association of School Business Officials, Albany  
 Rockland County officials, New City  
 Columbia & Greene County Town Clerks, Chatham  
 NY Conference of Mayors Annual Training School (2 programs), Lake Placid  
 Saratoga County Clerks Association, Corinth  
 Pioneer Library System, Canandaigua  
 Village of Port Chester, Port Chester  
 Nassau-Suffolk Association of Town Clerks (CLE), Selden  
 Training for state agency attorneys sponsored by Office of the Attorney General, Albany  
 New York State School Boards Association, Annual Convention (2 programs) Rochester  
 Annual Local Government Conference (2 programs), Potsdam  
 Orange County Municipal Planning Federation, Sugar Loaf  
 Albany/Schenectady Town Clerks, Berne  
 NY Association of Local Government Records Officers, Syracuse  
 Testimony before Joint Hearing of Assembly Committees, Albany  
 NYS Government Finance Officers Association (2 programs), Geneva and Poughkeepsie

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

Public forum sponsored by Gloversville Leader-Herald, Gloversville  
 Deadline Club, New York City  
 Gannett Albany Bureau, TV interview, Albany  
 Hudson Register-Star, Hudson  
 New York Press Association, Saratoga Springs  
 International Senior Lawyers Project, media law reform abroad, New York City

### **3. Presentations for students included:**

SUNY/Albany College of Computing and Information, Albany  
Albany Law School, Albany  
College of St. Rose, Albany  
CUNY Graduate School of Journalism, New York City  
League of Women Voters, Students Inside Albany, Albany  
Albany Law School, Albany  
Syracuse University, Maxwell School, Shanghai MPA students, Albany  
Carter Center delegation from Guangzhou, China  
Syracuse University, Maxwell School/Fudan University of Shanghai (2 programs), Albany  
Syracuse University, Maxwell School/East China Normal Univ., Shanghai, Albany  
NYS Senate Fellows, Albany  
SUNY/Albany, Albany  
Center for Technology in Government, Albany

### **4. Other presentations included:**

Public forum sponsored by Madison County Courier, Sullivan  
Capitol Pressroom, talk show, Albany  
Assemblymember Amy Paulin, TV discussion, Albany  
Public forum sponsored by Clarkstown Council of PTA's, Clarkstown  
Public forum, Rye  
International Center of the Capitol Region, Brazilian delegation, Albany  
Public forum sponsored by City of Corning, Corning  
Bethlehem Rotary Club, Delmar  
New York Lawyers in the Public Interest (CLE), New York City  
Public forum sponsored by Riverhead Local, Riverhead  
Public forums sponsored by Huntingtonian (2 programs), Huntington  
Capitol Pressroom, talk show, Albany  
International Center of the Capitol Region, Albany  
International Center of the Capitol Region, Transparency Project, Albany  
Public forum sponsored by Whitesboro Public Library, Whitesboro  
WLZW, Utica, Mark & Frank's Morning Show, remote from Albany  
NYS United Teachers, Cooperstown  
WUSB radio, Suffolk County, remote from Albany  
WAMC, Vox Pop, Albany  
Public forum sponsored by Citizens of Phillipstown, Phillipstown  
Public forum sponsored by Greenville Central School District, Greenville  
Public forum sponsored by City of Utica, Utica  
Public forum sponsored by Onondaga County Library System, Syracuse  
Public forum sponsored by Village of Greenport  
Public forum, Amenia