

Government, Law and Policy Journal



A Publication of the New York State Bar Association
Committee on Attorneys in Public Service, produced in cooperation with the
Government Law Center at Albany Law School

Freedom of Information Law



- Thirty Years of FOIL
- The Impact of Technology
- Unwarranted Invasions of Personal Privacy Under FOIA and FOIL
- Open Government in Yonkers: Leveling the Playing Field
- Improper Executive Sessions by Boards of Education
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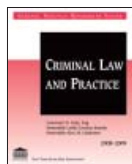
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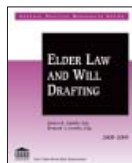
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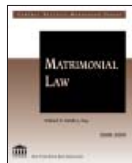
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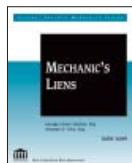
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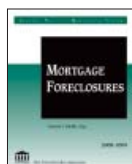
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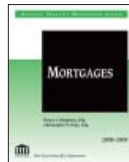
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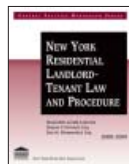
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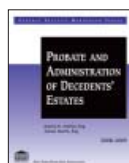
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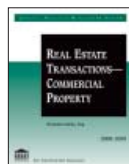
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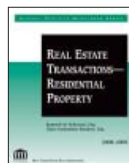
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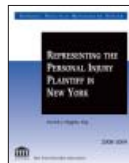
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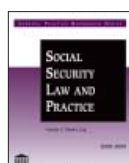
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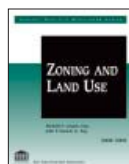
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Message from the Chair

By Patricia E. Salkin

This issue of the *Government, Law and Policy Journal* is bittersweet for me, as this is my last “Message from the Chair”; in June 2009, I will pass the gavel to a new Chair of the Committee on Attorneys in Public Service. The theme of this issue, access to government, is a fitting end to my culmination as Chair, having devoted a significant amount of my work to issues of reform, ethics, and transparency in government. Special kudos to our co-guest editors for this issue of the *Journal*—Robert Freeman and Camille Jobin-Davis—two government attorneys who exemplify excellence in public service for their substantive knowledge and their accessibility to lawyers, public servants and the public at large on issues relating to access to government.



Having been involved with the Committee on Attorneys in Public Service as a founding member, I thought I would use this opportunity to reflect upon the Committee’s successes and the work that lies ahead. While a number of government lawyers have long been members of the State Bar Association, a perception has existed that since the visible Association leadership is dominated by private sector attorneys, public service attorneys were not valued members. Nothing could be farther from reality; however, perceptions become reality unless they are addressed. Kathryn Grant Madigan, a former Association President, responded directly to this critique when, as Chair of the Association’s Membership Committee, she recommended the creation of the Committee on Attorneys in Public Service. From its inception, the mission of this Committee has been to send a message loud and clear to the Bar that all lawyers—public, private and non-profit—were welcome and wanted as members of the New York State Bar Association.

This Committee—a relatively small group of public service attorneys appointed for a term by the Association President—has undertaken a number of activities, including an examination of the dues structure/policy for Association membership with an eye toward public

sector salaries; the establishment of a semi-annual publication geared specifically for public service attorneys; books of interest for public service attorneys; Continuing Legal Education programming relevant to public service practice across agency lines; a series of initiatives focusing on government ethics for lawyers and for hearing officers/administrative law judges; opportunities for recognition of the work of public service attorneys by the Association; exploration of policies to enable public service attorneys to engage in *pro bono* legal services; facilitating the involvement of public service attorneys in Association Section activities; and continuing advocacy to ensure the active participation of public service attorneys in the Association.

This is not the time, however, to celebrate the level of activity of this Committee. Now that the activities of the Committee are being noticed, we must turn this interest into active Association membership. This starts with an effort to increase the number of public service attorneys who are dues paying members of the Association followed by an effort to turn passive members into active and visible members of the Association’s vibrant Sections and Committees. As public service attorneys begin to walk through these open doors in greater numbers, we must support them as they embark on leadership paths and become more active on Section executive committees, as members of the House of Delegates and on the Executive Committee. Imagine the day when a government lawyer, or a just-retired government lawyer, is sworn in as President of this Association! I am confident that as the Committee continues to provide new and innovative networking opportunities and information for public service attorneys, more active involvement will result.

Lastly, I want to thank all who have had direct and indirect involvement with the Committee on Attorneys in Public Service. From staff to lay leadership to Association members who have volunteered to take on tasks for the Committee—collectively, your efforts, enthusiasm and commitment to both the profession and to the Association have made my tenure as Chair enjoyable and fulfilling. Your friendship and support is cherished today and always. I look forward to working with the Committee and to continuing my involvement with the Association in other capacities.

Editor's Foreword

By Rose Mary Bailly

Transparency and accountability in government—what citizens should know about their government—are subjects that New York takes very seriously. We are pleased that our guest editors, Robert Freeman, the Executive Director of the Committee on Open Government, who has been with the Committee since its inception, and Camille Jobin-Davis, the Committee's Assistant Director, enthusiastically embraced our invitation to showcase the challenges of ensuring open government.



I also want to extend my thanks to the authors and all those behind the scenes whose hard work and diligence

have made this a successful issue. Our Board of Editors is ever supportive and helpful. Special thanks are in order to our Executive Editor for 2008–2009, Lauren DiPace, Albany Law School, Class of '09. She and her colleagues from Albany Law School, Class of '09—Christopher Clark, Samantha David, Cecilia Faleski, Ruth Green, Kevin Hines, Daniel Katz, and Jessica Vaughn—performed their tasks most diligently. As always the talent and expertise of the staff of the New York State Bar Association, Pat Wood, Lyn Curtis and Wendy Harbour, are extraordinary. And last, and always, my thanks to Patty Salkin for her unstinting support.

Finally, any flaws, mistakes, oversights or shortcomings in these pages fall on my shoulders. Your comments and suggestions are always welcome at rbail@albanylaw.edu or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

Peter S. Loomis Named New Committee on Attorneys in Public Service Chair

The Honorable Peter S. Loomis, ALJ of Albany, has been named chair of the NYSBA Committee on Attorneys in Public Service (CAPS). Loomis succeeds Patricia Salkin as CAPS chair as of June 1, 2009.

Judge Loomis is the Chief Administrative Law Judge for the New York State Department of Transportation (DOT) in Albany. He began his service at DOT in 1975 and has served in a variety of positions including Counsel, Staff Administrative Judge and Attorney during his tenure.

Judge Loomis has been a member of NYSBA's Committee on Attorneys in Public Service and its subcommittee on the Administrative Law Judiciary. He has been active with the New York State Administrative Law Judges Association (NYSALJA), serving as its president from 2001–2002, and in other leadership capacities. He also served as chair of the Special Events Committee for

the 2006 Annual National Association of Administrative Law Judges Conference in New York.

He served as a faculty member of Albany Law School's training for New York State Education Department Impartial Hearing Officers in 2002 and for the Administrative Law Judges Institute in 2003. He was a member of the Advisory Committee, New York State Department of Civil Service and Albany Law School joint project to rewrite *New York State Manual for Administrative Law Judges and Hearing Officers*, 1998–2002. He is currently a member of the Board of Directors, Rhodes Memorial Foundation (a private Capital District based charitable foundation), serving from 2006 to the present.

Judge Loomis received a B.A. from Hamilton College, Clinton, New York and a J.D. from Syracuse University College of Law, Syracuse, New York.

Thirty Years of FOIL

By Robert Freeman

The Freedom of Information Law, known widely as FOIL, has become integral to the relationship between the government and the public in New York.

FOIL is a noun, as in the Freedom of Information Law, or “I submitted a FOIL.” It is a verb: “I foiled a record,” or from an agency’s perspective, “We were foiled again.” It is even an adjective: “Is that record foilable?” The point is simple: FOIL has become part of the vocabulary of many New Yorkers, and every government agency, like it or not, has come to recognize that FOIL is here to stay.



A Bit of History

The grandfather of freedom of information in the United States is the federal Freedom of Information Act (FOIA). As initially enacted in 1966, it was weak and rarely used. On the heels of the upheavals of the late 1960s and early 1970s, and particularly the Watergate scandal, the federal Act was completely revised in 1974.¹ President Ford’s veto of the amendments was overridden by Congress, which served as a clear indication of the seriousness of the desire of both Congress and the public to ensure a reasonable right to know about the federal government’s activities. During the same year, the first version of New York’s FOIL was signed into law by Governor Malcolm Wilson.² New York was not alone in attempting to open government. Within the next ten years, every state had enacted open records and open meetings laws. Moreover, the concept of freedom of information has become international, and there are now more than eighty nations that have enacted access to information laws.

As in the case of the first version of the federal Act, the original FOIL in New York was weak. It contained a list of categories of accessible records, but unless a person seeking records could squeeze the request into one or more of those categories, that person had no rights. That difficulty was merely one of many that became quickly clear. By 1977, the Committee on Public Access to Records, later renamed the Committee on Open Government, was able to gain sufficient experience regarding the operation of the law to successfully press for the passage of a new law, and the original law was repealed and replaced with a new FOIL,³ the structure of which has remained unchanged since it became effective on January 1, 1978. Thus, we have now completed thirty years of FOIL.

If we can consider FOIL to be a successful effort, and I do, credit can be given to each branch of the government—the legislative, the judicial and the executive—for each has been instrumental in the development of the law as we approach the second decade of the 21st century.

The State Legislature

Following the lead of Congress and learning from the experience gained in considering the operation of the federal Act, staff from the Senate, the Assembly, and the Committee on Public Access to Records hammered out a new law containing attributes, the significance of which could not have been predicted.

“FOIL has become part of the vocabulary of many New Yorkers, and every government agency, like it or not, has come to recognize that FOIL is here to stay.”

Consider the manner in which government and others functioned in 1977. High tech was an electric typewriter; many of us used carbon paper to make copies. There wasn’t a PC on a single desk, and few could have imagined what the world knows as the Internet. The term “e-mail” had not yet been coined, for there was no e-mail, and telephones without cords were the stuff of science fiction. But in drafting FOIL in 1977, we got lucky. Although we could not have dreamed of the advances in technology that have become part of our lives, we were able to anticipate change. None of us, however, could have predicted the importance of defining the term “record.” A notable omission from the federal Act is a definition of “record,” and to this day there are issues that percolate through the federal courts involving who prepared it, what is its origin, and what is its function. Those issues were resolved in New York when the term “record” was defined to mean:

any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.⁴

In my view, the language of the definition is among the most critical features of FOIL, for it has provided the flexibility necessary to adapt to changes in information technology that most could not have foreseen thirty years ago. It has enabled us to resolve issues concerning the status of tape recordings, databases and emails that stalled in other jurisdictions. It has given us the ability to avoid the pitfalls associated with privatization, and its impact upon accountability. In other states, when a government agency contracts with a private firm to carry out a function on its behalf, it is not always clear that its access law applies, and often it does not. In New York, because FOIL applies to records kept by or for an agency, the connection and, therefore, rights of access are preserved.

Most recently, the state legislature has moved forward by enacting amendments to FOIL concerning information technology, embodying what I have come to characterize as the “if you can, you must” principle of law. Stated differently, when an agency of state or local government has the ability to make records available with reasonable effort in electronic form, it must do so.

The first such amendment, enacted in 2006, was based on the experience under the Mexican access to information law. When its legislature was drafting a version of a freedom of information law in the early years of this decade, it had the opportunity to do what we could not have done when access to records laws were drafted in the United States in the 1970s: it built modern information technology into its law. During the first year of the implementation of the Mexican law, 40,000 requests were made, and among them 36,000 were made and answered via e-mail. The amendment to FOIL, the first of its kind in this country, requires that agencies accept requests made by e-mail when they have the ability to do so, and to respond to requests by transmitting records via e-mail when they have the ability to do so. This new provision is changing the relationship between the public and the government in New York and enhancing the utility of FOIL. People can make requests day or night; often they can acquire the equivalent of a document of dozens of pages quickly and easily, and because fees under FOIL are limited to the reproduction of records, transmitting records through e-mail is free. From the government’s vantage point, there are also advantages: no one has to go to a filing cabinet and retrieve paper records, no one has to stand at the photocopy machine, and no one has to do the accounting associated with charging for photocopies. Many have described the foregoing as “a win/win.” Additionally, as a result of the legislation and the technology, agencies have placed records that are clearly available under FOIL and frequently requested on their Web sites. When they do so, the public no longer has to submit written requests, and agency staff no longer has to respond to requests; the records are simply there for the taking. Another win/win.

FOIL has long provided that an agency is not required to create a new record in response to a request.⁵ That concept was simple in the era of paper, but it became subject to a variety of interpretations as society moved into electronic information systems. In a 2008 amendment focusing on that issue, agencies must, when they can do so with reasonable effort, extract, generate or retrieve portions of records maintained in a database. Specifically, FOIL now states, “Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested . . . or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.”

Another critical attribute of FOIL is the presumption of access. Rather than limiting rights of access to categories of records, since 1978 FOIL has required the disclosure of all government records, except those records or portions of records that fall within one or more exceptions to rights of access.⁶ The exceptions are, from my perspective, based largely on common sense. The key question arising under FOIL and its companion, the Open Meetings Law, is very simply what would happen if the government had to disclose? In most instances, unless the answer is that there would be some sort of harm to an individual in terms of that person’s privacy, to the government in terms of its ability to function effectively on behalf of the public or, on occasion, to a private company vis-à-vis its competition, disclosure is the rule. Most of the exceptions include language describing some sort of harm, thereby giving government agencies, the courts, and the public standards that are understandable and that can be reasonably applied.

In most cases in which the action of government or a government official is challenged, the vehicle to do so is Article 78 of the CPLR. Typically, the person making the challenge must demonstrate to a court that the agency acted unreasonably or that a government agency or official failed to carry out a duty required by law to be accomplished. Under FOIL, the burden was shifted: rather than requiring John or Jane Q. Public to prove that the government failed in some way to perform its function appropriately, the government agency has the burden of proving that an exception to rights of access was properly asserted.⁷

The Judiciary

The courts have been instrumental in ensuring that the stated intent of FOIL is realized and they set a tone soon after the revision of FOIL thirty years ago.

FOIL was referenced by the Court of Appeals even before it went into effect in 1974. In a footnote in *Cirale v. 80 Pine Street Corporation*, the Court of Appeals suggested that the enactment of the statute did not abolish the ability of an agency to assert a “governmental privilege,”⁸ which might also be characterized as executive privilege, the official

information privilege, or the deliberative process privilege. Five years later, the Court in *Doolan v. BOCES* appears to have abolished any such privilege in relation to FOIL, holding that unless an agency can justify denying access based on one or more of the exceptions appearing in that statute, it must disclose. Almost as significant, the Court found that rights of access cannot be conditioned on a "cost accounting basis," and that compliance with FOIL is "fulfillment of a governmental obligation, not the gift of, or waste of, public funds."⁹

The Court of Appeals, in decisions critical to the scope and utility of FOIL, has construed the definition of "record" literally. Soon after the death of Erastus Corning, who served as mayor of the city of Albany for forty-two years, it was discovered that the city maintained a treasure trove of documents. It seems that the mayor kept all of the documents that came into his possession, as well as copies of those that he prepared and sent. Following a request for the "Corning papers," it was contended that two categories of the documents were not "records" and, therefore, that FOIL did not apply. They involved documents pertaining to the mayor acting in a personal capacity, and those pertaining to his activities as political party leader. In holding that the documents constituted "records," the Court found that:

respondents' construction—permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL—would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3] . . . Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action . . .

. . . as a practical matter, the procedure permitting an unreviewable prescreening of documents—which respondents urge us to engraft on the statute—could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it "purely

private." Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected.¹⁰

Also important, for a different reason associated with the definition of "record," is *Encore College Bookstores, Inc. v. Auxiliary Services Corporation*.¹¹ A branch of the State University contracted with a not-for-profit corporation to run its campus bookstore, and the issue involved booklists maintained by the bookstore. Even though those records were not in the physical possession of the University, the Court found that due to the relationship between the University and the corporation the records were maintained for the University and, consequently, fell within the scope of FOIL.

The courts, and particularly the Court of Appeals, have been serious regarding agencies' responsibility to meet the burden of proof when attempting to deny access to records. As early as 1979, the Court of Appeals set the tone, stating in *Fink v. Lefkowitz*, "Only where the material falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld."¹² The Court on several occasions confirmed its general view of the intent of FOIL and the obligations of agencies, holding: "To ensure maximum access to government records, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption."¹³

Another Court of Appeals decision, one that is not widely cited, has been critical in ensuring reasonableness and common sense in construing FOIL. *Konigsberg v. Coughlin* dealt with a request by an inmate, essentially for all records relating to his name or identification number that are maintained by the Department of Correctional Services. Although the Department was able to locate approximately 2,300 pages of material, it contended that the request did not "reasonably describe" the records as required by section 89(3)(a) of FOIL. The issue reached the high court and because the Department was able to locate and identify the records associated with the inmate, the request, despite the volume of the records, met the requirement that it must reasonably describe the records sought. However, in its discussion of the issue, the Court, citing federal precedent, held that in attempting to locate records an agency "is not required to follow a path not already trodden," and that the nature of an agency's filing or recordkeeping system often will be crucial in determining whether or the extent to which the request meets the standard of reasonably describing the records.¹⁴ In other words, neither the volume of a request nor its specificity is necessarily determinative of the propriety of a request. If records are kept chronologically, but a request is made by name, an agency would not be required to search through the haystack in an effort to find the needle, even if it knows that the needle is there somewhere. In that instance, the applicant for the record should be informed of the means by

which the agency maintains its records in order to enable the applicant to renew the request in a manner consistent with the agency's filing or retrieval system, or to justify its response.

The Executive

FOIL, since 1978, has existed through five governors. Although no chief executive has granted access to all records that have been requested, each of the five clearly has treated FOIL in good faith and none have done significant damage to the law. Part of the reason for governors' apparent respect for FOIL relates to a relatively unique aspect of the law, the creation of what had been known as the Committee on Public Access to Records.

