OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

NEW YORK

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

Open Government Guide

Open Records and Meetings Laws in

NEW YORK

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Previously Titled
Tapping Officials' Secrets

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Contents

Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as Tapping Officials' Secrets — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words supra or infra to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

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FOREWORD

Stating that "a free society can be maintained only when government is open and accessible to its citizens," the Governor of New York signed the State's first Freedom of Information Law in 1974 (1974 N.Y. Laws chs. 578, 579, 580 (Approval Message No. 47)). As originally enacted, the law specified those records of government to which the public would have unimpaired access; required all agencies of the state or local governments to make such records available for public inspection and copying; required agencies to maintain lists of all available records produced after September 1, 1974; and created a Committee on Public Access to Records (now the Committee on Open Government) to advise agencies and municipalities and to promulgate rules and regulations with respect to the administration of the new law.

The 1974 Freedom of Information Law was repealed and reenacted in 1977 (1977 N.Y. Laws ch. 933). Like its predecessor, the new enactment opened with a legislative declaration reading as follows:

> The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government. As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible. The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares 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 in accordance with the provisions of this article.

The most significant change in the re-enacted Freedom of Information Law was a reversal of the previous law's presumption that records would be unavailable unless falling within specified, limited categories of available documents. As rewritten in 1977 and continuing through the present, New York's Freedom of Information Law states that all records are available to the public unless they fall within one of the law's exemptions.

The statute exempts the following records from disclosure: (1) those exempt from disclosure by state or federal statute; (2) those which if disclosed would constitute an unwarranted invasion of privacy; (3) those which if disclosed would impair contract awards or collective bargaining negotiations; (4) those containing trade secrets; (5) those compiled for law enforcement purposes, under certain specific circumstances; (6) those which if disclosed would endanger life or safety; (7) those containing examination questions or answers; (8) inter-agency or intra-agency materials which are neither statistical nor factual data, instructions to staff affecting the public, final agency policy or determinations, or external audits, including those performed by the comptroller and federal government; (9) those which if disclosed would jeopardize the security of an agency's information technology; (10) computer access codes; and (11) traffic-control signal photographs.

Another significant change in the revised Freedom of Information Law was the requirement that agencies reproduce or copy records for requesters offering to pay a stipulated fee. This contrasts with the earlier law's directive to make records available to an individual for his or her inspection and copying.

The 1977 revision remains largely in place today. There have been a number of legislative amendments adding to or refining its details, but they have not significantly modified the law's basic structure. One of the more important amendments occurred in 1982 with the addition of a provision authorizing an award of attorneys' fees to requesters in certain instances (1982 N.Y. Laws ch. 73). In 1989 a provision was added making it a violation for any person to willfully conceal or destroy any record with the intent to prevent public inspection. (1989 N.Y. Laws ch. 705).

In May of 2005, FOIL was amended to make more specific the time frames available to an agency in which to respond to a request for records. Other amendments are noted, where appropriate, in the body of the text that follows.

Pursuant to an amendment which became law in 2006, all agencies which have "reasonable means available" are required to accept requests for records in email format and to respond in e-mail format when requested to do so.

Further, legislation effective August 7, 2008 contains amendments reflecting advances in information technology and the costs associated with providing access to information that is maintained electronically. The 2008 amendments are discussed throughout the outline below.

Open meetings law

In 1976, New York enacted an Open Meetings Law ("OML") (Chapter 511 of the Laws of 1976, effective January 1, 1977). The enactment opened with a legislative declaration of purpose, set forth in Public Officers Law § 100, as follows:

"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."

A Committee on Open Government has been established within the New York Department of State, as mandated by the New York Freedom of Information Law. N.Y. Pub. Off. Law § 89(1) (McKinney 1988). The Committee "shall issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the Open Meetings Law." N.Y. Pub. Off. Law § 109 (McKinney 1988). The Committee's advisory opinions, while not binding, should be credited when they are neither irrational nor unreasonable.

The Committee may be contacted as follows: Committee on Open Government, Robert Freeman, Executive Director, 41 State Street, Albany, New York 12231. Tel. (518) 474-2518, fax (518) 474-1927, e-mail rfreeman@dos.state.ny.us. The text of the statutes, many advisory opinions, FAQs and other information are available at the Committee's web site:*http://www.dos.state.ny.us/coog/coogwww.html*

Several amendments have been made to the statute since its enactment in 1976. The most significant of these relate to the statute's exemption provision, Public Officers Law § 108. In 1977, an amend-

ment was adopted to specifically provide that the proceedings of the public service commission are not exempt from the Open Meetings Law (1977 N.Y. Laws ch. 532). A 1983 amendment makes the proceedings of zoning boards of appeals subject to the law's provisions (1983 N.Y. Laws ch. 80). A 1985 amendment clarified the initial intent of the exemption as applied to the deliberations of political committees, conferences and caucuses of the State Legislature or legislative body of a county, town or village. Judicial decisions interpreting the law had restricted the effect of the original exemption to apply only where the political committee, conference or caucus met to discuss political business. The amended statute makes all deliberations of political committees, conferences and caucuses of legislative bodies exempt from the provisions of the Open Meetings Law, regardless of the subject matter under discussion (1985 N.Y. Laws ch. 136).

There have been a number of other legislative amendments that add to or refine details of the law. For example, in 1977 the Legislature amended the statute to require public bodies to make all reasonable efforts to ensure that meetings are held in facilities which permit barrier-free physical access for people with physical disabilities (1977 N.Y. Laws ch. 368). In 1979, the statute was amended to provide that an executive session may be held to discuss the proposed acquisition, sale or exchange of securities held by a public body where publicity would substantially affect their value (1979 N.Y. Laws ch. 704). Other amendments are noted, where appropriate, throughout the outline that follows.

This edition is based on earlier editions prepared by Peter Danziger and Jay B. Wright. The original 1988 publication was prepared with the assistance of Barbara G. Billet. Jordan A. LaVine assisted in updating the 1992 version. Seth F. Eisenberg participated in the preparation of the 1997 edition, with special thanks to Marilyn Kelley. Michael J. Grygiel prepared the Fifth Edition in 2006.

Open Records

I. STATUTE -- BASIC APPLICATION

A. Who can request records?

1. Status of requestor.

Not limited. The statute states that "the public, individually and collectively and represented by a free press, should have access to the records of government." N.Y. Pub. Off. Law § 84 (McKinney 1988). The law must be liberally construed to grant maximum public access to governmental records. *See Lucas v. Pastor*, 117 A.D.2d 736, 498 N.Y.S.2d 461 (2d Dep't 1986); *New York News Inc. v. Grinker*, 142 Misc.2d 325, 537 N.Y.S.2d 770 (Sup. Ct. 1989)

2. Purpose of request.

"[T]he status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions." *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 688 N.Y.S.2d 472 (1999) ("An agency's inquiry into, or reliance upon the status and motive of a FOIL applicant would be administratively infeasible, and its intrusiveness would conflict with the remedial purposes of FOIL."); *Edwards v. N.Y. State Police*, 44 A.D.3d 1216, 843 N.Y.S.2d 729 (3d Dep't 2007) (court disregarded the petitioner's personal purpose for crime-scene photographs and weighed the general public interest in disclosure against the personal privacy interests at stake.) . *Accord Scott v. Records Access Officer*, 65 N.Y.2d 294, 480 N.E.2d 1071, 491 N.Y.S.2d 289 (1985); *Buffalo News v. Buffalo Municipal Housing Authority*, 163 A.D.2d 830, 558 N.Y.S.2d 364, (4th Dep't 1990); *New York 1 News v. President of the Borough of Staten Island*, 631 N.Y.S.2d 479 (Sup. Ct. Kings County 1995) ("FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose . . . ."). Thus, "FOIL's scope should not be restricted to 'the purpose for which a document was produced or the function to which it relates.'" *Russo v. Nassau Community College*, 81 N.Y.2d 690, 698, 623 N.E.2d 15, 603 N.Y.S.2d 294 (1993) (quoting *Westchester Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 581); *Muniz v. Roth*, 163 Misc.2d 293, 620 N.Y.S.2d 700 (Sup. Ct. Tompkins County 1994) (FOIL does not require a showing of need for the requested record).

Even in the instance where the requester's purpose relates to potential or pending litigation against the agency, access remains unaffected under FOIL. *M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984). "[T]he standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced (*Fitzpatrick v. County of Nassau*, 83 Misc.2d 884, 372 N.Y.S.2d 939, *aff'd* 53 A.D.2d 628 (2d Dep't 1976)) nor restricted (*Burke v. Yudelson*, 51 A.D.2d 673, 378 N.Y.S.2d 165 (4th Dep't 1976)) because he is also a litigant or potential litigant." *John P. v. Whalen*, 54 N.Y.2d 89, 429 N.E.2d 117, 444 N.Y.S.2d 598 (1981). *See also M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984); *Property Valuation Analysts Inc. v. Williams*, 164 A.D.2d 131, 563 N.Y.S.2d 545 (3d Dep't 1990); *Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991); *Hudson River Fisherman's Association v. New York City Dept. of Environmental Protection*, No. 7679-90 (Sup. Ct., New York County, July 12, 1990); *Cf. Brady v. City of New York*, 84 A.D.2d 113, 445 N.Y.S.2d 724 (1st Dep't 1982) (denying access where litigant had filed note of issue); *Travelers Indemnity Co. v. County of Westchester*, N.Y.L.J. April 5, 1994 (Sup. Ct. Westchester County); *Benedict v. Albany County*, 22 Misc.3d 597, 867 N.Y.S.2d 906 (Sup. Ct. 2008) (District Attorney's characterization of the Article 78 challenge as a mandamus to compel was incorrect; a petitioner does not have to demonstrate a "clear legal right" to a FOIL request).

The requester's purpose has been deemed material in the interpretation of FOIL and application of the statutory exemptions. *See*, *e.g.*,

Matter of Newsday Inc. v. State Dep't of Transportation, 5 N.Y.3d 84, 800 N.Y.S.2d 67 (2005) ("Where a FOIL request for materials subject to [23 U.S.C. § 409] is made by a tort plaintiff, or by someone acting on such a plaintiff's behalf, perhaps denial of the request will be justified"); *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979) (denying access to portions of an office manual of the Special Prosecutor for Nursing Homes under the "law enforcement" exemption, stating "the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution"). The sale or release of lists of names and addresses may be denied if such lists would be used for commercial or fund-raising purposes. N.Y. Pub. Off. Law § 89(2)(b)(iii) (McKinney 1988). *See N.Y. State Rifle and Pistol Ass'n, Inc. v. Kelly*, 55 A.D.3d 222, 863 N.Y.S.2d 439 (1st Dep't 2008) (digital list of the names and addresses of all pistol licensees in N.Y.C. was exempt from disclosure because respondent provided specific proof of petitioner's intent to use the requested materials for the purposes of fund-raising and/or commercial gain)

3. Use of records.

The statute contains no restrictions on subsequent use of information, and neither "the motives of petitioners [nor] the means by which they will report the information" would be determinative of a right to information under FOIL. *Capital Newspapers Division of Hearst Corp. v. Burns*, 109 A.D.2d 92, 95, 490 N.Y.S.2d 651 (3d Dep't 1985), *aff'd*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986).

B. Whose records are and are not subject to the act?

The FOIL requires disclosure of all records (exclusive of those falling within the ambit of a statutory exemption) which are held by an "agency." N.Y. Pub. Off. Law § 87(2) (McKinney 1988). "Agency" is defined to mean "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." N.Y. Pub. Off. Law § 86(3) (McKinney 1988); *Weston v. Sloan*, 201 A.D.2d 778, 779, 607 N.Y.S.2d 478 (3d Dep't 1994), *modified*, 84 N.Y.2d 462, 643 N.E.2d 1071, 619 N.Y.S.2d 255 (the Legislature is not an agency and, therefore, Public Officers Law § 87 is inapplicable, however, legislative documents may be obtained under section 88).

1. Executive branch.

a. Records of the executives themselves.

Records of the Governor of the State of New York have been made available pursuant to FOIL requests, and courts have held that records of local chief executives are subject to disclosure under FOIL. *See, e.g., Capital Newspapers Division of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) (granting access to the records of ex-Mayor of City of Albany when held by the agency); *John v. New York State Ethics Commission*, 178 A.D.2d 51, 581 N.Y.S.2d 882 (3d Dep't 1992) (annual financial disclosure filed by chair of Monroe County Republican Committee was available under FOIL); *Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991) (granting access to records of Attorney General's office); *Rold v. Cuomo*, No. 1909-88 (Sup. Ct., Albany County, May 31, 1988) (granting access to registers required to be maintained by Governor concerning applications for pardons, commutations, or executive clemency); *Kerr v. Koch*, N.Y.L.J., Feb. 1, 1988 (Sup. Ct., New York County, 1988) (granting access to records of Mayors' expense accounts).

b. Records of certain but not all functions.

"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." *Capital Newspapers Division of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) (granting access to mayor's private papers which were intermingled with public records, rejecting contention that only records dealing with government functions or decision-making process should be subject to FOIL); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.E.2d 15, 603 N.Y.S.2d 294 (1993). *Accord, Washington Post v. Insurance Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984) (granting access to minutes of insurance company meetings voluntarily filed with the Insurance Department under a promise of confidentiality). "While [FOIL's] purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process." *M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984) (granting access to records relating to a construction project). *Accord Westchester Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 408 N.E.2d 904, 430 N.Y.S.2d 574 (1980) (granting access to fiscal records of a lottery run by a village volunteer fire department).

2. Legislative bodies.

Records of the New York State Legislature are subject to FOIL under a separate provision of that law which delineates the specific records which are subject to public inspection and copying. N.Y. Pub. Off. Law § 88 (McKinney 1988). The "State Legislature" is defined by FOIL to mean "the legislature of the State of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof." N.Y. Pub. Off. Law § 86(2) (McKinney 1988). *See Polokoff-Zakarin v. Boggess*, 62 A.D.3d 1141, 879 N.Y.S.2d 244 (3d Dep't 2009) (holding that the State Senate must disclose Senate employee's time and attendance records as they are included in the list of records that must be disclosed under 88 (3)(b));*Weston v. Sloan*, 201 A.D.2d 778, 607 N.Y.S.2d 478 (3d Dept. 1994), *modified* 84 N.Y.2d 462, 643 N.E.2d 1071, 619 N.Y.S.2d 255 (granting access to facts and figures memorializing the expenditure of public funds for legislative printings and mailings, but denying access to copies of newsletters and information targeted mailings). Local legislative bodies are governmental entities within the definition of "agency" and thus subject to FOIL. *See generally King v. Dillon*, No. 20859/84 (Sup. Ct., Nassau County, Dec. 19, 1984) (granting access to minutes of village board meeting); *Malman v. Supervisor (Town of Islip)*, No. 7361/81 (Sup. Ct., Nassau County, Aug. 20, 1981) (granting access to resolution passed by Town Board).

3. Courts.

The "judiciary" is expressly excluded from the statutory definition of "agency," N.Y. Pub. Off. Law § 86(3) (McKinney 1988) and is thus exempt from the law's directive that all "agencies" make records available for public inspection and copying. "Judiciary" is defined by FOIL to mean "the courts of the state, including any municipal or district court, whether or not of record." N.Y. Pub. Off. Law § 86(1) (McKinney 1988). *See Bridgewater v. Johnson*, 44 A.D.3d 549, 844 N.Y.S.2d 39 (1st Dep't 2007) (grand jury minutes are exempt from disclosure, as "court records are exempt from the ambit of FOIL"). *See Mullgrav v. Santucci*, 195 A.D.2d 786, 600 N.Y.S.2d 382 (3d Dept. 1993) (denying access to Grand Jury minutes because they are court records, not agency records); *Moore v. Santucci*, 151 A.D.2d 676, 543 N.Y.S.2d 103, (2d Dep't 1989) (suppression hearing or trial transcripts held by Office of District Attorney are court records, not agency records); *Newsday v. Sise*, 120 A.D.2d 8, 507 N.Y.S.2d 182 (2d Dep't 1986), *aff'd*, 71 N.Y.2d 146, 518 N.E.2d 930, 524 N.Y.S.2d 35 (1987) (Commissioner of Jurors is part of judiciary and is not subject to FOIL); *Pasik v. State Bd. of Law Examiners*, 102 A.D.2d 395, 478 N.Y.S.2d 270 (lst Dep't 1984) (State Board of Law Examiners exercises judicial function and is part of "judiciary" exempt from disclosure requirements of FOIL); *Gibson v. Grady*, 149 Misc.2d 818, 566 N.Y.S.2d 829 (Sup. Ct. 1991) (instructions to grand jury were not subject to disclosure under FOIL); *Herald Co. v. Town of Geddes*, 122 Misc.2d 236, 470 N.Y.S.2d 81 (Sup. Ct. 1983) (FOIL is not applicable to records of a justice court); *Quirk v. Evans*, 116 Misc.2d 554, 5 N.Y.S.2d 918 (Sup. Ct. 1982), *aff'd*, 97 A.D.2d 992, 469 N.Y.S.2d 834 (lst Dep't 1983) (Office of Court Administration is not a "court" within the definition of "judiciary"; it is

an "agency," and therefore its records are subject to FOIL); *Babigian v. Evans*, 104 Misc. 2d 140, 427 N.Y.S.2d 688 (Sup.Ct. 1980), *aff'd*, 97 A.D.2d 992, 469 N.Y.S.2d 834 (lst Dep't 1983); *People v. Blakely*, No. 1769/82 (Sup. Ct., Queens County, April 12, 1985) (denying access to court papers); *N.Y. PIRG Inc. v. Greenberg*, No. 3734-79 (Sup. Ct., Albany County, April 27, 1979) (Office of District Attorney is subject to FOIL.

It should be noted however, that once an agency has custody of documents issued or mandated by a court, they may become agency records subject to disclosure under FOIL. *Newsday Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 746 N.Y.S.2d 855 (2002) (held, once judicial subpoenas were served upon respondent, a FOIL-defined state agency, they lost their immunity as judicial records and were subject to disclosure under FOIL unless falling within a specific exemption).

Most court records are available under other provisions of law. *See* N.Y. Jud. Law § 255 (McKinney 1988); N.Y. Unif. Just. Act § 2019-a (McKinney 1988).

4. Nongovernmental bodies.

a. Bodies receiving public funds or benefits.

Nongovernmental bodies which act on behalf of governmental bodies or which perform an essential public service are subject to FOIL. *Perez v. City Univ. of New York*, 5 N.Y.3d 522, 806 N.Y.S.2d 460(2005) (voting by student Senate of public university may not be done by secret ballot because it would prevent compilation of requisite record of final vote of each member subject to disclosure under FOIL); *Westchester Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 408 N.E.2d 904, 430 N.Y.S.2d 574 (1980) (granting access to records of a village volunteer fire department as performing essential public service). *See Buffalo News v. Buffalo Enterprise Development Corporation*, 173 A.D.2d 43, 578 N.Y.S.2d 945 (4th Dep't 1991), *aff'd*, 84 N.Y.2d 488, 644 N.E.2d 277, 619 N.Y.S.2d 695 (non-profit city economic development corporation acting as city's agent was government agency subject to FOIL); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.E.2d 15, 603 N.Y.S.2d 294 (1993) (community college is an "agency" subject to FOIL and teaching materials come within law's definition of "record"); *Eisenberg v. Goldstein*, No. 21381-87 (Sup. Ct., Kings County, Feb. 26, 1988) (granting access to records of college not-for-profit foundation); *S. W. Pitts v. Capital Newspapers*, No. 8400-87 (Sup. Ct., Albany County, Jan. 25, 1988) (granting access to records of volunteer fire companies serving fire protection districts); *Decker v. Ardler*, No. 6986/81 (Sup. Ct., Orange County, Aug. 31, 1982). *Compare Rumore v. Bd. of Educ. of City Sch. Dist. of Buffalo*, 35 A.D.3d 1178, 826 N.Y.S.2d 545 (4th Dep't 2006) (although a not-for-profit corporation may fall within FOIL's definition of a "state agency" if its purpose is governmental and it has the attributes of a public entity," the record established that respondent did not have those attributes, as its budget was not governmentally approved, it had a self-elected board, and it did not have its offices in a state-owned building).

b. Bodies whose members include governmental officials.

Nongovernmental bodies which act on behalf of governmental bodies or which perform an essential public service are subject to FOIL. *See Buffalo News v. Buffalo Enterprise Development Corporation*, 173 A.D.2d 43, 578 N.Y.S.2d 945 (4th Dep't 1991), *aff'd* 84 N.Y.2d 488, 644 N.E.2d 277, 619 N.Y.S.2d 695 (1994) (non-profit city economic development corporation acting as city's agent was government agency subject to FOIL). *Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.E.2d 15, 603 N.Y.S.2d 294 (community college was an "agency" subject to FOIL and teaching materials came within law's definition of "record"). Although not directly addressed by FOIL, records of nongovernmental groups are accessible if kept, held or filed with an agency. *Capital Newspapers Division of Hearst Corporation v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) (granting access to ex-mayor's personal and political papers, when held by an agency). *Compare Ervin v. S. Tier Econ. Dev., Inc.*, 26 A.D.3d 633, 809 N.Y.S.2d 268 (3d Dep't 2006) (although not-for-profit corporation performs a governmental function, it is not an "agency" for FOIL purposes because it was created by private business persons and a majority of the board is private business persons).

5. Multi-state or regional bodies.

Lower courts have held that the records of interstate bodies are not subject to disclosure, while the records of regional bodies are available under FOIL. *See Metro-ILA Pension Fund v. Waterfront Commission*, N.Y.L.J., Dec. 16, 1986 (Sup. Ct., New York County, 1986) (holding that the Waterfront Commission of New York Harbor, an interstate body, did not fall within the FOIL definition of agency); *Westchester Rockland Newspapers v. Fischer*, 101 A.D.2d 840, 475 N.Y.S.2d 796 (2d Dep't 1984) (dismissing appeal from order directing production of certain records of the White Plains Housing Authority).

6. Advisory boards and commissions, quasi-governmental entities.

The FOIL definition of agency expressly includes a board, commission, committee, public authority, council, office or other governmental entity performing a governmental function. N.Y. Pub. Off. Law § 86(3) (McKinney 1988).On the question of access to records of bodies serving in an advisory capacity, see *Justice v. King*, 60 A.D.3d 1452, 876 N.Y.S.2d 301 (4th Dep't 2009) (holding that a corporation serving parolees that has contracted with the state on a fee-for-service basis is not an agency for purposes of FOIL); *Reese v. Daines*, 62 A.D.3d 1254, 877 N.Y.S.2d 801 (4th Dep't 2009) (holding that the Western New York Health System, Inc. is a public body subject to FOIL requirements while it oversees the merger of a public benefit corporation and a private entity); *Buffalo News Inc. v. Buffalo Enterprise Development Corporation*, 173 A.D.2d 43, 578 N.Y.S.2d 945 (4th Dep't 1991), *aff'd* 84 N.Y.2d 488, 644 N.E.2d 277, 619 N.Y.S.2d 695 (1994) (non-profit city economic development corporation acting as city's agent was government agency subject to FOIL); *Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984, 437 N.Y.S.2d 446 (4th Dep't 1981), *appeal dismissed*, 55 N.Y.2d 995, 434 N.E.2d 270, 449 N.Y.S.2d 201 (1982) (granting access to the documents of two advisory committees where the records were kept and held by the municipality). *But see Baumgarten v. Koch*, 97 Misc.2d 449, 411 N.Y.S.2d 487 (Sup. Ct. 1978) (denying access to records of the Mayor's Committee on the Judiciary on the grounds that the Committee performed a purely advisory function of merely making recommendations to the Mayor on judicial appointments).

C. What records are and are not subject to the act?

1. What kind of records are covered?

The FOIL defines "record" to mean "any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever." N.Y. Pub. Off. Law § 86(4) (McKinney 1988).

In applying the statutory definition, the courts have held that a document need not evince some governmental purpose to be within the scope of FOIL, as nothing in the legislative history suggests that the Legislature intended such a "content-based limitation in defining the term 'record' . . . . Moreover . . . 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 statute]." *Capital Newspapers Division of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) (holding that personal or unofficial documents intermingled with official government files being kept or held by a governmental entity are "records").

The courts have also held that a "promise of confidentiality . . . is irrelevant to whether the requested documents fit within the Legislature's definition of records. . . . Nor is it relevant [whether] the documents originated outside the government." *Washington Post v. Insurance Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984) (granting access to minutes of insurance company meetings voluntarily

given in confidence to the Insurance Department); *Paul Smith's College of Arts and Sciences v. Cuomo*, 186 A.D.2d 888, 589 N.Y.S.2d 106 (3d Dept. 1992); *Smith v. County of Rensselaer*, RJI No. 41-1156-92 (Sup. Ct. Rensselaer County) (itemized bills prepared or submitted by an attorney working for an agency are agency records within FOIL subject to disclosure); *Mulgrew v. Board of Educ. of City School Dist. of City of New York*, 31 Misc.3d 296, 919 N.Y.S.2d 786 (Sup. Ct. 2011) (promises of confidentiality to teachers were invalid because the courts have repeatedly held that "as a matter of public policy the Board of Education cannot bargain away the public's right to access public records").

Relevance of place of origin and the location of records. A record is "any information kept or held" by an agency, and "temporary possession in another does not necessarily oust a permanent possessor of the control which would make it subject to the responsibilities imposed by FOIL." *Westchester Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 581, 408 N.E.2d 904, 430 N.Y.S.2d 574 (1980) (granting access to lottery records of village volunteer fire department in possession of District Attorney). An agency that transferred records to another agency may be required to recover and furnish the records. *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712, (3d Dep't, 1990); *In Re Mazzone*, 30 Misc.3d 981, 914 N.Y.S.2d 623 (Sup. Ct. 2011) (a single FOIL request may not be subdivided into two or more FOIL requests based on geographic region, thus creating multiple final determinations. FOIL only contemplates that a requestor will receive a single final determination). "[N]or is it relevant [whether] the documents originated outside the government." *Washington Post v. Insurance Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984) (granting access to minutes of insurance company meetings voluntarily given in confidence to the Insurance Department). *See also Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993) (film and film strips used in a public college and provided by the college are "records" within FOIL); *Capital Newspapers Division of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) (granting access to the records of ex-Mayor of City of Albany when held by the agency); *Montalvo v. City of New York*, N.Y.L.J., October 19, 1995 (Sup. Ct. New York County, 1995) ("Opinions and recommendations . . . do not lose their exempt status simply because they are prepared for the agency, at its request by an outside consultant"); *Kerr v. Koch*, N.Y.L.J., Feb. 1, 1988 (Sup. Ct., New York County, 1988) (granting access to records of Mayors' expense accounts); *Cf. United Food and Commercial Workers, District Union, Local One v. City of Schenectady Industrial Development Agency*, 204 A.D.2d 887, 612 N.Y.S.2d 477 (3d Dept. 1994) (records submitted to and possessed by a private corporation and not requested to be prepared by an agency are not subject to FOIL); *Moore v. Santucci*, 151 A.D.2d 676, 543 N.Y.S.2d 103 (2d Dep't 1989) (suppression hearing or trial transcripts held by Office of District Attorney are court records, not agency records); *Gannett Satellite Information Network Inc. v. City of Elmira*, No. 94-1752 (Sup. Ct., Chemung County, August 26, 1994) (granting access to factual inventory data compiled by appraisal firm retained by City); *Smith v. County of Rensselaer*, No. 41-1156-92 (Sup. Ct. Rensselaer County) (itemized bills prepared or submitted by an attorney working for an agency are agency records within FOIL subject to disclosure).