When FOIL was first drafted in 1974, many recognized that it was an experiment and weak. An editor for the Gannett Newspapers in Westchester County, William Bookman, suggested to Governor Wilson that there should be an advisory body created to provide guidance regarding the new law and to gauge its effectiveness. That suggestion gave birth to the Committee, which consisted of seven members: the Director of the Budget, the Commissioner of General Services, and the Commissioner of the Office of Local Government, as well as four members of the public, two of whom must have been representatives of the news media. The first chair was Elie Abel, a former correspondent for NBC News and the *New York Times* and the dean of the Graduate School of Journalism at Columbia University. Dean Abel brought instant prestige to the Committee.

Soon after its creation, Hugh Carey was elected Governor, he designated Mario Cuomo as Secretary of State, and the Department of State acquired the functions of the Office of Local Government. Under the leadership of Dean Abel and Secretary Cuomo, the Committee began to develop a reputation for impartiality and expertise. Perhaps most importantly, the Committee was able to function and was viewed as independent and apolitical. Those attributes have been preserved and strengthened. Although the size of the Committee has changed and its functions have expanded to include advisory roles in relation to the Open Meetings and Personal Privacy Protection Laws,¹⁵ its primary attributes have remained.

Although every state has enacted open records and open meetings statutes, few have created agencies to oversee those laws. In most states, if there are questions or problems involving access to government information, there is nobody to call. Here in New York, the Committee, with a staff of two, three or never more than four employees at any time during the past thirty years, has responded to more than 200,000 telephone inquiries, prepared more than 22,000 written advisory opinions, and has provided training, lectures, CLE programs, and the like during more than 2,000 events. Perhaps most important to thousands, the Committee's Web site includes an array of material, including the text of open government laws, highlights

describing recent developments, procedural regulations, model regulations that enable agencies to develop rules by filling in the proper blanks, an educational video containing 27 chapters concerning FOIL and the Open Meetings Law, summaries and citations for judicial decisions rendered since the effective date of those statutes, and the full text of thousands of advisory opinions. The opinions can be located by means of a key phrase index or through a search box that enables users to type a key word or phrase to be connected with opinions.

The use of the Committee's Web site has grown exponentially since it was initiated in 2004 and received 2.7 million hits in 2008. To connect to the website, users can find it the old fashioned way: <www.dos.state.ny.us/coog/coogwww.html> , or even easier, simply Google "Coog" or "Committee on Open Government," and the first website listed will be "Welcome to the Committee on Open Government."

Having worked for the Committee since its inception in 1974, I have never experienced a dull day. New questions arise every day, and we can never predict whose voice will be heard when we answer the phone. The Committee is a government agency created to be idealistic, and to preserve, protect, and enhance democratic principles. Imagine that!

Endnotes

1. Freedom of Information Act, 5 U.S.C. § 552 (2002).
2. 1974 N.Y. Laws chapters 578–580.
3. 1977 N.Y. Laws chapter 933; N.Y. PUB. OFF. LAW § 84–90.
4. N.Y. PUB. OFF. LAW § 86(4) (2003).
5. N.Y. PUB. OFF. LAW § 89(3)(a) (2008).
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8. *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 316 N.E.2d 301, 359 N.Y.S.2d 1 (2004).
9. *Doolan v. Board of Co-op Educational Services*, 48 N.Y.2d 341, 347, 398 N.E.2d 533, 537, 422 N.Y.S.2d 927, 931 (1979).
10. *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 253–54, 505 N.E.2d 932, 936–37, 513 N.Y.S.2d 367, 371 (1987).
11. *Encore College Bookstores, Inc. v. Auxiliary Serv. Corp. of the State Univ. of New York at Farmingdale et al.*, 87 N.Y.2d 410, 663 N.E.2d 302, 639 N.Y.S.2d 990 (1995).
12. *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 465–66, 419 N.Y.S.2d 467, 470–71 (1979).
13. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275, 675 N.E.2d 808, 811, 653 N.Y.S.2d 54, 57 (1996).
14. *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 250, 501 N.E.2d 1, 3–4, 508 N.Y.S.2d 393, 395–96 (1986).
15. N.Y. PUB. OFF. LAW, Articles 7 and 6-A.

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The Impact of Technology: Electronic Access

By Camille S. Jobin-Davis

Introduction to Information Online

If I want to compare my salary with the salaries of other similarly situated state employees, I can start by sifting through an online database of names, titles and salaries. After locating other *assnt dirs* I can sort by agency or salary, and learn more about each individually, including his or her full title and office address.¹ Prior to this year, if I wanted to access such information, I would have had to make a written request to the Department of Civil Service, and wait, hoping that the Department would be able to search by job title (or titles), that there wasn't some obvious impediment to such a search, technological or otherwise, and that it wouldn't take more than a few days. Today, because of a law that requires records to be made available in a desired electronic format, data can be searched and sorted online, at any time, by anyone.

Among other items, school district labor contracts, state contracts, and legislative information can be compared and contrasted in similar online fashion, thanks to the proactive efforts of journalists,² activist organizations³ and two state officials. In 2007, the Office of the Attorney General launched "Project Sunlight," an interactive database of information related to campaign finance, legislation, lobbying activity, and recipients of state government contracts.⁴ More recently, the Office of the State Comptroller unveiled "Open Book," three unique databases reporting local government fiscal data, state contracts, and state agency budget information.⁵ These offices have taken a proactive stance, providing access to public information in a user friendly environment and in a manner that allows comparisons and analyses.

While this information has always been public, it is now available to anyone with Internet access. Some state agencies make information available on a "look up" basis, requiring the applicant to enter identifying information about a particular person or corporate entity in order to confirm the answers to a question, such as whether a contractor has workers' compensation insurance,⁶ whether an attorney has a valid license to practice law,⁷ or whether someone is authorized to cut hair.⁸ The Office of Professional Responsibility makes physician information available, including educational background, areas of expertise, any legal action and/or disciplinary action, and provides the physician the opportunity to offer a state-



ment online.⁹ Gone are the days that the fact-checking resident or the investigative journalist must wait for these particular items, wishing of a way to answer routine questions without having to navigate the bureaucracy. Thanks to these advocates and recent changes to the state's Freedom of Information Law, data that was previously public but not readily available is accessible to the public in an ever expanding interactive manner.

"Today, because of a law that requires records to be made available in a desired electronic format, data can be searched and sorted online, at any time, by anyone."

New Legal Requirements

Until 2006, there was no requirement that an agency respond to a request for records via e-mail, or that an agency provide access to electronic records via e-mail. The State Technology Law expressly permitted an agency the discretionary authority to provide documents via electronic mail, but there was no obligation to do so. While case law evolved requiring agencies to provide access to data in an electronic format acceptable to the applicant when able,¹⁰ it was not until 2006 that the Freedom of Information Law was amended to require agencies to provide records via e-mail when possible,¹¹ and not until August of 2008 that the statute was amended to require an agency to transfer data into a particular electronic storage medium upon request.¹² This new provision also provides for the imposition of actual costs to the applicant making the request, permitting the agency to charge the salary of the lowest-paid staff person capable of preparing the electronic record, if it takes more than two hours to do so, or the actual cost of engaging a professional to prepare the record when an agency lacks the machinery to do so, in addition to the cost of the storage device used to convey the records.¹³ The new provisions also clarify that "[a]n agency shall not deny a request on the basis that the request is voluminous. . . ."¹⁴

"Practical Obscurity"

Much has changed in the very recent past. Consider, for example, the U.S. Supreme Court decision in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*,¹⁵ in which a request was made for "matters of public record" from an FBI "rap sheet" that contained personal information, as well as a history of arrests, charges,

convictions and incarcerations of one Charles Medico. According to the Pennsylvania Crime Commission, Mr. Medico's family operated a legitimate family business dominated by organized crime figures that allegedly obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.¹⁶ The Court held that disclosure of information previously disclosed to the public from Mr. Medico's rap sheet could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of the Federal Freedom of Information Act (FOIA), and, therefore, was not required. The Court's decision was based in part on the "practical obscurity" of the information contained in the rap sheet.

When that decision was rendered in 1989, arrest, conviction, sentencing and incarceration information could be obtained and compiled, jurisdiction by jurisdiction, with persistent effort; however, because most of the data was maintained only by individual and often local courts, police departments or correctional facilities, it was difficult, if not practically impossible, to obtain a comprehensive record from the public portions of a person's criminal history. The Court interpreted the "practically obscure" nature of the data as one indicator of its sensitivity, and expressed its displeasure with the concept that the media might capitalize on the government's amassing such data. "[T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information."¹⁷

Government Scrutiny

"Practical obscurity" was only part of the rationale the Supreme Court relied on to deny access to the comprehensive "rap sheet." In denying access to the record in *Reporters Committee*, the Supreme Court also held that whether disclosure is an unwarranted invasion of privacy turns on the nature of the requested document and its relationship to the basic purpose of the FOIA "to open agency action to the light of public scrutiny . . . that a democracy cannot function unless the people are permitted to know what their government is up to."¹⁸ The Court made reference to a previous decision in which it was held that "it was never suggested that FOIA would be a boon to academic researchers, by eliminating their need to assemble on their own data which the government has already collected."¹⁹ While there was "unquestionably" some public interest in providing interested citizens with answers to their questions about a member of a mob family and his ties to a corrupt Congressman, the Court held that interest fell outside the ambit of the public interest that the FOIA was enacted to serve.²⁰ FOIA was designed, in the Court's estimation, to make public those records that would shed light on the conduct of government, to permit people "to know what their government is up to," not to access information about individual people.

What's Different Here and Now

There are two critical distinctions between the situation leading up to the Supreme Court's ruling in *Reporters Committee* and the current situation in New York. The first is a 1984 ruling from the Court of Appeals of New York, *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*,²¹ in which the Court clarified that records are public regardless of the status or interest of the applicant.

M. Farbman & Sons, Inc. contracted with the New York City Health and Hospitals Corporation to perform plumbing work at Harlem Hospital in 1977. When delays resulted in cost overruns, Farbman made a request for copies of records relating to the construction project. New York City denied the request primarily on the ground that Farbman would use the material for litigation, in circumvention of the CPLR. The Supreme Court ordered New York City to provide the records for an in-camera inspection, soon after which Farbman filed a notice of claim for breach of contract. On appeal of the order to produce records in camera, the Appellate Division dismissed the petition, citing its "continually unanimous position against the use of FOIL to further in-progress litigation."²²

The Court of Appeals reversed and held that access to public records is not affected by an applicant's pending or potential litigation against the agency. In its decision, the Court held

FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process.²³

And further, that "Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request."²⁴ Accordingly, in New York there is no allowance for whether disclosure serves the public interest; the burden of demonstrating that requested material is exempt from disclosure rests on the agency, and it is permitted to do so only pursuant to narrowly interpreted statutory exemptions.²⁵

The second distinction between the Supreme Court's ruling in 1989 and the present situation is the technological shift from "practical obscurity" to large amounts of both public and private information electronically stored and at the fingertips of law enforcement officers across the state. Today, law enforcement agencies are likely to share information electronically on a region-wide basis with access from local offices and patrol cars. The State Police have developed an electronic database and notification system not only to share existing arrest and conviction data, but to alert local agencies of emerging and potentially dangerous situations.²⁶

The nature of the information at issue before the Supreme Court had at one point been public, and continued to remain public, but it was maintained in a fashion that made it obscure. Arrest information, while it may become sealed at a later date if charges are dismissed, is public in New York for as long as a record of the arrest is maintained.²⁷ Conviction information is similarly public, and information pertaining to an incarcerated individual is already available on a look-up basis, by name, through the Department of Correctional Services Web site, including, among other items, the date of birth, nature of conviction(s), date of incarceration, and earliest release date.²⁸ Similarly, the Office of Court Administration, for a fee, will disclose any person's history of convictions in the state. In sum, the foundation for the Supreme Court's decision to prevent access to the "clearinghouse" no longer exists within the shared-database world where we now live. Without the underlying "practical obscurity" of the information, the Court's primary rationale that disclosure would violate the intent of the law evaporates.

"[G]overnment is the public's business and . . . the public, individually and collectively and represented by a free press, should have access to the records of government."

Information About Individuals v. Government Scrutiny

Is there added value in making "clearinghouse" information about individuals accessible? What if the information is incorrect and therefore damaging? What if the data is not analyzed or interpreted correctly? Does access to information in this format enhance the public's ability "to know what their government is up to?"

It is my contention that there is added value when information is available in this manner, that the positive effects are likely to overcome the negatives, and that access to information through use of technological advances not only enhances the public's ability to check government activity, but is at the very heart of the design of a democratic society.

Consider, for example, information about residential use of municipal water. Imagine the night when after a busy day at work, I can put the kids to bed and then pursue an answer to some lingering question about the rising cost of public water for my family. Imagine when I can research water consumption in my area for households of similar size, read minutes from meetings of the board of my local water district, and compare water usage rates between municipalities, all from the home computer. Depending on my findings, I may appeal to municipal

officials for consideration, or learn that my concerns are for naught. Either way, access to more information about individual water users is the only way to move forward on the question of whether the government is behaving in a reasonable manner and treating me fairly.

Consider the issue of unauthorized parking privileges in the City of Albany. If there were an online database of public information related to parking tickets issued and fees incurred, an industrious reporter might have noticed a 15- to 20-year practice of issuing "no-fine" tickets to certain individuals and broken the story about favors to friends and families of police union leaders well before December of 2008²⁹—another example of public information pertaining to individual people that sheds light on how well, poor or fairly government is performing.

Conclusion

Comprehensive large-scale databases online may not be the most accurate or fool-proof sources for obtaining reliable information about the performance of public officials and employees, yet it is imperative in the age of instant communication and instant media to capitalize on the technological tools available. We are equipped to receive news on a split-second basis, our communication devices are designed to alert us even when our attention is on other matters, and our information databases can compile and analyze large amounts of data with relative ease. Admittedly, there are problems with inaccurate and misleading information and difficulties merging and comparing data between databases; however, the overall impact and the possibilities are tremendously positive. Without public inspection and oversight, inaccuracies will continue to exist, and as we become more comfortable with the media, we will become more capable with the data. This is, I believe, what our elected representatives meant when they declared that "government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government."³⁰

Endnotes

1. Web site maintained by the Empire State Center for New York State Policy, a project of the Manhattan Institute for Public Research: Empire Center for New York State Policy, *SeeThroughNY*, <http://seethroughny.net>.
2. Web sites maintained by news organizations include: *Yonkers City Payroll 2007*, http://tjnnews.com/salary/salaries_yk.php; *Recordonline.com*, *Public Payroll: An analysis of public salaries in the Hudson Valley*, <http://www.recordonline.com/apps/pbcs.dll/?section?Category=NEWS63>.
3. Empire Center for New York State Policy, *SeeThroughNY*, <http://seethroughny.net>.
4. New York State Office of the Attorney General, *Project Sunlight*, <http://sunlightny.org>.
5. Office of the State Comptroller, *Open Book New York*, <http://www.openbooknewyork.com>.

6. Web site maintained by the Workers' Compensation Board: *New York State Workers' Compensation Board, Does Employer Have Coverage?*, http://www.wcb.state.ny.us/content/ebiz/icempcovsearch/icempcovsearch_overview.jsp.
7. Web site maintained by the Office of Court Administration: *New York State Unified Court System, Attorney Search*, <http://iapps.courts.state.ny.us/attorney/AttorneySearch>.
8. Web site maintained by the Department of State: *New York State Department of State, Division of Licensing Services, Index of Licensees and Registrants*, http://appsext8.dos.state.ny.us/lcns_public/chk_load.
9. <http://www.health.state.ny.us/professionals/doctors/conduct/>.
10. See *Brownstone Publishers, Inc. v. New York City Dept. of Buildings*, 550 N.Y.S.2d 564 (Sup. Ct., N.Y. Co. 1990), *aff'd* 166 A.D.2d 294 (1st Dep't 1990); See also *New York Public Interest Research Group v. Cohen*, 188 Misc.2d 658, 729 N.Y.S.2d 379, (Sup. Ct., N.Y. Co. 2001).
11. N.Y. PUB. OFF. LAW § 87(3)(b).
12. N.Y. PUB. OFF. LAW § 87(5)(a).
13. N.Y. PUB. OFF. LAW § 87(2)(c).
14. N.Y. PUB. OFF. LAW § 89(3)(a).
15. See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).
16. *Id.* at 749.
17. *Id.* at 764.
18. *Id.* at 772.
19. *Id.* at 773.
20. *Id.* at 775.
21. *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984).
22. *Id.* at 79, 464 N.E.2d at 438, 476 N.Y.S.2d at 70.
23. *Id.* at 80, 464 N.E.2d at 439, 476 N.Y.S.2d at 71, citing *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984).
24. *Id.* at 80, 464 N.E.2d at 439, 476 N.Y.S.2d at 71.
25. *Id.*
26. Advisory Opinion No. 16044 (June 23, 2006), N.Y. EXECUTIVE LAW §§ 217-221.
27. N.Y. CRIM. PROC. § 160.50.
28. New York State Department of Correctional Services, *Inmate Population Information Search*, <http://nysdocslookup.docs.state.ny.us/kinqw00>.
29. *No-fine tickets total about 10,000*, TIMES UNION, Dec. 11, 2008; *Chief: unaware of ghost tickets*, TIMES UNION, Dec. 12, 2008.
30. N.Y. PUB. OFF. LAW § 84.

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Unwarranted Invasions of Personal Privacy Under Federal FOIA and New York FOIL

By Stephen E. Gottlieb¹



The problems of protecting privacy in the computer age are outstripping the laws intended to protect individual privacy. And that is having the effect of distorting the effect of distinctions both federal and New York privacy law have traditionally made. Information in “rap sheets” and data banks compiled from government information illustrate the concern.

Unwarranted Invasions and Rap Sheets

The federal Freedom of Information Act exempts from disclosure “unwarranted invasions of personal privacy”² and “clearly unwarranted invasions of personal privacy.”³ New York uses an almost identical exemption from disclosure for “an unwarranted invasion of personal privacy” for agency records which:⁴

(b) if disclosed would constitute an unwarranted invasion of personal privacy.

...

Thus a crucial issue under both statutes is to determine what is warranted.

The federal statute does not provide a definition. The U.S. Supreme Court took a major step in defining “an unwarranted invasion of personal privacy” in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*.⁵ The case grew out of efforts by a network news correspondent to link organized crime with a corrupt politician and with government contracts. The FBI refused to supply “rap” sheets about a living member of the family the reporter was probing.