No requirement to create records. "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by the entity." N.Y. Pub. Off. Law § 89(3) (McKinney 1988). *See Gabriels v. Curiale*, 216 A.D.2d 850, 628 N.Y.S.2d 882 (3d Dept. 1995) (agency was not required to create new records or develop a program to produce information in the form requested); *O'Shaughnessy v. New York State Division of State Police*, 202 A.D.2d 508 (2d Dept. 1994) (denying petitioner's request for records in part because no such records existed and agencies are under no obligation to create a record); *Reubens v. Murray*, 194 A.D.2d 492, 599 N.Y.S.2d 580 (1st Dept. 1993) (agency was not required to compile requested data from the documents or records in its possession); *Adams v. Hirsch*, 182 A.D.2d 583, 582 N.Y.S.2d 724 (1st Dep't 1992) (agency not required to provide reprint of photograph); *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991) (agency was not required to compile information or to rearrange its filing system); *see also Guerrier v. Hernandez-Cuebas*, 165 A.D.2d 218, 566 N.Y.S.2d 406, (3d Dep't 1991) (FOIL does not differentiate between records that are maintained in written form or on computerized tapes or discs); *Brownstone Publishers Inc. v. New York City Department of Buildings*, 166 A.D.2d 294, 560 N.Y.S.2d 642 (1st Dep't 1990) (computer files were required to be transferred onto computer tapes); *Duban v. State Board of Law Examiners*, 157 A.D.2d 946, 550 N.Y.S.2d 207 (3d Dep't 1990) (law bar examination was destroyed, therefore request was moot); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712, (3d Dep't 1990) (an agency that transferred records to another agency may be required to recover and furnish the records); *Kryston v. Board of Education*, 77 A.D.2d 896, 430 N.Y.S.2d 688 (2d Dep't 1980); *Day v. Town Board of Milton*, No. 4Q-14, (Sup. Ct., Saratoga County, April 27, 1992) (respondent was under no duty to compile a new list); *Chechek v. Gribble*, No. 5320/80 (Sup. Ct., Dutchess County, April 6, 1981); *Wood v. Ellison*, 196 A.D.2d 933, 602 N.Y.S.2d 237 (3d Dept. 1993); *see, e.g., Oakknoll v. De Francesco*, 200 A.D.2d 619, 608 N.Y.S.2d 850 (1994) (dismissing proceeding where a review of the file revealed that the file did not contain the requested material).

Agencies are required, however, to prepare a "reasonably detailed current list by subject matter," of all records in their possession, whether or not available under FOIL. N.Y. Pub. Off. Law § 87(3)(c) (McKinney 1988). *See Quirk v. Evans*, 116 Misc.2d 554, 5 N.Y.S.2d 918 (Sup. Ct. 1982), *aff'd*, 97 A.D.2d 992, 469 N.Y.S.2d 834 (lst Dep't 1983). This statutory mandate has not been read to require a detailed listing or index of final opinions of an agency. *See Wattenmaker v. N.Y.S. Employees' Retirement System*, 95 A.D.2d 910, 464 N.Y.S.2d 52 (3d Dep't 1983), *appeal denied*, 60 N.Y.2d 555, 455 N.E.2d 487, 467 N.Y.S.2d 1030 (1983); *D'Alessandro v. Unemployment Insurance Appeals Bd.*, 56 A.D.2d 762, 392 N.Y.S.2d 433 (lst Dep't 1977). This list is not required to be maintained by each subdivision of a larger entity. *American Society For The Prevention of Cruelty to Animals v. Board of Trustees*, 147 Misc.2d 846, 556 N.Y.S.2d 447 (Sup. Ct. 1990).

The 2008 amendments include an important new provision which states that "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." Therefore, in cases when a request reasonably describes records or data maintained electronically, and using new programming is more reasonable or efficient than manually manipulating the data or redacting it, the agency is required to use the new programming to provide the information.

2. What physical form of records are covered?

The term "record" includes information 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." N.Y. Pub. Off. Law § 86(4) (McKinney 1988). *See Russo v. Nassau Community College*, 81 N.Y.2d 690, 603 N.E.2d 294, 623 N.Y.S.2d 15 (1993) (film and film strips used in a public college and provided by the college are "records" within FOIL); *Buffalo Broad. Company v. New York State Department of Correctional Services*, 174 A.D.2d 212, 578 N.Y.S.2d 928 (3d Dep't 1992), *aff'd* 84 N.Y.2d 488, 644 N.E.2d 277, 619 N.Y.S.2d 695 (copies of video tapes taken at Attica Correctional facility were subject to disclosure under FOIL); *Gabriels v. Curiale*, 216 A.D.2d 850, 628 N.Y.S.2d 882 (3d Dept. 1995) (FOIL applies to information contained in a computer database); *Guerrier v. Hernandez-Cuebas*, 165 A.D.2d 218, 566 N.Y.S.2d 406 (3d Dep't 1991) (FOIL does not differentiate between records that are maintained in written form or on computerized tapes or discs); *Brownstone Publishers Inc. v. New York City Department of Buildings*, 166 A.D.2d 294, 560 N.Y.S.2d 642 (1st Dep't 1990) (information on computer ordered transferred onto

computer tapes); *Allen v. Strojnowski*, 129 A.D.2d 700, 514 N.Y.S.2d 463 (3d Dep't 1987), *motion for leave to appeal denied*, 70 N.Y.2d 871, 518 N.E.2d 5, 523 N.Y.S.2d 493 (1987) (physical evidence, such as tools and clothing, is not a "record"); *Blanche v. Winn*, No. 90-894, (Sup. Ct., Cayuga County, Sept. 17, 1990) (telephone bills and clothing were not "records"); *Steele v. Dep't of Health*, 119 Misc.2d 963, 464 N.Y.S.2d 925 (Sup. Ct. 1983) (handwritten field notes and monitoring draft reports are available records); *Szikszay v. Buelow*, 107 Misc.2d 886, 436 N.Y.S.2d 558 (Sup.Ct. 1981) (computer format of information does not alter right of access); *Babigian v. Evans*, 104 Misc. 2d 140, 427 N.Y.S.2d 688 (Sup. Ct. 1980), *aff'd*, 97 A.D.2d 992, 469 N.Y.S.2d 834 (lst Dep't 1983) (access to information in a computer cannot be restricted merely because it is not in printed form); *Warder v. Board of Regents*, 97 Misc.2d 86, 410 N.Y.S.2d 742 (Sup. Ct. 1978) (notes of Regents meetings taken by Secretary to Board of Regents are "records"); *Zaleski v. Hicksville Union Free School Dist.*, N.Y.L.J., Dec. 27, 1978 (Sup. Ct., Nassau County, 1978) (tape recordings of open meetings are accessible).

Records contained in an indexed computer data base may be protected by the New York State Personal Privacy Protection Law ("PPPL") which was enacted to protect against the danger to personal privacy posed by modern computerized data collection and retrieval systems. *See* Public Officers Law article 6-A (McKinney); *Spargo v. New York State Commission on Government Integrity*, 140 A.D.2d 26, 531 N.Y.S.2d 417 (3d Dep't 1988).

From the 2008 amendments, a new section 87(5) requires an agency to "provide records on the medium requested . . . if the agency can reasonably make such copy." This clarifies that agencies are required to make records available economically on computer tapes or disks, rather than photocopying or transferring data onto computer tapes or disks when printing the requested records would result in a copious and costly use of paper. It also specifies that records provided in a computer format shall not be encrypted.

3. Are certain records available for inspection but not copying?

Generally no. Under the statute's general access provision, "[e]ach agency shall . . . make available for public inspection and copying all records. . . ." N.Y. Pub. Off. Law § 87(2) (McKinney 1988). *See Town of Islip v. Machlin*, No. 82-12366 (Sup. Ct., Suffolk County, Oct. 1982) (agency erred in permitting only a visual inspection of records); *but see White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991) (agency's grant of access to voluminous files mooted requester's claims); *Waldman v. Vill. of Kiryas Joel*, 31 A.D.3d 569, 819 N.Y.S.2d 72 (2d Dep't 2006) (under New York Election Law § 3-220(2), certain election records may not be publicly disseminated, but are subject only to inspection).

D. Fee provisions or practices.

1. Levels or limitations on fees.

Except when a different fee is otherwise prescribed by statute, the fee for copies of records shall not exceed:

- $.25 per photocopy not in excess of 9" by 14," or
- the actual cost of reproducing any other record.

N.Y. Pub. Off. Law § 87(1)(b)(iii) (McKinney 1988). *See Sheehan v. City of Syracuse*, 137 Misc.2d 438, 521 N.Y.S.2d 207 (Sup. Ct. 1987) (limiting fee to $.25 per page despite local ordinance requiring $7.00 for copies); *Szikszay v. Buelow*, 107 Misc.2d 886, 436 N.Y.S.2d 558 (Sup. Ct. 1981) (limiting fee for tax map to actual cost of reproduction despite county legislature's established fee of $4.00 per copy); *Gancin, Schotsky & Rappaport, P.C. v. Suffolk County*, N.Y.L.J. December 30, 1994 (Sup. Ct., New York County, 1994) (invalidating county code as contravening FOIL's $0.25 per photocopy limit); *see generally Schulz v. New York State Board of Elections*, No. 4797-94 (Sup. Ct., Albany County, 1995); *Fenstermaker v. Edgemont Union Free Sch. Dist.*, 48 A.D.3d 564, 856 N.Y.S.2d 115 (1st Dep't 2008) (fee of $0.25 per copy imposed by FOIL is proper, and further, a delay in fulfillment of FOIL request until the fee is paid is proper).

A new section 87(1)(c) defines the basis for determining the actual cost of reproducing records maintained electronically.

In those instances in which substantial time is needed to prepare a copy, at least two hours of an employee's time, the legislation permits an agency to now charge a fee based on the cost of the storage medium used, as well the hourly salary of the lowest paid employee who has the skill needed to do so. In those in which an agency is incapable of preparing a copy, it can charge the actual cost of engaging a private professional service to do so. Fees based on actual cost may include all expenditures incurred by an agency associated with preparing a copy, such as postage, transportation, and the like. An agency must inform requestors of the fee in advance of providing the information if more than two hours of employee time or an outside professional service is needed to prepare a copy of a record.

2. Particular fee specifications or provisions.

a. Search.

The FOIL does not provide for search fees.

b. Duplication.

Except where a different fee is prescribed by statute, the fee for duplication shall not exceed:

- $.25 per photocopy not in excess of 9" x 14," or
- the actual cost of reproducing any other record.

N.Y. Pub. Off. Law § 87(1)(b)(iii) (McKinney 1988); *Schulz v. New York State Board of Elections*, No. 4797-94 (Sup. Ct., Albany County, 1995) ("'reproducing' a record certainly does not include 'producing' the record in the first place — i.e. compiling the information from which the record is produced.").

c. Other.

Computer access; printout. Fees for copies of computer printouts and tapes shall not exceed the actual cost of reproduction, except where otherwise prescribed by statute. N.Y. Pub. Off. Laws § 87(1)(b)(iii) (McKinney 1988). *See Brownstone Publishers Inc. v. New York City Department of Buildings*, 166 A.D.2d 294, 560 N.Y.S.2d 642 (1st Dep't 1990) (computer files were required to be transferred onto computer tapes); *Reese v. Mahoney*, (Sup. Ct., Erie County, June 28, 1984) (allowing fee of $125 as actual cost of reproduction of computer tape); *Real Estate Data Inc. v. County of Nassau*, No. 11364 (Sup. Ct., Nassau County, Sept. 18, 1981).

Microfiche. Fees for copies of microfiche shall not exceed the actual cost of reproduction, except where otherwise prescribed by statute. N.Y. Pub. Off. Law § 87(1)(b)(iii) (McKinney 1988).

Non-print audio or audio-visual records. Fees for copies of recordings shall not exceed the actual cost of reproduction, except where otherwise prescribed by statute. N.Y. Pub. Off. Law § 87(1)(b)(iii) (McKinney 1988). This has been held to require exclusion of fixed costs of the agency, such as operator salaries. *Zaleski v. Hicksville Union Free School Dist.*, N.Y.L.J., Dec. 27, 1978 (Sup. Ct., Nassau County, 1978).

CD-ROM format. Many agencies now disclose information from computerized databases in a CD-ROM format at a nominal fee to the requester.

Redacted records. When a portion of a document must be redacted, a state agency may refuse to allow inspection of that document, and instead require redacted copies of the document to be made along with charging the established copying fee. *See Brown v. Goord*, 45 A.D.3d 930, 845 N.Y.S.2d 495 (3d Dep't 2007).

3. Provisions for fee waivers.

Agencies are required to promulgate rules and regulations regarding fees for copies of records not to exceed the limits set by the FOIL. N.Y. Pub. Off. Law § 87(1)(b) (McKinney 1988). *Whitehead v. Morgenthau*, 146 Misc.2d 733, 552 N.Y.S.2d 518 (Sup. Ct. 1990) (no provision for fee waiver despite status as inmate and indigent person).

4. Requirements or prohibitions regarding advance payment.

The fee is payable when the agency is ready to provide a copy of the requested record. N.Y. Pub. Off. Law § 89(3) (McKinney 1988).

5. Have agencies imposed prohibitive fees to discourage requesters?

Agencies may not impose fees which exceed the limits set by FOIL. N.Y. Pub. Off. Law § 87(1)(b) (McKinney 1988).

A lower court has held that an agency must accept United States currency in addition to the policy of requiring bank checks or money orders. *Reese v. Mahoney*, (Sup. Ct., Erie County, June 28, 1984).

E. Who enforces the act?

Threshold compliance with FOIL's requirements is largely committed to an agency's internal decision-making with respect to the disclosure of records. In cases where an agency does not comply with FOIL's requirements and refuses to disclose non-exempt information, the New York State Committee on Open Government can be contacted to perform an important ombudsman's role (see discussion below). If a FOIL request is denied by an agency, and an administrative appeal to the agency results in upholding the denial, the requester has the option of commencing legal action (known as an Article 78 proceeding) against the agency in which a New York State Supreme Court judge will decide the merits of the disclosure issue under FOIL. Many such legal cases are brought by news organizations as surrogates for the public.

1. Attorney General's role.

In the event an Article 78 proceeding is commenced against an agency based on its failure to comply with FOIL, the New York State Attorney General's office will defend the agency.

2. Availability of an ombudsman.

An opinion letter with respect to the disclosure status under FOIL of a certain record from a specific state or municipal agency can be obtained upon request from the New York State Committee on Open Government, 41 State Street, Albany, New York.

3. Commission or agency enforcement.

As stated above, an agency's compliance with FOIL's search-and-disclose obligations is committed in the first instance to the agency's interpretation of the statutory exemptions and any applicable case law.

F. Are there sanctions for noncompliance?

In cases where an agency does not proceed in good faith in withholding non-exempt records, a reviewing court may, in its discretion, award reasonable attorneys' fees and costs to a party which prevails in litigation against an agency. In order to be eligible for a recovery of fees, a party must satisfy three statutory requirements: (1) the party must have "substantially prevailed" against the agency in the FOIL litigation; (2) the record involved must be of clearly significant interest to the general public, and (3) the agency must have lacked a reasonable basis in law for not disclosing the record. *Public Officers Law* § 89(4)(c). As discussed below (see V.D.9., *infra*), fees have been awarded in only a handful of cases in New York State and have generally been limited to instances where an agency has flagrantly disregarded its disclosure obligations under FOIL. *See Henry Schein, Inc. v. Eristoff*, 35 A.D.3d 1124, 827 N.Y.S.2d 718 (3d Dep't 2006) (decision to award counsel's fees, even where statutory requisites are met, lies within the discretion of the court).

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

1. Character of exemptions.

a. General or specific?

The statutory exemptions are specific in nature. N.Y. Pub. Off. Law § 87(2) (McKinney 1988). "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government," *Capital Newspapers Division of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) ("[t]he agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access"); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993); *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984); *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979); *Muniz v. Roth*, 163 Misc.2d 293, 620 N.Y.S.2d 700 (Sup. Ct. 1994) (holding that merely asserting the exemption without particularity is insufficient); *In Re W. Harlem Bus*., 13 N.Y.3d 882, 921 N.E.2d 592, 893 N.Y.S.2d 825 (2010) (Empire State Business Corporation failed to meet its burden of sufficiently identifying a particular exemption when it submitted documents for in camera review because it failed to specify which documents fell under the inter/intra-agency exemption); *In Re Carnevale*, 68 A.D.3d 1290, 891 N.Y.S.2d 495 (3d Dep't 2009) (holding that respondents categorical assumption that all law enforcement investigations will be harmed if witnesses names are available through a FOIL request failed to establish that witnesses statements to police fell under any particular exemption).

The FOIL exemptions must be read as having engrafted, as a matter of public policy, certain limitations on the disclosure of otherwise accessible records. *Xerox v. Town of Webster*, 65 N.Y.2d 131, 480 N.E.2d 74, 490 N.Y.S.2d 488 (1985) (denying access to intra-agency records under FOIL exemption notwithstanding general principles for access to public records under § 51 of General Municipal Law).

Once it is determined that the requested material falls within a FOIL exemption, no further policy analysis is required. *Hanig v. Department of Motor Vehicles*, 79 N.Y.2d 106, 588 N.E.2d 750, 580 N.Y.S.2d 715 (1992); *Bellamy v. New York City Police Dept*., 59 A.D.3d 353, 874 N.Y.S.2d 60 (1st Dep't 2009) (holding that while age of requested record is a factor in determining an exemption, age alone is not a sufficient basis to find an exemption inapplicable).

Waiver or loss of exemption. Public disclosure of records may waive the cloak of confidentiality. *McGraw-Edison Company v. Williams*, 133 Misc.2d 1053, 509 N.Y.S.2d 285 (Sup. Ct. 1986) (inadvertent disclosure does not waive an exemption); *Moore v. Santucci*, 151 A.D.2d 676, 543 N.Y.S.2d 103, (2d Dep't 1989) (investigative statements lose cloak of confidentiality once the statements have been used in open court); *Gerbe v. Franklin Hospital Medical Center*, N.Y.L.J., Sept. 6, 1991 (Sup. Ct., Nassau County, 1991) (granting access to investigation file where no promise of confidentiality and agency allowed counsel access to file). Improper or inadvertent disclosure may not waive confidentiality, *Mitzner v. Sobol*, 173 A.D.2d 1064, 570 N.Y.S.2d 402 (3d Dep't 1991) (unauthorized disclosure of a record does not operate as a waiver of the FOIL exemptions); *New York 1 News v. President of the Borough of Staten Island*, 631 N.Y.S.2d 479 (Supreme Court Kings County 1995) (FOIL exemption may be waived by voluntary disclosure of a significant part of the privileged communications or, alternatively, if a release creates even an unintended impression of the existence of underlying material); *McGraw-Edison Company v. Williams*, 133 Misc.2d 1053, 509 N.Y.S.2d 285 (Sup. Ct. 1986) (inadvertent disclosure does

not waive an exemption); *Miller v. New York State Dept. of Transp*., 58 A.D.3d 981, 871 N.Y.S.2d 489 (3d Dep't 2009) (inadvertent disclosure does not waive exemption).

Identifying the exemption. A governmental body seeking an exemption from the disclosure requirements of FOIL has the burden of proving that a record falls "squarely within the ambit of one of [the] statutory exemptions." *Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993) (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571). N.Y. Pub. Off. Law. § 89(4)(b) (McKinney 1988). *See Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *Washington Post v. Insurance Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984); *Doolan v. BOCES*, 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979). *See also Grune v. Alexanderson*, 168 A.D.2d 496, 562 N.Y.S.2d 739, (2d Dep't 1990) (agency failed to identify with specificity those portions of records claimed to be exempt); *Burton v. Slade*, 166 A.D.2d 352, 561 N.Y.S.2d 637 (1st Dep't 1990) (abuse of discretion for agency to deny access without reviewing documents and stating with particularity reasons for denial).

Conclusory allegations are insufficient to meet the agency's burden of proof. *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *Dobranski v. Houper*, 154 A.D.2d 736, 546 N.Y.S.2d 180 (3d Dep't 1989); *Mooney v. State Police*, 117 A.D.2d 445, 502 N.Y.S.2d 828 (3d Dep't 1986); *Hopkins v. City of Buffalo*, 107 A.D.2d 1028, 486 N.Y.S.2d 514 (4th Dep't 1985).

b. Mandatory or discretionary?

The FOIL exemptions are discretionary in their application by the agency. N.Y. Pub. Off. Law § 87(2) (McKinney 1988) ("such agency may deny access . . ."). "[T]he language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records . . . if it so chooses." *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *Accord*, *Buffalo Teachers Federation Inc. v. Buffalo Board of Ed.*, 156 A.D.2d 1027, 549 N.Y.S.2d 541 (4th Dep't 1989).

c. Patterned after federal Freedom of Information Act?

The FOIL was patterned after the federal Freedom of Information Act, 5 U.S.C. 552, *et seq*., and accordingly, federal case law and legislative history on the scope of the federal act are instructive in interpreting New York's law, including its exemptions. *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979). *Accord Seeling v. Sielaff*, 201 A.D.2d 298, 607 N.Y.S.2d 300 (1st Dept. 1994) (following federal case law that the release of Social Security numbers constitutes an unwarranted invasion of privacy); *Hawkins v. Kurlander*, 98 A.D.2d 14, 469 N.Y.S.2d 820 (4th Dep't 1983); *McAulay v. Board of Education*, 61 A.D.2d 1048, 403 N.Y.S.2d 116 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 659, 396 N.E.2d 1033, 421 N.Y.S.2d 560 (1979); *New York 1 News v. President of the Borough of Staten Island*, 166 Misc.2d 270, 631 N.Y.S.2d 479 (Sup. Ct. Kings County 1995); *Whitehead v. Morgenthau*, 146 Misc.2d 733, 552 N.Y.S.2d 518 (Sup. Ct. 1990). *Quirk v. Evans*, 116 Misc.2d 554, 5 N.Y.S.2d 918 (Sup. Ct. 1982), *aff'd*, 97 A.D.2d 992, 469 N.Y.S.2d 834 (lst Dep't 1983).

2. Discussion of each exemption.

There are ten categories of exempted records under FOIL. New York Public Officers Law 87(2) states that each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

> (a) are specifically exempted from disclosure by state or federal statute;
>
> (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
>
> (c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
>
> (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
>
> (e) are compiled for law enforcement purposes and which, if disclosed, 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;
>
> (f) if disclosed would endanger the life or safety of any person;
>
> (g) are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or
>
> (h) are examination questions or answers which are requested prior to the final administration of such questions;
>
> (i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
>
> (j) are photographs, microphotographs, video-tape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

N.Y. Pub. Off. Law § 87(2)(a)-(j) (McKinney 1988 and McKinney Supp. 1993).

a. *Exemption from disclosure by other state or federal statute*.

An agency may deny access to records or portions thereof that are specifically exempted from disclosure by state or federal statute. N.Y. Pub. Off. Law § 87(2)(a) (McKinney 1988).

In applying this exemption, the Court of Appeals has stated that "[a]lthough we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection." *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986). *Accord M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (l984); *In Re New York Comm*., 72 A.D.3d 153, 892 N.Y.S.2d 377 (1st Dep't 2010) (holding that because City could not demonstrate that requested documents were at some point in possession of the Worker's Compensation Board it failed to establish that records were exempt under the Workers Compensation Law).

An agreement of confidentiality without a statutory predicate cannot form the basis for denial of access under FOIL. *Washington Post v. Insurance Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984) (granting access to minutes of insurance company meetings

voluntarily given by the companies to Insurance Department for its examination; the agreement of confidentiality between the companies and Department did not have a statutory predicate that could preempt FOIL); *Town of Waterford v. New York State Dept. of Environmental Conservation*, 77 A.D.3d 224, 906 N.Y.S.2d 651 (3d Dep't 2010) (FOIL does not specifically exempt documents created as part of settlement negotiations).

The statutory exemption must be based upon a state or federal statute; not a local law. *See Morris v. Martin*, 82 A.D.2d 965, 440 N.Y.S.2d 365 (3d Dep't 1981), *rev'd*, 55 N.Y.2d 1026, 434 N.E.2d 1079, 449 N.Y.S.2d 712 (1982) (granting request by property owners for sales data lists during course of tax certiorari litigation, despite contention that New York City Admin. Code 1146-15.0 prohibited disclosure of such lists).

It has also been held that "exemptions can only be controlled by other statutes, not by regulations which go beyond the scope of specific statutory language." *Zuckerman v. Board of Parole*, 53 A.D.2d 405, 407, 385 N.Y.S.2d 811 (3d Dep't 1976). *See also N.Y.P.I.R.G. Inc. v. City of New York*, N.Y.L.J., Sept. 27, 1982 (Sup. Ct., New York County, 1982) (denying access to certain tax records based upon Tax Law Article 31-A and regulations on confidentiality promulgated thereunder); *Herald Co. v. School District*, 104 Misc.2d 1041, 430 N.Y.S.2d 460 (Sup. Ct. 1980) (denying access to name of and charges against a tenured teacher on the basis of Education Law § 3020-a and regulations promulgated thereunder).

For cases finding an exemption from disclosure by other state or federal statutes, *see Waldman v. Vill. of Kiryas Joel*, 31 A.D.3d 569, 819 N.Y.S.2d 72 (2d Dep't 2006) (under New York Election law, election records may not be publicly disseminated, but are subject only to inspection); *Argentieri v. Goor*d, 25 A.D.3d 830, 807 N.Y.S.2d 445 (3rd Dep't 2006) (documents generated during an investigation of a corrections officer constitute "personnel record" for the purposes of Civil Rights Law § 50-a, and thus are exempt from disclosure under FOIL); *Molloy v. New York City Police Dept*., 50 A.D.3d 98, 851 N.Y.S.2d 480 (1st Dep't 2008) (although remanding for further administrative action, court opined that request relating to investigations by NYPD Internal Affairs Bureau which purportedly involved a police officer would likely be exempt from disclosure under Civil Rights Law § 50-a, which makes confidential personnel records of police officers used to evaluate performance toward continued employment and promotion).

b. *Exemption based on unwarranted invasion of privacy.*

An agency may deny access to records or portions thereof that, if disclosed, would constitute an unwarranted invasion of personal privacy. N.Y. Pub. Off. Law § 87(2)(b) (McKinney 1988).

An unwarranted invasion of personal privacy includes, but shall not be limited to:

> 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 commercial 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; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency.
>
> (c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . .
>
> i. when identifying details are deleted;
>
> ii. when the person to whom a record pertains consents in writing to disclosure; or
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him.

N.Y. Pub. Off. Law § 89(2)(b) and (c) (McKinney 1988).

(i) *General invasion of privacy argument.*

The invasion of personal privacy exemption is not limited to the examples set forth in the statute. *See Hanig v. Department of Motor Vehicles*, 79 N.Y.2d 106, 588 N.E.2d 750, 580 N.Y.S.2d 715 (1992) (medical histories are but one example of information that could intrude on personal privacy).