Rap sheets contain information both about convictions and about arrests and proceedings which did not lead to a conviction. The federal Freedom of Information Act requires federal agencies to provide “reasonably describe[d] . . . records” to any person.⁶ Individual records may not be disclosed without individual consent unless required by the Freedom of Information Act, or FOIA.⁷ The two relevant FOIA exceptions both employ the “unwarranted invasion of privacy” language:

(6) personnel and medical files and similar files the disclosure of which would

constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.⁸

Though noting that exemption (6) might be relevant, the Court focused on (7).⁹ The issue as thus framed by the Court was whether disclosing records about an individual constituting a rap sheet would be an “unwarranted invasion of personal privacy.”

“The problems of protecting privacy in the computer age are outstripping the laws intended to protect individual privacy. And that is having the effect of distorting the effect of distinctions both federal and New York privacy law have traditionally made.”

The Court noted that some of the information in rap sheets is public information insofar as it is contained in the individual court files of the places where an individual may have been convicted.¹⁰ On the other hand, other portions of rap sheets are *not* public and the states *forbid* the dissemination of records of arrest, as opposed to conviction.¹¹

The Court made a second “distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole.”¹² The Court unanimously concluded, though in two separate opinions, that there was a protected privacy interest in that second distinction and kept the entire rap sheet private.

Federal and New York Treatment of Law Enforcement Records

Both New York and federal statutes authorize law enforcement agencies to withhold data in another set of exemptions relating to law enforcement which implicate privacy concerns. The federal statute authorizes an agency to protect records “compiled for law enforcement purposes, but only to the extent” that disclosure:

(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual. . . .¹³

Similarly, New York protects records “compiled for law enforcement purposes” if their disclosure would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures. . . .¹⁴

Most of those exceptions, like those in the federal statute, are for the protection of law enforcement. Nevertheless, the effect is to protect individual privacy.

The New York Public Officers Law protects records the release of which “could endanger the life or safety of any person”¹⁵ and defines “an unwarranted invasion of personal privacy” by reference to section 89(2)¹⁶ which elaborates the definition of “an unwarranted invasion of personal privacy” as including:

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- iv. disclosure of information of a personal nature when disclosure would result in

economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or

vi. information of a personal nature contained in a workers’ compensation record, except as provided by section 110-a of the workers’ compensation law.

There are exceptions where “identifying details are deleted,” the subject consents, or seeks access to records about him or herself.

Of those exceptions, only section 89(b)(iv) applies to the possibility that rap sheets “would result in economic or personal hardship” but the next clause eliminates any protection unless “such information is not relevant to the work of the agency requesting or maintaining it.” Rap sheets, of course, are relevant to the work of the law enforcement agencies collecting them. Nevertheless, the definition is nonexclusive by its terms, leaving protection against “an unwarranted invasion of personal privacy” in section 87(2)(b), supplemented by section 87(2)(e), for departmental, not privacy, reasons.

Thus the statutory scheme diverges somewhat but the result appears to be the same.

The private or public character of rap sheets stands in the crossfire between different treatments of criminal justice. On the one hand, the current effort to find, identify and cordon off everyone ever convicted of a sexual offense illustrates a kind of public safety approach, though one that may well prove self-defeating. On the other hand, some states try to protect ex-offenders who have served their sentences in order to try to reintegrate them into society and provide a path to a productive rather than a criminal life. Their focus is rehabilitation of the ex-offender.

The freedom of information laws were designed to assist the public in evaluating public servants.¹⁷ The Court seemed more concerned with rehabilitation by protecting the privacy of the ex-offender,¹⁸ though that seems an odd posture for some members of the *Reporters Committee* Court who have tended to welcome relatively harsh approaches to criminal law and procedure.¹⁹

Degrees of Privacy and Data Mining

The view that there are degrees of privacy which need to be protected has also been advanced by Daniel Solove.²⁰ He argues that the dangers of collecting and

organizing information in a single data bank far exceed the risks from dispersed information even though legally “public” and accessible. Government and private entities are able to merge disparate bits of data gained from a variety of originally independent sources into a single file as if it were reliably about a single individual.²¹ The merged data may in fact include both spurious relationships and inaccurate information. Solove refers to the computerized manipulation of such data as giving rise to Kafkaesque problems because it is quite likely that the individuals involved will never find out that some kinds of opportunities like jobs or consultantships were never offered or why opportunities for which they applied were given to others. It is sometimes a problem to identify the reasons for denial even when the individual realizes that he or she has been barred as from some airplane flights. It is still more problematic when the individuals don’t realize they are being considered for a benefit. Indeed those manipulating the machines may not know, either, in any real sense—the machine makes decisions and its negative conclusions do not necessarily show up as decisions. Thus the individuals don’t know what they have lost and have no way to confront the problem.

Governments dramatically expand the risks of data mining when they provide extensive databases for private use, largely without legal regulation. Databases designed in different ways are then merged with unreliable results. The recent attempt to purge the voting lists in Ohio because their “registration applications did not match government databases” provided an example of the havoc such merged lists can create. In Ohio, the Secretary of State refused and the courts supported her determination because of the likely disfranchisement of thousands of eligible voters as a result of trivial discrepancies and other inaccuracies.²²

There are at least two parts to this problem. One part of the problem is the collapse of the distinction between innocent and harmful information. Any information can become harmful when it can be used to disqualify voters because of discrepancies in the ways they write their names or addresses, for example, or because somewhere they may have given the wrong age. The other part of the problem is the release of government information in bulk insofar as it facilitates the data mining that creates these risks.

Thus the Court made an important point about the difference between older and newer forms of record keeping. The “cat may be out of the bag” nevertheless. There is little restriction on private commercial databases.²³ Indeed New York privacy law is very narrowly focused on commercial use of one’s name or likeness, and New York has rejected other common law privacy torts altogether.²⁴ And the internet already contains an enormous quantity of data about each of us. The problem therefore may be how

to minimize the damage. New York tried to take a step in the right direction with restrictions on the commercial use of public information.²⁵ But the problem has more to do with how the information is treated, whether efforts are made to check the information, whether and how the individual involved may have the opportunity to correct the data, or even become aware that there is data to be checked, and what the information may be used for, and whether it is sufficiently reliable for the purpose.²⁶

The problem created by data mining is that it destroys the distinction between private information, the inappropriate release of which may be unjustifiably harmful, and information which is appropriately public.²⁷

The statutory standard, “unwarranted invasion of personal privacy,” obviously contemplates a balance between the benefits of disclosure (“warranted”) against the consequent invasion of personal privacy. As Justice Blackmun suggested, there are some very difficult trade-offs inherent in the vague language of an “unwarranted invasion of personal privacy.”

Endnotes

1. The author would like to express his appreciation for the expert editorial comments and suggestions of Camille Jobin-Davis.
2. 5 U.S.C. § 552(b)(7).
3. 5 U.S.C. § 552(b)(6).
4. N.Y. PUB. OFF. LAW § 87(2)(b).
5. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).
6. 5 U.S.C. § 552(a)(3).
7. 5 U.S.C. § 552(a)(4) defines “records” and section 552a(b) requires consent unless, *inter alia*, and as provided by section 552a(b)(2), disclosure is required by 5 U.S.C. § 552. Compare with N.Y. PUB. OFF. LAW § 96. The Court and Justice Blackmun noted that disclosure of rap sheets to the public may be prohibited by another statute, referring to the prohibition of disclosure in 28 U.S.C.S. § 534, and therefore might be excluded from disclosure under the Freedom of Information Act by 5 U.S.C. § 552(b)(3), but that argument had been abandoned and was not before the Court. *Reporters Comm.*, 489 U.S. at 757-58, 765; *Id.* at 781 (Blackmun, J., concurring in the judgment).
8. 5 U.S.C. § 552(b)(6)-(7).
9. *Reporters Comm.*, 489 U.S. at 762n.
10. *Id.* at 764.
11. See *Reporters Comm.*, 489 U.S. at 759; and see N.Y. CRIM. PROC. § 160.50 (requiring records be sealed, destroyed or returned on termination of a criminal action in favor of the accused).
12. *Reporters Comm.*, 489 U.S. at 764.
13. 5 U.S.C. § 552(b)(7). See also the still stronger language in the federal Privacy Act at 5 U.S.C. § 552a(j)(2).
14. N.Y. PUB. OFF. LAW § 87(2)(e).
15. N.Y. PUB. OFF. LAW § 87(2)(f).
16. N.Y. PUB. OFF. LAW § 87(2)(b).

17. See *Reporters Comm.*, 489 U.S. at 772.
18. See *Reporters Comm.*, 489 U.S. at 767 (“the law enforcement profession generally assumes . . . that individual subjects have a significant privacy interest in their criminal histories”).
19. For example, several of the justices in the majority supported the execution of an inmate without a hearing on exculpatory evidence unearthed after trial, *Herrera v. Collins*, 506 U.S. 390 (1993).
20. Daniel J. Solove, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE*, 8, 42-44 (New York University Press, 2004).
21. *Id.* at 44-47.
22. Ian Urbina, *Ohio: Flagged Voters Remain Nameless*, N.Y. TIMES, October 30, 2008 at A19.
23. See Solove, *DIGITAL PERSON*, 9, 46, 120-23.
24. See N. Y. CIV. RIGHTS LAW, § 50; *Messenger v. Gruner & Jahr Printing & Publ'g*, 94 N.Y.2d 436, 727 N.E.2d 549, 706 N.Y.S.2d 52 (2000); *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (rejecting a common law privacy tort).
25. N.Y. PUB. OFF. LAW § 89(2)(b)(iii), treating “sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes” as an example of an unwarranted invasion of privacy.
26. See Daniel J. Solove and Marc Rotenberg, *INFORMATION PRIVACY LAW* 22-25 (New York: Aspen, 2003) (describing the statutory sources of privacy law and the proposed Code of Fair Information Practices). See also Part Two of the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data §§ 7-14 (23rd September, 1980) available at http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html (visited February 15, 2009).
27. See Solove, *DIGITAL PERSON*, 8, 44-47 (describing the inadequacy of the secrecy and invasion conceptions of privacy and the impact of vast quantities of public information on the distinction between public and private).

Stephen E. Gottlieb has been a member of the Albany Law faculty for three decades and, among other courses, has taught constitutional and privacy law, written about the Rehnquist Court, and served on the Board of Directors of the New York Civil Liberties Union.

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Rebuilding Yonkers: How Open Government Laws Are Helping Level the Playing Field in the City of Hills

By Debra S. Cohen

Introduction

For those familiar with the challenging topography of Yonkers, N.Y., it is understandable why New York State's fourth largest city is known as the "city of hills." In recent years Yonkers has tried to move past a more colorful and less flattering description some ascribe to it as "the city of hills where nothing is on the level." Nestled along the Hudson River just north of New York City, with a panoramic view from its downtown of the majestic Palisades, Yonkers has struggled to shed its reputation as a parochial and isolated fiefdom ruled with an iron fist by tough-talking politicians and power brokers. Rough and tumble politics, backroom deals, racially charged public debates over housing and school desegregation, and a series of investigations raising the specter of corruption and cronyism have kept Yonkers from realizing its potential and fully reaping the economic, social and cultural benefits of its unique location.

However, there are signs that Yonkers may be turning a corner. Although the city still grapples with many challenges and controversies, recently progress has been made to attract new residents, businesses and developers. Tentative steps have been taken to break down some of the longstanding barriers separating Yonkers' neighborhoods and unite its diverse residents around common goals and concerns.

If Yonkers has made progress in this regard, credit must be given to open government advocates who have developed a greater understanding of their rights under New York's Freedom of Information Law and Open Meetings Law and are finding ways to wield them as effective tools for positive change. People in Yonkers are beginning to see how transparency, vigorous and informed debate, and consideration of a diversity of opinions can lead to more, not less, effective decision-making on important issues facing the city. Although not without resistance in some quarters, more Yonkers officials are learning that "transparency and accountability" are not optional, but in fact are requirements of governance in a healthy democracy.

The first steps Yonkers officials have taken toward more open government were not taken voluntarily. Recent efforts to cure some of the dysfunction in Yonkers' public



processes have been largely driven by a growing number of community members energetically, and sometimes creatively, exercising their right to meaningfully participate in the public decision-making process. Some have been willing to engage the legal system to enforce that right. The change in how Yonkers government operates has been "market driven" by taxpayers increasingly comfortable with invoking their "right to know" and then sharing what they learn with others. As open government advocates have become increasingly effective in obtaining and disseminating information about the activities of their local public officials, Yonkers government has begun to respond by initiating reforms to improve its transparency and accountability.

This article will explore some examples of how people in Yonkers have used FOIL and the Open Meetings Law as effective tools to level the playing field in the "city of hills" and, in doing so, help the city move in a more positive direction.

"Although not without resistance in some quarters, more Yonkers officials are learning that 'transparency and accountability' are not optional, but in fact are requirements of governance in a healthy democracy."

The Yonkers Ballpark: FOIL and SEQRA

In April 2002, Yonkers Mayor John Spencer announced the city's intention to build a minor league ballpark in downtown Yonkers on the site of a municipal parking lot known as Chicken Island. The parking lot sits in the shadow of Yonkers City Hall and is adjacent to the city's historic business center at Getty Square. The site is bordered by a variety of businesses along New Main Street and Palisade Avenue, the city's fire department headquarters on School Street and a main thoroughfare—Nepperhan Avenue.

Mayor Spencer sent a letter inviting New Main Street business and property owners to City Hall to learn more about the project. They were shocked when told they would have to relocate immediately to make way for the ballpark. It was even suggested at this April meeting that they not place orders for Christmas because they would need to vacate their properties by October. The meeting at City Hall was the first time these business and prop-

erty owners had heard about the ballpark project. There had been no information publicly released nor any public review or approval process prior to the project being presented to them as a *fait accompli*.

Most of the business and property owners did not understand the review and approval process the law required for such a development proposal, including the requirements of New York's State Environmental Quality Review Act (SEQRA), or their rights under New York's eminent domain law. But Martin Goldman, the owner of one of the largest businesses and pieces of property that would be impacted, knew better. Mr. Goldman had opened the C.H. Martin Department Store, at the corner of New Main Street and Palisade Avenue in the heart of Getty Square, in 1978. He did so after being asked to open a store by the mayor of Yonkers after other retailers had abandoned this key downtown corner.

Mr. Goldman knew that the city could not just tell the businesses to "get out" or force property owners to accept whatever terms the city chose to offer. He had successfully fought a similar threat to one of his stores in New Jersey a few years earlier. He was prepared to fight again to protect his property, business, and rights. He and his son Harvey reached out to other concerned business and property owners and convinced them that working together they had a better chance to protect their interests than each standing alone. In July 2002, the group contacted attorneys they had been told had helped the City Park community in New Rochelle, N.Y. successfully deal with a similar threat to their neighborhood from a proposed IKEA superstore.

An unincorporated association of neighborhood businesses, property owners, residents and other concerned Yonkers residents was formed under the name Save Our Stores (SOS). Very little was known about what was actually being proposed. So as one of the attorneys for SOS, my first task was to try and learn as much as possible about the ballpark project. SOS members felt that if they were being told to close their businesses and give up their property, they were entitled to know what would be replacing them and why it was a better alternative for the city of Yonkers. Why had the city decided to put a minor league ballpark in the middle of a congested urban area? How was the Chicken Island site chosen? Who was going to build it? How was it going to be paid for? How many jobs and how much tax revenue would it produce? What would happen to the businesses and residents being displaced? What other options had been considered?

Requests for documents were filed pursuant to New York's Freedom of Information Law (FOIL) on July 23 and August 6, 2002 seeking feasibility and environmental studies, planning documents, property appraisals and other documents relevant to the project. The city ignored the requests. After no response was received, an appeal of the constructive denial of the requests was filed pursu-

ant to N.Y. Pub. Off. Law § 89(3) on August 15, 2002. But the city continued to be unresponsive and non-compliant with its obligations under FOIL.

On September 10, 2002, the Yonkers City Council passed resolutions taking the first substantive public steps in the review and approval process required under the State Environmental Quality Review Act (SEQRA).¹ The City Council declared itself lead agency under SEQRA and scheduled a public scoping session for October 1, 2002. According to SEQRA, the primary goals of scoping are to "focus the EIS (Environmental Impact Statement) on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or non-significant."²

While not required under SEQRA, the lead agency has the option to conduct a scoping process prior to undertaking a draft EIS. If the lead agency chooses to undertake scoping, of significance to the members of SOS was the requirement that scoping "*must include an opportunity for public participation.*" "The lead agency may either provide a period of time for the public to review and provide written comments on a draft scope or provide for public input through the use of meetings, exchanges of written material, or other means."³

Without prior access to the background information that SOS had sought in the two FOIL requests, it was clear that it would be impossible for SOS and other interested members of the public to participate in a meaningful way in the environmental review of the project. Communications with the city regarding the FOIL requests made it clear that the intention was to stonewall access to information until after the SEQRA process was well under way. The approval process for the ballpark project was being fast-tracked before public scrutiny could raise any questions that might delay it.

On September 19, 2002, SOS filed an Article 78 special proceeding, brought on by Order to Show Cause, in Supreme Court of Westchester County. Ostensibly the purpose was to enforce the city of Yonkers' compliance with FOIL. However, the larger goal was to challenge the city to do what was necessary to allow the people of Yonkers to exercise the "opportunity for public participation" that SEQRA requires.

The Order to Show Cause was signed by the Honorable Joseph K. West, and the parties were ordered to appear before the Court on September 24. The Order to Show Cause directed the city of Yonkers to either provide the documents sought or, in the alternative, stay the public scoping hearing scheduled for October 1, 2002 "*so that petitioner, as affected property owners, may meaningfully participate in said hearing.*"⁴

On September 24, lawyers for SOS and from the Yonkers Office of the Corporation Counsel appeared before Judge West.⁵ The city attorneys vehemently argued that

the Court could not stay a SEQRA proceeding for failure to comply with FOIL but, when queried by Judge West, could not cite any legal authority to support that position.

SOS argued that until FOIL was complied with, and documents about the project produced, the stay should remain in place. At the heart of SOS's argument was SEQRA's clearly stated requirement for public participation. Given Yonkers' failure to respond to requests for information, the stay was necessary to insure that members of the public would have a reasonable period of time for review of pertinent documents so that they could participate meaningfully in the SEQRA process, starting with the scoping session.

Judge West expressed concern that the city had failed to comply with its obligations under FOIL, characterizing its response to the SOS FOIL requests as "a runaround." He noted that FOIL was designed "so that we have an informed citizenry, so that we are able to get information so that they can take part in [a] public hearing knowledgeably, so that they can express their concerns based on facts."

Within a day of the initial hearing, the city of Yonkers provided access to a significant number of the withheld documents. Because SOS felt that there were sufficient documents to prepare for the October 1 scoping session, the Court was advised by SOS at the next court appearance on September 26 that the stay of the scoping session could be lifted.

Although the request for the preliminary injunction was withdrawn, the Court's involvement continued for another two months as the city continued to drag its feet while producing documents about the ballpark project. Over the next several months, as additional documents were slowly extracted from Yonkers, many issues of concern about the ballpark project, and other development activities in Yonkers, were discovered.

It came to light that city officials, through the Yonkers Industrial Development Agency (YIDA), had created several subsidiary corporations that were intertwined by overlapping board members and a series of questionable financial transactions. One of the corporations was a for-profit corporation created to develop the ballpark project. Initial attempts to obtain information about the corporation, Yonkers Baseball Inc. aka Yonkers Baseball Development Inc. (YBDI), were frustrated by another FOIL runaround by City officials, fueled by the claim that YBDI was a "private, for-profit corporation" and thus not subject to open government laws.

The Mayor, Deputy Mayor, and the city's Economic Development Director were all believed to be officers and directors of the corporation. Therefore, the initial FOIL request was directed to the city of Yonkers seeking any documents in its possession, custody or control about YBDI's activities.

After weeks of delay in responding to the request, the city's Records Access Officer finally advised that the request had been made to the wrong entity and that it should be sent to "Edward Sheeran or Dennis Lynch, in care of the Yonkers Industrial Development Agency, City Hall, 40 South Broadway, Yonkers, N.Y. 10701."⁶ Among the documents requested were minutes of meetings, resolutions, funding proposals, budgets and tax returns of both YIDA and Yonkers Baseball. A FOIL request was then immediately sent to the YIDA. A handful of documents were made available for review by the YIDA, but SOS attorneys were told that a third and separate FOIL request would have to be made to YBDI, even though the YIDA was the sole shareholder of the corporation and all four of its directors were also directors of the YIDA.

Although the Open Meetings Law requires minutes of public meetings to be accessible to the public, it was almost four months before YIDA minutes were produced for review. Attorneys for the YIDA refused to provide copies of the minutes until they had an opportunity to review them for possible redactions. The minutes of one particular YBDI meeting were produced twice, in response to two separate FOIL requests made several months apart, leading to the discovery that the first set of minutes produced had been significantly edited to remove potentially embarrassing and controversial information. Eventually an Article 78 special proceeding had to be filed against the Yonkers Industrial Development Agency and several City and YIDA officials to obtain full disclosure of the information sought about the ballpark for-profit corporation.⁷

After several FOIL requests and time-consuming and costly litigation, thousands of pages of documents were finally obtained about the ballpark project and related development activities. As a result of the information obtained through FOIL, Yonkers Baseball Development, Inc. and other Yonkers development corporations became the subject of intense media scrutiny as well as audits and investigations by state and federal officials.

The New York State Comptroller determined that the YIDA had acted outside its legal authority forming the for-profit corporation and loaning it \$670,000 to pay for the development costs of the ballpark project. The activities of other YIDA-created corporations were more closely examined and the activities of at least one, the Ridge Hill Development Corporation, are related to an ongoing federal investigation.

Statewide public awareness subsequently grew regarding the danger of the proliferation of public authorities operating as virtual shadow governments. The New York State Legislature enacted laws requiring greater transparency and accountability by Industrial Development Agencies. Ultimately the original ballpark project was abandoned after closer scrutiny of the project revealed it lacked economic viability and its financial structuring was called into question. Private developers

subsequently took over the development rights for the Chicken Island site and proposed more ambitious and comprehensive plans for redevelopment of the site that they say will not require the condemnation of property and will leave the C.H. Martin property intact. Unlike the first ballpark proposal, prior to undertaking the SEQRA process for their project, the developers vetted it publicly at numerous public meetings and have made SEQRA-related studies available on-line for public review. Although the new proposal is not without controversy, there is no doubt that the public has had far greater access to information necessary to meaningfully participate in the review and approval process without having to file a legal action to obtain it.

One Man, a Camera and the Open Meetings Law

One of the main reasons the people of Yonkers were able to more meaningfully participate in the review and approval process for the revised downtown development proposal is that meeting notices, agendas and minutes are now posted on the city's Web site and many meetings are televised on the city's public access station.⁸ For people living in other municipalities, the ready accessibility of such information is likely taken for granted. For Yonkers, this is a recent and dramatic step forward. In all likelihood, a significant catalyst for this change has been an unassuming Yonkers resident named Martin McGloin. A film and video editor by profession, McGloin and his video camera have become a familiar sight in Yonkers City Hall and at public meetings throughout the city.

I was contacted by Mr. McGloin in January of 2005 after he had been prevented from videotaping a meeting of the City Council's Budget Committee with the explanation that it was "against Council protocol." At the time, no Council committee meetings, and few other official meetings, were televised and notices of meetings were posted only on the bulletin board outside the mayor's office or with a small public notice in the newspaper. Minutes of meetings could only be obtained by filing FOIL requests, which were either ignored or responded to in a notoriously slow fashion. The city government seemed to do what it could to keep the public from being informed and to discourage public participation in the government decision-making process.

McGloin did not let the matter drop. He contacted the New York State Committee on Open Government to better understand his rights. He then contacted me and asked for help. I sent a letter on his behalf to the Yonkers Corporation Counsel asking him to clarify whether any rules or regulations of the city of Yonkers prohibited or regulated the videotaping of meetings by members of the public. The case of *Csorny v. Shoreham-Wading River Central School District*,⁹ where the court held that members of the public could not be prohibited from using video cameras to record public meetings, was brought to the

city's attention, wherein the Appellate Division, Second Department, had determined that inherent in the rights granted by the Open Meetings Law was the public's right to videotape public meetings, with reasonable regulations to prevent disruption of the proceedings. It was noted that Mr. McGloin had no desire to interfere with the work of the City Council but simply wanted to exercise his right to accurately and effectively "memorialize local democracy in action," as recognized by the Court in *Csorny*. As a result, the Yonkers Corporation Counsel advised the City Council that although the Council could promulgate reasonable rules regulating the videotaping of meetings, it may not prohibit the videotaping of meetings by members of the public.

Martin McGloin began to regularly videotape not only City Council meetings, but other governmental meetings that previously had been rarely observed by the public, including the Yonkers Industrial Development Agency, the Community Development Agency, the Board of Contract and Supply and the Charter Revision Commission. He began to travel throughout the city recording various public meetings and soon became a welcome presence in community centers and meeting halls in all parts of Yonkers. Soon members of the public and the media knew to contact Martin if they were trying to locate a record that memorialized accurately what had occurred at a public meeting.

Through the lens of his video camera, he began to see how people in the diverse neighborhoods of Yonkers, who rarely had contact with each other, shared common concerns about the integrity, openness and transparency of the governmental decision-making process. He recognized the importance of government activities being more readily accessible to the people of Yonkers and the ability of technology to make that happen.

Technology, Access to Information and Community-Building

McGloin shared his observations with another concerned Yonkers resident, Deirdre Hoare. They recognized that one issue that was directly impacting people throughout Yonkers was economic development. The city had been trying to jump-start significant economic development projects for years in an attempt to rebuild the city's deteriorating finances and infrastructure. In addition to the controversial ballpark project, the West Side of Yonkers was considering several major proposals, including some along the Hudson River waterfront while the East Side was grappling with a proposal to build the Ridge Hill "village" along the New York State Thruway and an expansion of the Cross County Shopping Center. Suddenly people who thought they had little in common were grappling with similar concerns about the economic, environmental and quality-of-life impacts of development on their families and neighborhoods. They also shared a

fear that the projects would be pushed through without their concerns being seriously or adequately considered.

Hoare and McGloin formed Community First! Development Coalition (CFDC) to help people all across Yonkers meaningfully participate in the development process and support each other's efforts to influence government officials to be more responsive to their concerns. This was no small challenge in a city often seen as a conglomerate of fiercely independent neighborhoods, sometimes sharply divided over emotionally charged issues, rather than as one unified community.

CFDC was founded with a simple but powerful mission:

We strive to provide accurate & timely information about development proposals and notification of opportunities for community participation in the development process. Our goal is to educate community members about our rightful role in economic redevelopment and to empower ourselves with the tools and resources we need to ensure that our voices are heard. We therefore advocate for greater public access to the public information necessary for citizens to make informed decisions about development, and monitor compliance with open government laws. In addition, we encourage community organization and mobilization efforts as well as community driven and designed development initiatives.¹⁰

McGloin and Hoare began to attend almost every meeting on development project proposals all over Yonkers. They met with community-based organizations and neighborhood associations throughout the city to learn about their concerns. CFDC became a conduit for community leaders to meet to discuss concerns they shared and to develop strategies for working together to make their voices heard. It quickly became a reliable source of information about the various development projects and how members of the public could participate in the review and approval process.

An e-mail network was developed of groups and individuals all across Yonkers with an interest in the city's development activities. Hoare and McGloin began to monitor City Hall for meeting announcements and disseminate meeting notices via email and post the information on the CFDC Web site.¹¹ If meetings were scheduled without complying with the notice provisions of the Open Meetings Law, they challenged them. If executive sessions were called, they demanded to know the grounds. When important issues were being discussed by the City Council, they insisted the public have timely access to documents to prepare ahead of time and then be allowed to express their views.

CFDC expanded with two additional Web sites. Yonkers TV posts McGloin's videotapes of public meetings which, although unofficial records, provide illuminating insights into the workings of Yonkers.¹² At the very least, Yonkers officials now know that their every action and word at public meetings is being captured on videotape and can be observed by anyone with access to a computer. Without any publicity or advertising, Yonkers TV has to date had almost 25,000 video views of the approximately 250 videos posted. As a result, the public discourse at City Hall has become more civil and at least the most egregious backroom deal-making is beginning to subside.

The other offshoot of the CFDC Web site is FOIL Yonkers, where documents obtained by Hoare, McGloin and others regarding development issues are freely shared.¹³ FOIL Yonkers is used by the media, investigative authorities and concerned members of the public as a source of firsthand information about government deal-making, waste, ethics and other issues of public interest previously the purview of only a handful of insiders.

"Throughout the city more people are showing an understanding of how the review and approval process for development projects is supposed to work and their right to meaningfully participate in it."

Conclusion

The public demand for, and widespread impact of, these open government activities have not gone unnoticed by Yonkers officials. In the past few city elections, "transparency and accountability" of government have become key themes. The City Council has instituted new policies to make information more readily available to the public, allow for more public participation and comment during council meetings and televise more of the Council's activities. The city's Web site was revised and now posts timely information about scheduled meetings, including agendas and minutes. Documents that people once had to sue for are now more regularly available online as well, including budgets and development proposals. Although there are still too many FOIL requests not responded to properly and instances where the Open Meetings Law is not being complied with, the uniformly blatant and egregious violations have been significantly reduced.

The positive impact on Yonkers of people willing to use FOIL and the Open Meetings Law to exercise their "right to know," such as the Goldmans, Martin McGloin and Deirdre Hoare, is evident each time a new development issue emerges in Yonkers.

Throughout the city more people are showing an understanding of how the review and approval process for development projects is supposed to work and their right to meaningfully participate in it. The public's questions and comments are increasingly being listened and responded to. New coalitions and unlikely alliances are continuing to form around development and other issues critically important to the city's future.

Some naysayers contend that these changes have been bad for Yonkers—that decisions were made more quickly in the old days when information was locked down and people were put down. But a growing number of people in Yonkers say they will never let the city revert back to the old ways of doing business. Yonkers continues to be a city dominated by strong personalities and diverse points of view. It faces some serious social and economic challenges. But there is a growing and palpable feeling of energy and optimism about its future. Justice Brandeis observed that "sunlight is the best disinfectant." Most would agree that, at the very least, sunlight is a necessary ingredient for any healthy environment that wants to grow and thrive. Yonkers is no exception.

Endnotes

1. State Environmental Quality Review, 6 N.Y.C.R.R. § 617 (2000).
2. State Environmental Quality Review, 6 N.Y.C.R.R. § 617.8(a) (2000).
3. State Environmental Quality Review, 6 N.Y.C.R.R. § 617.8(e) (2000).
4. *Save Our Stores Association v. City of Yonkers, et al.*, Index No. 02-015508-2002 (S. Ct., Westchester Co.).

5. In an interesting twist, an attorney for six local business owners identifying themselves as American Minority Enterprise Network (AMEN) intervened to oppose the stay of the SEQRA scoping process with the representation that his clients, who would be relocated by the ballpark project, objected to the stay because it would cause them "irreparable harm." A few months after the initial hearing it was learned that the attorney also represented the Yonkers Industrial Development Agency and the for-profit corporation created by the YIDA to develop the ballpark project. *Id.*
6. Mr. Sheeran was serving simultaneously as the Yonkers Director of Economic Development and Executive Director of the Yonkers Industrial Development Agency. Mr. Lynch, counsel to the YIDA, was also the attorney representing the interveners in the FOIL action against the City of Yonkers opposing the stay of the Oct. 1 ballpark scoping session.
7. *Save Our Stores Association v. Yonkers Industrial Development Agency, et al.*, Index No. 03-005285-2003 (S. Ct., Westchester Co.).
8. *Making Government User-Friendly*, www.yonkersny.gov.com.
9. *Csorny v. Shoreham-Wading River Cent. Sch. Dist.*, 305 A.D.2d 83, 759 N.Y.S.2d 513 (2d Dep't 2003).
10. Deirdre Hoare & Martin McGloin, Co-founders, Community First! Development Coalition, <http://communityfirstdevelopmentcoalition.blogspot.com>.
11. Community First! Development Coalition, [www.communityfirstdevelopmentcoalition.blogspot.com](http://communityfirstdevelopmentcoalition.blogspot.com).
12. Yonkers TV, www.yonkerstv.blogspot.com.
13. FOIL Yonkers, www.foilyonkers.blogspot.com.

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Improper Executive Sessions by Boards of Education Thwart Transparency and Accountability

By John A. Miller

The more things change, the more they remain the same. New York State's Open Meetings Law¹ (OML) was enacted in 1976² in the aftermath of the infamous Watergate scandal³ in an attempt to restore the public's faith and trust in governmental officials and institutions. The legislative declaration and preamble to the Open Meetings Law states the following:



It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.⁴

Although the OML has been amended by New York's lawmakers many times, the essential purpose of the law has remained unchanged since it took effect thirty-two years ago. Moreover, the passage of time has not diminished the importance of the ideals embodied by the legislative preamble. These are not lofty objectives of a bygone era, long ago achieved and taken for granted by later generations. To the contrary, recent events have confirmed that it remains "essential to the maintenance of a democratic society that the public business be performed in an open and public manner . . ."

In 2004, for example, New Yorkers were sobered by a scandal in the Roslyn School District on Long Island that involved embezzlement of millions of dollars in district funds by the superintendent and school business official, as well as falsification of district records by the district's independent auditor in an effort to conceal the embezzlement, resulting in the responsible individuals being jailed for their misconduct.

Like the Watergate scandal that precipitated enactment of the OML, the Roslyn scandal did not merely

erode public confidence in the individuals who were directly responsible for the egregious misconduct. It also deprived Roslyn's sitting board members of the trust of their school community and eroded confidence of citizens throughout the state in public school officials and the educational institutions they serve.

Not surprisingly, the Roslyn scandal catalyzed the enactment of several new state laws and regulations aimed both at increasing the transparency of public school districts' fiscal operations and increasing accountability by public school districts' boards of education.⁵ Among these new laws is a requirement that every public school district be audited by the Office of the State Comptroller by March 31, 2010.⁶

It was tragically ironic, therefore, when state Comptroller Alan Hevesi, who presided over the first of the post-Roslyn era school district audits and regularly held press conferences to castigate school officials for financial irregularities, pleaded guilty in 2006 to felony criminal misconduct involving the misuse of his public office for personal gain. This caused incalculable damage to the public's trust in elected officials and institutions.

The implications of the Roslyn scandal were not lost on public school officials. In the wake of Roslyn, it is almost impossible to attend a school board meeting anywhere in New York State where the words "transparency and accountability" are not uttered by board members or other school officials in conscious recognition of the increased scrutiny that is upon them at all times. Yet the very same school board members and school officials who pay homage to the importance of conducting school business in an open and transparent fashion sometimes participate in holding executive sessions or exempt meetings for the purpose of discussing topics that the law does not authorize boards to discuss behind closed doors, thereby directly contravening the public's right to "attend and listen to the deliberations and decisions that go into the making of public policy."

It is not unheard of, for example, for boards of education to schedule hour-long executive sessions, a year in advance, to occur at the beginning of each regularly scheduled board meeting. The ostensible purpose of scheduling executive sessions in advance, and notifying the public of this, is to avoid having the public arrive at the schoolhouse for public session, and then sit by idly for an hour or more while the board meets in executive session. However, the law only authorizes boards to convene an executive session following a majority vote taken in public approving a motion that states a proper purpose

for holding the executive session.⁷ Therefore, routinely scheduling executive sessions at the beginning of each and every board meeting may give the public the impression that the board intends to meet in executive session regardless of whether there are proper subjects to justify the board's entry into executive session.

Just as an individual's reputation of personal credibility can be permanently damaged by misconduct, or even the mere perception of misconduct, a school board's reputation with its community can be permanently marred by improperly discussing topics behind closed doors that the law requires boards to discuss in public. Once the public's trust is lost, it can be difficult to regain. In addition, a loss of community trust in the local school board can impact many facets of school operations. Gadflies who feel they have been wrongly kept in the dark about public matters may incessantly file Freedom of Information Law (FOIL) requests for district records, if for no other reason than to show school officials that they have the power to hold them accountable. Community members who distrust school officials may viscerally oppose the district budget and other ballot propositions. These are just examples. The consequences of losing the public's trust are immeasurable.