For cases which have limited access to records based upon a general invasion of privacy argument, *see Hearst Corp. v. Office of State Comptroller*, 24 Misc.3d 611, 882 A.D.3d 862 (N.Y. Sup. 2009)(birth dates of state employees are exempt); *Rodriguez v. Johnson*,, 66 A.D.3d 536, 886 N.Y.S.2d 695 (1st Dep't 2009) (pursuant to the public interest, respondent properly withheld certain identifying characteristics of witnesses and the statements of two witnesses who spoke to law enforcement personnel); *Rhino Assets, LLC v. New York City Dept. for Aging (SCRIE PROGRAMS)*, 60 A.D.3d 538, 876 N.Y.S.2d 20 (1st Dep't 2009) (holding that names of those receiving SCRIE benefits are exempt from disclosure because the nature of program requirements would reveal the age and income of individuals receiving benefits); *N.Y. State Rifle and Pistol Ass'n, Inc. v. Kelly*, 55 A.D.3d 222, 863, N.Y.S.2d 439 (1st Dep't 2008) (request for digital list of names and addresses of all pistol licensees in New York City was exempt from disclosure, as disclosure of the lists would constitute an "unwarranted invasion of privacy stemming from … the 'sale or release of lists of names and addresses if such lists would be used for commercial or fundraising purposes.'"); *Humane Soc'y of the United States v. Brennan*, 53 A.D.3d 909, 861 N.Y.S.2d 234 (3d Dep't 2008) (disclosure of telephone numbers of personal targets of an investigation was exempt from disclosure); *Edwards v. New York State Police*, 44 A.D.3d 1216, 843 N.Y.S.2d 729 (3rd Dep't 2007) (disclosure of crime-scene photographs were exempt from disclosure on the ground that their release would constitute an unwarranted invasion of privacy of the victim's surviving family members); *Hawley v. Vill. of Penn Yan*, 35 A.D.3d 1270, 827 N.Y.S.2d 390 (4th Dep't 2006) (unlisted and wireless numbers may be redacted from a request for a list of all calls made and received by a public official during a two-month period); *New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 796 N.Y.S.2d 302 (2005) (with respect to 911 calls made in connection with the September 11, 2001 terrorist attacks on the World Trade Center, "the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private"); *Tate v. De Francesco*, 217 A.D.2d. 831, 629 N.Y.S.2d 529 (3d Dept. 1995) (inmate privacy); *Seeling v. Sielaff*, 201 A.D.2d 298, 607 N.Y.S.2d 300 (1st Dept. 1994) (the release of Social Security numbers constitutes an unwarranted invasion of privacy); *Lyon v. Dunne*, 180 A.D.2d 922, 580 N.Y.S.2d 803, (3d Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (redacting names, addresses, dates of birth, and phone numbers of troopers, attorneys, investigators and sources after balancing competing interests of public access and individual privacy); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 174 A.D.2d 212, 578 N.Y.S.2d 928 (3d Dep't 1992) (allowing redaction of video tape of frisks of inmates during Attica uprising); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712, (3d Dep't 1990) (inmates have no general expectation of privacy, but videotape of inmates showering or going to the bathroom or which is unduly degrading or humiliating is of a personal nature and would result in personal hardship); *Bernier v. Mann*, 166 A.D.2d 798, 563 N.Y.S.2d 158 (3d Dep't 1990) (inmate privacy); *Dobranski v. Houper*, 154 A.D.2d 736, 546 N.Y.S.2d 180 (3d Dep't 1989) (redacting inmates' prison identification, dietary requirements and name and address of next

of kin); *Messina v. Lufthansa German Airlines*, 83 A.D.2d 831, 441 N.Y.S.2d 557 (2d Dep't 1981) (denying access to information concerning a claim for unemployment insurance benefits as an unwarranted invasion of personal privacy); *Waste-Stream Inc. v. Solid Waste Disposal Authority*, 166 Misc.2d 6, 630 N.Y.S.2d 1020 (Sup. Ct. St. Lawrence County 1995) (personal privacy exemption rendered moot); *Inner City Press v. New York City Dep't of Housing Preservation*, No. 126653/93 (Sup. Ct., New York County, 1993) (denying access to home addresses and Social Security numbers); *Village Times v. Three Village Cent. School Dist.*, No. 20325-83 (Sup. Ct., Suffolk County, March 21, 1984) (allowing redaction of name upon release of disciplinary settlement); *N.Y. PIRG Inc. v. City of New York*, N.Y.L.J., Sept. 27, 1982 (Sup. Ct., New York County, 1982) (denying access to New York City capital gains tax returns); *In re Lipsman*, N.Y.L.J., Oct. 1, 1981 (Sup. Ct., New York County, 1981) (denying access to graduate school transcripts).

For cases rejecting a claim of privacy, see *Mulgrew v. Board of Educ. of City School Dist. of City of New York*, 31 Misc.3d 296, 919 N.Y.S.2d 786 (Sup. Ct. 2011) (rejecting a claim that releasing the names of public school teachers in Teacher Data Reports are an invasion of privacy because their release rationally balanced in the public interest); *Schenectady County Soc. For Prevention of Cruelty To Animals, Inc v. Mills*, 74 A.D.3d 1417, 904 N.Y.S.2d 512 (3d Dep't 2010) (respondent did not meet burden of showing that names and street addresses of licensed veterinarians was an unwarranted invasion of privacy because respondent was unsure whether the addresses it maintained were home or business addresses); *Humane Soc'y of United States v. Fanslau*, 54 A.D.3d 537, 863 N.Y.S.2d 519 (3d Dep't 2008) (holding that disclosure of Sullivan County District Attorney's financial disclosure statements pertaining to family members' income and/or investments did not constitute an unwarranted invasion of personal privacy under FOIL); *Legal Aid Society of Northeastern New York v. New York State Department of Social Services*, 195 A.D.2d 150, 605 N.Y.S.2d 785 (3d Dept. 1993) (granting access to certain fair hearing decisions; rejecting a privacy argument where identifying information is redacted); *Geames v. Henry*, 173 A.D.2d 825, 572 N.Y.S.2d 635 (2d Dep't 1991) (granting access to conviction record); *Cornell University v. City of New York Police Dep't*, 153 A.D.2d 515, 544 N.Y.S.2d 356, (1st Dep't 1989), *leave denied*, 75 N.Y.2d 707 (1990) (revelation of details of sex crime would not constitute unwarranted invasion of privacy where victim commenced civil action); *Thompson v. Weinstein*, 150 A.D.2d 782, 542 N.Y.S.2d 33 (2d Dep't 1989) (granting access to criminal convictions and pending criminal action against witness as public records and not an invasion of privacy); *Gannett Co. v. City Clerk's Office, City of Rochester*, 157 Misc.2d 349, 596 N.Y.S.2d 968 (Sup. Ct. 1993) (granting access to names of marriage license applicants sought by newspaper); *Faulkner v. DelGiacco*, 139 Misc.2d 790, 529 N.Y.S.2d 255 (Sup. Ct. 1988) (granting access to inmates statements and names of prison guards, but denying access to investigative records of prison melee); *Rainey v. Levitt*, 138 Misc.2d 962, 525 N.Y.S.2d 551 (Sup. Ct. 1988) (granting access to examination grades of certain persons taking the civil service examination for sergeant, rejecting a privacy argument); *Herald Company v. New York State Lottery*, No. 01-87-ST0944, (Sup. Ct., Albany County, August 28, 1987) (granting access to lottery sales figures); *Bensing v. LeFevre*, 133 Misc.2d 198, 506 N.Y.S.2d 822 (Sup. Ct. 1986) (granting access to names of inmates in special housing unit, rejecting arguments under Personal Privacy Protection Law and privacy exemption); *Bahlman v. Brier*, 119 Misc.2d 110, 462 N.Y.S.2d 381 (Sup. Ct., 1983) (deleting names from report on sick leave of city employees); *ABC Inc. v. Siebert*, 110 Misc.2d 744, 442 N.Y.S.2d 855 (Sup. Ct. 1981) (revealing identity of applicant for check cashing license, rejecting invasion of personal privacy argument); *Geneva Printing v. Village of Lyons*, No. 18713 (Sup. Ct., Wayne County, March 25, 1981) (granting access to confidential settlement of disciplinary action against village employee, rejecting privacy argument).

(ii) *Employment, credit histories, medical histories or medical records.*

An unwarranted invasion of personal privacy includes, but shall not be limited to:

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.

N.Y. Pub. Off. Law § 89(2)(b) (McKinney 1988).

A medical history is information that one would reasonably expect to be included as a relevant and material part of a proper medical history. A medical history is exempt from disclosure whether or not given to a health care provider or contained in an employment application. *Hanig v. Department of Motor Vehicles*, 79 N.Y.2d 106, 588 N.E.2d 750, 580 N.Y.S.2d 715 (1992) (responses on driver's license application regarding disabilities is exempt as a medical history); *New York 1 News v. President of the Borough of Staten Island*, 766 Misc.2d 270, 631 N.Y.S.2d 479 (Sup. Ct. 1995) (granting access to elements of a staff member's prior oral or written discussion expressly adopted by agency in explaining its final decision). *Rold v. Coughlin*, 142 Misc.2d 877, 538 N.Y.S.2d 896, (Sup. Ct. 1989) (access to inmate health care records granted with identifying details redacted); *Canty v. Office of Counsel*, 30 Misc.3d 705, 913 N.Y.S.2d 528 (Sup. Ct. 2010) (exempting portions of accident reports of correctional officer describing officers' injuries as medical records).

An employment history also may be exempt. *See Obiajulu v. City of Rochester*, 213 A.D.2d 1055, 625 N.Y.S.2d 779 (4th Dept. 1995) (holding that disclosure of performance evaluations and appraisals do not constitute an invasion of privacy when identifying details are deleted; disciplinary charges, the agency determination of those charges, and the penalties imposed are not exempt from disclosure); *Stone v. Department of Investigation of City of New York*, 172 A.D.2d 165, (1st Dep't 1991) (denying access to employment histories and confidential reports of investigatory file); *LaRocca v. Bd. of Educ.*, 159 Misc.2d 90, 602 N.Y.S.2d 1009 (Sup. Ct. 1993) (denying access to records relating to a disciplinary matter as an employment record), *modified*, 220 A.D.2d 424, 632 N.Y.S.2d 576 (granting access to portions of documents not constituting "employment history" and to redacted settlement agreement); *Willson v. Washburn* (Sup. Ct. Oneida County November 18, 1993) (granting access to requester's own personnel file); *Inner City Press/Community on the Move v. New York City Dep't of Housing Preservation and Development*, No. 35882/92 (Sup. Ct., New York County, January 26, 1993) (holding that credit histories are exempt from disclosure, but that asset statements are distinguishable from credit histories and, therefore, subject to disclosure). *See George v. New York Newsday*, N.Y.L.J. October 4, 1994 (Sup. Ct., New York County, 1994) (Public Officers Law does not create a privacy cause of action against a private publisher of improperly released materials)(iii) *Commercial or fundraising purposes.* An unwarranted invasion of personal privacy includes, but shall not be limited to:

iii. sale or release of lists of names and addresses if such lists would be used for commercial or solicitation purposes.

The 2008 amendments to FOIL substitute "solicitation" for "commercial" to clarify that the intent of the exemption is to avoid the use of a list of persons' names and residential addresses when the list would be used to contact citizens directly in their homes to solicit their business. Further, when a requester seeks names and addresses, an agency may require the requester to "provide a written certification" that the list will not be used for the purpose of engaging in solicitation or fund-raising.

N.Y. Pub. Off. Law § 89(2)(b) (McKinney 1988).

For cases applying the exemption's clause relative to requests for commercial or fundraising purposes, see *New York State Rifle and Pistol Ass'n, Inc. v. Kelly*, 55 A.D.3d 222, 863 N.Y.S.2d 439 (1st Dep't 2008) (digital list of names and addresses of all pistol licensees in New York City was exempt from disclosure because respondent provided specific proof of petitioner's intent to use the requested materials for the purposes of fund-raising and/or commercial gain); *Scott v. Records Access Officer*, 65 N.Y.2d 294, 480 N.E.2d 1071, 491 N.Y.S.2d 289

(1985) (deleting names and addresses of accident victims from accident reports sought by law firm for solicitation purposes); *Gannett Co. v. City Clerk's Office, City of Rochester*, 157 Misc.2d 349, 596 N.Y.S.2d 968 (Sup. Ct. Monroe County 1993) (granting access to names of marriage license applicants sought by newspaper); *Goodstein v. Shaw*, 119 Misc.2d 400, 463 N.Y.S.2d 162 (Sup. Ct. 1983) (denying access to names and addresses of persons filing complaints with Division of Human Rights when requested by private attorney); *In re Nicholas*, 117 Misc.2d 630, 458 N.Y.S.2d 858 (Sup. Ct. 1983) (denying access to income executions to a lawyer seeking to send correspondence to judgment debtors); *Gramet v. Gilmartin*, No. 81-26110 (Sup. Ct., Suffolk County, March 31, 1982) (denying access to desk sergeant's daily journal where requester wanted to inform accident victims of their rights); *Golbert v. Suffolk Dep't of Consumer Affairs*, No. 80-9249 (Sup. Ct., Suffolk County, Sept. 5, 1980) (denying access to list of home improvement contractors); *New York State United Teachers v. Brighter Choice Charter School*, 15 N.Y.3d 560, 940 N.E.2d 899, 915 N.Y.S.2d 194 (2010) (holding that the names of teachers employed at Charter Schools are exempt from disclosure as an invasion of privacy).

(iv) *Economic or personal hardship.* An unwarranted invasion of personal privacy includes, but shall not be limited to:

> 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.

N.Y. Pub. Off. Law § 89(2)(b) (McKinney 1988).

For cases where a privacy argument has been asserted based on economic or personal hardship, see *Buffalo News v. Buffalo Municipal Housing Authority*, 163 A.D.2d 830, 558 N.Y.S.2d 364, (4th Dep't 1990) (granting access to payroll records and disciplinary records as not creating economic or personal hardship and such records are relevant to day-to-day operations of the agency); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712, (3d Dep't 1990) (inmates have no general expectation of privacy, but videotape of inmates showering or going to the bathroom or which is unduly degrading or humiliating is of a personal nature and would result in personal hardship); *Hopkins v. City of Buffalo*, 107 A.D.2d 1028, 486 N.Y.S.2d 514 (4th Dep't 1985) (granting access to payroll records of several public work projects); *Gannett Co. v. County of Monroe*, 59 A.D.2d 309, 399 N.Y.S.2d 534 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 954, 383 N.E.2d 1151, 411 N.Y.S.2d 557 (1978) (granting access to names and salary levels of terminated county employees, because the records were relevant and essential to the ordinary work of the municipality); *Smith v. County of Rensselaer*, No. 41-1156-92 (Sup. Ct. Rensselaer County) (granting access to itemized bills prepared or submitted by an attorney working for an agency); *Tri-State Publishing Company v. City of Port Jervis*, No. 7498-91 (Sup. Ct. Orange County, March 4, 1992) (denying access to names and addresses of tenants in housing subsidy program or of property owners where all tenants are in subsidy program as an unwarranted invasion of privacy); *Minerva v. Village of Valley Stream*, No. 7566/81 (Sup. Ct., Nassau County, May 20, 1981) (granting access to front of village attorney's paycheck, but denying request to examine and copy the back of the check on the basis of privacy exemption); *MacHacek v. Harris*, 106 Misc.2d 388, 431 N.Y.S.2d 927 (Sup. Ct. 1980) (the manner in which information will be used is an improper standard to determine economic or personal hardship).

(v) *Confidentiality.* An unwarranted invasion of personal privacy includes, but shall not be limited to:

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

N.Y. Pub. Off. Law § 89(2)(b) (McKinney 1988).

For cases considering the issue of confidentiality, see *Stone v. Department of Investigation of City of New York*, 172 A.D.2d 165 (1st Dep't 1991) (denying access to employment histories and confidential reports of investigatory file); *Cornell University v. City of New York Police Dep't*, 153 A.D.2d 515, 544 N.Y.S.2d 356 (1st Dep't 1989), *leave denied*, 75 N.Y.2d 707 (1990) (granting disclosure of police investigative file where witnesses were not promised anonymity); *Allen v. Strojnowski*, 129 A.D.2d 700, 514 N.Y.S.2d 463 (3d Dep't 1987), *motion for leave to appeal denied*, 70 N.Y.2d 871, 518 N.E.2d 5, 523 N.Y.S.2d 493 (1987) (denying access to names, addresses, and statements of confidential witnesses compiled during a criminal investigation); *see Buffalo Evening News v. City of Lackawanna*, (Sup. Ct., Erie County, June 24, 1985) (granting access to real estate escrow records and holding that the identity of a proposed supplier to a city contract is not information of a personal nature); *Gannett News Service Inc. v. State Office of Alcoholism and Substance Abuse*, 99 Misc.2d 235, 415 N.Y.S.2d 780 (Sup. Ct. 1979) (granting access to drug abuse surveys taken of secondary school students, although schools had been promised confidentiality).

(vi) *Deletion of identifying details.*

> Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . .
>
> i. when identifying details are deleted;

N.Y. Pub. Off. Law § 89(2)(c) (McKinney 1988).

Under the privacy exemption, an agency has authority to delete identifying details prior to disclosure. N.Y. Pub. Off. Law § 89(2)(c)(i) (McKinney 1988). *See, e.g., Scott v. Records Access Officer*, 65 N.Y.2d 294, 480 N.E.2d 1071, 491 N.Y.S.2d 289 (1985) (deleting names and addresses of accident victims prior to release of accident reports for commercial purposes); *Obiajulu v. City of Rochester*, 625 N.Y.S.2d 779 (4th Dept. 1995) (disclosure of performance evaluations and appraisals do not constitute an invasion of privacy when identifying details are deleted; disciplinary charges, the agency determination of those charges, and the penalties imposed are not exempt from disclosure); *Harris v. City University*, 114 A.D.2d 805, 495 N.Y.S.2d 175 (lst Dep't 1985) (granting access to certain *curricula vitae* but first ordering deletion of identifying information such as names, addresses and Social Security numbers); *Malowsky v. D'Elia*, 160 A.D.2d 798, 163 N.Y.S.2d 479, (2d Dep't 1990) (medical histories of a child in foster care and of his natural parents shall be provided under Social Services law § 373(a) after deletion of identifying details); *Bahlman v. Brier*, 119 Misc.2d 110, 462 N.Y.S.2d 381 (Sup. Ct., 1983) (deleting names from report on sick leave of city employees); *Cirino v. Board of Education*, N.Y.L.J., July 10, 1980 (Sup. Ct., New York County, 1980) (granting access to archival records on alleged communists and subversives, with identifying details deleted).

Where records are subject to other specific statutory exemptions FOIL's provisions for deletion of identifying details do not remove confidentiality requirements. *Short v. Board of Managers*, 57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724 (1982).

c. *Exemption based on impairment of contract awards or collective bargaining negotiations.*

The FOIL authorizes an agency to deny access to records or portions thereof that, if disclosed, would impair present or imminent contract awards or collective bargaining negotiations. N.Y. Pub. Off. Law § 87(2)(c) (McKinney 1988). Efforts by agencies to withhold documents through assertion of collective bargaining impairment arguments have generally proved unsuccessful. *See, e.g., Doolan v. BOCES*, 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979) (granting access to a BOCES prepared annual document containing regional data on salaries and fringe benefits of teachers and administrators); *Professional Standards Review of America v. New York State Department of Health*, 193 A.D.2d 937 (3d Dept. 1993) (granting access to contract bid submitted by private organization and to factual and statistical data used by agency in making its final determination to award the contract); *Waste-Stream Inc. v. Solid Waste Disposal Authority*, 166 Misc.2d 6, 630 N.Y.S.2d 1020 (Sup. Ct. 1995) (granting access to lists

of potential customers, names and addresses of customers responding to a questionnaire, proposed contracts with customers and lists of all accounts extended credit within the past two years); *Babigian v. Evans*, 104 Misc.2d 140, 427 N.Y.S.2d 688 (Sup. Ct. 1980), *aff'd*, 97 A.D.2d 992, 469 N.Y.S.2d 834 (lst Dep't 1983) (granting access to list of employees who were awarded back pay); *Geneva Printing v. Village of Lyons*, No. 18713 (Sup. Ct., Wayne County, March 25, 1981) (granting access to terms of confidential settlement of employee's arbitration hearing); *United Fed'n v. New York City Health and Hosp. Corp.*, 104 Misc.2d 623, 428 N.Y.S.2d 823 (Sup. Ct. 1980) (granting access to grievances and decisions rendered thereon). *But see Cohalan v. Board of Education*, 74 A.D.2d 812, 425 N.Y.S.2d 367 (2d Dep't 1980) (denying access to preliminary contract proposals and demands between school board and teachers' association).

The "impairment of contract award" language has been held to allow an agency to withhold documents in cases of imminent, or even potential, awards of contracts, but not in cases where contractual agreements are consummated. *Compare Murray v. Troy Urban Renewal Agency*, 84 A.D.2d 612, 444 N.Y.S.2d 249 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 888, 438 N.E.2d 1115, 453 N.Y.S.2d 400 (1982) (denying access to reports by an independent appraiser for the potential sale of buildings) *and Pirro v. Murray*, (Sup. Ct., Onondaga County, Aug. 2, 1982) (denying access to records of resource survey project) *with Shaw v. Triborough Bridge and Tunnel Auth.*, N.Y.L.J., June 17, 1980 (Sup. Ct., New York County, 1980) (granting access to records related to a "consummated" contractual agreement). *See also Buffalo Evening News v. City of Lackawanna*, (Sup. Ct., Erie County, June 24, 1985) (granting access to names of persons making escrow deposits relating to negotiations for development of aluminum mill); *Faxton Hospital v. Plumley*, No. 84-9 64 (Sup. Ct., Oneida County, May 30, 1984) (granting access to documents submitted by applicant for industrial development revenue bonds). *See also Verizon New York, Inc. v. Bradbury*, 40 A.D.3d 1113, 837 N.Y.S.2d 291 (2d Dep't 2007) (draft of cable franchise agreement with municipality was not exempt from disclosure as the impairment of an imminent contract award because party seeking the records and Verizon were not competitors for the issuance of a cable television franchise).

d. *Exemption based on trade secrets or records maintained for regulation of a commercial enterprise.*

The FOIL permits an agency to deny access to records or portions thereof that are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise. N.Y. Pub. Off. Law § 87(2)(d) (McKinney Supp. 1993).

Each state agency which maintains records containing trade secrets is directed by statute to promulgate regulations pertaining to such records, including, but not limited to the following: (1) the manner of identifying the records or parts; (2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available; and (3) the manner of safeguarding against any unauthorized access to the records. N.Y. Pub. Off. Law § 87(4)(a) (McKinney 1988). The term "agency" or "state agency" for the purposes of this statutory directive means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor. N.Y. Pub. Off. Law § 87(4)(b) (McKinney 1988).

When records are required to be submitted to state agencies pursuant to law by a commercial entity, the entity may request that the records or portions thereof be kept confidential on the ground that the records constitute trade secrets. N.Y. Pub. Off. Law § 89(5) (McKinney 1988). If a request is made for records characterized as trade secrets, or if the agency chooses to reject a claim of trade secrets, the entity submitting the records must be informed and be given the opportunity to justify its claim of trade secret status. N.Y. Pub. Off. Law § 89(5) (McKinney 1988). *See Irving Bank Corporation v. Considine*, 138 Misc.2d 849, 525 N.Y.S.2d 770 (Sup. Ct. 1988) (Public Officers Law § 89(5) sets forth a very detailed schedule within which applications for confidential treatment of commercial trade information and secrets and appeals therefrom must be made, and failure to follow this schedule can result in failure to exhaust administrative remedies).

For trade secret cases, *see Verizon New York, Inc. v. Mills*, 60 A.D.3d 958, 875 N.Y.S.2d 572 (2d Dep't 2009) (holding that franchise agreement between Village and cable company was exempt because disclosure would cause substantial injury to the competitive position of the subject enterprise); *Verizon New York, Inc. v. Devita*, 60 A.D.3d 956, 879 N.Y.S.2d 140 (2d Dep't 2009) (franchise agreement between municipality and cable company exempt from disclosure, but municipality retains discretion to disclose franchise reports even if reports fall under exemption); *Hearst Corp. v. State, Office of State Comptroller*, 24 Misc.3d 611, 882 N.Y.S.2d 862 (N.Y. Sup. Albany County 2009) (trade secret exception does not apply to state payroll tables that did not use social security numbers of state employees); *Markowitz v. Serio*, 11 N.Y.3d 43, 893 N.E.2d 110, 862 N.Y.S.2d 833 (2008) (request for records revealing "the number of voluntary [automobile] policies issued, renewed, cancelled … or nonrenewed" for "each Kings County zip code, including, by carrier," was not exempt as a trade secret, as the interested insurance companies were not able to demonstrate that the records' disclosure would put them at a competitive disadvantage); *City of Schenectady v. O'Keeffe*, 50 A.D.3d 1384, 856 N.Y.S.2d 281 (3d Dep't 2008) (records pertaining to public utility's franchise and right-of-way agreement with a state agency, and which contained cost and inventory data identifying and tracking all of the utility's property assets that are employed along the right-of-way and used to transmit and distribute electricity, were exempt from disclosure as a trade secret, the release of which would cause substantial competitive injury); *N.Y. Racing Ass'n, Inc. v. State, Racing and Wagering Bd.*, 21 Misc.3d 379, 863 N.Y.S.2d 540 (N.Y. Sup. Ct. 2008) (holding that release of documents concerning confidential bidding correspondence in connection with a state contract between private corporation and state agency was exempt from disclosure under FOIL, as the request documents were "proprietary trade information"); *Verizon New York, Inc. v. Bradbury*, 40 A.D.3d 1113, 837 N.Y.S.2d 291 (2d Dep't 2007) (holding that draft of cable franchise agreement with municipality was not exempt from disclosure as a trade secret because Verizon failed to establish a specific harm that disclosure would cause); *Professional Standards Review of America v. New York State Department of Health*, 193 A.D.2d 937 (3d Dept. 1993) (granting access to contract bid submitted by private organization and to factual and statistical data used by agency in making its final determination to award the contract); *Niagara Mohawk Power Corporation v. New York State Department of Environmental Conservation*, 169 A.D.2d 943, 564 N.Y.S.2d 839 (3d Dep't 1991) (question of whether report of data was a "trade secret" was rendered "moot"); *P.J. Garvey Carting and Storage Inc. v. County of Erie*, 125 A.D.2d 972, 510 N.Y.S.2d 365 (4th Dep't 1986) (unsuccessful bidder unable to get damages for release of its "route list" by county; route list neither a trade secret nor "record" under FOIL); *Waste-Stream Inc. v. Solid Waste Disposal Authority*, 166 Misc.2d 6, 630 N.Y.S.2d 1020 (Sup. Ct. St. Lawrence County 1995) (while an agency may hold "trade secrets" exempt from disclosure, information sought to be withheld on the basis of substantial injury to the competitive position does not apply to the agency itself); *Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991) (records from Attorney General's investigation of company's pricing policy are not trade secrets); *American Society for the Prevention of Cruelty to Animals v. Board of Trustees*, 147 Misc.2d 846, 556 N.Y.S.2d 447 (Sup. Ct. 1990) (information relating to procedures to be performed on animals did not explore researcher's underlying method, hypothesis, analysis, or results, and were not exempt from disclosure as trade secrets under 7 U.S.C. § 2157 which exempts release of trade secrets); *Oswego Motor Lines v. Frank*, No. 85-5409 (Sup. Ct., Onondaga County, Oct. 15, 1985) (denying access to list of charter customers or clients); *N.Y. PIRG Inc. v. City of New York*, N.Y.L.J., Sept. 27, 1982 (Sup. Ct., New York County, 1982) (rejecting agency's assertion that disclosure of real property

gains tax returns would reveal trade secrets); *Belth v. Insurance Dep't*, 95 Misc.2d 18, 406 N.Y.S.2d 649 (Sup. Ct. 1977) (denying access to computer programs, statistical assumptions and mathematical models of insurance company).

e. *Exemption for records compiled for law enforcement purposes.*

An agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would: (i) interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of the right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information about a criminal investigation; or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures. N.Y. Pub. Off. Law § 87(2)(e) (McKinney 1988).

"[T]he purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution. . . . Records . . . which merely clarify procedural or substantive law must be disclosed." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979) (denying access to portions of an office manual of the Special Prosecutor for Nursing Homes on basis that disclosure would reveal non-routine investigatory techniques).

In interpreting the exemption, the courts have held that the law enforcement exemption potentially applies even where the investigation has terminated, is inactive and no judicial proceeding exists. *Hawkins v. Kurlander*, 98 A.D.2d 14, 469 N.Y.S.2d 820 (4th Dep't 1983), *appeal withdrawn*, 62 N.Y.2d 804 (1984) (denying access to transcripts of confidential interviews of witnesses in investigation by district attorney).