Why, then, do school boards ever improperly discuss subjects in executive session that belong in public session? Do they deliberately repeat words about transparency and accountability as an empty slogan, without any intention of fulfilling the promise to regain and restore the public trust that these words portend? Perhaps. However, it is far more likely, and more consonant with the author's personal experience, that board members utter noble words and phrases about the importance of transparency and accountability, and then engage in activities that are inconsistent with such words and phrases, because they do not fully understand what the law requires.

It should come as no surprise to anyone that school board members are not steeped in the nuances of the Open Meetings Law. For starters, the specific purposes for which boards are authorized to convene executive sessions are hardly intuitive. That is, the list of subjects that may be lawfully discussed in executive session is not based on any inherent or implicit sense of right or wrong. These rules must be learned. Furthermore, neither study nor mastery of the legal rules pertaining to the conduct of open meetings in general, or entry into executive session in particular, is foremost in the minds of persons who seek to serve as volunteer members of their local school boards, nor should it be.

It is the responsibility of each school district's legal counsel to explain the rules for entry into executive session to their board clients, so that boards can implement these rules with reasonable precision, unaided by counsel at every turn. This is an ongoing responsibility, because the composition of most school boards changes from year-

to-year, as does the office of board president (albeit less frequently), who presides over board meetings and gavel on motions for entry into executive session.

Amendment to the OML May Compel Payment of Adversaries' Attorneys' Fees

If sufficient reason did not already exist for legal counsel to train board members about the rules for taking board discussions behind closed doors, a recent amendment to the OML gives the law sharp new teeth that should motivate legal counsel to provide appropriate training to the boards they represent. Specifically, Chapter 397 of the Law of 2008 amended the OML, as follows:

If a court determines that a vote was taken in material violation of this article, *or that substantial deliberations relating thereto occurred in private prior to such vote*, the court *shall* award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held.⁸ [Emphasis added].

This new provision of the OML does not merely authorize courts to award attorneys' fees upon finding a violation of the OML by a school board. The law also mandates the award of attorneys' fees to a successful petitioner when a court finds that a board of education (or other public body) lacked a reasonable basis for engaging in substantial discussions about a matter behind closed doors prior to voting on that matter.

School Boards' Use of Exempt Meetings and Executive Sessions

The purpose of the remainder of this article is to provide guidance to school district legal counsel about the rules governing exempt board meetings and executive sessions. The discussion that follows focuses on a few of the most common purposes for which the Open Meetings Law authorizes boards of education to enter into exempt meetings and/or executive sessions. Although this discussion focuses on the application of the Open Meetings Law to public school boards, most of the same legal principles apply to other public bodies that are subject to the provision of the OML.

Exempt Meetings

There are some topics which boards of education are permitted, or even required, to discuss behind closed doors that do not appear anywhere on the list of topics for which a board may properly enter into an executive session. This is because the Open Meetings Law explicitly exempts from its coverage, *inter alia*, "any matter made confidential by federal or state law."⁹

For example, nowhere on the list of purposes for which boards of education may properly enter into an executive session does the law indicate that a board may enter into executive session to discuss matters pertaining to individual students. However, boards of education routinely meet behind closed doors to discuss matters pertaining to the discipline of individual students, the educational placement of individual students, and other private matters involving the district and individual students and their families. Notwithstanding the absence of explicit authority to convene an executive session for any of these purposes, conducting such discussions behind closed doors is not only legally authorized, it is also legally mandated, because of a federal law known as the Family Education Rights & Privacy Act (FERPA), which makes student education records, and information obtained therefrom, confidential as a matter of law.¹⁰

Similarly, boards of education routinely meet behind closed doors with their attorneys to obtain legal advice concerning myriad aspects of school district operations. Although the Open Meetings Law explicitly authorizes boards of education to enter into executive session to discuss “proposed, pending, or current litigation”¹¹ (discussed in greater detail below) there is no requirement that a district’s legal counsel be present when the board meets in executive session to discuss proposed, pending or current litigation. Conversely, there are many matters about which boards of education seek legal advice from their attorneys that have nothing to do with proposed, pending, or current litigation. How then, can boards meet privately with their attorneys to discuss such matters when authority to discuss legal matters with counsel is not listed among the purposes for which boards may meet in executive session? The answer is that such meetings are exempt from the OML, because the advice rendered by a school district’s legal counsel is a matter made confidential by state law, specifically by the attorney-client privilege set forth in the New York Civil Practice Law and Rules (CPLR).¹²

Executive Sessions

It is important to note at the outset that boards of education lack legal authority to vote during executive session on topics which they may properly discuss during executive session,¹³ with limited exceptions.¹⁴

It also is important to note that the OML never compels a board of education to enter into executive session. To be sure, there are certain topics that boards of education are forbidden by law from discussing in public, as for example, confidential education records pertaining to particular students¹⁵ (discussed above). However, the list of purposes for which boards of education are authorized to meet in executive session is permissive, not mandatory.

Not all of the purposes for which boards may enter into executive session are listed or discussed herein. The review and analysis that follow are based on selected

topics for which boards of education frequently have occasion to enter into executive session with clear legal authority, together with a discussion about when such authority does not exist. Other topics that may properly be discussed in executive session are not discussed herein, mainly because they arise less frequently in the public school setting. The discussion below focuses on just three of eight general topics¹⁶ that the law explicitly authorizes boards of education to discuss in a properly convened executive session:

(1) Proposed, Pending or Current Litigation

Proposed Litigation. The OML explicitly authorizes boards of education to enter into executive session, upon a proper motion, to discuss “proposed, pending or current litigation.”¹⁷ As noted above, there is no requirement that the district’s legal counsel be present to justify the board’s entry into executive session to discuss such litigation.

“Proposed” litigation means litigation against another person or entity that is being contemplated by the board of education.¹⁸ It does not mean that the board may meet in executive session to discuss an anticipated or feared lawsuit against the district.¹⁹

Thus, while it is proper for a board of education to enter into executive session to talk about suing a third party, it is improper for a board of education to enter into executive session to discuss the board’s concerns about being sued. If a board wants to meet privately to discuss board members’ concerns about the district being sued, or to discuss liability risk management, then the board must invite the district’s legal counsel to an “exempt” meeting to provide advice to the board about the anticipated lawsuit or related matters.

Pending or Current Litigation. These redundant terms refer to litigation that has actually been commenced by the district against a third party, or commenced by a third party against the district. When a board of education makes a motion to enter into executive session to discuss pending or current litigation, in most cases the board should identify the name of the opposing party in the motion, as for example, “to convene executive session for the purpose of discussing current litigation with the XYZ Corporation.”²⁰ However, if the litigation involves a particular student, then the motion to convene executive session must state only that the board proposes to convene executive session to discuss a “pending lawsuit against the district by a particular student.” Neither the student nor the student’s parent or guardian should be identified by name in the board motion, because the fact that litigation was commenced on behalf of a particular student is personally identifiable information made confidential by FERPA.²¹

Similarly, an executive session to discuss a lawsuit that the board is contemplating filing against a third party

need not name the party if disclosure of the name would compromise the district's litigation strategy.²²

(2) Discussions Pertaining to Collective Negotiations Pursuant to Article 14 of the Civil Service Law (i.e., the "Taylor Law")

The OML explicitly authorizes public bodies, including boards of education, to discuss matters pertaining to collective negotiations in accordance with Article 14 of the Civil Service Law,²³ more commonly referred to as the "Taylor Law." As denoted by the express words of the statute, this provision is limited to discussions about matters that are the subject of collective negotiations between the district and unions (a.k.a. "bargaining units") that represent district employees. A motion to convene executive session to discuss collective negotiations should identify the collective negotiations that will be discussed during the executive session, as for example, "to convene executive session for the purpose of discussing negotiations with the [Insert Name] Teachers' Association."

Boards of education often refer to this type of executive session as one involving the discussion of "contract negotiations." The quoted phrase is legally problematic and misleading, insofar as the law does not authorize boards of education to enter into executive session to discuss any type of "contract negotiation" except collective negotiations.

In contrast, if a board wants to talk in executive session about whether to contract with a particular person (as for example, a new superintendent), then the board motion to convene an executive session for this purpose should indicate that the board proposes "to convene an executive session for the purpose of discussing matters leading to the appointment of a particular person." Inasmuch as the law does not authorize boards to convene executive sessions for the purpose of discussing "contract negotiations" in any generic sense, use of this phrase may leave the public with the impression that the board will be meeting in an executive session for an unauthorized purpose, even if the underlying discussion is otherwise lawful. Moreover, misuse of the phrase "contract negotiations" may leave board members themselves with the impression that it is proper for the board to meet in executive session any time "contract negotiations" are being discussed, which is not the case.

(3) Selected Matters Pertaining to Particular Persons or Corporations

Anyone who has attended at least a few public school board meetings has likely heard the board vote to approve a motion to convene executive session to discuss "personnel matters." Significantly, however, the word "personnel" does not appear anywhere in the OML. Instead, the law authorizes public bodies, including boards of education, to convene executive sessions for the purpose of discussing any of the following:

The medical, financial, credit or employment history of a *particular* person or corporation or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a *particular* person or corporation.²⁴ [Emphasis added].

Thus, for example, a board of education may properly convene an executive session to discuss matters pertaining to the employment history of a particular person and/or to discuss matters pertaining to the discipline of a particular person.²⁵

School board members often use the words "personnel matter" as a shorthand descriptor when convening executive session for one or more of the purposes listed above. As a matter of law, however, the motion to convene an executive session for any of the purposes enumerated above should not characterize the board's proposed executive session as a discussion about a "personnel matter," for at least two reasons. First and foremost, the law does not authorize this. Second, and equally as important, a motion to convene executive session to discuss "personnel matters" does not tell persons in attendance at the public meeting whether the purpose for which the board will be meeting behind closed doors is in fact a purpose for which the law allows the board to meet and talk without allowing the public to "listen to [its] deliberations and decisions."

The distinction is more than semantic. A board motion that is crafted in accordance with the law, as for example, a motion "to discuss the medical history of a particular person," not only informs persons in attendance at the public board meeting that the board understands the requirements of the Open Meetings Law, but also informs the public that the board proposes to convene an executive session for a purpose that is explicitly authorized by law.

The law does not require the board to name the particular person(s) whose employment history, or medical history, or discipline, *et cetera*, the board intends to discuss in executive session.²⁶ It is legally sufficient for the board motion to use the words "particular person," provided that the motion further specifies the nature of the discussions contemplated regarding the particular person, e.g., the "employment history" of a particular person.²⁷

The use of the word "particular" in the law has legal significance. Boards of education sometimes convene, or propose to convene, an executive session for the purpose of discussing layoffs or job restructuring proposals, on grounds that the layoff or restructuring will affect a particular person or persons. This is an improper use of executive session.

There are few decisions a board of education makes that do not ultimately affect a particular employee or

employees. Discussions and deliberations about whether to lay off district employees for reasons of economy and efficiency or to engage in job restructuring for legitimate educational reasons are policy discussions that the public is legally entitled to observe and hear, notwithstanding the fact that the board's decision will ultimately affect a particular person or persons.

In fact, the OML was amended in 1979²⁸ to add the word "particular" to the above quoted passage to make it clear that public bodies, including school boards, are only legally authorized to meet in executive session to discuss matters pertaining to employees and/or corporations when the discussion involves a real, identifiable, particular person (or a particular corporation), as for example when a board meets in executive session to talk about whether to grant tenure to a particular probationary teacher. This is not a policy discussion. This is a discussion about whether the particular teacher's job performance during the probationary period warrants the conferral of tenure, or termination, as recommended by the superintendent.

Conclusion

Fostering an environment in which the public has a *meaningful* ability to observe the performance of their local boards of education and to listen to the deliberations and decisions that go into making local education policy is essential to assuring that the oft-proclaimed commitment to "transparency and accountability" does not ring hollow for members of the school communities that boards of education serve. If this alone is not reason enough for boards and their legal counsel to strive for greater compliance with the Open Meetings Law, then the recent amendment to the OML that threatens districts with the prospect of paying attorneys' fees to legal adversaries if their boards improperly discuss topics behind closed doors should be a motivating factor. Now, more than ever, it is important for school attorneys to embrace the responsibility to train and advise school board clients about compliance with the Open Meetings Law.

Endnotes

1. N.Y. PUB. OFF. LAW, Article 7, §§ 100 *et seq.*
2. L. 1976, c. 511, § 1 (effective January 1, 1977).
3. *Gordon v. Vil. of Monticello*, 87 N.Y.2d 124, 126, 661 N.E.2d 691, 692-93, 637 N.Y.S.2d 961, 963 (1995).
4. PUB. OFF. LAW § 100.
5. L.2005., c.263; c.267; *see also*, N.Y. EDUC. LAW §§ 2102-a; 2116-a; 2116-b; 2116-c; 8 N.Y.C.R.R. § 170.12.
6. L.2005, c.267; *see also*, N.Y. GEN. MUN. LAW § 33(2).
7. PUB. OFF. LAW § 105(1).
8. PUB. OFF. LAW § 107(2).
9. PUB. OFF. LAW § 108(3).

10. 20 U.S.C. § 1232g; 34 C.F.R. Part 99.
11. PUB. OFF. LAW § 105(1)(d).
12. N.Y.C.P.L.R. § 3101(b)(c).
13. N.Y. EDUC. LAW § 1708(3); *see also In re Kramer*, 72 St. Dept. Rep. 114 (1951); *In re Rosenbaum*, 8 Ed. Dept. Rep. 210 (1969).
14. N.Y. EDUC. LAW § 3020-a(2)(a) (McKinney Supp. 2009); *see also, Sanna v. Lindenhurst Bd. of Educ.*, 85 A.D.2d 157, 447 N.Y.S.2d 733 (2d Dep't), *aff'd*, 58 N.Y.2d 626, 444 N.E.2d 975, 458 N.Y.S.2d 511 (1982); *United Teachers of Northport v. Northport UFSD*, 50 A.D.2d 897, 376 N.Y.S.2d 182 (2d Dep't 1975). Some boards also vote in closed session on students' Individualized Education Programs (IEPs), because the student records involved are made confidential by FERPA. 20 U.S.C. § 1232g. *See also* N.Y. PUB. OFF. LAW § 108(3); Formal Opn. of Counsel No. 239, 16 Ed. Dep't Rep. 457 (1976). While the discussion of student IEPs in an exempt meeting is clearly authorized by N.Y. PUB. OFF. LAW § 108(3), it is not entirely clear whether board votes approving student IEPs may properly occur in an exempt meeting. *See* Formal Opn. of Counsel No. 239, 16 Ed. Dep't Rep. at 460. It may be better practice to discuss student IEPs in private, but vote on IEPs, with identifying information concealed, in public. *See also Gersen v. Mills*, 290 A.D.2d 839, 737 N.Y.S.2d 137 (3d Dep't 2002), wherein a school board met with its attorney in an exempt meeting pursuant to Pub. Off. Law section 108(3), but the Appellate Division invalidated the board's decision, made during that exempt meeting, to authorize the attorney to take appeal from an adverse decision of the Commissioners of Education, because the board did not vote to authorize the appeal in an open, public meeting.
15. 20 U.S.C. § 1232g; 34 C.F.R. Part 99.
16. PUB. OFF. LAW § 105(1).
17. PUB. OFF. LAW § 105(1)(d).
18. Opinion of the N.Y.S. Committee on Open Government, OML-AO-2946 (Oct. 16, 1998).
19. *Weatherwax v. Stony Point*, 97 A.D.2d 840, 841; 468 N.Y.S. 914, 916 (2d Dep't 1983).
20. *Daily Gazette v. Town Bd. Cobleskill*, 111 Misc. 2d 303, 444 N.Y.S.2d 44 (N.Y. Sup. Ct. 1981); *see also* Opinion of the N.Y.S. Committee on Open Government, OML-AO-2882 (April 27, 1998).
21. 20 U.S.C. § 1232g; 34 C.F.R. Part 99.
22. *In re Concerned Citizens to Review Jefferson Valley Mall v. Town Bd. of Yorktown*, 83 A.D.2d 612, 613, 441 N.Y.S.2d 292, 294 (2d Dep't); *appeal dismissed*, 54 N.Y.2d 957, 429 N.E.2d 833, 445 N.Y.S.2d 154 (1981).
23. PUB. OFF. LAW § 105(1)(e).
24. PUB. OFF. LAW § 105(1)(f).
25. *Id.*
26. OML-AO-2882.
27. *Id.*
28. L.1979, c.704, § 3.

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Journalist's Perspective on FOIL

By Christopher Mele

It began with a hunch.

Could Orange County sheriff's deputies, many of whom were known to moonlight at the Village of Montgomery Police Department, possibly be crazy enough to file timecards showing them at both jobs on the same day at the same time?

Could such flagrant double-dipping—in which taxpayers were being scammed for what amounted to no-show jobs—be going on right under the noses of police brass?

To test this theory, New York State's Freedom of Information Law (FOIL) would become a reporter's best friend. Over time, it would prove to be one of the most powerful tools a medium-sized paper like ours (*Times Herald-Record*, daily circulation circa 80,000) could enlist in its role as watchdog for the public's interest.

First, a FOIL request to every municipal police department in Orange County yielded a list of their full- and part-time officers' names, ranks and salaries. A separate FOIL request to Orange County provided the names of their deputies and correction officers. A comparison of the two lists revealed 32 deputies and correction officers moonlighting as part-time cops or full-time cops moonlighting as part-time sheriff's deputies.

Now it was time to take the plunge. I filed separate FOIL requests for the timecards and/or time sheets for all 32 workers for the years 1996-97, and later, 1998-99. I was able to secure thousands of records.

I started to see patterns emerge, with certain individuals clocking in at both jobs at the same time. But to make this theory bulletproof, I had to "prosecute the story." So, more FOIL requests: for time-off slips for vacation, personal leave, sick time, bereavement leave, overtime, etc. Were there any plausible explanations for how officers appeared to be working when they might have been genuinely out sick or on vacation? Under FOIL, I secured copies of the union contracts and the departments' policies and procedure manuals, looking for any loopholes.

In total, I discovered nine cops had engaged in double-dipping 125 times for a total of 234 hours. The abuses spanned five police departments and agencies.¹



The investigation spawned numerous internal probes, an investigation by the Attorney General's Office, suspensions, firings and one criminal indictment. It also led to reforms in how certain departments tracked and accounted for officers' time. The story ultimately contributed to the political downfall of the then-sheriff.