It has also been held that there is no requirement that the records be compiled by a law enforcement agency. Rather, the only requirement is that such records be compiled for law enforcement purposes and be held by a public agency. *City of New York v. Bustop Shelters Inc.*, 104 Misc.2d 702, 428 N.Y.S.2d 784 (Sup. Ct. 1980). *See also Frick v. Hennessy*, No. 1405/79 (Sup. Ct., Sullivan County, July 25, 1979) (denying access to investigative file relating to oil spill).

For law enforcement cases, *see Lesher v. Hynes*, 80 A.D.3d 611, 914 N.Y.S.2d 264 (2d Dep't 2011) (held, claim that disclosure of documents would interfere with an ongoing police investigation was sufficiently particularized to deny access); *Bellamy v. New York City Police Dept.*, 80 A.D.3d 442, 913 N.Y.S.2d 225 (1st Dep't 2011) (allowing access to police reports containing the names and statements of witnesses who did not testify at petitioner's trial since no promises of confidentiality were made, nor was their any evidence that access would allow violators to evade detection by deliberately tailoring their conduct); *Gomez v. Fischer*, 74 A.D.3d 1399, 902 N.Y.S.2d 212 (3d Dep't 2010) (request for statements made by a witness during an interview with investigators was improperly denied because witness statements must be disclosed unless there is a promise of confidentiality); *Esposito v. Rice*, 67 A.D.3d 797, 888 N.Y.S.2d 178 (2d Dep't 2009) (respondents properly withheld statements to law officers made by persons who did not testify at a criminal trial); *Smith v. Capasso*, 200 A.D.2d 502, 608 N.Y.S.2d 815 (1st Dep't 1994); *Spencer v. New York State Police*, 187 A.D.2d 919, 591 N.Y.S.2d 207 (3d Dept. 1992) (denying access to non-routine, highly detailed step-by-step depictions of the investigatory process and to portions of the file describing autopsies performed on victims, but granting access to files regarding surveillance, establishment of roadblocks and lists of evidence seized); *Lyon v. Dunne*, 180 A.D.2d 922, 580 N.Y.S.2d 803 (3d Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to laboratory analyses of evidence because it would reveal nonroutine techniques and procedures, however, evidence inventory list is not exempt from disclosure); *Laureano v. Grimes*, 179 A.D.2d 602, 579 N.Y.S.2d 357 (1st Dep't 1992) (granting access to police memo books of investigation where no assertion or promise of confidentiality and confidentiality, if given, was lost since witnesses later testified); *Ennis v. Slade*, 179 A.D.2d 558, 579 N.Y.S.2d 59 (1st Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to records of narcotics buy operation); *Mitchell v. Slade*, 173 A.D.2d 226, 569 N.Y.S.2d 437 (1st Dep't 1991) (arrest follow-up report was not exempt under law enforcement or intra-agency exemptions); *Grune v. Alexanderson*, 168 A.D.2d 496, 562 N.Y.S.2d 739 (2d Dep't 1990) (portions of arson control plan which reveal routine criminal investigative techniques or procedures are subject to disclosure); *Dobranski v. Houper*, 154 A.D.2d 736, 546 N.Y.S.2d 180 (3d Dep't 1989) (denying access to identikit papers and notations as nonroutine); *Cornell University v. City of New York Police Dep't*, 153 A.D.2d 515, 544 N.Y.S.2d 356 (1st Dep't 1989), *leave denied*, 75 N.Y.2d 707 (1990) (granting disclosure of police investigative file where witnesses were not promised anonymity); *New York News Inc. v. Office of the Special State Prosecutor of the State of New York*, 153 A.D.2d 512, 544 N.Y.S.2d 151 (1st Dep't 1989) (depositions compiled during investigation were exempt as disclosure could interfere with law enforcement investigations); *Auburn Publisher Inc. v. City of Auburn*, 147 A.D.2d 900, 537 N.Y.S.2d 354 (4th Dep't 1989) (denying access to affidavits in police investigation); *Allen v. Strojnowski*, 129 A.D.2d 700, 514 N.Y.S.2d 463 (3d Dep't 1987), *motion for leave to appeal denied*, 70 N.Y.2d 871, 518 N.E.2d 5, 523 N.Y.S.2d 493 (1987) (denying access to names, addresses, and statements of confidential witnesses compiled during a criminal investigation); *Matter of Spruils* N.Y.L.J., July 28, 1995 (Sup. Ct., New York County, 1995) (denying access to police officer's memo book on personal hardship grounds and which might contain names, addresses and statements of confidential witnesses); *Muniz v. Roth*, 163 Misc.2d 293, 620 N.Y.S.2d 700 (Sup. Ct. 1994) (granting access to fingerprint tests because they are routine investigative techniques); *Planned Parenthood of Westchester v. The Town Board of the Town of Greenburgh*, Sup. Ct., Westchester County (January 27, 1992) (disclosure of photographs of arrestees compiled for law enforcement purposes would not interfere with law enforcement purposes were exempt from disclosure under FOIL); *Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991) (granting access to Attorney General's investigative records where allegation of interference with law enforcement is wholly speculative); *Matter of Woods*, N.Y.L.J. February 2, 1995 (Sup. Ct., New York County, 1995) (ordering *in camera* inspection of police follow-up reports (DD-5's) to determine if they contain exempt opinions); *Matter of Warner*, N.Y.L.J. (App. Div. 1st Dept. March 17, 1995) (ordering *in camera* inspection of police training material to determine whether exempt as criminal investigative techniques or procedures or would endanger life or safety of any person); *Matter of New York City Dept. of Investigation*, N.Y.L.J., May 12, 1995 (Sup. Ct., New York County, 1995); *Maffeo v. New York Organized Crime Task Force*, Index #92-18502 (Sup. Ct., Westchester County April 14, 1993) (denying disclosure of applications made and warrants issued for eavesdropping surveillance pursuant to CPL 700.55; denying access to investigation interviews and lists prepared by the FBI; granting access to trial testimony transcripts).

f. *Exemption for records which, if disclosed, would endanger the life or safety of any person.*

Any record which, if disclosed, would endanger the life or safety of any person may be exempt from disclosure. N.Y. Pub. Off. Law § 87(2)(f) (McKinney 1988). *See John H. v. Goord*, 27 A.D.3d 798, 809 N.Y.S.2d 682 (3d Dep't 2006) (request of inmate/petitioner for investigative reports, interviews and related documents generated in response to his allegations of sexual assault by a corrections officer were exempt from disclosure because disclosure would reveal the identity of a non-confidential witness, whose life or safety may then be in danger); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 174 A.D.2d 212, 578 N.Y.S.2d 928 (3d Dep't 1992) (denying access to portions of videotape of security system, storming of cells, other prison techniques during Attica uprising as possible endangerment to prison security and staff safety); *Newton v. Police Department City of New York*, 183 A.D.2d 621, 585 N.Y.S.2d 5 (1st Dep't 1992) (disclosure of certain law enforcement records could endanger the life or safety of person); *Connolly v. New York Guard*, 175 A.D.2d 372, 572 N.Y.S.2d 443 (3d Dep't 1991) (denying access to some of the mo-

bilization plans and documents of the New York Guard); *Bernier v. Mann*, 166 A.D.2d 798, 563 N.Y.S.2d 158 (3d Dep't 1990) (institutional safety justified denial of petitioner's request for information on inmates involved in a prison disturbance); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712 (3d Dep't 1990) (agency failed to establish that videotape of inmates endangered safety and security); *Dobranski v. Houper*, 154 A.D.2d 736, 546 N.Y.S.2d 180 (3d Dep't 1989) (denying access to deposition and criminal information underlying criminal complaint); *Stronza v. Hoke*, 148 A.D.2d 900, 539 N.Y.S.2d 528 (3d Dep't 1989) (agency need only demonstrate a possibility that information would endanger the lives or safety of individuals); *Lonski v. Kelly*, 149 A.D.2d 976, 540 N.Y.S.2d 114 (4th Dep't 1989) (denying access to videotape depicting petitioner's transfer to special housing unit); *Flowers v. Sullivan*, 149 A.D.2d 287, 545 N.Y.S.2d 289 (2d Dep't, 1989) (denying access to records of prison security system); *Nalo v. Sullivan*, 125 A.D.2d 311, 509 N.Y.S.2d 53 (2d Dep't 1986), *appeal denied*, 69 N.Y.2d 612, 511 N.E.2d 86 (1987) (denying access to records referring to petitioner as member of organized crime and escape risk); *Matter of Warner*, N.Y.L.J., March 17, 1995 (App. Div. 1st Dept. 1995) (ordering *in camera* inspection of police training material to determine whether exempt as criminal investigative techniques or procedures or would endanger life or safety of any person); *McDermott v. Lippman* N.Y.L.J., January 4, 1994 (Sup. Ct., New York County, 1993) (denying disclosure of security survey of New York trial courts due to possibility that disclosure will pose a danger to the life or safety of any person); *New York News v. Koch*, N.Y.L.J., May 22, 1987 (Sup.Ct., New York County, 1987) (denying access to records pertaining to a pending investigation of Bess Myerson on basis of prejudice to fair trial rights, harm to witnesses, confidential information, and privacy rights); *Elmira Star-Gazette v. Strojnowski*, No. 9924-84 (Sup. Ct., Albany County, Nov. 7, 1984) (denying access to state police reports); *ABC Inc. v. Siebert*, 110 Misc.2d 744, 442 N.Y.S.2d 855 (Sup. Ct. 1981) (granting access to names and business addresses of principals of check cashing businesses licensed by Banking Dep't, but denying access to other aspects of license applications, such as home addresses); *Whitfield v. Bailey*, 80 A.D.3d 417, 914 N.Y.S.2d 58 (1st Dep't 2011) (granting access to records but allowing redaction of names of witnesses who testified at trial since disclosure could endanger their life or safety); *Canty v. Office of Counsel*, 30 Misc.3d 705, 913 N.Y.S.2d 528 (Sup. Ct. 2010) (holding that while certain portions of the accident reports of correctional officers were subject to disclosure, certain identifying information could be redacted which might endanger the life or safety of the officers).

g. *Exemption for inter-agency or intra-agency materials.*

Inter-agency or intra-agency records are exempt from disclosure unless they are: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; or (iv) external audits, including audits by the comptroller or federal government. N.Y. Pub. Off. Law § 87(2)(g) (McKinney 1988). The exemption is intended to protect the deliberative process of government, and to encourage the free exchange of ideas among government policymakers. *See Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993) (inter-agency materials are construed to mean "deliberative material", i.e. communications exchanged for discussion purposes not constituting final policy decisions); *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 653 N.Y.S.2d 54(1996); *New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 796 N.Y.S.2d 302 (2005). The FOIL allows denial of access to predecisional memoranda or other nonfinal recommendations, whether or not action is taken. *Xerox v. Town of Webster*, 65 N.Y.2d 131, 480 N.E.2d 74, 490 N.Y.S.2d 488 (1985).

An agency, however, is not authorized to throw a protective blanket over all information by casting it in the form of an internal memo. *Miracle Mile Ass'n v. Yudelson*, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), *appeal denied*, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979).

With regard to the general applicability of the exemption, it has been held that "records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process." *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 480 N.E.2d 74, 490 N.Y.S.2d 488 (1985) (denying access to portions of appraisal reports prepared by private consulting firm for town). *Accord Goodstein & West v. O'Rourke*, 201 A.D.2d 731, 608 N.Y.S.2d 306 (2d Dept. 1994) (denying access of investigative report prepared by Department of Correction at the requests of the Office of Affirmative Action as inter-agency or intra-agency materials); *Austin v. Purcell*, 103 A.D.2d 827, 478 N.Y.S.2d 64 (2d Dep't 1984) (consultants' reports and opinion of outside counsel treated as intra-agency material); *Bray v. Mar*, 106 A.D.2d 311, 482 N.Y.S.2d 759 (lst Dep't 1984) (panel of outside experts considered part of agency); *Sea Crest Construction Corp. v. Stubing*, 82 A.D.2d 546, 442 N.Y.S.2d 130 (2d Dep't 1981) (correspondence between town and outside consultant is intra-agency); *Montalvo v. City of New York*, N.Y.L.J., October 19, 1995 (Sup. Ct., New York County, 1995) (an outside consultant); *Gannett Satellite Information Network Inc. v. City of Elmira*, No. 94-1752 (Sup. Ct., Chemung County, August 26, 1994) (denying access to appraisal figures of appraisers retained by City as professional opinions; not statistical or factual tabulations and data). *Town of Waterford v. New York State Dept. of Environmental Conservation*, 77 A.D.3d 224, 906 N.Y.S.2d 651 (3d Dep't 2010) (exemption for intra/inter-agency materials could be applied to records containing communications exchanged between state and federal agencies during planning and implementation of environmental remediation project). *But see Tuck-It-Away Assoc., L.P. v. Empire State Development Corp.*, 54 A.D.3d 154, 861 N.Y.S.2d 51 (1st Dep't 2008) (holding that the intra- or inter-agency exemption does not attach to a government agency's communications with a firm hired as a consultant by that agency whose approval is required for the project, when the same firm was also hired by the entity promoting the project in question)

Material which is not prepared by or at the behest of an agency cannot fall within the intra-agency exemption. The mere fact of records being collected by an agency and appended to its report does not transform a record into intra-agency material. *Ingram v. Axelrod*, 90 A.D.2d 568, 456 N.Y.S.2d 146 (3d Dep't 1982) (granting access to material not prepared by or for the department). *Accord Lowry v. Bureau of Labor Services*, No. 20438-83 (Sup. Ct., New York County, March 9, 1984) (granting access to correspondence between a public agency and a private organization it regulates).

Even if a record is a draft or preliminary, an agency is obliged to review the record for the purpose of disclosing those portions that are accessible. *Gould v. New York City Police Dept.*, 89 NY 2d 267, 675 NE 2d 808, 25 Med.L.Rptr. 1004 (1996) (holding that police complaint follow-up reports are not categorically exempt from disclosure and that police activity logs are agency records)

For cases granting access, *see Mulgrew v. Board of Educ. of City School Dist. of City of New York*, 31 Misc.3d 296, 919 N.Y.S.2d 786 (Sup. Ct. 2011) (holding that the names of teachers included in Teacher Data Reports do not fall under the exception since such names are "statistical or factual tabulations of data"); *Humane Soc'y of the United States v. Empire State Development Corp.*, 53 A.D.3d 1013, 863 N.Y.S.2d 107 (3d Dep't 2008) (copies of project finance memorandum and cost-benefit analysis for funding arrangement between private company and Empire State Development Corp. were not exempt from disclosure as an intra-agency material, provided that the state agency's projections were redacted from the record); *Humane Soc'y of the United States v. Brennan*, 53 A.D.3d 909, 861 N.Y.S.2d 234 (3d Dep't 2008) (handwritten notes and memoranda authored by a Department of Agriculture and Markets veterinarian in connection with the investigation of avian flu at a foie gras farm were not exempt from disclosure as intra-agency records, as they contained objective, factual data); *Tuck-It-Away Assoc., L.P. v. Empire State Development Corp.*, 54 A.D.3d 154, 861 N.Y.S.2d 51 (1st Dep't 2008) (holding that the intra- or inter-agency exemption does not attach to a government agency's communications with a firm hired as a consultant by that agency whose approval is required for the project, when the same firm was also hired by the entity promoting the

project in question); *New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 796 N.Y.S.2d 302 (2005) (held, dispatch calls made over Fire Department's internal communications system concerning response to September 11 terrorist attacks are disclosable "to the extent they consist of factual statements or instructions affecting the public"); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993) (while the nature of a classroom may be one of deliberation, teaching materials used in the course for years constitute final agency policy or determinations); *Professional Standards Review of America v. New York State Department of Health*, 193 A.D.2d 937 (3d Dept. 1993) (granting access to rating sheets used to make final determination, but remitting the matter for *in camera* inspection and redaction of any subjective commentary, opinions and recommendations); *Svaigsen v. City of New York*, 203 A.D.2d. 32, 609 N.Y.S.2d 894 (1st Dept. 1994) (granting access to interviews of investigating officers that might ordinarily be exempt as pre-decisional intra-agency materials where such interviews comprise a factual account); *Miller v. Hewlett-Woodmere Union Free School District*, N.Y.L.J., May 16, 1990 (Sup. Ct., Nassau County, 1990) (granting access to records of final decision denying request to change schools); *Rold v. Coughlin*, 142 Misc.2d 877, 538 N.Y.S.2d 896, (Sup. Ct. 1989) (granting access to inmate health care records as factual data and final agency determinations); *Faulkner v. DelGiacco*, 139 Misc.2d 790, 529 N.Y.S.2d 255 (Sup. Ct. 1988) (granting access to inmates statements as not intra-agency); *Matter of Woods*, N.Y.L.J. February 2, 1995 (Sup. Ct., New York County, 1995) (Ordering *in camera* inspection of police follow-up reports (DD-5's) to determine if they contain exempt opinions); *Smith v. Capasso*, 200 A.D.2d 502, 608 N.Y.S.2d 815 (1st Dept. 1994).

For cases denying access, *see Miller v. New York State Dept. of Transp*., 58 A.D.3d 981, 871 N.Y.S.2d 489 (3d Dep't 2009) (Department of Transportation documents are not exempt because they consist of communications with people outside the agency and press releases; contain "objective information" rather than "opinions;" and contain instructions to staff that affect the public); *In Re Pro*, 69 A.D.3d 1040, 892 N.Y.S.2d 642 (3d Dep't 2010) (specific documents withheld by the Department of Taxation and Finance met inter and intra-agency exemption because they contained predecisional, nonfinal discussion and recommendations); *Marino v. Pataki*, 55 A.D.3d 1171, 867 N.Y.S.2d 219 (3d Dep't 2008) (handwritten notes made in preparation for a presentence investigation report were exempt from disclosure as an "inter-agency material"); *Tate v. De Francesco*, 217 A.D.2d. 831, 629 N.Y.S.2d 529 (3d Dept. 1995) (denying, after *in camera* inspection, access to records regarding a prison altercation based on privacy, safety and intra-agency exemptions); *Rothenberg v. City University of New York*, 191 A.D.2d 195, 594 N.Y.S.2d 210 (1st Dept. 1993) (denying access to documents regarding an individual's failure to achieve the rank of professor); *O'Shaughnessy v. New York State Division of State Police*, 202 A.D.2d 508 (2d Dept. 1994) (denying access to request for records relating to his application for and subsequent denial to position of State Trooper consisting of opinions, advise, evaluations, conclusions or recommendations); *Rowland v. Scully*, 152 A.D.2d 570, 543 N.Y.S.2d 497 (2d Dep't 1989), *aff'd*, 76 N.Y.2d 725, 557 N.E.2d 112, 557 N.Y.S.2d 876 (denying access to assessment forms used to determine placement of an inmate as predecisional evaluations and recommendations); *Scott v. Chief Medical Examiner*, 179 A.D.2d 443, 577 N.Y.S.2d 861, (1st Dep't 1992) (denying access to police officer's memo book as exempt interagency material and as private property of officer); *Rome Sentinel Company v. City of Rome*, 174 A.D.2d 1005, 572 N.Y.S.2d 165 (4th Dep't 1991) (denying access to internal review of agency which consisted solely of opinions and subjective material); *Mitzner v. Sobol*, 173 A.D.2d 1064, 570 N.Y.S.2d 402 (3d Dep't 1991) (interim report and accompanying analysis were predecisional, interagency material exempt from disclosure under FOIL); *Stronza v. Hoke*, 148 A.D.2d 900, 539 N.Y.S.2d 528, (3d Dep't 1989) (denying access to inmates security assessment summaries as interagency or intra-agency records and as danger to life or safety); *Flores v. City of New York*, 207 A.D.2d 302, 615 N.Y.S.2d 400 (1st Dept. 1994) (denying access to Internal Affairs Division and Civilian Complaint Review Board as predecisional intra-agency materials); *Gannett Satellite Information Network Inc. v. City of Elmira*, No. 94-1752 (Sup. Ct., Chemung County, August 26, 1994) (denying access to status reports between City and the New York State Department of Equalization and Assessment as inter-agency material to the extent that they do not contain statistical or factual tabulations or data).

(i) *Statistical or factual tabulations or data*. For cases on statistical or factual tabulations or data, *see Professional Standards Review of America v. New York State Department of Health*, 193 A.D.2d 937 (3d Dept. 1993) (backup factual and statistical data to a final determination of an agency is not exempt from disclosure, however, the subjective comments, opinions and recommendations written by committee members are not required to be disclosed and may be redacted); *Akras v. Suffolk Department of Civil Service*, 137 A.D.2d 523, 524 N.Y.S.2d 266 (2d Dep't 1988) (granting access to factual material relating to reclassification of incumbent position); *MacRae v. Dolce*, 130 A.D.2d 577, 515 N.Y.S.2d 295 (2d Dep't 1987) (granting access to actual response times of firefighters contained in an exempt planning report); *Ingram v. Axelrod*, 90 A.D.2d 568, 456 N.Y.S.2d 146 (3d Dep't 1982) (granting access to factual portions of investigative report); *Polansky v. Regan*, 81 A.D.2d 102, 440 N.Y.S.2d 356 (3d Dep't 1981) (holding that "budget examiner's worksheet" is not automatically excluded from disclosure; *in camera* review necessary); *Miracle Mile Ass'n v. Yudelson*, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), *appeal denied*, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979) (granting developer access to factual materials regarding proposed shopping center); *Matter of Newsday Inc.*, N.Y.L.J. (1st Dept. 1992) (granting access to inter-agency audit report to the extent that it contains statistical information); *Gannett Satellite Information Network Inc. v. City of Elmira*, Index No. 94-1752 (Sup. Ct. Chemung County August 26, 1994) (granting access to factual inventory data compiled by appraisal firm retained by City); *Stewart Park and Reserve Coalition v. White*, No. 0191-ST2939, (Sup. Ct., Albany County, Sept. 4, 1991) (granting access to statistical and factual data even if latter used to form an opinion); *Rold v. Coughlin*, 142 Misc.2d 877, 538 N.Y.S.2d 896, (Sup. Ct. 1989) (inmate health care records are factual data and final agency determinations and are available to individual patients and, therefore, are not intra-agency material); *Warder v. Board of Regents*, 97 Misc.2d 86, 410 N.Y.S.2d 742 (Sup. Ct. 1978) (granting access to notes of Regents meeting consisting of factual data).

(ii) *Instructions to staff*. For cases on instructions to staff that affect the public, see *Miller v. New York State Dept. of Transp*., 58 A.D.3d 981, 871 N.Y.S.2d 489 (3d Dep't 2009) (Department of Transportation documents are not exempt because they contain instructions to staff); *Buffalo Broad. Co. v. City of Buffalo*, 126 A.D.2d 983, 511 N.Y.S.2d 759 (4th Dep't 1987) (granting access to tapes of police radio broadcasts); *Adirondack Park Local Government Review Board v. Adirondack Park Agency*, No. 273-81 (Sup. Ct., Essex County, June 24, 1981) (granting access to an agency report from its Legal Affairs Committee).

(iii) *Final agency policy or determination*. For cases on final agency policy or determinations, see *Kheel v. Ravitch*, 62 N.Y.2d 1, 464 N.E.2d 118, 475 N.Y.S.2d 814 (1984) (denying access to staff memo prepared for internal use in collective bargaining as nonfinal intra-agency memo); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993) (while the nature of a classroom may be one of deliberation, teaching materials used in the course for years constitute final agency policy or determinations); *Mitzner v. Sobol*, 173 A.D.2d 1064, 570 N.Y.S.2d 402 (3d Dep't 1991) (interim report was predecisional); *Grune v. New York State Dept. of Correctional Services*, 166 A.D.2d 834, 562 N.Y.S.2d 826 (3d Dep't 1990) (predecisional evaluations, recommendations and conclusions of inmates' conduct in prison are exempt); *Village of Tuckahoe v. Public Service Commission*, 150 A.D.2d 466, 541 N.Y.S.2d 221 (2d Dep't 1989), *motion for leave to appeal denied*, 74 N.Y.2d 609 (1989) (predecisional memoranda are exempt); *David v. Lewishohn*, 142 A.D.2d 305, 535 N.Y.S.2d 793, (3d Dep't 1988), *lv. denied*, 74 N.Y.2d 610, 546 N.Y.S.2d 554, 545 N.E.2d 868 (denying access to nonfinal recommendations contained in real property transfer data; *MacRae v. Dolce*, 130 A.D.2d 577, 515 N.Y.S.2d 295 (2d Dep't 1987) (denying access to city planning report

as predecisional draft); *Bray v. Mar*, 106 A.D.2d 311, 482 N.Y.S.2d 759 (lst Dep't 1984) (actions and recommendation of staff or panels represent final agency action when adopted by the agency); *Schumate v. Wilson*, 90 A.D.2d 832, 456 N.Y.S.2d 11 (2d Dep't 1982) (denying access to minutes, recommendations and similar materials regarding an inmate's temporary release determination); *Sinicropi v. County of Nassau*, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980), *appeal denied*, 51 N.Y.2d 704, 411 N.E.2d 797, 432 N.Y.S.2d 1028 (1980) (denying access to predecisional materials relating to disciplinary proceeding; charges, pleadings and stipulation of settlement had been provided); *Miracle Mile Ass'n v. Yudelson*, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), *appeal denied*, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979) (final determinations include decisions at every level of administrative process); *McAulay v. Board of Education*, 61 A.D.2d 1048, 403 N.Y.S.2d 116 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 659, 396 N.E.2d 1033, 421 N.Y.S.2d 560 (1979) (denying access to records of advisory hearing panel as predecisional); *New York 1 News v. President of the Borough of Staten Island*, 166 Misc.2d 270, 631 N.Y.S.2d 479 (Sup. Ct., Kings County 1995) (granting access to portions of staff member's prior oral or written discussion expressly adopted by the agency in explaining its final decision); *Rome Sentinel Company v. City of Rome*, 145 Misc.2d 183, 546 N.Y.S.2d 304 (Sup. Ct. 1989) (granting disclosure of final determination of fireman's suspension hearing, but denying access to documents which contain allegations, complaints, or witness names); *Rold v. Coughlin*, 142 Misc.2d 877, 538 N.Y.S.2d 896 (Sup. Ct. 1989) (inmate health care records are factual data and final agency determinations are available to individual patients and, therefore, are not intra-agency material); *Faulkner v. DelGiacco*, 139 Misc.2d 790, 529 N.Y.S.2d 255 (Sup. Ct. 1988) (denying access to investigative records of prison melee as predecisional material); *Montalvo v. City of New York*, N.Y.L.J. October 19, 1995 (Sup. Ct., New York County, 1995) (denying access to "final report" because report does not reflect final policy or determinations of the agency; denying access to reports of committee because they reflect only opinions and suggestions of the committee); *Gannett Satellite Information Network Inc. v. City of Elmira*, Index No. 94-1752 (Sup. Ct. Chemung County, August 26, 1994) (denying access to appraisal figures of appraisers retained by City as professional opinions; not statistical or factual tabulations and data; denying access to status reports between City and the New York State Department of Equalization and Assessment as inter-agency material to the extent that they do not contain statistical or factual tabulations or data).

h. *Exemption for examination questions or answers.*

Any examination questions or answers which are requested prior to the final administration of such questions are exempt. N.Y. Pub. Off. Law § 87(2)(h) (McKinney 1988). *See Social Services Employee Union v. Cunningham*, 109 Misc.2d 331, 437 N.Y.S.2d 1005 (Sup. Ct. 1981) (denying access to copies of Civil Service examination questions to allow for re-use); *Livoti v. Bahou*, No. 8418-81 (Sup. Ct., Albany County, Oct. 2, 1981) (denying access to copies of police sergeant exam questions and answers).

i. *Exemption for computer access codes.*

Computer access codes are exempt from disclosure. This law was amended recently to include any information that "would jeopardize an agency's capacity to guarantee the security of its information technology assets." N.Y. Pub. Off. Law § 87(2)(i) (McKinney 1988).

j. *Exemption for traffic-control signal photographs.*

Photographs, microphotographs, video-tape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law are exempt. N.Y. Pub. Off. Law § 87(2)(j) (McKinney Supp. 1993).