This investigation was exceptional in that it took two years and spanned thousands of records. However, it underscores the importance and utility of the state's records-access laws. Time and again, the law has proven a powerful tool for the newspaper. It reinforces the public's right to know, it provides a glimpse into the inner workings of government, it can shed light on the failings of public systems, and it provides—short of subpoena power—the strongest mechanism to secure public records.

FOIL is not solely for news reporters. It is, of course, meant for citizens to use as well. But just how easy is it for ordinary citizens to get public records? That's what the *Times Herald-Record* set to find out by conducting so-called "public records audits" in 2005 and 2008. While the results in the first audit were somewhat discouraging, the second audit offered more promise.

The premise was simple: In 2005, students were recruited from journalism classes at SUNY New Paltz and Mount Saint Mary College. They were assigned to visit town and village halls, police departments and school districts to request specific public records on the same day. The experiment called for them to ask for the records as ordinary citizens as opposed to relying on their stature as representatives of the press.

We wanted to replicate what members of the public might experience if they visited a government office and asked for the documents. If asked specifically if they were from the press, the students were instructed to reveal that they were working on a story for the *Record*. As needed, the auditors filled out FOIL forms or wrote formal FOIL requests.

At village and city halls, the students asked for invoices of the mayor's expenses for the first three months of 2005; at town halls they asked for a list of employees by name, title and salary; at school districts, they sought a copy of the superintendent's contract; and at police departments they asked for the arrest blotter of April 15-17, 2005. (The follow-up audit in 2008 sought slightly different documents but all of the requests were for public records.)

We tried to focus on records that would be of common interest to the public: How much was the school district

paying its superintendent? What was the police activity in a given community over the weekend? How much are public servants being paid? Where was the mayor spending taxpayer money?

The auditors were supplied with assessment forms to fill out immediately after their visits. They assigned scores of 1-10 (10 being the best) to their visits based on how they were treated, how helpful the offices were in meeting their requests and how well informed the offices were about record access rules.

The results of the 2005 visits were instructive for us as members of the media, for readers as members of the public and for various agencies we visited as custodians of the records.

We visited 61 different agencies (the sheer geography of our coverage area of Orange, Ulster and Sullivan counties, totaling some 30+ school districts and 70+ towns, cities and villages, made it impossible to visit every government office).

On a scale of 1-10, the agencies overall scored an average of 6.4. Town and city halls scored an average of 8.2; school districts 7.1; village halls 6.8 and police departments, 4.6.²

With the package of stories, we included background information on FOIL, explained its exemptions, provided links to the state's Committee on Open Government Web site and included a sample FOIL letter. We capped off the project by hosting a public forum that featured Robert Freeman, executive director of the Committee on Open Government, as a guest speaker. Nearly 100 members of the public attended the forum.

When we conducted a follow-up audit in 2008, it appeared that our previous educational efforts (and numerous FOIL requests in the intervening years) had paid off. Consider: In 2005, we had seven agencies flat-out deny us access to the records, telling us that they were not public. That number dropped to two in 2008.

In 2005, we were asked 29 times why we wanted the information. (Such questions are not relevant to the release of public records and the auditors were asked to respond to such inquiries with a question of their own: Do you really need to know that in order to give me the documents?) But in 2008, the number of times we were confronted about *why* we wanted the records dropped to 16.

The number of times we were provided with the records on the spot remained the same in 2005 and 2008: 14 times. We visited almost the same number of agencies in 2008 (63) as we did in 2005 (61).

Notably, agencies overall improved their scores in 2008. (We relied on a letter grade in 2008 instead of a nu-

merical average as we did in 2005. And in 2008 we relied on *Record* reporters and journalism students from Mount Saint Mary College only.) In general, police departments fared much better in the 2008 audit than in the 2005 audit, when a majority of departments refused to turn over arrest records. In 2008, 11 of 16 police departments visited earned an A-minus or better.³ In all, 73 percent of the agencies we visited earned an A-minus or better.

The audits underscored a number of valuable lessons: One, educating the civil servants who control access to public records about the Freedom of Information Law is a constant process. Clerks come and go, misinformation abounds, some places hardly ever get such requests and hence, don't know what to do with them. Sometimes public embarrassment can go a long way to making a lasting impression on recalcitrant agencies.

Two, such audits were "teachable moments" to remind reporters that while it's named the Freedom of Information Law, it really is about access to documents or records, not information in its purest sense. A common mistake among new reporters is assuming they can get information under the law that does not exist in a record already maintained by the agency. Third, as a media outlet, you don't have to have the resources of a *New York Times* (though it would be nice) to pursue meaningful accountability stories. The use of FOIL is limited only by the law itself and your imagination.

It was our imagination and our curiosity that led the *Record* to put the law to timely use in the fall of 2005. It was September and Hurricane Katrina had ravaged New Orleans and a second hurricane was predicted for the Gulf Coast. It got us to wondering about how well prepared (or not) our communities would be for a full-fledged natural disaster like a hurricane? (Our region was hit by significant flooding in the spring of 2005, so we had had a sense of how damaging disasters could be.)

We embarked on an ambitious project: Asking—and, as needed, filing FOIL requests—for each of our communities' emergency preparedness plans. The thousands of pages of plans we reviewed were as startling as they were voluminous.

Our region is host to major interstates, chemical plants and high-profile potential targets of terrorist attacks such as the U.S. Military Academy at West Point, Woodbury Common Premium Outlets, one of the most-visited tourist attractions in New York, and the Satmar Hasidic Village of Kiryas Joel. But even living in a post-9/11 world where homeland security is paramount, we found that three-quarters of our communities would be unprepared for a man-made or natural disaster.

Of the 75 communities that provided their plans for review, only 25 percent were up to date or specific enough to be useful in a catastrophe, according to state emergency

planning standards. Some plans didn't include basic information, such as shelter locations and phone numbers for first responders, while others were generic or fill-in-the-blank documents. The City of Newburgh, the largest city in the Hudson Valley, hadn't updated its plan in decades.⁴

The spotlight placed on the poor public safety plans forced some communities to acknowledge their procedures needed updating. "You brought to our attention how inadequate it was," said Susan Cockburn, then supervisor for the Town of Montgomery.⁵

Not all stories involving public records have to be monumental undertakings that span multiple towns. Sometimes FOIL can be used to put a spotlight on unsafe or inhumane conditions.

Imagine a temporary dorm created to house jail inmates. Now imagine that temporary dorm, overcrowded, in the heat of summer and lacking any bathroom facilities. And now imagine what happened when inmates were denied bathroom privileges for three or four hours at a stretch and were left to fend for themselves. If the conditions sound like something in a third-world country or a prisoner-of-war camp, think again. This is exactly what happened at the Orange County Jail in the summer of 1999.

How bad did it get? Inmates urinated into cups or onto walls and mats when they were housed in the bathroom-less unit. How did we know this? We relied on jail logs—secured through a FOIL request—in which officers had to track the dorm's activity in regular intervals.

An activity log kept by correction officers provided graphic details, as described in a Sept. 14, 1999, story in the *Times Herald-Record*: "Sgt. Barker on rounds. Sending mat from DM 8 hall to be washed. Saturated with urine. Hallway to be notified of bathroom runs. Clean-up in progress."

FOIL can be used to inform the public about government action in addition to its uses in helping to root out wrongdoing. Using information gained through FOIL requests, many Web sites are now available that provide databases with vast collections of searchable data on topics ranging from public payrolls to campaign contributions to the conditions of bridges and dams.⁶

The *Record* has relied on FOIL to publish data on the findings of restaurant inspections in Orange County by the county Health Department, but the development of this information is a lesson about how FOIL is only as helpful (or smart) as the people making and/or receiving the request.

About four years ago, I was hell-bent to find a way to tell readers about major violations cited at Orange County restaurants. When I assigned a reporter to look into it, she

reported back that the county did not inventory major and minor violations separately, that each restaurant had its own inspection report and cataloguing the number of major and minor violations would require going through thousands of documents by hand.

Discouraged, I thought: Game over. Fast-forward a couple of years, and I was back at it. This time, I was determined that, even if it meant getting a month's worth of inspection results at a time and entering them manually into a spreadsheet, I was, by God, going to get this information. After the second FOIL request to the Health Department produced a stack of paper records, the sanitary engineer there called and said: "You know, I can give you a computerized printout of the results." True to his word, he sent the printout.

Now it seemed to me that if the Health Department could provide a computerized printout of the results, then it must have the information in some kind of electronic form, that is, data stored on a computer! Now this is where FOIL ends and common sense begins. When I asked for the information electronically, I was told the county's computer system did not keep it in a way that was readily compatible with modern-day systems (such as Microsoft Excel, Microsoft Access or other database management programs). After some back and forth with the county's information technology people, and with the help of a data-savvy reporter, we were able to import the data and convert it into usable form.

The results have been a series of stories highlighting "Unclean Cuisine" at a variety of eateries. We relied on data from 2005-08 to create an online searchable database. Beyond the mere publication of such public health information, though, we analyzed the inspection findings with surprising results.

While reviewing the data for a story, reporter Matt King noticed a strange pattern involving one of the Health Department inspectors (identified only in the data as "Inspector 6"). It appeared that Inspector 6 was letting off restaurants with minor or no infractions while other inspectors were citing the very same eateries with either numerous infractions or heavier violations.

King drilled into the data extensively and produced a telling accountability story that showed the sanitary codes were being unevenly enforced, depending on the whims of the particular inspector who happened to be on the job on a particular day. One inspector, for instance, issued more serious violations in 2006-08 than the other five inspectors combined.

For example, in the 16 times Johnny D's Diner had been inspected since January 2006, four times the inspector had been Alan Kalleberg, the most aggressive inspector in the county. Kalleberg, listed in county records as "Inspector 9," handed out nine of the 14 major violations

and almost half of the 44 minor violations the diner received in that time. Meanwhile, the county's lax grader, Michael Gauthier, known as "Inspector 6," inspected the same diner three times and gave it a perfect report twice.⁷ Not only did we secure the data (amounting to some 8,000 inspections) through a FOIL request, but a FOIL request also gave us the identities of the inspectors so we could match their signature numbers (6, 9, etc.) with their names. The revelations about the inconsistent enforcement forced the deputy health commissioner to acknowledge that more training and oversight would be needed.

Beyond public health and safety issues, we've used FOIL to live up to the newshound's motto of "follow the money." This is especially true when it comes to the public's purse. In another example of FOIL helping us do our job, on April 1, 2007 we sent records requests to the 140 public agencies at every level of government in our region, requesting a list of their workers by name, title, and salary. Cities, towns, villages, school districts, state agencies, public authorities and BOCES were among the public entities that we solicited. When possible, we asked for the information to be provided in an electronic format, such as a Word document, a PDF file, or an Excel spreadsheet.

The initial premise was that we would write a story about the 10 highest-paid public servants, but as the information streamed in and we started to compile it, the notion of making this a searchable database began to take shape.

The work was daunting: Many responses had to be entered manually because they sent paper records. Some agencies sent records that were a jumble. Others, most notably Sullivan County Community College, flat-out refused to provide the names of public employees listed with their titles and salaries.

Officials at Sullivan County Community College argued that disclosure of such information would be an invasion of personal privacy despite the Freedom of Information Law's clear-as-glass language that public agencies were not only required to disclose such information but, as a matter of law, compile it. (It's one of the few types of records that the law compels public entities to create.) We prevailed after filing an appeal with the county attorney.

Not all records requests were successful. We're still fighting with one serial FOIL offender, the Village of Kiryas Joel, for its payroll records. Unfortunately, after having exhausted the appeals available under FOIL, we're left with no other choice but to take the village to court. That's one frustration of the law: I wish there were a remedy a notch above the law's administrative appeal process, but short of costly civil litigation.

Some 18 months from its start, the public payroll project was published. What distinguished these stories from similar ones across the country was the deep analysis and

context that King brought to bear. The review of some 40,000 local public salaries was unprecedented in our area and was one of the few examples of a deep analysis of a public payroll done in the country.

Among the findings: Teachers are among the highest-paid public servants in our region; an analysis of nearly 23,000 full-time government workers in Orange, Sullivan and Ulster counties found more than one-third of them don't earn enough to maintain even a modest standard of living; and the local public payroll cost taxpayers about \$1.6 billion in 2007.⁸

We relied on FOIL in a similar way to analyze trends in police overtime spending. Numerous records-access requests were made to local full-time police departments for the names of officers who earned overtime, how much money they earned in overtime, the number of overtime hours they worked, their base salary and title. Many departments kept records that took in all of that information in one sweep; others had the data scattered among records that we had to then piece together.

Again, the results were striking: Taxpayers in 2007 footed the bill for some \$10 million in overtime costs for local police and for the New York State Police Troop F, which covers the Hudson Valley. The costs among local police departments in Ulster, Sullivan and Orange counties skyrocketed 83 percent between 2003 and 2007. In some cases, such as in the cities of Middletown and Newburgh, crimes rates soared during this time, contributing to the overtime bloating.⁹

Beyond straightforward follow-the-money stories, FOIL can be used to reveal lax government oversight, incompetence, overspending, or all three.

For instance, we discovered that the temptation of staying and dining in New York City on the taxpayer dime was too strong a lure for many town officials. A review of vouchers and expenses for attendance at the annual Association of Towns convention held in New York City revealed that 216 local attendees spent a total of \$143,000 in lodging, food, travel and related costs.¹⁰ What was striking is which towns ended up spending sizable sums of money.

The Town of Monroe sent 18 people to the convention and spent \$14,000, more than any other town in Orange, Ulster and Sullivan counties. Most town officials stayed in a hotel for three nights and charged the town at least \$150 each for meals. That's striking because the town is in southern Orange County, a hub of residents who commute daily to New York City for work. That, in turn, begged the question of why town officials could not follow the lead of their taxpayers and skip the overnight lodging in New York City and travel back and forth to the convention each day?

We were able to assemble a chart of the \$143,000 in expenses broken down by lodging, food/meals, transportation, etc. and include PDFs online of the vouchers so readers could judge for themselves whether their town's officials were thrifty or spendthrifts.¹¹ One notable difference: Since we reported on town spending on the convention years before, the number of towns that broke the \$10,000 barrier decreased in 2008, and one in particular, the Town of Chester, made a concerted effort to curb its spending.

And then there is what we in the news business refer to as a "talker"—the kind of story that causes someone at the breakfast table to say, "Hey Mabel, get a load of this." It's a story that resonates with a wide audience because what's being reported is such a universal experience. Such was the story of the troubled bridge over the waters of the Wallkill River.

Work on this bridge on Route 17 in the Town of Wallkill seemed like it was going on for generations. And for motorists headed to the Galleria mall at Crystal Run or travelers to or from Sullivan County, there was no avoiding this roadwork. We set out to ask—and answer—what was taking so long?

We made records requests to the state Department of Transportation for daily construction logs, change orders, correspondences between the department and the contractor and other related documents. The picture we assembled was of a project beset by issues. As noted by reporter Simon Shifrin: "A review of thousands of public documents reveals that errors in design and execution, mechanical failures, breakdowns in communication and a strained relationship between the DOT and Harrison & Burrowes, the general contractor, all contributed to this bridge boondoggle."¹² We were able to report, based on the paper trail of records, that the project was three years late, \$4 million over budget and five years in the making.

All of these stories that rely on FOIL don't automatically improve the situations we're exposing. They are, however, meant to energize readers, citizens and lawmakers to take steps to remedy the problems that we identify. At the end of the day, the state's records-access law allows us as members of the media to do a better job of being the eyes and ears of citizens, and if we don't tell the public, who will?

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Open Meetings Law “Puzzlers” for Local Municipalities

By Mark Schachner

Introduction

By way of introduction, I have focused on municipal, planning and zoning and environmental law matters for my 25+ years legal career, the last dozen or so years devoted almost exclusively to representation of local municipalities. In this context, I have had the pleasure and burden of attending somewhere between 1,500 and 2,000 evening meetings of municipal boards, the overwhelming majority as legal counsel to the board itself. I have on many occasions observed boards struggling with “Open Meetings” issues with considerable difficulty. Based on this experience, this article discusses the issues which seem to cause the most confusion.



do so, if for no other reason than to simply follow one of the fundamental principles of “good government.” The following discussion includes the “technical” rules or “letter of the law,” but also suggests practical guidance based on my experience in these matters. It is hoped that legal practitioners, and perhaps board members as well, may gain some insight and be better prepared to handle these issues as they arise in the future.

Open Meetings Law Issues

A. What Constitutes a Quorum?

As most practitioners and board members are aware, in order to lawfully convene and conduct business, a Board must have attendance of a sufficient number of Members to constitute a “quorum.” Simply stated, a quorum consists of and requires the attendance of a simple majority of the entire membership of the board (i.e., three or more members of a five-member board; four or more members of a seven-member board, etc.). Meeting participation generally requires the board members’ physical presence and remote participation by telephone does not constitute “attendance,” although OML § 102(1) has (since 2000) allowed the seldom utilized option of attendance by videoconference.

B. What if a Quorum “Dissolves?”

Those who recognize the quorum requirements for convening a public meeting sometimes fail to appreciate that the quorum must be maintained throughout the meeting.

What if (a) Board Member(s) Leave(s)?

If a board member leaves a meeting, regardless of the reason for doing so, the remaining members must still constitute a quorum in order for the gathering to continue as an official meeting of the board. In other words, if the meeting was convened with a “bare minimum quorum,” that is, just the minimum number of members who are enough to constitute a quorum, then departure of a single member essentially terminates the meeting. Similarly, departure of multiple members terminates the meeting if those who remain are not sufficiently numerous to constitute a quorum. In this event, any remaining members can lawfully stay and discuss whatever they wish without violating OML as, by definition, an official meeting is no longer being conducted.⁴ However, such discussion should be discouraged, as it is no longer part of an official meeting and, as a result, no action can be taken. Even temporary absence of a member or members reducing the number to less than a quorum should be handled by temporarily suspending the meeting until a sufficient number of members return to reconvene.

“If there is no identifiable harm in allowing public access notwithstanding potential applicability of a lawful exemption, then I would urge that the municipality be encouraged to do so, if for no other reason than to simply follow one of the fundamental principles of ‘good government.’”

The Open Meetings Law (OML) is an “open government law” set forth in Public Officers Law Article 7.¹ OML § 103(a) generally mandates that all meetings of public bodies be open to the public. OML also includes exceptions or exemptions pursuant to which meetings need not be open. However, as described in OML § 100, the statute is clearly intended to promote rather than discourage transparency and sharing of governmental access and information. If an exemption or exception is lawfully triggered, then a municipality *may* lawfully avail itself of the opportunity to deny public access to a meeting, but is not *required* to do so. In other words, even if an exemption/exception might apply, the municipality can nonetheless choose to afford public access rather than deny it.² Governments can be sued (successfully) for failure to provide public access when required.³ On the other hand, providing such access, even if arguably not required, could seldom if ever give way to any liability. If there is no identifiable harm in allowing public access notwithstanding potential applicability of a lawful exemption, then I would urge that the municipality be encouraged to

What if (a) Board Member(s) Recuse(s)?

Recusal of a board member is appropriate under certain circumstances and is even sometimes required. However, while recusal is presumably specific to one particular issue or project, recusal is no different than absence in terms of the need for a quorum. Therefore, if a board member has recused himself or herself from consideration of a particular issue and the remaining members do not constitute a quorum, then the matter must be adjourned to a time when sufficient additional members, eligible to participate, are present.

C. When Does (and Doesn't) a Vote Constitute a "Decision"?

Less clear and sometimes misunderstood by attorneys and board members are the voting requirements for formal decision-making. A legally valid and binding "decision" is made only if it is supported (by vote, motion, resolution or whatever) by a majority of the members of the entire board, regardless of how many members are actually present at the meeting. Therefore, if only three members of a five-member board are at a meeting, then only an affirmative vote of all three constitutes a decision. A two-to-one vote on a motion, while clearly constituting a majority of those members in attendance, does not constitute a legal decision, because it has not been supported by a majority of the entire board. Similarly, a three-to-one vote of a seven-member board does not constitute a valid decision, despite the support of thrice as many affirmative votes as negative votes, or the support of a full three-quarters, or 75%, of the members present. The affirmative vote of a majority of the entire membership must be obtained to constitute a valid decision.

D. What About "Off-Site" and/or Informal Gatherings?

OML requires that any meetings convened by a board for the purpose of conducting official business be properly noticed and open to the public. The law is neither limited to meetings conducted at the municipal building or official meeting place, nor can board members lawfully circumvent the law merely by gathering or meeting elsewhere in a less formal setting. In other words, the proverbial "around the kitchen table" discussion of municipal matters by three Town Board, Village Board or City Council members would violate OML, as would a similar discussion by four members of a Planning Board or Zoning Board of Appeals.

However, considerable confusion abounds regarding substantially less formal gatherings at which a quorum (or even all) of the members of a particular board happen to be in attendance. OML § 102(1) defines a "meeting" as "the official convening of a public body for the purpose of conducting public business."⁵ Therefore, if there is no specter of conducting "official business," simply stated, OML does not apply to such situations. For example, there is clearly no OML violation when most or even all

members of a board attend the same social function or are members of the same softball team or book club. OML would not apply, at least in theory, even if the entire membership of a board convened a weekly card game with no other attendees, as the purpose of the gathering would clearly not be to conduct public business.⁶ However, as a practical matter, such a convening would be quite inadvisable simply due to the impossible and perhaps unavoidable (even if innocent) temptation to discuss official business, when such discussion would obviously evade public awareness, attendance, accountability and transparency. Similarly, while board members can lawfully attend the same social function or informal gathering, they certainly should not use the "coincidence" to steal away or huddle in a corner to discuss municipal matters.

E. What About "Site Inspections"?

Applicability of OML to site inspections is misunderstood with astonishing frequency. Site inspections are invaluable for rational governmental decision-making, especially for Planning Boards and Zoning Boards of Appeals, but the range of conflicting statements and opinions seems remarkable and includes:

- (i) site inspections are unlawful and impermissible under any circumstances;
- (ii) board members can conduct site inspections, but only one member at a time;
- (iii) board members can conduct site inspections accompanied by other board members, but never so many as to constitute a quorum;
- (iv) board members may conduct site inspections together even if a quorum or all members are present but, if a majority is present, then the site inspection is an open public meeting which the public is welcome to attend; and
- (v) some or all board members may conduct site inspections and such gatherings are not open public meetings regardless of the number of members in attendance.

Despite the widespread confusion, the last item above is the correct one. Individual or a "less-than-quorum" number of board members can certainly visit and review sites without invoking any OML concerns. However, board members may also conduct site inspections *en masse* but, so long as proper guidelines are observed, the "group tour" has been held to *not* constitute a public meeting subject to OML. The guidelines are easy to state but, as a practical matter, difficult to adhere to diligently. The lawful purpose of a site inspection is to *gather* information, but not to discuss it or deliberate; the idea, at least in part, being that in "gathering information," the board is not really "conducting business." Discussion or deliberation of the application or matter at hand clearly would constitute "conducting business" and would therefore be subject to

OML. There are a number of valid policy considerations to allow and even encourage site inspections (the proverbial “picture worth a thousand words”) and sound reasons for such gatherings to not be considered open public meetings. Among other reasons is the specter of members of the public attending such “meetings,” entering on private properties and suffering an injury while there. Lack of appropriate accessibility to such properties and the impracticality of creating meeting minutes are also included in these considerations. Therefore, board members can lawfully take site inspection trips together, but must strive as scrupulously as possible to merely take in information and not engage in discussion or deliberation about it among each other *or with the applicant* (or anyone else). This is one of several legal principles that are almost impossible to implement successfully “in real life.” As a result, board members must really strive to not engage in discussion or deliberation or, if this is simply impossible and the situations are being “abused,” then they should refrain from engaging in multi-member site inspections.

F. When Can Executive Session Be Lawfully Convened?

Most, if not all, practitioners and board members are aware that OML includes certain exceptions or exemptions pursuant to which an otherwise open public meeting may shift to a private, “behind closed doors” meeting of the board or public body known as “executive session.” The lawful grounds for executive session are often misunderstood and, quite frankly, often abused or used inappropriately. These grounds are actually quite limited and, in addition, should be strictly and narrowly construed rather than interpreted liberally. Some public bodies have become notorious for playing “fast and loose” with the executive session grounds and, in particular, tossing around the terms “personnel,” “contract” and “litigation” with little or no supportive detail to convene in executive session. Interestingly enough, the lawful grounds for executive session as set forth in OML § 105 do not even contain the words “personnel” or “contract.”

What About “Personnel”?

Governmental bodies frequently move to convene in executive session to discuss a “personnel matter” or “personnel matters” or even just “personnel.” However, the potentially applicable OML exception at § 105(1)(f) actually states that executive session may be convened to discuss “the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation.”

The legal practitioner should carefully review the above language and recognize that, in reality, it is quite legally inappropriate to simply use the word “personnel” as a “catchall” for this exception.⁷ In determining whether

a personnel matter truly qualifies for executive session, it is important to focus on the “particular person or corporation” language with which both parts of the statutory provision conclude. Generally speaking, if the board wishes to discuss a matter which truly does involve a particular, specific person or corporation, then it is entirely possible or even likely that it will be discussing that person’s or corporation’s “employment history” or a matter leading to their “appointment, employment, [or] promotion. . . .” However, any matter which does *not* involve a particular person or corporation, although it may clearly be a “personnel matter,” does not qualify for executive session and should be discussed in an open public meeting. For example, organizational decisions regarding departmental structure, chain of command, creation of positions and the like are generally not specific to a particular person or corporation and, therefore, are not properly discussed in executive session. This result holds up to scrutiny and also makes common sense, as discussion of such topics typically does not involve personal information about a specific individual or corporation, public disclosure of which could be construed as somehow invasive of reasonable privacy expectations of the individual or company. The long and short of it is that the statutory exemption language should be literally and strictly construed, so that governmental bodies recognize that the mere fact that something may be a “personnel” matter does not in and of itself justify discussing it behind closed doors.

What About “Contracts”?

Similar to “personnel,” the word “contract” also does not appear in the OML § 105 list of lawful grounds for executive session, yet this word too is often thrown out cavalierly to justify closed-door discussion. Upon careful review of the statutory language, it seems that “contractual” discussions are only appropriate for executive session in certain limited circumstances. First, contractual negotiations between public employers and employee organizations under Civil Service Law Article 14 are specifically eligible for executive session pursuant to OML § 105(1)(e). Second, discussion about the (often contractual) proposed acquisition, sale or lease of real property or securities is also a proper executive session topic, pursuant to OML § 105(1)(h), but only when publicity would substantially affect the contract value. Finally, if the proposed contract is for employment of a particular individual or company, then the exemption previously described in discussion of “personnel” may apply. However, in the vast majority of instances, discussion of what is often nebulously referred to as “contracts” fits in none of these categories and is *not* appropriate for consideration in executive session. For example, while certain contracts for services could fall within the “employment” exemption language, discussions about contracts for goods or materials are seldom exempt. Similarly, the subject matters of most inter-municipal agreements typically do not fall within any of the

exemption language and should therefore be discussed in open public meetings.⁸

What About “Litigation”?

“To discuss litigation” is the last “catch all” which governmental bodies often utter to convene in Executive Session. However, the so-called “litigation” ground for executive session is not so broad, vague and generic as to apply to anything that might conceivably someday involve litigation (past, present or future) in any manner, but is instead limited to “discussions regarding proposed, pending or current litigation.” There are several well-worded Opinions of the Committee on Open Government describing this limitation as, for example, “intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.”⁹ Similar are court holdings such as: “the purpose of [the litigation ground for Executive Session] is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings.”¹⁰ Governmental bodies routinely convene in executive session to “discuss litigation,” when what is really being discussed is decision-making that “could” or “might possibly” result in litigation, something of a “fear of litigation paranoia.” However, as the above descriptions hopefully make clear, such speculation does not constitute lawful basis for executive session and serves only to frustrate the legitimate goals of OML. After all, one would be hard-pressed to envision any governmental decision, especially one of some controversy, which could not conceivably or potentially result in litigation and such a tenuous finding does not and should not justify executive session secrecy.

G. When Can Privileged “Attorney/Client” Discussions Occur Behind Closed Doors?

The final topic of difficulty involves the ability of a governmental body to meet privately with its legal counsel to seek and gain legal advice. Perhaps surprisingly, very few municipal boards are even aware of the formation of the attorney/client relationship and the resulting “attorney/client privilege” protection of the confidentiality of legal advice. There is also widespread confusion even among municipal officers who may at least be aware of the existence of this concept.

Simply stated, a governmental body has the right to meet with its legal counsel at any time and place of its choosing to seek legal advice. This type of legal conference is exempt from OML regardless of the number of board members in attendance. However, conferring with legal counsel about legal issues or the seeking and gaining of legal advice is *not* one of the lawful grounds for convening in executive session at an otherwise public meeting. Rather, the meeting with legal counsel is entirely exempt from OML.

The reason that appropriate attorney/client conference is exempt from OML stems from statutory protection of the sanctity of the “attorney/client privilege.” More specifically, OML § 108(3) exempts “any matter made confidential by federal or state law” from its coverage and CPLR 4503 confirms the confidentiality of an attorney/client relationship. Therefore, communications made between attorney and client in the context of the privileged relationship are confidential under State law and exempt from OML. The exemption is explained more thoroughly in several Committee on Open Government Opinions, including the previously cited OML Opinion No. 4019.

Regardless of the fact that this exemption is clearly established, local governmental bodies are largely unaware of it and/or fail to understand it. There are several practical considerations to appreciate. First, the ability to confer with counsel should certainly not be abused to facilitate closed-door meetings that stray from (or never even start out following) their intended purpose. Just like the labels “personnel,” “contracts” and “litigation,” mere utterance of the words “attorney/client privileged communication” does not make it so. The mere presence of counsel at a meeting certainly does not alone mean that the meeting falls within the protection of the privilege.

Second, when “attorney/client privileged” conferences are held, it is essential that the discussion truly be limited to seeking and gaining of legal advice and not “morph” into discussion and deliberations of policy matters, applications or the like. It is especially incumbent upon counsel himself or herself to make sure that the limitation is strictly observed and, if necessary, tell the public officials that they are straying and that further discussions on whatever they are discussing cannot lawfully continue behind closed doors.

Finally, it seems apparent (at least to me) that “attorney/client privileged” conferences are best held completely separate and apart from public meetings, not to add any level of “secrecy,” but rather to avoid interruption of an ongoing public meeting and having to explain the subtleties and nuances of the privilege to an often (sometimes with good reason) skeptical or distrusting public. Generally speaking, legal issues requiring advice of counsel can either be identified in advance of the decision-making meeting or, when complex legal issues arise, the decision may often be delayed to a future meeting, after the board has had the opportunity to obtain the legal advice it may need. Again, however, as is true in dealing with all of the other OML issues, none of this is to suggest that legal advice should *only* be obtained in closed-door conferences or that a governmental body seeking such advice must do so privately. In fact, most legal advice given by most attorneys to most legislative bodies, Planning Boards and Zoning Boards of Appeals, is given right at the open public meeting of the governmental body without difficulty.

Conclusion

Many of the above principles are ascertained simply from close reading of the Open Meetings Law. However, many practitioners and most members of governmental bodies are not intimately familiar with the OML provisions and their intricacies. In addition, although explained more easily in the abstract or hypothetical, those intricacies are often difficult to properly implement “in real life.” Hopefully, the above discussion addresses some of the more complicated OML issues in an understandable manner which proves useful in dealing with them.

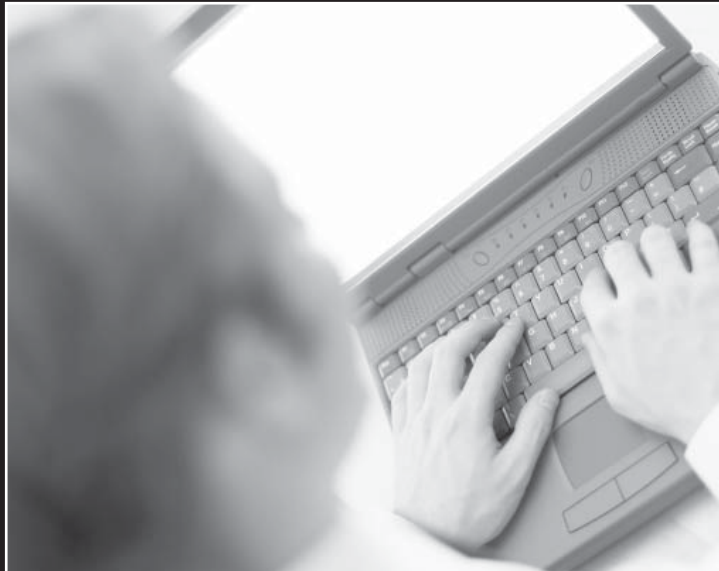
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1. N.Y. Pub. Off. Law §100 *et seq.*
2. N.Y. State Comm. Open Gov’t AO 2869.
3. N.Y. Pub. Off. Law §107; *See, e.g., Smith v. City University of New York*, 92 N.Y.2d 707, 708 N.E.2d 983, 685, N.Y.S.2d 910 (1999).
4. *See* N.Y. Pub. Off. Law § 102(1)(2).

5. *Id.*
6. *See Mobil Oil Corp. v. City of Syracuse Indus. Development Agency*, 224 A.D.2d 15, 29, 646 N.Y.S.2d 741, 752 (4th Dep’t 1996).
7. N.Y. State Comm. Open Gov’t AO 3078.
8. *See Brander v. Town of Warren Town Bd.*, 18 Misc. 3d 477, 847 N.Y.S.2d 450 (Sup. Ct., Onondaga Co. 2007).
9. OML Opinion No. 4019.
10. *Jefferson Val. Mall (Concerned Citizens to Review) v. Town Bd. of Town of Yorktown*, 83 A.D.2d 612, 613 (2d Dep’t 1981).

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The Freedom of Information Law and Its Impact on Government Agencies

By Steven Goulden and Paul Herzfeld



Steven Goulden

The New York State Freedom of Information Law (Public Officers Law § 84 *et seq.*, FOIL) was enacted to promote public insight into the operations of government without, at the same time, impairing those operations. Thus, the provisions of FOIL address both the public's right to know and the government's need to function. Responsibility for effectuating those provisions is given, in the first

instance, to the government itself, to the records access and records appeals officers who respond to requests for access to the records of their agencies. These requests may be submitted by private individuals, by businesses or litigants, even by other government agencies—under FOIL they must be acknowledged and determined without distinction. This duty requires that an agency's FOIL officers be familiar not only with the disclosure requirements and exemptions set forth in FOIL, but also with certain questions that arise repeatedly in interpreting the statute.

FOIL § 87 provides, in subdivision 2, that "[e]ach agency shall . . . make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that [fall within any of the exemptions from disclosure set forth in subdivision 2.]" The obligation to acknowledge and determine requests for access under FOIL thus falls separately on each "agency" of government. The question whether an entity is an "agency" for purposes of FOIL arises as new entities are established in varying relations to government and existing entities are modified.

FOIL § 86(3) defines "agency" as

any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.

Clearly, entities that are integral parts of state or local government are "agencies" for purposes of FOIL.¹

Where it is less certain that an entity falls within the FOIL definition of "agency," courts look to whether "its



Paul Herzfeld

purpose is governmental and it has the attributes of a public entity."² Thus, in *Buffalo News, Inc. v. Buffalo Enterprise Development Corp.*,³ the Court of Appeals held that the Buffalo Enterprise Development Corporation (BEDC), a not-for-profit corporation established to promote the growth of local manufacturing companies and small businesses in Buffalo, served an "undeniably governmental" purpose and

accordingly was an "agency" under FOIL. In reaching its conclusion, the Court noted, among other things, that the permanent directors of the BEDC included two officials of the City of Buffalo; that its offices had been located in a City Hall; and that its annual budget was subject to a public hearing and submitted for review to the City of Buffalo.⁴

A second basic question frequently presented under FOIL is whether a given document or set of documents constitutes an agency "record" for purposes of the statute. FOIL § 86(4) defines "record" as

any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

This is a broad definition which, on its face, includes electronic as well as paper documents.