B. Other statutory exclusions.

In determining what constitutes the kind of specific statutory authority permitting an exemption from FOIL, the courts have held that what is required is clear legislative intent to establish and preserve confidentiality. *M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984).

The other statute need not expressly state that it is intended to establish a FOIL exemption, but it must show the intention of confidentiality. *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986). Only a state or federal statute and not an administrative rule, regulation or city ordinance will create an exemption under this section. *See Morris v. Martin*, 82 A.D.2d 965, 440 N.Y.S.2d 365 (3d Dep't 1981); *rev'd*, 55 N.Y.2d 1026, 434 N.E.2d 1079, 449 N.Y.S.2d 712 (1982); *Brownstone Publishers Inc. v. New York City Department of Finance*, 167 A.D.2d 166, 561 N.Y.S.2d 245 (1st Dep't 1990) (in 1989 the state legislature amended section 11-2115 of the Administrative Code of the City of New York to deem it a state statute for purposes of FOIL to enforce its "secrecy" provision). *Contra Faulkner v. LeFevre*, 140 Misc.2d 699, 532 N.Y.S.2d 337 (Sup. Ct. 1988) (redacting names from inmate grievance document pursuant to agency rule requiring privacy).

Where records are subject to other specific statutory exemptions, FOIL's provisions for deletion of identifying details do not remove confidentiality requirements. *Short v. Board of Managers*, 57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724 (1982).

A number of cases have addressed other state or federal statutes as a basis for exemption from disclosure, as set forth below.

1. *State law.*

a. Abandoned Property Law ("APL") [N.Y. Aband. Prop. Law (McKinney)].

U.S. Claims Services, Inc. v. New York State Dept. of Audit and Control, Office of the State Comptroller, 23 Misc.3d 923, 873 N.Y.S.2d 897 (Sup. Ct. Albany County 2009) (holding that the value of abandoned property, including value ranges, is exempt from disclosure under Abandoned Property Law § 1401).

b. *Civil practice law and rules* ("CPLR") [N.Y. Civ. Prac. L. & R. (McKinney)].

M. Farbman & Sons v. New York City, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984) (holding that CPLR Article 31 on discovery is not a statute "specifically exempting" public records from disclosure under the FOIL while noting that this holding did not address a possible claimed exemption on the more narrow basis of privilege (CPLR 3101[b]), attorney's work product (CPLR 3103[c]), and material prepared for litigation (CPLR 3101[d]), all of which might fall within the "specifically exempt" category);

Rustin v. Purcell, 103 A.D.2d 827, 478 N.Y.S.2d 64 (2d Dep't 1984) (issue of whether discussion of substance of report waived attorney-client privilege under CRLR 4503);

Sciascia v. City of New York, 96 A.D.2d 901, 466 N.Y.S.2d 74 (2d Dep't 1983) (granting access to investigatory file of the fire marshall's office, rejecting claim of exemption under CPLR);

In Re Estate of Schwartz, 130 Misc.2d 786, 497 N.Y.S.2d 834 (Sup. Ct. 1986) (the fact that investigatory records of the D.A. and police department regarding a possible homicide are exempt under FOIL does not automatically prevent disclosure; the provisions of the CPLR provide a second level of access to the litigant);

Malowsky v. LaPook, No. 10024-25 (Sup. Ct., Albany County, Sept. 27, 1985) (holding that an agency is not the proper party to raise the physician-patient privilege under CPLR 4504);

Mid-Boro Medical Group v. New York City Dep't of Finance, N.Y.L.J., Dec. 7, 1979 (Sup. Ct., Bronx County, 1979) (denying access to memos sent by department attorney to department official as within attorney-client privilege of CPLR 3101 (b)).

Various provisions in the CPLR deal with the fees that county clerks may charge for services that they provide. Section 8019 deals with

the preparation of copies, but referred only to copies made on paper. A new paragraph (5) added to section 8019(f) states that the provisions in FOIL dealing with the actual cost of reproducing records "in a medium other than paper" serve as the standard under which county clerks may assess fees for preparing copies of records.

c. *Civil rights law* [N.Y. Civ. Rights Law (McKinney)].*Fappiano v. N.Y. City Police Dep't*, 95 N.Y.2d 738, 724 N.Y.S. 2d 685 (2001) (held, exception in Civil Rights Law § 50-b(2)(a), which authorizes disclosure of information that may identify the victim of a sex crime to persons "charged" with a sexual offense, does not apply to convicted sex offenders who submitted FOIL requests for records pertaining to the offenses of which they were convicted, because they had already been convicted of the crimes charged and were therefore outside the scope of the exception);

Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 688 N.Y.S.2d 472 (1999) (held, records identifying 18 City of Schenectady police officers who were disciplined for engaging in off-duty misconduct exempt from disclosure as personnel records protected by Civil Rights Law § 50-a);

Capital Newspapers Division of Hearst Corp. v. Burns, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986) (granting access to sick leave report of police officer, rejecting contention that it was a personnel record exempted from disclosure by Civil Rights Law § 50-a);

Lyon v. Dunne, 180 A.D.2d 922, 580 N.Y.S.2d 803, (3d Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to complaints, reprimands and incidents of misconduct of police officers as records used to evaluate performance toward continued employment which are exempt under Civil Rights law § 50-a);

Prisoners' Legal Services v. New York State Dep't Correctional Services, 138 A.D.2d 712, 526 N.Y.S.2d 526, 73 N.Y.2d 26 (1988) (2d Dep't 1988) (denying legal services agency access to grievance and disciplinary records concerning correction officer under Civil Rights Law § 50-a, even though information was not physically placed in officer's personnel file);

In Re Carnevale, 68 A.D.3d 1290, 891 N.Y.S.2d 495 (3d Dep't 2009) (documents containing statements of police officers given to investigative body to determine whether discipline against officers was warranted were properly withheld as personal records of a law enforcement agency under Civil Rights Law § 50-a).

Capital Newspapers Div. of Hearst Corp. v. City of Albany, 63 A.D.3d 1336, 881 N.Y.S.2d 214 (3d Dep't 2009) ("gun tags" identifying officers involved in a police scandal fell within personnel records under Civil Rights Law § 50-a and were therefore exempt under a specific state or federal statute. However, the court ordered the "gun tags" disclosed with identifying information redacted).

Radio City Music Hall Productions v. New York City Police Dep't, 121 A.D.2d 230, 503 N.Y.S.2d 722 (lst Dep't 1986) (granting access to police investigation reports after redacting names and statements of confidential witnesses, with discussion in dissent of right of privacy of victim of sex offense under Civil Rights Law § 50-b);

Gannett Co. v. James, 86 A.D.2d 744, 447 N.Y.S 2d 781 (4th Dep't 1982), *appeal dismissed*, 56 N.Y.2d 502, 435 N.E.2d 1099, 450 N.Y.S.2d 1023 (1982) (denying access to records containing complaints against police officers and records concerning disciplinary action taken against police officers, holding them confidential under Civil Rights Law § 50-a as personnel records);

Flores v. City of New York, 207 A.D.2d 302, 615 N.Y.S.2d 400 (1st Dept. 1994) (denying access to Internal Affairs Division and Civilian Complaint Review Board as exempt from disclosure pursuant to Civil Right law § 50-a);

Muniz v. Roth, 162 Misc.2d 293, 620 N.Y.S.2d 700 (Sup. Ct. County 1994) (denying access to statements made during confidential hearings conducted pursuant to Executive Law § 6 and Civil Rights Law § 73);

Gannett Co. v. Riley, 161 Misc.2d 321, 613 N.Y.S.2d 559 (Sup. Ct. Monroe County 1994) (denying access to internal investigation and report of disturbance at county jail as personnel records exempt from disclosure under Civil Rights Law § 50-a; redacting the names is not sufficient to protect the confidentiality of records otherwise exempt under § 50-a);

Rome Sentinel Company v. City of Rome, 145 Misc.2d 183, 546 N.Y.S.2d 304 (Sup. Ct. 1989) (Civil Rights Law § 50-a did not prevent disclosure of final determination in fireman's suspension hearing);

Town of Woodstock v. Goodson-Todman Enterprises, 133 Misc.2d 12, 505 N.Y.S.2d 540 (Sup. Ct. 1986) (granting access to charges and proceedings regarding sleeping on duty; rejecting claim of exemption under Civil Rights Law § 50-a);

Alliance for the Preservation of Religious Liberty v. State, N.Y.L.J., April 10, 1979 (Sup. Ct., New York County, 1979) (denying access to records of Attorney General compiled under Executive Law § 63(8) and Civil Rights Law § 73(8));

People v. Morales, 97 Misc.2d 733, 412 N.Y.S.2d 310 (Crim. Ct. 1979) (denying access to records of Civilian Complaint Review Board based on Civil Rights Law § 50-a and ordering *in camera* review);

People v. Zanders, 95 Misc.2d 82, 407 N.Y.S.2d 410 (Sup.Ct. 1978) (granting access to personnel evaluation records regarding continued employment and promotion under Civil Rights Law § 50-a after *in camera* review);

People v. Pack, N.Y.L.J., April 27, 1978 (Crim. Ct., New York County, 1978) (denying access to police personnel records on basis of Civil Rights Law § 50-a, but granting access to records of Civilian Complaint Review Board).

Lesher v. Hynes, 80 A.D.3d 611, 914 N.Y.S.2d 264 (2d Dep't. 2011) (denying access to certain police records since they were expressly exempt under Civil Rights Law §50-b which prohibits disclosure of the name of a victim of a sexual offense).

Canty v. Office of Counsel, 30 Misc.3d 705, 913 N.Y.S.2d 528 (Sup. Ct. Albany County 2010) (holding no application of statutory exemption under Civil Rights Law § 50-a since accident reports were not relevant to continued employment or promotion)

d. *County law* [N.Y. County Law (McKinney)].

Lyon v. Dunne, 180 A.D.2d 922, 580 N.Y.S.2d 803, (3d Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to autopsy reports under County Law § 677[3]).

Moore v. Santucci, 151 A.D.2d 676, 543 N.Y.S.2d 103, (2d Dep't 1989) (autopsy reports are exempt under County law § 677[3][b]);

Scott v. Chief Medical Examiner, 179 A.D.2d 443, 577 N.Y.S.2d 861 (1st Dep't 1992) (County Law § 677 regarding autopsy report does not apply to New York County, which is wholly contained within a City);

Herald Co. v. Murray, 136 A.D.2d 954, 524 N.Y.S.2d 949 (4th Dep't 1988) (denying access to autopsy reports under County Law § 677[3]);

Bartczak v. Dillon, N.Y.L.J., Nov. 2, 1989 (Sup. Ct. Nassau County, 1989) (County Law § 2207(3) was a "state statute" exempting county attorney's records from FOIL).

Newsday v. O'Brien, No. 23660/87 (Sup. Ct., Nassau County, 1987).

e. *Criminal procedure law* [N.Y. Crim. P. Law (McKinney)].

Newton v. District Attorney, Bronx County, 186 A.D.2d 57, 588 N.Y.S.2d 269 (1st Dept. 1992) (Grand Jury testimony is specifically exempted from disclosure pursuant to Criminal Procedure Law § 190.25(4));

In re Thomas, 131 A.D.2d 488, 515 N.Y.S.2d 885 (2d Dep't 1987) (holding that a presentence report is confidential unless sentencing court authorizes its release under Criminal Procedure Law §§ 390.50,

390.60);

Planned Parenthood of Westchester v. Town Board of the Town of Greenburgh, 154 Misc.2d 971, 587 N.Y.S.2d 461 (Sup. Ct. 1992) (photos of arrestees sealed under Criminal Procedure Law § 160.55(1)(d) are not accessible under FOIL);

Maffeo v. New York Organized Crime Task Force, Index No. 92-18502 (Sup. Ct., Westchester County, April 14, 1993) (denying disclosure of applications made and warrants issued for eavesdropping and video surveillance pursuant to CPL § 700.55(1));

Journal Publishing Co. v. Office of the Special Prosecutor, 131 Misc.2d 417, 500 N.Y.S.2d 919 (Sup. Ct. 1986) (tape recordings made in course of criminal investigation held confidential when sealed under Criminal Procedure Law § 160.50);

King v. Dillon, No. 20859/84 (Sup. Ct., Nassau County, Dec. 19, 1984) (minutes of village board meeting available under FOIL even though transferred to District Attorney under Grand Jury subpoena; Criminal Procedure Law § 190.25 prohibits disclosure of Grand Jury proceedings but does not "eradicate records otherwise public in nature").

f. *Domestic relations law* [N.Y. Dom. Rel. Law (McKinney)].

In re Radov, N.Y.L.J., Oct. 19, 1981 (Sup. Ct., New York County, 1981) (birth records identifying natural parents held confidential under Domestic Relations Law § 114, Public Health Law § 4138(3)(d), Social Services Law § 372(4));

Gannett Co. v. City Clerk's Office, City of Rochester, 157 Misc.2d 349, 596 N.Y.S.2d 968 (Sup. Ct. Monroe County 1993), *aff'd*, 197 A.D.2d 919, 604 N.Y.S.2d 848 (4th Dept. 1993) (Domestic Relations Law § 19 does not exempt the names of marriage license applicants).

g. *Education law* [N.Y. Educ. Law (McKinney)].

Matter of Terry D, 182 A.D.2d 406 (1st Dep't 1992), *rev'd on other grounds*, 81 N.Y.2d 1042, 619 N.E.2d 389, 601 N.Y.S.2d 452 (1993) (confidentiality provisions of Education Law § 3212-a cannot defeat rights of criminal defendants to discover exculpatory evidence);

Murphy v. State Educ. Dept., 148 A.D.2d 160, 543 N.Y.S.2d 70, (1st Dep't 1989) (records of investigation of professional misconduct are confidential pursuant to Education Law § 6510(8) except from the order of a court in a pending action or proceeding).

LaRocca v. Board of Education, 159 Misc.2d. 90, 602 N.Y.S.2d 1009 (Sup. Ct. Nassau County 1993) (denying access to records relating to settlement of a disciplinary matter as protected by Education Law § 3020-a, 8 N.Y.C.R.R. Part 82.9; finding such documents to constitute employment records the release of which would constitute an unwarranted invasion of privacy), *modified*, *LaRocca v. Board of Education*, 220 A.D.2d 424, 632 N.Y.S.2d 576 (2d Dept. 1995) (holding that agency must release those portions of documents that do not constitute an "employment history" and ordering disclosure of redacted settlement agreement).

Village Times v. Three Village Cent. School Dist., No. 20325-83 (Sup. Ct., Suffolk County, March 21, 1984) (confidentiality provisions of Education Law § 3020-a do not extend to final determination);

Herald Co. v. School District, 104 Misc.2d 1041, 430 N.Y.S.2d 460 (Sup. Ct. 1980) (name of and charges lodged against tenured teacher found specifically exempt from disclosure by Education Law § 3020-a).

h. *Executive law* [N.Y. Exec. Law (McKinney)].

John v. New York State Ethics Commission, 178 A.D.2d 51, 581 N.Y.S.2d 882 (3d Dept. 1992) (Executive Law § 94(17)(a) permits respondent to prohibit the photocopying of annual financial disclosure statements while permitting the inspection of such documents);

Jordan v. Hammock, 86 A.D.2d 725, 447 N.Y.S.2d 44 (3d Dep't 1982) (denying access to certain records of Parole Board based upon confidentiality provisions of Executive Law § 259-k and implementing regulations);

Rold v. Cuomo, No. 1909-88 (Sup. Ct., Albany County, May 31, 1988) (granting access to registers required to be maintained by the Governor pursuant to Executive Law § 5(3) concerning applications for pardons, commutations, or executive clemency);

Muniz v. Roth, 162 Misc.2d 293, 620 N.Y.S.2d 700 (Sup. Ct. 1994) (denying access to statements made during confidential hearings conducted pursuant to Executive Law § 6 and Civil Rights Law § 73);

Robertson v. Chairman of Bd. of Parole, 122 Misc.2d 829, 471 N.Y.S.2d 1015 (Sup. Ct. 1984), *appeal dismissed*, 112 A.D.2d 333, 491 N.Y.S.2d 989 (2d Dep't 1985), *rev'd in part and dismissed in part*, 67 N.Y.2d 197, 492 N.E.2d 762, 501 N.Y.S.2d 634 (1986) (denying access to certain records of Parole Board based upon Executive Law § 259-k and implementing regulations);

Alliance for the Preservation of Religious Liberty v. State, N.Y.L.J., April 10, 1979 (Sup. Ct., New York County, 1979) (denying access to records of the Attorney General compiled under Executive Law § 63 (8) and Civil Rights Law § 73 (8)).

i. *General business law* [N.Y. Gen. Bus. Law (McKinney)].

Ragusa v. New York State Dept. of Law, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991) (Attorney General is authorized to disclose investigation of monopolies under General Business Law § 343).

j. *Judiciary law* [N.Y. Jud. Law (McKinney)].

Newsday v. Sise, 120 A.D.2d 8, 507 N.Y.S.2d 182 (2d Dep't 1986), *aff'd*, 71 N.Y.2d 146, 518 N.E.2d 930, 524 N.Y.S.2d 35 (1987) (names and addresses of jurors derived from questionnaire held confidential by Judiciary Law § 509-a).

k. *Labor law* [N.Y. Lab. Law (McKinney)]

Messina v. Lufthansa German Airlines, 83 A.D.2d 831, 441 N.Y.S.2d 557 (2d Dep't 1981) (holding that Labor Law § 537 would not restrict access to certain unemployment insurance records, but denying access on privacy grounds);

Clegg v. Bon Temps, Ltd., 114 Misc.2d 805, 452 N.Y.S.2d 825 (Civ. Ct. 1982) (information acquired for unemployment insurance purposes held confidential pursuant to Labor Law § 537).

Mullady v. Bogard, 153 Misc.2d 1018, 583 N.Y.S.2d 744 (Sup. Ct. 1992) (denying access to autopsy reports of the Chief Medical Examiner of the City of New York as exempt pursuant to New York City Charter 557(g)); *Matter of Mitchell*, N.Y.L.J. September 16, 1994 (Sup. Ct., New York County, 1994) (denying access to audiotape and autopsy worksheets pursuant to § 557(g) of the New York City Charter).

l. *Penal law* [N.Y. Penal Law (McKinney)].

Kwitny v. McGuire, 53 N.Y.2d 968, 424 N.E.2d 546, 441 N.Y.S.2d 659 (1981) (granting access to pistol license applications under FOIL and Penal Law § 400.00(5));

New York News Inc. v. Office of the Special State Prosecutor of the State of New York, 153 A.D.2d 512, 544 N.Y.S.2d 151 (1st Dep't 1989) (denying access to investigative information of leak from Grand Jury under FOIL and Penal Law § 215.70 which prohibits disclosure of matters before a Grand Jury).

m. *Personal privacy protection law* [N.Y. Pub. Off. Law, art. 6-A (McKinney)].

Records contained in an indexed computer data base may be protected by the New York State Personal Privacy Protection Law ("PPPL") which was enacted to protect against the danger to personal privacy posed by modern computerized data collection and retrieval systems. N.Y. Pub. Off. Law art. 6-A (McKinney). *See Spargo v. New York State*

Commission on Government Integrity, 140 A.D.2d 26 (3d Dep't 1988).

Lochner v. Surles, 149 Misc.2d 243, 564 N.Y.S.2d 673 (Sup. Ct. 1990) (consideration of case law under FOIL is appropriate in analyzing the PPPL);

Matter of Building a Better New York Committee v. New York State Commission on Government Integrity, 138 Misc.2d 829, 525 N.Y.S.2d 488 (Sup. Ct. 1988);

George v. New York Newsday, N.Y.L.J., October 4, 1994 (Sup. Ct. New York County, 1994) (Personal Privacy Protection Law provides a civil cause of action only against a government agency which is releasing private material; it is inapplicable to private parties).

n. *Public authorities law* [N.Y. Pub. Auth. Law (McKinney)]

Reape v. State of New York Metropolitan Transportation Authority, 185 A.D.2d 275, 586 N.Y.S.2d 23 (2d Dep't 1992) (denying access to Transit Adjudication Bureau records under Public Authorities Law § 1209-a[4][f]).

o. *Public health law* [N.Y. Pub. Health Law (McKinney)].

In 1988, Public Health Law § 4174(1)(a) was amended to require the Commissioner of Health to issue death certificates or transcripts only when they are required for certain enumerated purposes. This amendment has exempted death certificates from FOIL requests.

Short v. Board of Managers, 57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724 (1982) (denying access to certain medical records based on the confidentiality provisions of Public Health Law § 2803-c(3)(f) and § 2805-g(3) and Social Services Law § 369(3), and holding that deletion of identifying details as a means of removing the confidentiality requirements does not extend to records subject to specific statutory exemption);

John P. v. Whalen, 54 N.Y.2d 89, 429 N.E.2d 117, 444 N.Y.S.2d 598 (1981) (denying access to patient records and interviews obtained by State Board of Professional Medical Conduct during an investigation of charges of professional misconduct, holding such records confidential under Public Health Law § 230);

Williams & Connolly v. Axelrod, 139 A.D.2d 806, 527 N.Y.S.2d 113 (3d Dep't 1988) (denying access to certain documents relating to examination of town residents for chemical exposure on the basis of Public Health Law § 206(1)(j));

Miller v. Dep't of Health, 91 A.D.2d 975, 457 N.Y.S.2d 564 (2d Dep't 1983) (denying access to records of a patient abuse investigation of a nursing home under Public Health Law § 2803-d as well as other FOIL exemptions);

St. Joseph's Hospital v. Axelrod, 74 A.D.2d 698, 425 N.Y.S.2d 669 (3d Dep't 1980), *appeal denied*, 49 N.Y.2d 706, 405 N.E.2d 711, 428 N.Y.S.2d 1026 (1980) (holding that hospital's uniform financial reports are available under FOIL and Public Health Law § 2805-a);

Marshall v. State Bd. for Professional Medical Conduct, 73 A.D.2d 798, 423 N.Y.S.2d 721 (4th Dep't 1979), *appeal denied*, 49 N.Y.2d 709, 406 N.E.2d 1354, 429 N.Y.S.2d 1026 (1980) (denying access to requesting physician of records pertaining to charges of professional misconduct on basis of Public Health Law § 230);

In re Radov, N.Y.L.J., Oct. 19, 1981 (Sup. Ct., New York County, 1981) (birth records identifying natural parents held confidential under Domestic Relations Law § 114, Public Health Law § 4138(3)(d), Social Services Law § 372(4)).

p. *Public officers law* [N.Y. Pub. Off. Law (McKinney)].

Scott v. Records Access Officer, 65 N.Y.2d 294, 480 N.E.2d 1071, 491 N.Y.S.2d 289 (1985) (granting partial access to car accident reports filed by police department; Public Officers Law § 66-a which predates the FOIL and which opens accident records to members of public "having an interest therein" cannot be read to impose additional restrictions on access);

Kooi v. Chu, 129 A.D.2d 393, 517 N.Y.S.2d 601 (3d Dep't 1987) (confidentiality provisions of Tax Law §§ 384, 697 and Public Officers Law § 96 were not violated by disclosure of name of state employee who failed to file tax return);

Bensing v. LeFevre, 133 Misc.2d 198, 506 N.Y.S.2d 822 (Sup. Ct. 1986) (granting access to names of inmates housed in special unit, rejecting claim of exemption under Public Officers Law § 95).

q. *Real property tax law* [N.Y. Real Prop. Tax Law (McKinney)].

Property Valuation Analysts Inc. v. Williams, 164 A.D.2d 131, 563 N.Y.S.2d 545, (3d Dep't 1990) (Real property transfer reports are confidential under Real Property Tax law § 574[5]).

In the 2008 amendments, a new subparagraph (iv) added to section 89(2)(c) specifies that disclosure of records involving real property, such as assessment records critical to enable individuals to ascertain the fairness of their real property tax assessment, would not constitute an unwarranted invasion of personal privacy if disclosed.

r. *Real property transfer tax law of New York City* (1989 N.Y. Laws ch. 714, § 10).

Brownstone Publishers Inc. v. New York City Department of Finance, 167 A.D.2d 166, 561 N.Y.S.2d 245 (1st Dep't 1990) (in 1989 the state legislature amended section 11-2115 of the Administrative Code of the City of New York to deem it a state statute for purposes of FOIL to enforce its "secrecy" provision).

s. *Social services law* [N.Y. Soc. Serv. Law (McKinney)].

Short v. Board of Managers, 57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724 (1982) (denying access to certain medical records based on the confidentiality provisions of Public Health Law §§ 2803-c(3)(f) § 2805-g(3) and Social Services Law § 369(3), and holding that deletion of identifying details as a means of removing the confidentiality requirements does not extend to records subject to specific statutory exemption);

Sam v. Sanders, 55 N.Y.2d 1008, 434 N.E.2d 710, 449 N.Y.S.2d 474 (1982) (limiting access to records of foster care under Social Services Law § 372);

Wise v. Battistoni, 208 A.D.2d 755, 617 N.Y.S.2d 506 (2d Dept. 1994) (all Department of Social Services records relating to a child are confidential and pursuant to Social Services Law §§ 372(3) and (4) are not subject to disclosure under FOIL);

Newsday Inc. v. State of New York Commission on Quality of Care for the Mentally Disabled, No. 01-92-ST3734 (Sup. Ct., Albany County, December 22, 1992) (SSL § 422 precludes disclosure of investigative files of the Commission on Quality Care for the Mentally disabled with respect to reports of child abuse except for *bona fide* research purposes);

New York News Inc. v. Grinker, 142 Misc.2d 325, 537 N.Y.S.2d 770, (Sup. Ct. 1989) (foster care records are confidential under Social Services law § 372 and child abuse reports are confidential under Social Services law § 422);

Malowsky v. D'Elia, 160 A.D.2d 798, 163 N.Y.S.2d 479, (2d Dep't 1990) (medical histories of a child in foster care and of his natural parents shall be provided under Social Services law § 373(a) after deletion of identifying details);

New York Ass'n of Homes & Services for the Aging v. Axelrod, No. 7414-85 (Sup. Ct., Albany County, Aug. 18, 1985) (Social Services Law § 369(3) precludes disclosure of Patient Review Instruments on Medicaid patients);

In re Radov, N.Y.L.J., Oct. 19, 1981 (Sup. Ct., New York County, 1981) (birth records identifying names of natural parents held confidential under Domestic Relations Law § 114, Public Health Law § 4138(3)(d), Social Services Law § 372(4)).

t. *Tax law* [N.Y. Tax Law (McKinney)].

Kooi v. Chu, 129 A.D.2d 393, 517 N.Y.S.2d 601 (3d Dep't 1987) (confidentiality provisions of Tax Law §§ 384 and 697 and Public Officers Law § 96 were not violated by disclosure of name of state employee who failed to file tax return, because confidentiality is accorded to information submitted by taxpayers).

u. *Transportation law* [N.Y. Transp. Law (McKinney)].

Newsday Inc. v. State Dep't of Transportation, 5 N.Y. 3d 84, 800 N.Y.S. 2d 67 (2005) (held, priority lists of hazardous intersections and locations compiled by DOT not exempt from disclosure under FOIL pursuant to federal statute);

Bloomberg v. Hennessy, 99 Misc.2d 958, 417 N.Y.S.2d 593 (Sup. Ct. 1979) (accident reports prepared by Department of Transportation are not exempt from disclosure under Transportation Law § 117 and, thus, subject to public access under the FOIL);

McAuley v. Commissioner, 99 Misc.2d 83, 415 N.Y.S.2d 389 (Sup. Ct. 1979) (granting access to departmental accident records under FOIL and Transportation Law § 83, except for notice of accident filed by bus company under Transportation Law § 142).

u. *Election Law* [N.Y. Elec. Law (McKinney].

Waldman v. Vill. of Kiryas Joel, 31 A.D.3d 569, 819 N.Y.S.2d 72 (2d Dep't 2006) (denying disclosure on the basis that under New York Election Law § 3-220(2), certain election records may not be publicly disseminated, and are subject only to inspection).

2. *Federal law.*

Newsday Inc. v. State Dep't of Transportation, 5 N.Y.3d 84, 800 N.Y.S.2d 67 (2005) ("We hold that 23 U.S.C. § 409, which provides that certain documents relating to traffic safety shall not be subject to discovery in lawsuits arising out of traffic accidents, does not exempt these documents from disclosure under [FOIL].");

Shedrick v. Coughlin, 176 A.D.2d 391, 574 N.Y.S.2d 98, (3d Dep't 1991), *appeal dismissed*, 79 N.Y.2d 896, 590 N.E.2d 244, 581 N.Y.S.2d 659 (denying access to Alcoholics Anonymous records as exempt under Public Health Service Act § 544(a), as amended 42 U.S.C. § 290dd-3(a)).

Board of Education v. Regan, 131 Misc.2d 514, 500 N.Y.S.2d 978 (Sup. Ct. 1986) (denying access to computer list of students who might be eligible for student aid, based upon federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g);

Krauss v. Nassau Community College, 122 Misc.2d 218, 469 N.Y.S.2d 553 (Sup. Ct. 1983) (denying access to names and addresses of students as precluded by federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g).

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

There are no court-derived exclusions under FOIL. "Only where the material requested falls squarely within the ambit of one of the statutory exemptions may disclosure be withheld." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979).

The common law privilege which existed prior to FOIL has been abolished. "The public policy concerning governmental disclosure is fixed by the Freedom of Information Law. The common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed." *Doolan v. Boces*, 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979). *Accord In Re Estate of Schwartz*, 130 Misc.2d 786, 497 N.Y.S.2d 834 (Sur. Ct. 1986).

However, the attorney-client privilege may be asserted. *See Rye Police Ass'n v. City of Rye*, 34 A.D.3d 591, 824 N.Y.S.2d 163 (2d Dep't 2006) (documents protected by attorney-client privilege were exempt from disclosure).

D. Are segregable portions of records containing exempt material available?

Yes. An agency may deny access to records or a portion thereof. N.Y. Pub. Off. Law § 87(2) (McKinney 1988). *See Polansky v. Regan*, 81 A.D.2d 102, 440 N.Y.S.2d 356 (3d Dep't 1981).

An agency may also delete identifying details in the instance where disclosure would otherwise constitute an unwarranted invasion of personal privacy. N.Y. Pub. Off. Law § 87(2)(b) and 89(2) (McKinney 1988); *Short v. Board of Managers*, 57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724 (1982). *See, e.g., Harris v. City University*, 114 A.D.2d 805, 495 N.Y.S.2d 175 (1st Dep't 1985).

E. Homeland Security Measures.

New York may deny access to records if:

1. their disclosure could endanger the life or safety of any person, N.Y. Pub. Off. § 87(2)(f)

2. their disclosure would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, N.Y. Pub. Off. N.Y. Pub. Off § 87 (2)(i)

3. they are compiled for law enforcement purposes and, if disclosed, 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, N.Y. Pub. Off § 87(2)(e)(i)-(iv)

4. they are photographs, videotape, or other recorded images prepared under the state's vehicle and traffic law(this provision is only effective until Dec. 1, 2009) N.Y. Pub. Off. N.Y. Pub. Off § 87(2)(j).

III. STATE LAW ON ELECTRONIC RECORDS

A. Can the requester choose a format for receiving records?

There is nothing in the statute addressing the requester's right to choose a format for receiving records. Further, there is no case where a requester attempted to obtain records in a particular format. Case law has stated, however, that access to information in a computer cannot be restricted because it is not in printed form. *Babigian v. Evans*, 104 Misc.2d 140, 427 N.Y.S.2d 688 (Sup. Ct. 1980), *aff'd*, 97 A.D.2d 992 (1st Dept. 1983). Case law has also stated that when a portion of a document must be redacted, a state agency may refuse to allow inspection of that document, and instead require redacted copies of the document to be prepared, and charge the established copying fee. *Brown v. Goord*, 45 A.D.3d 930, 845 N.Y.S.2d 495 (3d Dep't 2007). On the other hand, an agency is not required to prepare any record not possessed or maintained by it. N.Y. Pub. Off. Law. § 89(3) (McKinney 1988).

B. Can the requester obtain a customized search of computer databases to fit particular needs?

FOIL does not require an agency to prepare any record not possessed or maintained by it. N.Y. Pub. Off. Law. § 89(3) (McKinney 1988); *Babigian v. Evans*, 104 Misc.2d 140, 427 N.Y.S.2d 688 (1980), *aff'd*, 97 A.D.2d 992 (1st Dept. 1983) (FOIL does not impose a duty upon a government office to compile statistics in response to an information request). The issue of FOIL disclosure of records maintained in agencies' computerized databases continues to be a developing area of law, and presents an interesting tension between FOIL's objective

of promoting accountability through maximum disclosure of governmental records and an agency's lack of a duty to "create" a record for public disclosure (i.e., through the reprogramming of an existing databases) in response to a FOIL request.

A foundational New York Court of Appeals case in this area is *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 880 N.E.2d 10, 849 N.Y.S.2d 489 (2007). In *Data Tree*, the Court of Appeals held that "if the records are maintained electronically by an agency and are retrievable with reasonable effort, that agency is required to disclose the information. In such situation, the agency is merely retrieving the electronic data that it has already compiled." In that case, questions of fact of fact existed as to whether disclosure of electronic documents could be accomplished by merely retrieving information already maintained electronically or would require the creation of a new record. For cases holdings stemming from *Data Tree* see *In Re New York Comm*., 72 A.D.3d 153, 892 N.Y.S.2d 377 (1st Dep't 2010) (holding that New York Committee for Occupational Safety and Health's request for all 2006 records transmitted to the City of New York be remanded to the Supreme Court for a hearing to determine whether City must produce electronically stored documents and whether producing hard copy documents creates an undue burden); *Hearst Corp. v. Office of State Comptroller*, 24 Misc.3d 611, 882 N.Y.S.2d 862 (N.Y. Sup. 2009) (held, disclosure of an electronic spreadsheet which would replace social security numbers with unique identifiers would require State Comptroller to create new records, which is not required under FOIL, but also that the State failed to demonstrate that data in tables that use social security numbers as their primary key is not retrievable through "a simple manipulation of the computer").

Although this continues to be an evolving issue, the 2008 amendments are now controlling. For cases prior to the amendments, and the *Data Tree* decision see:

Locator Serv. Grp., Ltd. v. Suffolk Cnty. Comptroller, 40 A.D.3d 760, 836 N.Y.S.2d 223 (2d Dep't 2007)(disclosure of list of all un-negotiated checks greater than $1,000 and copies of the computer screen showing the payee's names and addresses for those specific checks did not require the country to create a new record, because in order to access the information sought, county would only be performing queries within its database and utilizing existing software).

• *NYPIRG v. Cohen*, 188 Misc.2d 658, 663 (N.Y. County Sup. Ct., 2001)

"The [agency's] computers, as aforesaid, contain a great deal of information. To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here, all that is involved is that [the agency] is being asked to provide less than all of the available information. I find that in providing such limited information [the agency] is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency."

• *Gabriels v. Curiale*, 216 A.D.2d 850, 851 (3d Dep't 1995) (citations omitted)

"However, because the Department has no need to maintain records which only display the particular information petitioner seeks, it does not have an automated or 'batch' program to routinely compile and print out these records in a single report as it does with some of its other unattended recordkeeping. To accommodate petitioner's request, it is necessary for a computer operator to create new records through a 'computer run', i.e., a search of the online databases, accomplished by entering petitioner's criteria. We, therefore, agree with respondent that FOIL does not require the Department to create these new records, nor develop a program to accomplish this task for the purpose of complying with petitioner's request."

C. Does the existence of information in electronic format affect its openness?

No. The FOIL defines "record" to mean "any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever." N.Y. Pub. Off. Law. § 86(4). (McKinney 1988). This includes computer tapes or discs. *Id*; *Gabriels v. Curiale*, 216 A.D.2d 850, 628 N.Y.S.2d 882 (3d Dept. 1995) (FOIL applies to information contained in a computer database); *Guerrier v. Hernandez-Cuebas*, 165 A.D.2d 218, 566 N.Y.S.2d 406 (3d Dept. 1991) (FOIL does not differentiate between records that are maintained in written form or on computerized tapes or discs); *Brownstone Publishers Inc. v. New York City Department of Buildings*, 166 A.D.2d 294, 560 N.Y.S.2d 642 (1st Dept. 1990) (information on computer ordered transferred into computer tapes); *Szikszay v. Buelow*, 107 Misc.2d 886, 436 N.Y.S.2d 558 (Sup. Ct. 1981) (computer format of information does not alter right of access); *Babigian v. Evans*, 104 Misc.2d 140, 427 N.Y.S.2d 688 (Sup. Ct. 1980), *aff'd*, 97 A.D.2d 992 (1st Dept. 1983) (access to information in a computer cannot be restricted merely because it is not in printed form).

Records contained in an indexed computer data base may be protected by the New York State Personal Privacy Protection Law ("PPPL") which was enacted to protect against the danger to personal privacy posed by modern computerized data collection and retrieval systems. *See* Public Officers Law, Art. 6-A (McKinney); *Spargo v. New York State Commission on Government Integrity*, 140 A.D.2d 26, 531 N.Y.S.2d 417 (3d Dept. 1988).

D. How is e-mail treated?

While the statute does not address e-mail specifically, there are a number of advisory opinions from the New York State Department of State (*See eg* FOIL-AO-17045, March 17, 2008) clarifying that electronic mail, or "e-mail is considered a record under FOIL since the statute defines"record" to include information in any physical format whatsoever. N.Y. Pub. Off. Law § 86(4) (McKinney 1988).

E. How are text messages and instant messages treated?

The statute does not address text messages or instant messages, however, the statute defines"record" to include information in any physical format whatsoever. N.Y. Pub. Off. Law § 86(4) (McKinney 1988).

F. How are social media postings and messages treated?

The statute does not address social media messages or postings, however, the statute defines"record" to include information in any physical format whatsoever. N.Y. Pub. Off. Law § 86(4) (McKinney 1988).

G. How are online discussion board posts treated?

The statute does not address online discussion posts, however, the statute defines"record" to include information in any physical format whatsoever. N.Y. Pub. Off. Law § 86(4) (McKinney 1988).

H. Computer software

2. Is software and/or file metadata public?

In *Irwin v. Onondaga County Resource Recovery Agency*, 72 A.D.3d 314, 895 N.Y.S.2d 262 (4th Dep't 2010), the court engaged in analysis of a request for the metadata related to pictures contained on a web site. The court described three possible types of metadata: "substantive metadata," which is created by the software used to create a document and reflects editing changes or comments; "system metadata," which reflects automatically generated information about a document such as its author and time of creation and modification; and "embedded metadata," which is inputted into a file by a document's creator or user, but cannot be seen in the document's display. Examples of embedded metadata include the formuals used in a spread sheet, or linked files. The court ruled that "system metadata" consitutes a re-

cord under FOIL pursuant to *Data Tree, LLC v. Romaine*, because it is the electronic equivalent of notes on a file folder indicating the date ot its creation. However, the court specifically declined to rule whether substantive or embedded metadata were "records" subject to disclosure under FOIL.

Another ruling related to metadata is *Hearst Corp. v. State, Office of State Comptroller*, 24 Misc.3d 611, 882 N.Y.S.2d 862 (N.Y. Sup. 2009), in which the Supreme Court ruled that while metadata contained in databases maintained by the Office of the State Comptroller could constitute a trade secret subject to the exemption contained in § 87(2)(d), it could find no commercial harm in releasing the requested information.

I. How are fees for electronic records assessed?

The FOIL provides that unless otherwise prescribed by statute, the fee for copies of records shall not exceed $0.25 per photocopy not in excess of 9" by 14" or the actual cost of reproducing any other record. N.Y. Pub. Off. Law. § 87(1)(b)(iii)(McKinney 1988); Reese v. Mahoney, (Sup. Ct., Erie County, June 28, 1984) (allowing fee of $125 as actual cost of reproduction of computer tape).

J. Money-making schemes.

In general state agencies cannot profit from records requests. See NY. Pub. Off. Law. § 87(b)(iii) (McKinney 2006). Copying fees are limited to 25 cents per page when the paper is smaller than 9 by 14 inches or to the actual cost of reproducing other records. For electronic records, this includes the cost of the disc the requester receives the records on and a reasonable amount for the salary of the state employee who fulfills the request. See N.Y. State Comm. Open Govt. Advisory Opinion No.10866. However, the state legislature may pass statutes altering the fee structure of specific records. Local ordinances on fees are generally preempted by the state FOIL. See Sheehan v. City of Syracuse, 521 N.Y.S.2d 207 (1987).

K. On-line dissemination.

The statutes and case law do not directly address this issue.

IV. RECORD CATEGORIES -- OPEN OR CLOSED

A. Autopsy reports.

Spencer v. New York State Police, 187 A.D.2d 919, 591 N.Y.S.2d 207 (3d Dept. 1992) (portions of police files regarding autopsies performed on murder victims exempt from disclosure); *Lyon v. Dunne*, 180 A.D.2d 922, 580 N.Y.S.2d 803, (3d Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to autopsy reports under County Law § 677[3]). *See also Scott v. Chief Medical Examiner*, 179 A.D.2d 443, 577 N.Y.S.2d 861 (1st Dep't 1992), *cert. denied*, 113 U.S. 259, 121 L.E.2d 190 (County Law § 677 regarding autopsy report does not apply to New York County, which is wholly contained within a city); *Herald Co. v. Murray*, 136 A.D.2d 954, 524 N.Y.S.2d 949 (4th Dep't 1988) (denying access to autopsy reports under County Law § 677[3]); *Mullady v. Bogard*, 153 Misc. 2d 1018, 583 N.Y.S.2d 744 (Sup. Ct., 1992) (denying access to autopsy reports of the Chief Medical Examiner of the City of New York as exempt pursuant to New York City Charter 557(g)); *Matter of Mitchell*, N.Y.L.J. September 16, 1994 (Sup. Ct., New York County, 1994) (denying access under FOIL to audiotape and autopsy worksheets pursuant to § 557(g) of the New York City Charter).

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

Workers compensation records are generally exempt, but must have been in possession of the Workers Compensation Board at some point to qualify for the exemption. *See In Re New York Comm.*, 72 A.D.3d 153, 892 N.Y.S.2d 377 (1st Dep't 2010) (holding that because City could not demonstrate that requested documents were at some point in possession of the Worker's Compensation Board it failed to establish that records were exempt under the Workers Compensation Law).

When a correctional officer is injured, those portions describing the injuries will be exempt from accident reports. *See Canty v. Office of Counsel*, 30 Misc.3d 705, 913 N.Y.S.2d 528 (Sup. Ct. 2010) (exempting portions of accident reports of correctional officer describing officers' injuries as medical records).

C. Bank records.

Records resulting from examinations and investigations of banking organizations by the State Banking Department are expressly made confidential and not subject to subpoena by state statute. N.Y. Banking Law § 36 (10) (McKinney Supp. 1988). However, these records may be made available through publication, if in the judgment of the Superintendent of Banking, the ends of justice and public advantage would be served by disclosure. N.Y. Banking Law § 36 (10) (McKinney Supp. 1988).

D. Budgets.

Presumably open, but there is no law speaking directly on the issue.

E. Business records, financial data, trade secrets.

An agency may deny access to records which are trade secrets or are maintained for the regulation of commercial enterprises which if disclosed would cause substantial injury to the competitive position of the subject enterprise. N.Y. Pub. Off. Law § 87 (2)(d) (McKinney 1988).

For cases on other business records, see *Washington Post v. Insurance Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984) (granting access to minutes of insurance company meetings in possession of Insurance Department); *St. Joseph's Hospital v. Axelrod*, 74 A.D.2d 698, 425 N.Y.S.2d 669 (3d Dep't 1980), *appeal denied*, 49 N.Y.2d 706, 405 N.E.2d 711, 428 N.Y.S.2d 1026 (1980) (granting access to uniform financial report); *ABC Inc. v. Siebert*, 110 Misc.2d 744, 442 N.Y.S.2d 855 (Sup. Ct. 1981) (granting access to names and business addresses of principals of check cashing businesses, but denying access to home addresses on basis of endangerment of life and safety); *Flatbush Dev. Corp. v. Insurance Dep't*, N.Y.L.J. Oct. 7, 1983 (Sup. Ct., New York County, 1983) (granting access to records indicating identities of insurance companies for properties in a particular area); *Hopkins v. Hennessy*, (Sup. Ct., Erie County, Dec. 23, 1980) (granting access to names, addresses and payroll records of employees of government contractor but denying access, on privacy basis, to records on dues and Social Security numbers because agency offered only conclusory assertions regarding privacy and failed to meet its burden of proof); *Herald Company v. New York State Lottery*, No. 01-87-ST0944, (Sup. Ct., Albany County, August 28, 1987) (granting access to lottery sales figures).

F. Contracts, proposals and bids.

An agency may deny access to records or portions thereof if disclosure would impair present or imminent contract awards. N.Y. Pub. Off. Law § 87(2)(c) (McKinney 1988).

For cases on proposals and bids, see *N.Y. Racing Ass'n, Inc. v. State, Racing and Wagering Bd.*, 21 Misc.3d 379, 863 N.Y.S.2d 540 (N.Y. Sup. Ct. 2008) (holding that release of documents concerning confidential bidding correspondence in connection with a state contract between private corporation and state agency was exempt from disclosure under FOIL, as the request documents were "proprietary trade information"); *City of Schenectady v. O'Keeffe*, 50 A.D.3d 1384, 856 N.Y.S.2d 281 (3d Dep't 2008) (holding that records pertaining to a public utility's franchise and right-of-way agreement with a state agency, and which contained cost and inventory data identifying and tracking all of the utility's property assets that are employed along the right-of-way and used to transmit and distribute electricity, was exempt from disclosure as a trade secret, the release of which would cause substantial competitive injury); *Professional Standards Review of America v. New York State Department of Health*, 193 A.D.2d 937 (3d Dept. 1993)

(granting access to contract bid submitted by private organization and to factual and statistical data used by agency in making its final determination to award the contract); *P. J. Garvey Carting and Storage Inc. v. County of Erie*, 125 A.D.2d 972, 510 N.Y.S.2d 365 (4th Dep't 1986) (unsuccessful bidder unable to get damages for release of its "route list" by county in solicitation of bids); *Contracting Plumbers Cooperative Restoration Corp. v. Ameruso*, 105 Misc.2d 951, 430 N.Y.S.2d 196 (Sup. Ct. 1980) (granting unsuccessful bidder access to successful bid proposal).

G. Collective bargaining records.

An agency may deny access to records or portions thereof if disclosure would impair collective bargaining negotiations. N.Y. Pub. Off. Law § 87(2)(c) (McKinney 1988). *See also Kheel v. Ravitch*, 62 N.Y.2d 1, 464 N.E.2d 118, 475 N.Y.S.2d 814 (1984) (denying access to internal memo on prospective collective bargaining negotiations based on interagency exemption).

H. Coroners reports.

Herald Co. v. Murray, 136 A.D.2d 954, 524 N.Y.S.2d 949 (4th Dep't 1988) (denying access to autopsy report based upon County Law § 677 applicable to both autopsy reports and coroners' records); New York Pub. Health Law § 4174(1)(a) (McKinney 1985 & Supp. 1996) (requiring issuance of death certificate or transcript only in certain enumerated situations and only when required for a proper purpose).

I. Economic development records.

Presumably open, but no law speaks directly on the issue.

J. Election records.

Gates v. Dyson, 55 A.D.2d 705, 389 N.Y.S.2d 154 (3d Dep't 1976) (granting access to records regarding referendum on extension of dairy promotion order); *Reese v. Mahoney*, (Sup. Ct., Erie County, June 28, 1984) (granting access to computer tapes with voter telephone numbers and voter histories).

K. Gun permits.

According to the express terms of N.Y. *Penal Law* § 400.00(5), "the name and address of any person" who has been granted a pistol permit license "shall be a public record." *See Sportsmen's Ass'n v. Kane*, 178 Misc.2d 185 (Nassau Co. Sup. Ct., 1998) ("it is clear that the Legislature intended only the name and address of the [pistol permit] licensee to be a public record"), *aff'd*, 266 A.D.2d 396 (2d Dep't 1999).

L. Hospital reports.

Foster care records.

Sam v. Sanders, 55 N.Y.2d 1008, 434 N.E.2d 710, 449 N.Y.S.2d 474 (1982) (limiting access to records of foster care under Social Services Law § 372); *Wise v. Battistoni*, 208 A.D.2d 755, 617 N.Y.S.2d 506 (2d Dept. 1994) (all Department of Social Services records relating to a child are confidential and pursuant to Social Services Law § 372(3) and (4) are not subject to disclosure under FOIL); *Malowsky v. D'Elia*, 160 A.D.2d 798, 163 N.Y.S.2d 479 (2d Dep't 1990) (medical histories of a child in foster care and of his natural parents shall be provided under Social Services Law § 373(a) after deletion of identifying details); *New York News Inc. v. Grinker*, 142 Misc.2d 325, 537 N.Y.S.2d 770, (Sup. Ct. 1989) (foster care records are confidential under Social Services law § 372, and child abuse reports are confidential under Social Services law § 422).

Hospital and health care facility reports.

Miller v. Dep't of Health, 91 A.D.2d 975, 457 N.Y.S.2d 564 (2d Dep't 1983) (denying access to records of a patient abuse investigation of a nursing home under Public Health Law § 2803-d as well as other FOIL exemptions); *Ingram v. Axelrod*, 90 A.D.2d 568, 456 N.Y.S.2d 146 (3d Dep't 1982) (granting access to hospital records and factual portions of investigative report); *St. Joseph's Hospital v. Axelrod*, 74 A.D.2d 698, 425 N.Y.S.2d 669 (3d Dep't 1980), *appeal denied*, 49 N.Y.2d 706, 405 N.E.2d 711, 428 N.Y.S.2d 1026 (1980) (granting access to uniform financial report); *New York Association of Homes & Services for the Aging Inc. v. Axelrod*, No. 7414-85 (Sup. Ct., Albany County, Aug. 28, 1985) (denying access to Patient Review Instruments on Medicaid Patients based on Social Services Law § 369(3)); *Fox v. Krill*, No. 3406-81 (Sup. Ct., Albany County, May 15, 1981) (denying access to records of investigation of patient abuse in health care facility).

Medical records.

Short v. Board of Managers, 57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724 (1982) (denying access to medical records as exempt from disclosure by Public Health Law and Social Services Law); *John P. v. Whalen*, 54 N.Y.2d 89, 429 N.E.2d 117, 444 N.Y.S.2d 598 (1981) (denying access to patient records and patient and doctor interviews compiled by State Board for Professional Misconduct during investigation, information confidential by Public Health Law); *Newton v. District Attorney, Bronx County*, 186 A.D.2d 57, 588 N.Y.S.2d 269 (1st Dept. 1992) (denying access to medical records as an unwarranted invasion of personal privacy); *Marshall v. State Bd. for Professional Medical Conduct*, 73 A.D.2d 798, 423 N.Y.S.2d 721 (4th Dep't 1979), *appeal denied*, 49 N.Y.2d 709, 406 N.E.2d 1354, 429 N.Y.S.2d 1026 (1980) (denying access to information giving rise to professional misconduct charges against psychiatrist); *Rold v. Coughlin*, 142 Misc.2d 877, 538 N.Y.S.2d 896 (Sup. Ct. 1989) (access to inmate health care records granted with identifying details redacted); *Malowsky v. LaPook*, No. 10024-25 (Sup. Ct., Albany County, Sept. 27, 1985) (granting access to an inmate's medical records, in order for inmate's son to acquire information about his background).

Medical histories.

A medical history is information that one would reasonably expect to be included as a relevant and material part of a proper medical history. A medical history is exempt from disclosure whether or not given to a health care provider or contained in an employment application. *Hagin v. Department of Motor Vehicles*, 79 N.Y.2d 106, 588 N.E.2d 750, 580 N.Y.S.2d 715 (1992) (responses on driver's license application regarding disabilities is exempt as a medical history).

Other records.

Shedrick v. Coughlin, 176 A.D.2d 391, 574 N.Y.S.2d 98, (3d Dep't 1991) (denying access to inmates Alcoholics Anonymous records as confidential under federal statute, however, disclosure of confidential information may be warranted in the context of a pending criminal proceeding).

M. Personnel records.

1. Salary.

Each agency shall maintain a record setting forth the name, public office address, title and salary of every officer or employee of the agency. N.Y. Pub. Off. Law § 87(3)(b) (McKinney 1988). *Doolan v. BOCES*, 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979) (granting access to regional salary and fringe benefit data compiled for member school districts as part of subscription service); *Buffalo News v. Buffalo Municipal Housing Authority*, 163 A.D.2d 830, 558 N.Y.S.2d 364 (4th Dep't 1990) (granting access to housing authority payroll records); *Hopkins v. City of Buffalo*, 107 A.D.2d 1028, 486 N.Y.S.2d 514 (4th Dep't. 1985) (granting access to payroll records of several public work projects); *Gannett Co. v. County of Monroe*, 59 A.D.2d 309, 399 N.Y.S.2d 534 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 954, 383 N.E.2d 1151, 411 N.Y.S.2d 557 (1978) (granting access to salary levels of terminated county employees); *Day v. Town Board of Milton*, No. 4Q-14 (Sup. Ct., Saratoga County, April 27, 1992) (granting access to redacted W-2 form); *Young v. Smith*, No. 86-0307 (Sup. Ct., Essex County, Jan. 9, 1987) (granting access to vouchers approved by the village board of trustees for payment of village attorney); *Minerva v. Village of Valley Stream*, No, 7566/81 (Sup. Ct., Nassau County, May 20, 1981) (grant-

ing access to front of village attorney's paycheck, but denying request to examine and copy the back of the check on the basis of privacy exemption); *Hopkins v. Hennessy*, (Sup. Ct., Erie County, Dec. 23, 1980) (granting access to payroll records of the employees of a government contractor but denying access to union dues and Social Security numbers to prevent unwarranted invasion of personal privacy); *In re Wool*, N.Y.L.J., Nov. 22, 1977 (Sup. Ct., Nassau County, 1977) (denying access to union dues check-off information within payroll record under privacy exemption).

Although the Board of Education is not required to release home addresses of employees, it has authority to release this information. *Buffalo Teachers Federation Inc. v. Buffalo Board of Ed*., 156 A.D.2d 1027, 549 N.Y.S.2d 541 (4th Dep't 1989).

2. Disciplinary records.

School personnel.

LaRocca v. Board of Education, 159 Misc.2d. 90, 602 N.Y.S.2d 1009 (Sup. Ct. Nassau County 1993) (denying access to records relating to settlement of a disciplinary matter as protected by Education Law § 3020-a, 8 N.Y.C.R.R. Part 82.9; finding such documents to constitute employment records the release of which would constitute an unwarranted invasion of privacy), *modified*, ___ A.D.2d ___, 632 N.Y.S.2d 576 (2d Dept. 1995) (holding that agency must release those portions of documents that do not constitute an "employment history" and ordering disclosure of redacted settlement agreement).