Controversy over the term has centered not on the type or medium of materials that are "records" under FOIL but on their origin and custody. Thus, in *Capital Newspapers v. Whalen et al.*,⁵ the Court of Appeals ruled that the papers of the former mayor of Albany, maintained and held by agencies of the city of Albany, were "records" that could be requested under FOIL whether or not "their subject matter . . . evince[d] some governmental purpose." The holding rejected the distinction urged by the city between documents "which revealed the workings of government" and those which, like many of the former

Mayor's papers, were personal and private in nature.⁶ All documents in the custody and control of a government agency, in the Court's view, were "records" under FOIL regardless of their origin or content.⁷ The Court further stated that "FOIL's scope is not to be limited based on 'the purpose for which the document was produced or the function to which it relates.'" ⁸ Thus, it is clear that all documents in the possession of an agency, regardless of their origin, are that agency's records for purposes of FOIL.

Subsequent cases construing what is a "record" under FOIL have for the most part incorporated the concept of custody or control by an agency. Thus, in *Newsday, Inc. v. Empire State Development Corporation*, the Court rejected the argument that certain subpoenas *duces tecum* in the possession of the Empire State Development Corporation were records of the judiciary not subject to FOIL, holding that, because ESDC "presently has physical possession of the subpoenas" and "is undeniably an agency under FOIL," the documents were agency "records" under FOIL.⁹ In *Alderson v. New York State College of Agriculture and Life Sciences at Cornell University et al.*, the Court concluded that Cornell University, though a private entity, "perform[s] a public function" in expending public funds in the operation, pursuant to statute, of four "statutory colleges," branches of the State University. Therefore, with regard to such expenditures, "Cornell may be deemed a state agency," in whose custody documents relating to such expenditures were "records" subject to FOIL.¹⁰

Encore College Bookstores v. Auxiliary Service Corporation presents an anomaly in the case law defining "records" under FOIL. Petitioner in that case sought access to a book list compiled by the operator of the campus book store at SUNY Farmingdale and maintained by the Auxiliary Service Corporation (ASC), a not-for-profit corporation established to provide "educationally related services" to the campus. The Court, without determining whether ASC was "an agent or alter ego" of SUNY, held that ASC was not required to disclose the document because it had "sufficiently demonstrated that the information is exempt from disclosure" under FOIL.¹¹ However, the Court further ordered that SUNY, which had denied the request submitted to it solely because it did not possess the document, "must make the booklist available" to the petitioner. Citing the FOIL definition of "record," the Court rejected SUNY's argument "that disclosure turns solely on whether the requested information is in the physical possession" of SUNY, noting that a government agency should not be able "to insulate its records from public access by delegating responsibility for creating or maintaining particular information to a nongovernmental entity."¹² That aspect of the Court's decision has not been further applied or developed, and *Encore* has remained in that respect an outlier.

The definition of "record" is a key element of FOIL because the statute's disclosure requirement applies only

to the records kept by or for a government agency. FOIL provides, in § 89(3)(a), that, except for the three types of records specified in § 87(3), "[n]othing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity[.]" Thus, it is clear under FOIL that an agency is not obligated, in response to a request, to answer questions or to compile and provide information not already contained in one or more of its records. However, due to the existence and the varying capabilities of electronic databases, it is not always clear when an agency has effective access to information maintained in electronic form so that such information may be said to constitute an agency record.¹³ Recent amendments to FOIL, enacted by chapter 223 of the Laws of 2008, establish new requirements in § 89(3)(a) regarding retrieval of "data maintained in a computer storage system," as well as other requirements relating to records and other aspects of FOIL. Although these amendments appear generally to be significant, they have not yet been authoritatively interpreted.

As noted, access to agency records may be requested under FOIL by any person or entity, including litigants. There is no exception, even when a litigant requests access to records of the very agency that is the opposing party.¹⁴ Much to the advantage of private litigants (and to the disadvantage of government agencies), FOIL may, therefore, be used to obtain agency records that are of interest in litigation but unavailable through discovery. The Civil Practice Law and Rules (CPLR), for instance, permits a discovery demand to be served only after litigation has commenced and before the party seeking discovery has filed a note of issue and statement of readiness.¹⁵ The CPLR discovery provisions also permit a party resisting disclosure to seek a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."¹⁶ FOIL contains no such limitations.

The duties of agency FOIL officers require them not only to grapple with sometimes vexing threshold questions, such as those described above, but also to track the numerous and often minute steps of responding to FOIL requests. These are set forth primarily in FOIL § 89(3).

FOIL requires that agencies receive and determine requests for access to records that are submitted in writing, which may include e-mail.¹⁷ Requests are further required to "reasonably describe[]" the records to which access is sought.¹⁸ The Court of Appeals, in *Konigsberg v. Coughlin*, has concluded that this requirement is satisfied when a request is sufficient "for purposes of enabling [the agency] to locate and identify the documents sought[.]" Thus, the Court held in that case that the Department of Correctional Services was obligated under FOIL to accept and process an inmate's request for "all files of records kept on [that inmate]" by the agency.¹⁹ However, the Court further noted that, where an agency organizes its records by certain categories (e.g., last name and address of licensee)

and a FOIL request seeks access to records described in other categories (e.g., licensee's date of birth), the agency cannot search its existing filing system and may therefore deny the request for failure to "reasonably describe" the records sought.²⁰

An agency's FOIL officer must acknowledge receipt of each FOIL request directed to that agency within five business days, and in doing so must indicate approximately when the request will be determined (that is, granted or denied entirely or in part). In general, the time taken by an agency to determine a request must be "reasonable under the circumstances of the request," that is, in view of the scope of the request and the administrative resources available to the agency in responding to it.²¹

After acknowledging receipt of a request, a FOIL officer or the agency staff must search the agency's files for responsive records. Although the extent of the required search has not been precisely defined by the courts, it is clear that the burden on an agency of a conscientious search can be substantial, for some requests require the review of hundreds of files. Courts have held that, generally, the administrative burden resulting from a voluminous request is not, by itself, sufficient ground for denying that request.²² For such a request, the FOIL officer may reasonably allow a lengthy time to reach a determination in view of the scope of the required search.

The determination of a FOIL request depends, of course, on the results of the FOIL officer's search. If no responsive records are found, FOIL requires that the agency, on request, "certify that it does not have possession of [the requested] record or that such record cannot be found after diligent search."²³ The nature of this "certification" was resolved by the Court of Appeals in *Rattley v. New York City Police Department*.²⁴ There, the Court, noting that "[t]he statute does not specify the manner in which an agency must certify that documents cannot be located," concluded that "[n]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required."²⁵ The Court specifically held that the agency "satisfied the certification requirement by averring ... that it had conducted a diligent search for the documents it could not locate."²⁶

If the search locates records responsive to the request, the FOIL officer must determine whether some or all of those records must be disclosed to the person requesting them or whether they can and should be withheld from disclosure. As noted, FOIL provides, in § 87(2), that agencies disclose "all records, except that such agency may deny access to records or portions thereof" that fall within one or more of ten exemptions. Use of the word "may" is significant. As noted by the Court of Appeals, "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discre-

tion to disclose such records, with or without identifying details, if it so chooses."²⁷ Thus, responsive records located by an agency are disclosed to the person requesting them (a) if the agency determines that they do not fall within any of the applicable FOIL exemptions, or (b) assuming that no other provision of law mandates confidentiality, the agency decides to disclose them regardless of whether they fall within an applicable FOIL exemption.

FOIL requires, in general, that, when records are disclosed, the person requesting them be given access within twenty business days of the FOIL officer's letter acknowledging receipt of the request. If more time is needed to make disclosable records available, the FOIL officer is required, within the twenty-day period, to notify the person requesting them of the length of and reason for the extension.²⁸ These requirements assume, of course, that the FOIL officer is able to complete the necessary search and determine the disclosability of the recovered records within the statutory period. They do not, however, override the statutory language or the case law allowing the FOIL officer a "reasonable" period of time to determine a request.

The exemptions from disclosure set forth in FOIL and the case law interpreting them are far too voluminous to be reasonably discussed in this article. It is clear, however, that, when an agency determines to withhold responsive records, it "carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption" if its determination is challenged in court.²⁹ At the same time, an agency's burden does not require it to provide an itemized list of records withheld from disclosure or "to disclose the underlying facts contained in [those] documents" prior to the initiation of litigation.³⁰

In assessing whether agencies have met their burden of justifying the denial of access, courts disfavor the "blanket" application of exemptions to all documents of a given type or category.³¹ Thus, FOIL officers must generally review all responsive documents entirely before determining that any portion of them may be withheld. Nevertheless, certain FOIL exemptions apply by their terms to particular documents, and an agency, when it invokes such an exemption, satisfies its burden simply by averring that the documents withheld belong to the applicable category.³²

FOIL provides that a person denied access to records (because responsive records are withheld or cannot be located, or the agency fails to reach a timely determination) may, within thirty days, administratively appeal the denial to an appeals officer designated by the agency.³³ A FOIL appeal must be determined within ten business days of its receipt and, if it affirms the initial denial, must "fully explain in writing to the person requesting the records the reasons for further denial[.]"³⁴ Courts have rigorously applied the doctrine of exhaustion of administrative remedies to FOIL's appeal provision, barring judicial review

of a determination denying access to records when the person who requested access fails to file a timely administrative appeal of the determination.³⁵ An agency's appeal determination is its final step in the FOIL process.³⁶

Endnotes

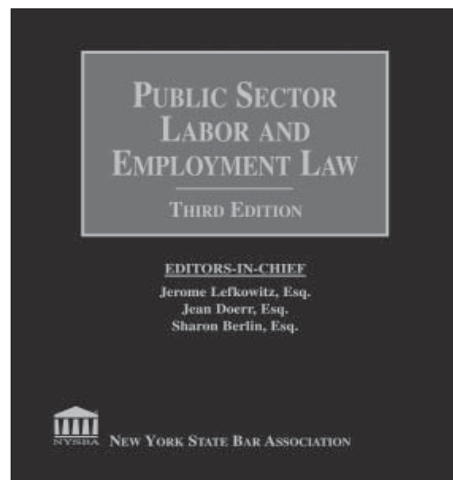
1. *See Encore College Bookstores, Inc. v. Auxiliary Service Corp.*, 87 N.Y.2d 410, 417, 663 N.E.2d 302, 305, 639 N.Y.S.2d 990, 993 (1995) (State University of New York is "agency" under FOIL); *Russo v. Nassau County Cmty. Coll.*, 81 N.Y.2d 690, 698, 623 N.E.2d 15, 18, 603 N.Y.S.2d 294, 297 (1993) (local community college is "agency" under FOIL).
2. *Rumore v. Bd. of Education of the City Sch. Dist. of Buffalo et al.*, 35 A.D.3d 1178, 1180, 826 N.Y.S.2d 545, 546 (4th Dep't 2006) *leave to appeal denied*, 8 N.Y.3d 810, 866 N.E.2d 454, 834 N.Y.S.2d 508 (2007).
3. *Buffalo News, Inc. v. Buffalo Enterprise Development Corp.*, 84 N.Y.2d 488, 644 N.E.2d 277, 619 N.Y.S.2d 695 (1994).
4. *Id.* at 490-491, 493, 644 N.E.2d 277, 278-79, 619 N.Y.S.2d 695, 696-97 (1994).
5. *Capital Newspapers v. Whalen et al.*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987).
6. *Id.* at 250-251, 505 N.E.2d 934-35, 513 N.Y.S.2d at 369-70.
7. *Id.* at 252-253, 505 N.E.2d 936-37, 513 N.Y.S.2d at 370-71.
8. *Id.* at 253, 505 N.E.2d 932, 513 N.Y.S.2d 367 (quoting *Westchester Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 581, 408 N.E.2d 904, 907 430 N.Y.S.2d 574, 577). *See also Washington Post Co. v. New York State Insurance Dept't et al.*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984) (minutes of meetings of directors of private insurance companies submitted to and maintained by state agency were "records" of that agency under FOIL).
9. *Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 362, 774 N.E.2d 1187, 1188, 746 N.Y.S.2d 855, 856 (2002).
10. *Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ. et al.*, 4 N.Y.3d 225, 231-233, 825 N.E.2d 585, 588-590, 792 N.Y.S.2d 370, 373 (2005).
11. *Encore*, 87 N.Y.2d at 418, 663 N.E.2d at 306, 639 N.Y.S.2d at 994.
12. *Encore*, 87 N.Y.2d at 417-18, 663 N.E.2d at 306, 639 N.Y.S.2d at 994.
13. *See Data Tree, LLC v. Romaine*, 9 N.Y. 3d 454, 465, 880 N.E.2d 10, 17, 849 N.Y.S.2d 489, 496 (2007) (questions of fact exist as to whether information maintained by agency in electronic form can be retrieved without creating new record).
14. *Farbman v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 81-82, 464 N.E.2d 437, 439-40, 476 N.Y.S.2d 69, 71-72 (1984).
15. N.Y. CPLR 3120.
16. N.Y. CPLR 3103(a).
17. FOIL § 89(3)(a)-(b).
18. FOIL § 89(3)(a).
19. *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 247, 501 N.E.2d 1, 2, 508 N.Y.S.2d 393, 394 (1986).
20. *Id.* at 247, 501 N.E.2d at 2, 508 N.Y.S.2d at 394.
21. FOIL § 89(3)(a). *See also Legal Aid Society et al. v. New York City Police Dep't*, 274 A.D.2d 207, 215, 713 N.Y.S.2d 3, 8-9 (1st Dep't 2000), *leave to appeal denied*, 95 N.Y.2d 956, 745 N.E.2d 349, 722 N.Y.S.2d 469 (2000); *Lecker v. New York City Board of Education*, 157 A.D.2d 486, 549 N.Y.S.2d 673 (1st Dep't 1990), *leave to appeal denied*, 75 N.Y.2d 946, 554 N.E.2d 1280, 555 N.Y.S.2d 692 (1990).
22. *See Konigsberg*, 68 N.Y.2d at 249; *Stein v. New York State Dep't of Transportation*, 25 A.D.3d 846, 848, 807 N.Y.S.2d 208, 210 (3d Dep't 2006); *Ruberti, Girvin & Ferlazzo, P.C. v. New York State Div. of State Police*, 218 A.D.2d 494, 499, 641 N.Y.S.2d 411, 415 (3d Dep't 1996).
23. FOIL § 89(3)(a), 21 NYCRR § 1401.2(b)(7)(i)-(ii).
24. *Rattley v. New York City Police Dep't*, 96 N.Y.2d 873, 756 N.E.2d 56, 730 N.Y.S.2d 768 (2001).
25. *Id.* at 875, 756 N.E.2d at 58, 730 N.Y.S.2d at 770. The Court's ruling indicated that this conclusion applies to both the certification provided to the person making the request and the sworn statement produced by the agency to the court in the event its determination is litigated.
26. *Id.* (citation omitted).
27. *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 567, 496 N.E.2d 665, 668, 505 N.Y.S.2d 576, 579 (1986).
28. FOIL § 89(3)(a).
29. *E.g.*, *Capital Newspapers v. Burns*, 67 N.Y.2d at 566, 496 N.E.2d at 667, 505 N.Y.S.2d at 578. *See also* FOIL § 89(4)(b).
30. *Nalo v. Sullivan*, 125 A.D.2d 311, 312, 509 N.Y.S.2d 53, 55 (3d Dep't 1987).
31. *E.g.*, *Gould v. New York City Police Department*, 89 N.Y.2d 267, 275, 675 N.E.2d 808, 811, 653 N.Y.S.2d 54, 57 (1996) (striking down respondent agency's denial of access to all police complaint follow-up reports as intra-agency materials on ground that portions of some or all such documents might not fall within that exemption).
32. *See, e.g.*, FOIL §§ 87(2)(h) (exemption for records that "are examination questions or answers which are requested prior to the final administration of such question"); § 87(2)(j) (exemption for materials which "are photographs, microphotographs, videotape or other recorded images prepared under authority of [the red light camera provisions] of the vehicle and traffic law").
33. FOIL § 89(4)(a).
34. FOIL § 89(4)(a).
35. *See, e.g.*, *Carty v. New York City Police Department*, 41 A.D.3d 150, 837 N.Y.S.2d 135 (1st Dep't 2007). Courts have permitted judicial review, however, when a FOIL officer, in denying access to records, neglects to inform the person seeking access of his or her right to file an administrative appeal. *Pennington v. Clark*, 307 A.D.2d 756, 763 N.Y.S.2d 191 (4th Dep't 2003).
36. FOIL § 89(4)(b).

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CAPS 2009 Annual Meeting Highlights

Tuesday, January 27, 2009 was the day of NYSBA's Committee on Attorneys in Public Service (CAPS) Annual Meeting programs, held at the New York Marriot Marquis Hotel. The Committee events featured two educational programs and the Awards for Excellence in Public Service Reception.

Susan Herman, Centennial Professor of Law, and Jason Mazzone, Associate Professor of Law, both from Brooklyn Law School, presented "The Supreme Court and the Election Returns," looking at issues related to the results of the November 2008 elections, and how the Court could be impacted. The program chair was CAPS member Donna Case.

The afternoon program focused on "Judith S. Kaye: A Legacy of Visionary Leadership," chaired by newly appointed Court of Appeals Justice Jonathan A. Lippman. 2008 marked Judge Kaye's final year as Chief Judge of the Court of Appeals. She had the remarkable distinction of being the first female to lead the Court, and the longest serving Chief Judge in New York history. The program included experts who worked with Judge Kaye on key administrative issues and legal developments faced by the Court of Appeals and the Office of Court Administration.



Professor Susan Herman

The 2009 Awards for Excellence in Public Service event was moderated by CAPS Chair Patricia Salkin. This year's honorees were Denise O'Donnell, Commissioner, State of New York, Division of Criminal Justice Services and Anthony Annucci, Executive Deputy Director, Department of Correctional Services.



NYSBA President Bernice Leber, Award for Excellence in Public Service recipients Anthony Annucci and Denise O'Donnell, and CAPS Chair Patricia Salkin.



Chief Judge Jonathan Lippman with panelists retired Judges Howard Levine, Albert Rosenblatt and George Bundy Smith



Professors Jason Mazzone and Susan Herman



Judges Levine, Rosenblatt and Bundy Smith



Professor Susan Herman



Professor Jason Mazzone



**Judith S. Kaye (ret.) and
newly appointed Chief
Judge Jonathan Lippman**



**Program Chair, CAPS
member Donna Case**



**CAPS Chair Patricia Salkin
and Anthony Annucci**



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