Hickman v. Board of Education, No. 4379 (Sup. Ct., Suffolk County, Aug. 5, 1987) (granting access to letter of resignation of internal auditor); *Village Times v. Three Village Cent. School Dist.*, No. 20325-83 (Sup. Ct., Suffolk County, March 21, 1984) (granting access to a stipulation of settlement in teacher disciplinary proceedings, with the name of teacher redacted to prevent an unwarranted invasion of privacy); *Herald Co. v. School District*, 104 Misc.2d 1041, 430 N.Y.S.2d 460 (Sup. Ct. 1980) (denying access to name and unproven charges against tenured teacher on basis of interagency exemption and Education Law § 3020-a); *Blecher v. Board of Education*, N.Y.L.J., Oct. 25, 1979 (Sup. Ct., Kings County, 1979) (granting access to complaints, reprimands and evaluations contained in personnel file as "final determinations"); *Mulgrew v. Board of Educ. of City School Dist. of City of New York*, 31 Misc.3d 296, 919 N.Y.S.2d 786 (Sup. Ct. 2011) (rejecting a claim that releasing the names of public school teachers in Teacher Data Reports are an invasion of privacy because their release rationally balanced in the public interest)

Law enforcement personnel.

Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 688 N.Y.S.2d 472 (1999)(held, disciplinary records pertaining to off-duty misconduct involving 18 police offers are exempt from disclosure as personnel records pursuant to Civil Rights Law § 50-a); *Prisoners' Legal Services of New York v. Dep't of Correctional Services*, 73 N.Y.2d 26, 538 N.Y.S.2d 190, 535 N.E.2d 243 (1988) (denying access to inmate grievances against correction officers and the administrative decisions relating thereto as exempt personnel records); *O'Shaughnessy v. New York State Division of State Police*, 202 A.D.2d 508 (2d Dept. 1994) (denying access to request for records relating to his application for and subsequent denial to position of state trooper consisting of opinions, advise, evaluations, conclusions or recommendations); *Obiajulu v. City of Rochester*, 213 A.D.2d 1055, 625 N.Y.S.2d 779 (4th Dept. 1995) (holding that disclosure of performance evaluations and appraisals do not constitute an invasion of privacy when identifying details are deleted; disciplinary charges, the agency determination of those charges, and the penalties imposed are not exempt from disclosure); *Prisoners' Legal Services v. New York State Dep't Correctional Services*, 138 A.D.2d 712, 526 N.Y.S.2d 526, 73 N.Y.2d 26 (1988) (2d Dep't 1988) (denying access to grievance and disciplinary records of correction officer under Civil Rights Law § 50-a); *Lyon v. Dunne*, 180 A.D.2d 922, 580 N.Y.S.2d 803, (3d Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to complaints, reprimands and incidents of misconduct of police officers as records used to evaluate performance toward continued employment which are exempt under Civil Rights law § 50-a); *Newsday v. New York City Police Dep't*, 133 A.D.2d 4, 518 N.Y.S.2d 966 (1st Dep't 1987) (denying access to records of firearms discharge as intra-agency materials); *Mooney v. State Police*, 117 A.D.2d 445, 502 N.Y.S.2d 828 (3d Dep't 1986) (granting access to investigative reports and discharge documents); *Gannett Co. v. James*, 86 A.D.2d 744, 447 N.Y.S.2d 781 (4th Dep't 1982), *appeal dismissed*, 56 N.Y.2d 502, 435 N.E.2d 1099, 450 N.Y.S.2d 1023 (1982) (denying access to complaints and records of disciplinary action taken against police officers on basis that such records are part of personnel records and thus confidential under Civil Rights Law § 50-a; complaints also exempt as they might interfere with law enforcement investigations or identify a confidential source; use of force forms, while not personnel records, held exempt from disclosure as intra-agency materials); *Sinicropi v. County of Nassau*, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980), *appeal denied*, 51 N.Y.2d 704, 411 N.E.2d 797, 432 N.Y.S.2d 1028 (1980) (denying access, on intra-agency ground, to materials prepared for disciplinary hearing of probation officer); *Walker v. City of New York*, 64 A.D.2d 980, 408 N.Y.S.2d 811 (2d Dep't 1978) (granting access to complaints and investigations of police officer); *Gannett Co. v. Riley*, 161 Misc.2d 321, 613 N.Y.S.2d 559 (Sup. Ct. Monroe County 1994) (denying access to internal investigation and report of disturbance at county jail as personnel records exempt from disclosure under Civil Rights Law § 50-a; redacting the names is not sufficient to protect the confidentiality of records otherwise exempt under § 50-a); *Town of Woodstock v. Goodson-Todman Enterprises*, 133 Misc.2d 12, 505 N.Y.S.2d 540 (Sup.Ct. 1986) (granting access to records on discipline of constables, rejecting claim of exemption based on Civil Rights Law § 50-a); *Petix v. Connelie*, 99 Misc.2d 343, 416 N.Y.S.2d 167 (Sup. Ct. 1979) (denying access to records of internal investigation of state policeman in a case where no charges were preferred); *People v. Morales*, 97 Misc.2d 733, 412 N.Y.S.2d 310 (Crim. Ct. 1979) (denying access to records of Civilian Complaint Review Board as intra-agency records and on basis of Civil Rights Law § 50-a, and ordering *in camera* review); *People v. Pack*, N.Y.L.J., April 27, 1978 (Crim. Ct., New York County, 1978) (denying access to police personnel records on basis of Civil Rights Law § 50-a, but granting access to records of Civilian Complaint Review Board); *Montes v. State*, 94 Misc.2d 972, 406 N.Y.S.2d 664 (Ct. Cl. 1978) (granting access to personnel records of parole officer to obtain information on complaints and incidents in false arrest case); *In Re Carnevale*, 68 A.D.3d 1290, 891 N.Y.S.2d 495 (3d Dep't 2009) (documents containing statements of police officers given to investigative body to determine whether discipline against officers was warranted were properly withheld as personal records of a law enforcement agency under Civil Rights Law § 50-a); *Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 63 A.D.3d 1336, 881 N.Y.S.2d 214 (3d Dep't 2009) ("gun tags" identifying officers involved in a police scandal fell within personnel records under Civil Rights Law § 50-a and were therefore exempt under a specific state or federal statute. However, the court ordered the "gun tags" disclosed with identifying information redacted).

Health care personnel.

John P. v. Whalen, 54 N.Y.2d 89, 429 N.E.2d 117, 444 N.Y.S.2d 598 (1981) (denying access to patient records and patient and doctor interviews compiled by State Board for Professional Misconduct during investigation; information confidential by Public Health Law); *Miller v. Dep't of Health*, 91 A.D.2d 975, 457 N.Y.S.2d 564 (2d Dep't 1983) (denying access to records of a patient abuse investigation of a nursing home under Public Health Law § 2803-d as well as other FOIL exemptions); *Marshall v. State Bd. for Professional Medical Conduct*, 73 AD.2d 798, 423 N.Y.S.2d 721 (4th Dep't 1979), *appeal denied*, 49 N.Y.2d 709, 406 N.E.2d 1354, 429 N.Y.S.2d 1026 (1980) (denying access to information giving rise to professional misconduct charges against psychiatrist).

Other personnel.

Wilson v. Town of Islip, 179 A.D.2d 763, 578 N.Y.S.2d 642 (2d Dep't

1992) (granting access to portion of Homestead Program application to show whether applicants are past or present employees of town); *Buffalo News v. Buffalo Municipal Housing Authority*, 163 A.D.2d 830; 558 N.Y.S.2d 364 (4th Dep't 1990) (granting access to housing authority disciplinary records); *Rome Sentinel Company v. City of Rome*, 145 Misc.2d 183, 546 N.Y.S.2d 304 (Sup. Ct. 1989) (granting disclosure of final determination of fireman's suspension hearing, but denying access to documents which contain allegations, complaints, or witness names); *Willson v. Washburn* (Sup. Ct., Oneida County November 18, 1993) (granting access to requester's own personnel file); *Geneva Printing v. Village of Lyons*, No. 18713 (Sup. Ct., Wayne County, March 25, 1981) (granting access to confidential settlement of disciplinary action against village employee).

3. Applications.

Obiajulu v. City of Rochester, 213 A.D.2d 1055, 625 N.Y.S.2d 779 (4th Dept. 1995) (holding that disclosure of performance evaluations and appraisals do not constitute an invasion of privacy when identifying details are deleted; disciplinary charges, the agency determination of those charges, and the penalties imposed are not exempt from disclosure); *O'Shaughnessy v. New York State Division of State Police*, 202 A.D.2d 508 (2d Dept. 1994) (denying access to request for records relating to his application for and subsequent denial to position of state trooper consisting of opinions, advice, evaluations, conclusions or recommendations); *Lyon v. Dunne*, 180 A.D.2d 922, 580 N.Y.S.2d 803, (3d Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (records used to evaluate performance toward continued employment of three state police officers were exempt from disclosure); *Akras v. Suffolk Department of Civil Service*, 137 A.D.2d 523, 524 N.Y.S.2d 266 (2d Dep't 1988) (granting access to factual portions of records pertaining to application for reclassification of incumbent position); *Public Education Ass'n v. Board of Examiners*, 93 A.D.2d 838, 461 N.Y.S.2d 60 (2d Dep't 1983) (denying access to studies of job analyses on basis of interagency exemption); *Rainey v. Levitt*, 138 Misc.2d 962, 525 N.Y.S.2d 551 (Sup. Ct. 1988) (granting access to examination grades of certain persons taking civil service exam for promotion to sergeant); *Shaw v. Lerer*, 112 Misc.2d 260, 446 N.Y.S.2d 885 (Sup. Ct. 1981) (denying access to rating sheets of hockey referee prepared by school coaches as interagency records); *People v. Zanders*, 95 Misc.2d 82, 407 N.Y.S.2d 410 (Sup. Ct. 1978) (granting access to those portions of personnel files of transit police officers which related to continued employment and promotion, after *in camera* review).

4. Personally identifying information.

Often this type of information will be redacted from records under FOIL's "invasion of personal privacy" exemption.

5. Expense reports.

Presumably open, but there is no law that speaks directly to the issue.

6. Other.

FOIL was amended in 1983 to provide that nothing therein shall require the disclosure of home addresses of retirees, beneficiaries, officers or employees of a public employees' retirement system or of an applicant for appointment to public employment. N.Y. Pub. Off. Law § 89(7) (McKinney 1988). *See New York Veteran Police Ass'n v. New York City Police Dep't Art. I Pension Fund*, 61 N.Y.2d 659, 460 N.E.2d 226, 472 N.Y.S.2d 85 (1983).

For additional cases on other personnel records, see *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986) (granting access to record of sick time taken by particular police officer); *Seeling v. Sielaff*, 201 A.D.2d 298, 607 N.Y.S.2d 300 (1st Dep't 1994) (the release of Social Security numbers constitutes an unwarranted invasion of privacy); *Buffalo News v. Buffalo Municipal Housing Authority*, 163 A.D.2d 830, 558 N.Y.S.2d 364 (4th Dep't 1990) (granting access to records regarding days worked, leave taken with or without pay, and leave accrued by employees); *Messina v. Lufthansa German Airlines*, 83 A.D.2d 831, 441 N.Y.S.2d 557 (2d Dep't 1981) (denying access to records of unemployment insurance benefits paid to recipient as an unwarranted invasion of personal privacy); *Bahlman v. Brier*, 119 Misc.2d 100, 462 N.Y.S.2d 381 (Sup. Ct. 1983) (deleting names from report on sick leave of city employees); *Clegg v. Bon Temps, Ltd.*, 114 Misc.2d 805, 452 N.Y.S.2d 825 (Civ. Ct. 1982) (information acquired from employers and employees for unemployment insurance purposes is confidential pursuant to Labor Law § 537); *Schenectady County Soc. For Prevention of Cruelty To Animals, Inc v. Mills*, 74 A.D.3d 1417, 904 N.Y.S.2d 512 (3d Dep't 2010) (respondent did not meet burden of showing that names and street addresses of licensed veterinarians was an unwarranted invasion of privacy because respondent was unsure whether the addresses it maintained were home or business addresses); *See Polokoff-Zakarin v. Boggess*, 62 A.D.3d 1141, 879 N.Y.S.2d 244 (3d Dep't 2009) (holding that the State Senate must disclose Senate employee's time and attendance records as they are included in the list of records that must be disclosed under 88 (3)(b)).

N. Police records.

Complaint follow-up reports. Gould v. New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54 (1996) (held, complaint follow-up informational reports, commonly known as "DD5's," are not categorically exempt from disclosure as intra-agency records).

For access to accident reports compiled by agencies other than the police, see *Bloomberg v. Hennessy*, 99 Misc.2d 958, 417 N.Y.S.2d 593 (Sup. Ct. 1979) (granting access to accident reports prepared by the Department of Transportation); *McAuley v. Commissioner*, 99 Misc.2d 83, 415 N.Y.S.2d 389 (Sup. Ct. 1979).

Police activity logs. Leather-bound books in which police officers recorded all of their work-related activitites are agency records subject to disclosure under FOIL, even though officers themselves maintained physical possession of the activity logs. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 653 N.Y.S.2d 54 (1996).

1. Accident reports.

For access to accident reports compiled by agencies other than the police, see *Bloomberg v. Hennessy*, 99 Misc.2d 958, 417 N.Y.S.2d 593 (Sup. Ct. 1979) (granting access to accident reports prepared by the Department of Transportation); *McAuley v. Commissioner*, 99 Misc.2d 83, 415 N.Y.S.2d 389 (Sup. Ct. 1979).

2. Police blotter.

Police activity logs. Leather-bound books in which police officers recorded all of their work-related activitites are agency records subject to disclosure under FOIL, even though officers themselves maintained physical possession of the activity logs. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 653 N.Y.S.2d 54 (1996).

3. 911 tapes.

The Committee on Open Government has expressed the opinion that 911 tapes can be viewed as records compiled in the ordinary course of business and as such, should generally be subject to disclosure. Comm. Open Gov't, FOIL-AO-3734 (1985); FOIL-AO-3540 (1984). *See New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 796 N.Y.S.2d 302 (2005) (emergency 911 calls made in connection with terrorist attacks on September 11, 2001, are subject to disclosure under FOIL to the extent that the words recorded are those of public employees and of eight deceased individuals whose survivors sought disclosure, but must be redacted to delete the words of other callers to 911).

4. Investigatory records.

An agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings. N.Y. Pub. Off. Law § 87(2)(e)(i) (McKinney 1988).

a. Rules for active investigations.

Laureano v. Grimes, 179 A.D.2d 602, 579 N.Y.S.2d 357, (1st Dep't 1992) (granting access to police memo books of investigation where no assertion of promise of confidentiality and confidentiality, if given, was lost since witnesses later testified); *Ennis v. Slade*, 179 A.D.2d 558, 579 N.Y.S.2d 59, (1st Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to records of narcotics buy operation); *Scott v. Chief Medical Examiner*, 179 A.D.2d 443, 577 N.Y.S.2d 861 (1st Dep't 1992) (denying access to police officer's memo book as exempt interagency material and as private property of officer); *Cornell Univ. v. City of New York Police Dep't*, 153 A.D.2d 515, 544 N.Y.S.2d 356 (1st Dep't 1989), *leave denied*, 75 N.Y.2d 707 (1990) (granting disclosure of police investigative file where witnesses were not promised anonymity); *New York News Inc. v. Office of the Special State Prosecutor of the State of New York*, 153 A.D.2d 512, 544 N.Y.S.2d 151 (1st Dep't 1989) (denying access to investigative materials on possibility that investigation may be reopened); *Auburn Publisher Inc. v. City of Auburn*, 147 A.D.2d 900 (4th Dep't 1989) (denying access to affidavits in police investigation); *The National Alliance v. New York City Police Department*, No. 21553/91 (Sup. Ct., New York County, March 10, 1992) (granting access to investigative records in absence of showing that disclosure would interfere with investigation); *New York News v. Koch*, N.Y.L.J., May 22, 1987 (Sup. Ct., New York County, 1987) (denying access to records pertaining to a pending investigation of Bess Myerson on basis of prejudice to fair trial rights, harm to witnesses, confidential information and privacy rights); *In re Estate of Schwartz*, 130 Misc.2d 786, 497 N.Y.S.2d 834 (Sur. Ct. 1986) (denying access to records of police and DA concerning possible homicide, without prejudice to a renewed request following completion of investigation or if criminal proceeding not commenced); *Foley v. Wilson*, No. 20250 (Sup. Ct., Wayne County, Nov. 23, 1982) (directing that records relating to pending investigation and criminal action be made available only after completion of proceedings, including breathalyzer test results and operation checklist); *Butler v. McGuire*, No. 40039/80 (Sup. Ct., New York County, June 2, 1980) (denying access to deliberative, advisory material prepared to assist DA in deciding whether to seek indictment in a homicide case); *Glantz v. Lupkin*, 100 Misc.2d 453, 419 N.Y.S.2d 34 (Sup. Ct. 1979) (denying access to Organized Crime Control Bureau report on grounds of interference with ongoing police investigation of organized crime); *Maffeo v. New York Organized Crime Task Force*, Index No. 92-18502 (Sup. Ct., Westchester County April 14, 1993) (denying disclosure of applications made and warrants issued for eavesdropping surveillance pursuant to CPL 700.55; denying access to investigation interviews and lists prepared by the FBI; granting access to trial testimony transcripts).

b. Rules for closed investigations.

Svaigsen v. City of New York, 203 A.D.2d 32, 609 N.Y.S.2d 894 (1st Dep't 1994) (remanding for *in camera* review of police investigation records to redact non-factual, exempted information); *Moore v. Santucci*, 151 A.D.2d 676, 543 N.Y.S.2d 103, (2d Dep't 1989) (the law enforcement exemption is not rendered unavailable because the investigation has been concluded, however, investigative statements lose cloak of confidentiality once the statements have been used in open court); *Feebe v. City of New York*, 95 A.D.2d 664, 464 N.Y.S.2d 367 (lst Dep't 1983) (denying access to records of investigation of police conduct); *Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991) (granting access to Attorney General's investigative records where allegation of interference with law enforcement is wholly speculative); *Brownell v. Grady*, 147 Misc.2d 105, 554 N.Y.S.2d 382 (Sup. Ct. 1990) (granting access to all witness statements except grand jury statements); *Journal Publishing Co. v. Office of the Special Prosecutor*, 131 Misc.2d 417, 500 N.Y.S.2d 919 (Sup. Ct. 1986) (granting access to undercover police tapes made during a criminal investigation after completion of criminal trial, to the extent needed to defend a libel action); *Westchester Rockland Newspapers v. Vergari*, N.Y.L.J., June 24, 1982 (Sup. Ct., Westchester County, 1982) (granting access to investigatory records, after redacting names and addresses of witnesses, where the investigation was closed four years earlier); *Petix v. Connelie*, 99 Misc.2d 343, 416 N.Y.S.2d 167 (Sup. Ct. 1979) (denying access to records of internal investigation of state policeman, although no charges proffered); *N.Y.P.I.R.G. Inc. v. Greenberg*, No. 3734-79 (Sup. Ct., Albany County, April 27, 1979) (granting access to records in DA's office where investigation terminated); *Matter of Woods*, N.Y.L.J. February 2, 1995 (Sup. Ct., New York County) (ordering *in camera* inspection of police follow-up reports (DD-5's) to determine if they contain exempt opinions).

5. Arrest records.

New York Civil Liberties Union v. City of Schenectady, 2 N.Y.3d 657, 781 N.Y.S.2d 267 (2004) (noting, in *dicta*, that "the City acknowledges that its incident and arrest reports would normally be subject to FOIL, and that it would agree to disclosure of existing use of force materials"); *Mitchell v. Slade*, 173 A.D.2d 226, 569 N.Y.S.2d 437 (1st Dep't 1991) (arrest follow-up report was not exempt under law enforcement or intra-agency exemptions); *Thompson v. Weinstein*, 150 A.D.2d 782, 542 N.Y.S.2d 33, (2d Dep't 1989) (granting access to criminal convictions and pending criminal action against witness as public records and not an invasion of privacy); *Johnson Newspaper Corp. v. Stainkamp*, 94 A.D.2d 825, 463 N.Y.S.2d 122 (3d Dep't 1983), *aff'd*, 61 N.Y.2d 958 (1984) (granting access to state police records regarding traffic tickets issued and lists of violations of traffic law); *Planned Parenthood of Westchester v. The Town Board of the Town of Greenburgh*, 154 Misc.2d 971, 587 N.Y.S.2d 461 (Sup. Ct. 1992) (photos of arrestees were not exempt from disclosure); *Romandette v. Colonie Police Dep't*, No. GM-1641 (Sup. Ct., Washington County, Sept. 3, 1984) (town provided access to arrest sheets, but denied access to police records relating to investigation); *People v. Nelson*, 103 Misc.2d 847, 427 N.Y.S.2d 194 (City Ct. 1980) (statistical data on arrest and prosecution of persons for prostitution-related offenses may be made available under FOIL); *Cromwell v. Ward*, 183 A.D.2d 459, 584 N.Y.S.2d 295 (1st Dep't 1992) (arrest records cannot be denied without particularized and specific justification); *Hearst Corporation v. Paguin*, No. 9688077 (Sup. Ct., Albany County, Aug. 26, 1977) (under former FOIL, granting access to booking records and police blotters, but denying access to records relating to incomplete investigation).

6. Compilations of criminal histories.

The FOIL does not directly exempt from disclosure compilations of criminal histories. The New York State Division of Criminal Justice Services, which compiles criminal histories, is governed by a statutory directive to adopt measures to assure the security and privacy of identification and information data in its possession. N.Y. Exec. Law § 837(8) (McKinney 1982). The division has relied upon this statutory provision to promulgate regulations exempting information in its criminal history files from disclosure on the basis that disclosure would result in an unwarranted invasion of personal privacy. 9 N.Y.C.R.R. 6150.4(b)(6) (1978). *Capital Newspapers Division of Hearst Corp. v. Poklemba*, No. 6308-88 (Sup. Ct., Albany County, Dec. 30, 1988) (denying access to computer data base of criminal convictions). In contrast, the Committee on Open Government has issued several advisory opinions stating that criminal history records, including those compiled by the Division of Criminal Justice Services, should be available under FOIL, except for arrest records or other information the disclosure of which could constitute an unwarranted invasion of personal privacy. Comm. Open Gov't, FOIL-AO-4269 (1986); FOIL-AO-3455 (1984); FOIL-AO-2396 (1982); FOIL-AO-1934 (1981); FOIL-AO-680 (1978).

Convictions records are available under FOIL. *See Geames v. Henry*, 173 A.D.2d 825, 572 N.Y.S.2d 635 (2d Dep't 1991) (granting access to conviction record); *Thompson v. Weinstein*, 150 A.D.2d 782, 542 N.Y.S.2d 33, (2d Dep't 1989) (granting access to criminal convictions and pending criminal action against witness as public records and not an invasion of privacy).

7. Victims.

Johnson Newspaper Corp. v. Call, 115 A.D.2d 335, 495 N.Y.S.2d 813 (4th Dep't 1985) (rejecting sheriff's practice of withholding reports of

offenses when person reporting the offense indicated preference that incident not be released to media).

8. Confessions.

Matter of Rainbow News 12 Co., N.Y.L.J. June 30, 1992 (Sup. Ct., Suffolk County, 1992) (holding that although witness statements, including confessions, are generally exempt from FOIL requests, videotaped confessions used in open court lose their cloak of confidentiality and are available for inspection).

9. Confidential informants.

An agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would identify a confidential source or disclose confidential information relating to criminal investigations. N.Y. Pub. Off. Law § 87(2)(e)(iii) (McKinney 1988).

For cases on confidentiality, see *Laureano v. Grimes*, 179 A.D.2d 602, 579 N.Y.S.2d 357, (1st Dep't 1992) (granting access to police memo books of investigation where no assertion of promise of confidentiality and confidentiality, if given, was lost since witnesses later testified); *Ennis v. Slade*, 179 A.D.2d 558, 579 N.Y.S.2d 59 (1st Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (records of a "buy operation" were compiled for law enforcement purposes and if disclosed would reveal confidential sources and information); *Geames v. Henry*, 173 A.D.2d 825, 572 N.Y.S.2d 635 (2d Dep't 1991) (granting access to conviction record); *Cornell University v. City of New York Police Dep't.*, 153 A.D.2d 515, 544 N.Y.S.2d 356, (1st Dep't 1989), *leave denied*, 75 N.Y.2d 707 (1990) (granting disclosure of police investigative file where witnesses were not promised anonymity); *Auburn Publisher Inc. v. City of Auburn*, 147 A.D.2d 900 (4th Dep't 1989) (denying access to affidavits in police investigation); *Allen v. Strojnowski*, 129 A.D.2d 700, 514 N.Y.S.2d 463 (3d Dep't 1987), *motion for leave to appeal denied*, 70 N.Y.2d 871, 518 N.E.2d 5, 523 N.Y.S.2d 493 (1987) (denying access to names, addresses and statements of confidential witnesses); *Radio City Music Hall Productions v. New York City Police Dep't*, 121 A.D.2d 230, 503 N.Y.S.2d 722 (lst Dep't 1986) (granting access to police investigation reports after redacting names and statements of confidential witnesses); *Hawkins v. Kurlander*, 98 A.D.2d 14, 469 N.Y.S.2d 820 (4th Dep't 1983) (denying access to interviews made under promise of confidentiality in connection with investigation which did not lead to filing of charges); *Gannett Co. v. James*, 86 A.D.2d 744, 447 N.Y.S.2d 781 (4th Dep't 1982), *appeal dismissed*, 56 N.Y.2d 502, 435 N.E.2d 1099, 450 N.Y.S.2d 1023 (1982) (denying access to records of complaints against police officers which might identify a confidential source); *State Police v. Boehm*, 71 A.D.2d 810, 419 N.Y.S.2d 23 (4th Dep't 1979) (requiring disclosure of identities of confidential informants was an abuse of discretion); *Walker v. City of New York*, 64 A.D.2d 980, 408 N.Y.S.2d 811 (2d Dep't 1978) (denying access to identities of confidential informants as well as confidential information relating to criminal investigation); *Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991) (ordering disclosure of Attorney General's investigation records where no assurance of confidentiality was made in this case); *Matter of Spruils*, N.Y.L.J. July 28, 1995 (Sup. Ct. New York County, 1995) (denying access to police officer's memo book which might contain names, addresses and statements of confidential witnesses on personal hardship grounds); *Elmira Star-Gazette v. Strojnowski*, No. 9924-84 (Sup. Ct., Albany County, Nov. 7, 1984) (denying access to state police reports containing identities of confidential sources); *Kwoczka v. Cawley*, 103 Misc.2d 13, 425 N.Y.S.2d 247 (Sup.Ct. 1980) (denying access to testimony, audio and videotapes of undercover police investigation where such disclosure would identify informants); *Petix v. Connelie*, 99 Misc.2d 343, 416 N.Y.S.2d 167 (Sup. Ct. 1979) (denying access to state police internal investigation report to protect identities of confidential informants).

10. Police techniques.

An agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would reveal criminal investigative techniques or procedures, except routine techniques and procedures. N.Y. Pub. Off. Law § 87(2)(e)(iv) (McKinney Supp. 1988). Records which may reveal law enforcement techniques may also be exempt under the general exemption for records which, if disclosed, would endanger the life or safety of any person. N.Y. Pub. Off. Law § 87(2)(f) (McKinney Supp. 1988).

For cases on police techniques, see *DeZimm v. Connelie*, 64 N.Y.2d 860, 476 N.E.2d 646, 487 N.Y.S.2d 320 (1985) (denying access to portions of State Police administrative manual concerning procedures for electronic surveillance and monitoring devices); *Smith v. Capasso*, 200 A.D.2d 502, 608 N.Y.S.2d 815 (1st Dep't 1994); *Spencer v. New York State Police*, 187 A.D.2d 919, 591 N.Y.S.2d 207 (3d Dept. 1992) (denying access to non-routine, highly detailed step-by-step depictions of the investigatory process and methods of gathering information, and portions of the file describing autopsies performed on victims, but granting access to files regarding surveillance, establishment of roadblocks and lists of evidence seized); *Lyon v. Dunne*, 180 A.D.2d 922, 580 N.Y.S.2d 803, (3d Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to laboratory analyses of evidence because it would reveal nonroutine techniques and procedures, however, evidence inventory list is not exempt from disclosure); *Ennis v. Slade*, 179 A.D.2d 558, 579 N.Y.S.2d 59 (1st Dep't 1992), *motion for leave to appeal denied*, 79 N.Y.2d 758 (1992) (denying access to records of narcotics buy operation); *Moore v. Santucci*, 151 A.D.2d 676, 543 N.Y.S.2d 103, (2d Dep't 1989) (ballistic and fingerprinting tests are routine investigative techniques); *Allen v. Strojnowski*, 129 A.D.2d 700, 514 N.Y.S.2d 463 (3d Dep't 1987), *motion for leave to appeal denied*, 70 N.Y.2d 871, 518 N.E.2d 5, 523 N.Y.S.2d 493 (1987) (denying access to reports revealing nonroutine techniques for processing homicide scene); *Muniz v. Roth*, 162 Misc.2d 293, 620 N.Y.S.2d 700 (Sup. Ct., Tompkins County 1994) (granting access to fingerprint tests because they are routine investigative techniques); *Banfield v. Michael*, N.Y.L.J., March 20, 1985 (Sup. Ct., New York County, 1985) (denying access to financial records which would reveal criminal investigative techniques); *Kotler v. Suffolk Police Dep't*, (Sup. Ct., Suffolk County, April 7, 1983) (granting access to fingerprint and polygraph records as product of routine procedures); *Foley v. Wilson*, No. 20250 (Sup. Ct., Wayne County, Nov. 23, 1982) (directing that records relating to pending investigation and criminal action be made available only after completion of proceedings, including breathalyzer test results and operation checklist); *Kwoczka v. Cawley*, 103 Misc.2d 13, 425 N.Y.S.2d 247 (Sup. Ct. 1980) (denying access to testimony, audio and videotapes of undercover police investigation on basis that disclosure would identify informants and "secret tricks and techniques"); *Matter of Warner*, N.Y.L.J. (App.Div. 1st Dept. March 17, 1995) (ordering *in camera* inspection of police training material to determine whether exempt as criminal investigative techniques or procedures or would endanger life or safety of any person).

11. Mug shots.

Presumably open, but there is no law that speaks directly to the issue.

12. Sex offender records.

Presumably open, but there is no law that speaks directly to the issue.

13. Emergency medical services records.

Presumably open, but there is no law that speaks directly to the issue.

O. Prison, parole and probation reports.

Konigsberg v. Coughlin, 68 N.Y.2d 245, 501 N.E.2d 1, 508 N.Y.S.2d 393 (1986) (presumption that records of inmate's file are open for inspection); *Goodstein & West v. O'Rourke*, 201 A.D.2d 731, 608 N.Y.S.2d 306 (2d Dept. 1994) (denying access to investigative report prepared by Department of Correction at the request of the Office of Affir-

mative Action as inter-agency or intra-agency materials); *Shedrick v. Coughlin*, 176 A.D.2d 391, 574 N.Y.S.2d 98 (3d Dep't 1991), *appeal dismissed*, 79 N.Y.2d 896, 590 N.E.2d 244, 581 N.Y.S.2d 659 (denying access to inmates Alcoholics Anonymous records as confidential under federal statute, however, disclosure of confidential information may be warranted in the context of a pending criminal proceeding); *Bernier v. Mann*, 166 A.D.2d 798, 563 N.Y.S.2d 158 (3d Dep't 1990) (information on other inmates involved in prison disturbance was ruled exempt from disclosure under FOIL, citing institutional safety and inmate privacy); *Tate v. De Francesco*, 217 A.D.2d. 831, 629 N.Y.S.2d 529 (3d Dept. 1995) (denying, after *in camera* inspection, access to records regarding a prison altercation based on privacy, safety and intra-agency exemptions); *Grune v. New York State Dept. of Correctional Services*, 166 A.D.2d 834, 562 N.Y.S.2d 826, (3d Dep't 1990) (pre-decisional evaluations, recommendations and conclusions of inmates conduct in prison are exempt); *Rowland v. Scully*, 152 A.D.2d 570, 543 N.Y.S.2d 497, (2d Dep't 1989), *aff'd* 76 N.Y.2d 725 (denying access to assessment forms used to determine placement of an inmate as pre-decisional evaluations and recommendations); *Lonski v. Collins*, 149 A.D.2d 977, 540 N.Y.S.2d 114 (4th Dep't 1989) (denying access to videotape of inmate transfer as endangering life or safety); *Flowers v. Sullivan*, 149 A.D.2d 287, 545 N.Y.S.2d 289 (2d Dep't, 1989), *appeal dismissed*, 75 N.Y.2d 712, (denying access to records of prison security system); *Stronza v. Hoke*, 148 A.D.2d 900, 539 N.Y.S.2d 528, (3d Dep't 1989) (denying access to inmates security assessment summaries as inter-agency or intra-agency records and as danger to life or safety); *In re Thomas*, 131 A.D.2d 488, 515 N.Y.S.2d 885 (2d Dep't 1987) (denying access to pre-sentence report from a correctional facility in absence of sentencing court's authorization for its release, on basis of CPL §§ 390.50, 390.60); *Nalo v. Sullivan*, 125 A.D.2d 311, 509 N.Y.S.2d 53 (2d Dep't 1986), *appeal denied*, 69 N.Y.2d 612, 511 N.E.2d 86 (1987) (denying access to inmate's file who was determined an escape risk on basis that disclosure could endanger lives or safety of individuals, as well as inter- or intra-agency exemption); *Schumate v. Wilson*, 90 A.D.2d 832, 456 N.Y.S.2d 11 (2d Dep't 1982) (denying access, as intra-agency material, to records concerning a temporary release determination); *Jordan v. Hammock*, 86 A.D.2d 725, 447 N.Y.S.2d 44 (3d Dep't 1982), *appeal dismissed*, 57 N.Y.2d 674 (denying access to correspondence with Parole Board by persons opposed to petitioner's release, as confidential under Executive Law § 259-K); *Fournier v. Fish*, 83 A.D.2d 979, 442 N.Y.S.2d 823 (3d Dep't 1981) (denying access to information that would indicate where records were kept in a correctional facility on the basis of prison security); *Zuckerman v. Board of Parole*, 53 A.D.2d 405, 385 N.Y.S.2d 811 (3d Dep't 1976) (holding that records of business meeting of Parole Board should be examined, *in camera*, to determine what, if any, exemption would apply);*Faulkner v. LeFevre*, 140 Misc.2d 699, 532 N.Y.S.2d 337 (Sup. Ct. 1988) (redacting names from inmate grievance document pursuant to agency rule requiring privacy); *Faulkner v. DelGiacco*, 139 Misc.2d 790, 529 N.Y.S.2d 255 (Sup. Ct. 1988) (granting access to inmate's statements and names of prison guards, but denying access to investigative records of prison melee); *Rold v. Cuomo*, No. 1909-88 (Sup. Ct., Albany County, May 31, 1988) (granting access to registers required to be maintained by Governor concerning applications for pardons, commutations, or executive clemency); *Kavanagh v. Department of Correctional Services*, (Sup. Ct., Albany County, April 22, 1986) (denying access to a district attorney of misbehavior reports of an inmate on basis of privacy); *Bensing v. LeFevre*, 133 Misc.2d 198, 506 N.Y.S.2d 822 (Sup. Ct. 1986) (granting access to names of inmates in special housing unit, rejecting arguments under Personal Privacy Protection Law and privacy exemption); *People v. Zavaro*, 126 Misc.2d 237, 481 N.Y.S.2d 845 (County Ct. 1984) (granting access to pre-sentence report of probation department upon request of defendant or his attorney); *Malowsky v. LaPook*, No. 10024-25 (Sup. Ct., Albany County, Sept. 27, 1985) (granting access to an inmate's medical records in order for inmate's son to acquire information about his background); *Robertson v. Chairman of Bd. of Parole*, 122 Misc.2d 829, 471 N.Y.S.2d 1015 (Sup. Ct. 1984), *appeal dismissed*, 112 A.D.2d 333, 491 N.Y.S.2d 989 (2d Dep't 1985), *rev'd in part and dismissed in part*, 67 N.Y.2d 197, 492 N.E.2d 762, 501 N.Y.S.2d 634 (1986) (denying access to certain records of Parole Board based upon Executive Law § 259-k and implementing regulations); *Hall v. Brandon*, 96 Misc.2d 318, 408 N.Y.S.2d 1006 (Sup. Ct. 1978) (denying access to records relating to an escape and recapture as intra-agency records of correctional facility); *Zanger v. Chinlund*, 106 Misc.2d 86, 430 N.Y.S.2d 1002 (Sup. Ct. 1980) (granting access to records relating to incidents of violence during a three-year period at a correctional facility), *Bentley v. Demski*, 673 N.Y.S.2d 226 (3d Dep't 1988) (denying access to transcript of resentencing because no transcript exists, and prisoner failed to file request under FOIL).

P. Public utility records.

The Committee on Open Government has expressed the opinion that public utilities are not governmental entities or "agencies" under FOIL and, therefore, public utility records would not be subject to disclosure. Comm. Open Gov't, FOIL-AO-3019 (1983); FCIL-AO-l 049 (1979).

Q. Real estate appraisals, negotiations.

City of New York v. State Board of Equalization and Assessment, 65 N.Y.2d 656, 481 N.E.2d 242, 491 N.Y.S.2d 610 (1985) (granting access to lists of sales of real property, but remitting case for consideration of city's claim that assessor's notations be exempted from disclosure as interfering with deliberative process); *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 480 N.E.2d 74, 490 N.Y.S.2d 488 (1985) (denying access to portions of real estate appraisal reports prepared for town by private consulting firm as intra-agency records); *Brusco v. New York State Division of Housing and Community Renewal*, 170 A.D.2d 184, 565 N.Y.S.2d 86 (1st Dep't 1991), *appeal dismissed*, 77 N.Y.2d 939 (1991) (landlord was required to maintain complete rent history); *Brownstone Publishers Inc. v. New York City Department of Finance*, 167 A.D.2d 166, 561 N.Y.S.2d 245 (1st Dep't 1990) (information from real property ordered disclosed); *Brownstone Publishers Inc. v. New York City Department of Buildings*, 166 A.D.2d 294, 560 N.Y.S.2d 642 (1st Dep't 1990) (statistical information contained on computer files concerning every parcel of real estate in New York City was ordered to be made available for computer copying); *Property Valuation Analysis Inc. v. Williams*, 164 A.D.2d 131, 563 N.Y.S.2d 545 (3d Dep't 1990) (property cards ordered disclosed); *Brownstone Publishers Inc. v. New York City Department of Finance*, 150 A.D.2d 185, 540 N.Y.S.2d 796 (1st Dep't 1989), *motion for leave to appeal denied*, 75 N.Y.2d 791 (1990) (statistical and factual information from real property transfers was ordered disclosed except for names of buyers and sellers); *David v. Lewishohn*, 142 A.D.2d 305, 535 N.Y.S.2d 793, (3d Dep't 1988), *lv. denied*, 74 N.Y.2d 610, 546 N.Y.S.2d 554, 545 N.E.2d 868) (denying access to nonfinal recommendations contained in real property transfer data); *Murray v. Troy Urban Renewal Agency*, 84 A.D.2d 612, 444 N.Y.S.2d 249 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 888, 438 N.E.2d 1115, 453 N.Y.S.2d 400 (1982) (denying access to an appraisal report prepared by a consultant to an urban renewal agency on basis that access would impair future contract awards); *124 Ferry Street Realty v. Hennessy*, 82 A.D.2d 981, 440 N.Y.S.2d 419 (3d Dep't 1981) (denying access to Department of Transportation's appraisal reports for a specific real estate parcel as intra-agency materials); *Morris v. Martin*, 82 A.D.2d 965, 440 N.Y.S.2d 365 (3d Dep't 1981), *rev'd*, 55 N.Y.2d 1026, 434 N.E.2d 1079, 449 N.Y.S.2d 712 (1982) (granting access to sales data lists to real property owners engaged in tax certiorari litigation); *Tri-State Publishing Company v. City of Port Jervis*, No. 7498-91 (Sup. Ct., Orange County, March 4, 1992) (denying access to names and addresses of tenants in housing subsidy program or of property owners where all tenants are in subsidy program as an unwarranted invasion of privacy); *Samuel v. Mace*, (Sup. Ct., Monroe County, Dec. 11, 1991) (granting access to listing of owners of residences in school district); *Buffalo Evening News v. City of Lackawanna*, (Sup. Ct., Erie County, June 24, 1985) (granting access to records regarding escrow agreements relating to negotiations for the acquisition of real property); *Szikszay v. Buelow*, 107 Misc.2d 886, 436 N.Y.S.2d 558 (Sup. Ct. 1981) (granting access to county tax maps and computerized assessment roll tapes); *Inner City Press/Community on the Move v. New York City Dep't of Housing Pres-*

ervation and Development, Index No. 126653/93 (Sup. Ct. New York County November 9, 1993); *New York State Ass'n of Realtors v. Paterson*, No. 4514-81 (Sup. Ct., Albany County, July 15, 1981) (granting access to names and addresses of all real estate licensees, their status as broker or salesperson and the names and addresses of the firms with which associated); *Phillips v. Brier*, No. 6565-80 (Sup. Ct., Albany County, Aug. 22, 1980) (granting access to correspondence between a private appraiser and city manager); *Gannett Satellite Information Network Inc. v. City of Elmira*, Index No. 94-1752 (Sup. Ct. Chemung County August 26, 1994) (denying access to appraisal figures of appraisers retained by city as professional opinions; not statistical or factual tabulations and data); *U.S. Claims Services, Inc. v. New York State Dept. of Audit and Control, Office of the State Comptroller*, 23 Misc.3d 923, 873 N.Y.S.2d 897 (Sup. Ct. Albany County 2009) (holding that the value of abandoned property, including value ranges, is exempt from disclosure under Abandoned Property Law § 1401).

R. School and university records.

3. Student records.

Pasik v. State Bd. of Law Examiners, 102 A.D.2d 395, 478 N.Y.S.2d 270 (lst Dep't 1984) (State Board of Law Examiners is part of "judiciary" and is exempt from FOIL); *Kryston v. Board of Education*, 77 A.D.2d 896, 430 N.Y.S.2d 688 (2d Dep't 1980) (granting access to standardized test scores with the student names deleted and the scores scrambled to protect student privacy); *Lipsman v. Bass*, 67 A.D.2d 654, 412 N.Y.S.2d 611 (lst Dep't 1979) (remanding case to determine if university course grade distribution sheets contained matter identifying students and grades needed redaction on basis of privacy); *Miller v. Hewlett-Woodmere Union Free School District*, N.Y.L.J., May 16, 1990 (Sup. Ct., Nassau County, 1990) (granting access to records of final decision denying request to change schools); *Dramadri v. New York Institute of Technology*, N.Y.L.J., Jan. 26, 1988 (Sup. Ct., New York County, 1988) (granting student access to transcript even though existing tuition dispute); *Board of Education v. Regan*, 131 Misc.2d 514, 500 N.Y.S.2d 978 (Sup. Ct. 1986) (denying access to computer lists of students who might be eligible for financial aid based on confidentiality requirement of federal Family Educational Rights and Privacy Act); *Krauss v. Nassau Community College*, 122 Misc.2d 218, 469 N.Y.S.2d 553 (Sup. Ct. 1983) (denying access to names and addresses of students as subject to the federal Family Educational Regulations and Privacy Act); *In re Lipsman*, N.Y.L.J., Oct. 1, 1981 (Sup. Ct., New York County, 1981) (denying access to graduate school transcripts as an unwarranted invasion of personal privacy); *Gannett News Service Inc. v. State Office of Alcoholism and Substance Abuse*, 99 Misc.2d 235, 415 N.Y.S.2d 780 (Sup. Ct. 1979) (granting access to drug abuse surveys taken of secondary school students); *Person-Wolinski Ass'n v. Nyquist*, 84 Misc.2d 930, 377 N.Y.S.2d 897 (Sup. Ct. 1975) (denying access to list of applicants for the C.P.A. exam as the list would be used for commercial purposes and would constitute an unwarranted invasion of personal privacy); *Dickman v. Trietley*, 702 N.Y.S.,2d 449 (denying access to documents relating to investigation prior to parole release because prisoner failed to exhaust administrative remedies).

4. Other.

Faculty/staff records.

Rothenberg v. City University of New York, 191 A.D.2d 195, 594 N.Y.S.2d 210 (1st Dept. 1993) (denying access to documents regarding an individual's failure to achieve the rank of professor); *Buffalo Teachers Federation Inc. v. Buffalo Board of Ed.*, 156 A.D.2d 1027, 549 N.Y.S.2d 541 (4th Dep't 1989) (although Board of Education is not required to release home addresses of employees it has authority to release this information); *Harris v. City University*, 114 A.D.2d 805, 495 N.Y.S.2d 175 (lst Dep't 1985) (granting access to *curricula vitae* of faculty members promoted to full professor within the last five years, with names, addresses and Social Security numbers deleted); *LaRocca v. Board of Education*, 159 Misc.2d. 90, 602 N.Y.S.2d 1009 (Sup. Ct. Nassau County 1993) (denying access to records relating to settlement of a disciplinary matter as protected by Education Law § 3020-a, 8 N.Y.C.R.R. Part 82.9; finding such documents to constitute employment records the release of which would constitute an unwarranted invasion of privacy), *modified*, 220 A.D.2d 424, 632 N.Y.S.2d 576 (2d Dept. 1995) (holding that agency must release those portions of documents that do not constitute an "employment history" and ordering disclosure of redacted settlement agreement); *Shaw v. Lerer*, 112 Misc.2d 260, 446 N.Y.S.2d 855 (Sup. Ct. 1981) (denying access, on inter-agency basis, to performance rating sheets prepared by school coaches on hockey referee); *Steinmetz v. Board of Education*, N.Y.L.J., Oct. 30, 1980 (Sup. Ct., Suffolk County, 1980) (granting access to information from teachers' transcripts regarding courses taken at educational institutions);*New York State United Teachers v. Brighter Choice Charter School*, 15 N.Y.3d 560, 940 N.E.2d 899, 915 N.Y.S.2d 194 (2010) (holding that the names of teachers employed at Charter Schools are exempt from disclosure as an invasion of privacy);

Other

Russo v. Nassau Community College, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993) (film and film strips used in a public college and provided by the college are "records" within FOIL); *Lipsman v. Bass*, 67 A.D.2d 654, 412 N.Y.S.2d 611 (lst Dep't 1979) (remanding case to determine whether evaluations of university programs would unjustifiably invade personal privacy of college president); *Samuel v. Mace*, (Sup. Ct. Monroe County, Dec. 11, 1991) (granting access to listing of owners of residences in school district); *Golubski v. Guinones*, (Sup. Ct., Kings County, May 29, 1985) (granting access to statistical information concerning incidents occurring at schools); *Warder v. Board of Regents*, 97 Misc.2d 86, 410 N.Y.S.2d 742 (Sup. Ct. 1978) (granting access to Regent meeting minutes taken by Secretary of the Board of Regents); *Leeds v. Burns*, N.Y.L.J. (Sup. Ct., Queens County, July 27, 1992) (holding that City University of New York is a state agency subject to FOIL and is required to disclose ABA accreditation reports, however, although petitioner would be entitled to costs because he substantially prevailed and the requested information was clearly of significant interest to the general public, a law student who has appeared *pro se* is not entitled to recover "legal fees").

S. Vital statistics.

1. Birth certificates.

Birth certificates are governed by § 4174 of the Public Health Law and are not generally available absent a showing of a proper purpose. Comm. on Open Gov't, FOIL-AO-4929.

2. Marriage & divorce.

Marriage records are kept by town or city clerks, depending where the marriage took place. Records pertaining to divorce, such as a certificate of disposition, can be obtained from the county clerk in the county in which the divorce was granted. Comm. on Open Gov't, FOIL-AO-4892. Although the FOIL generally governs the rights of access to records, other statutes pertain specifically to marriage records and, therefore, the rights of access are generally conditioned upon a showing that the request is made for judicial or other "proper purpose." Comm. on Open Gov't, FOIL-AO-4929.

3. Death certificates.

In 1988, Section 4174(1)(a) of the Public Health Law was amended to require the Commissioner of Health to issue death certificates or transcripts only when they are required for certain enumerated purposes. This statute specifically exempts death certificates or transcripts from disclosure under FOIL.

4. Infectious disease and health epidemics.

No law addresses the issue directly

V. PROCEDURE FOR OBTAINING RECORDS

A. How to start.

1. Who receives a request?

The FOIL directs each agency to promulgate rules and regulations pertaining to the availability of records and the procedures to be fol-

lowed to obtain access, including the times and places that records are available, the person from whom such records may be obtained, and the fees for copies of records. N.Y. Pub. Off. Law § 87(1)(b) (McKinney 1988). *See, e.g., Murphy v. State Educ. Dept.*, 148 A.D.2d 160, 543 N.Y.S.2d 70, (1st Dep't 1989); *Town of Northumberland v. Eastman*, 129 Misc.2d 447, 493 N.Y.S.2d 93 (Sup. Ct. 1985).

The person within an agency from whom records may be obtained is generally designated the records access officer, and is responsible for coordinating the agency's response to FOIL requests. *See, e.g., Zaleski v. Hicksville Union Free School Dist.*, N.Y.L.J., Dec. 27, 1978 (Sup. Ct., Nassau County, 1978); *see also Willson v. Washburn* (Sup. Ct., Oneida County November 18, 1993) (excusing failure to direct request to record access officer where agency told requester to communicate exclusively with another person); *Timmons v. Green*, 57 A.D.3d 1393, 871 N.Y.S.2d 562 (4th Dep't 2008) (although an agency may designate a records access officer, an agency is not thereby relieved of its burden of responding to FOIL requests).

Each agency must also maintain a reasonably detailed list, by subject matter, of all records in the possession of the agency, whether or not available under FOIL. N.Y. Pub. Off. Law § 87(3)(c) (McKinney 1988). This does not, however, require the agency to prepare a detailed list or index of its final opinions. *Wattenmaker v. N.Y.S. Employee's Retirement Sys.*, 95 A.D.2d 910, 464 N.Y.S.2d 52 (3d Dep't 1983), *appeal denied*, 60 N.Y.2d 555, 455 N.E.2d 487, 467 N.Y.S.2d 1030 (1983); *D'Alessandro v. Unemployment Ins. Appeals Bd.*, 56 A.D.2d 762, 392 N.Y.S.2d 433 (lst Dep't 1977). An agency may not deny records without first reviewing them and stating with particularity the reasons for denial. *Cornell University v. City of New York Police Dep't*, 153 A.D.2d 515, 544 N.Y.S.2d 356 (1st Dep't 1989), *leave denied*, 75 N.Y.2d 707 (1990); *Burton v. Slade*, 166 A.D.2d 352, 561 N.Y.S.2d 637 (1st Dep't 1990).

The 2008 amendments to sections 87 and 89 require an agency to consider public access when contracting with outside vendors and when designing electronic information systems.

The amendment to section 87 prohibits an agency from entering into or renewing a contract for the creation or maintenance of records if a contract would impair public inspection or copying.

The amendment to section 89 requires "whenever practicable and reasonable" that an agency design its information systems in a manner that permits segregation and retrieval of publicly available data "in order to provide maximum public access."

2. Does the law cover oral requests?

No. FOIL only addresses written requests. N.Y. Pub. Off. Law § 89(3) (McKinney 1988).

b. If an oral request is denied:

3. Contents of a written request.

a. Description of the records.

A FOIL request must "reasonably describe" the records which are requested. N.Y. Pub. Off. Law § 89(3) (McKinney 1988). The failure of a requester to reasonably describe desired records is a ground for nondisclosure that is entirely separate from the exemption provisions. *Lebron v. Smith*, 40 A.D.3d 515, 837 N.Y.S.2d 74 (1st Dep't 2007) (dismissing petition where petitioner failed to describe the documents sought with sufficient specificity); *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 251, 501 N.E.2d 1, 508 N.Y.S.2d 393 (1986); *Mitchell v. Slade*, 173 A.D.2d 226, 569 N.Y.S.2d 437 (1st Dep't 1991) (the burden is on the requester to reasonably describe the records, and the agency is not required to solicit additional information to identify the records).

Records have been held to be reasonably described when the agency is able to locate them. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984). *See Dunlea v. Goldmark*, 54 A.D.2d 446, 389 N.Y.S.2d 423 (3d Dep't 1977), *aff'd*, 43 N.Y.2d 754, 377 N.E.2d 798, 401 N.Y.S.2d 1010 (1977) ("budget examiner's file" not too vague); *Town of Woodstock v. Goodson-Todman Enterprises*, 133 Misc.2d 12, 505 N.Y.S.2d 540 (Sup. Ct. 1986) (granting access where records reasonably described); *Zanger v. Chinlund*, 106 Misc.2d 86, 430 N.Y.S.2d 1002 (Sup. Ct. 1980) (granting access to "all information and documents" relating to incidents of violence at particular prison over 3 year period).

b. Need to address fee issues.

A request need not address the issue of fees. Copying fees are set by agency regulations, but may not exceed fees set by statute. N.Y. Pub. Off. Law § 87(1)(h) (McKinney 1988). The prescribed fee is payable when the agency is ready to provide a copy of the requested records. N.Y. Pub. Off. Law § 89(3) (McKinney 1988).

c. Plea for quick response.

Under FOIL, the agency must respond within five business days of receipt of a written request by (1) granting or denying the request, or (2) by furnishing a written acknowledgment and a statement of the approximate date when such request will be granted or denied. N.Y. Pub. Off. Law § 89(3) (McKinney 2005).

d. Can the request be for future records?

FOIL refers to existing records. N.Y. Pub. Off. Law § 86(4) (McKinney 1988) (defining "record" as "any information kept, held, filed, produced or reproduced . . .").

e. Other.

Can the request require creation of records?

The FOIL expressly states that its provisions shall not be read to require an agency to prepare a record it does not already possess or maintain (other than certain records required to be maintained under FOIL). N.Y. Pub. Off. Law § 89(3) (McKinney 1988). Thus, an agency will not be required to create new records in response to a request. *Reubens v. Murray*, 194 A.D.2d 492, 599 N.Y.S.2d 580 (1st Dept. 1993) (agency was not required to compile requested data from the documents or records in its possession); *Adams v. Hirsch*, 182 A.D.2d 583, 582 N.Y.S.2d 724 (1st Dep't 1992) (because a ballistics report was destroyed and line up picture could not be found, respondent was not required to provide the information); *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991) (agency was not required to compile information or to rearrange its filing system); *Gannett Co. v. James*, 86 A.D.2d 744, 447 N.Y.S.2d 781 (4th Dep't 1982), *appeal dismissed*, 56 N.Y.2d 502, 435 N.E.2d 1099, 450 N.Y.S.2d 1023 (1982); *Flatbush Dev. Corp. v. Insurance Dep't*, N.Y.L.J., Oct. 7, 1983 (Sup. Ct, New York County, 1983); *Chechek v. Gribble*, No. 5320/80 (Sup. Ct., Dutchess County, April 6, 1981). *See also Kryston v. Board of Education*, 77 A.D.2d 896, 430 N.Y.S.2d 688 (2d Dep't 1980) (holding that agency was not required to create a record, but ordering the agency to rearrange or "scramble" standardized test scores otherwise listed alphabetically in order to protect privacy of students); *Wood v. Ellison*, 602 N.Y.S.2d 237 (3d Dept. 1993).

An agency that transferred records to another agency may be required to recover and furnish the records. *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712 (3d Dep't 1990).

Can the agency impose restrictions on access?

Time and place. Records must be made available for inspection and copying during regular business hours. *Murtha v. Leonard*, 210 A.D.2d 411, 620 N.Y.S.2d 101 (2d Dept. 1994) (limiting the hours during which documents can be inspected to less than the regular business hours of the office where the records are kept is violative of FOIL, however, rules and regulations regarding the number of persons who could view public documents at a given time and the use of photocopiers constitutes a valid and rational exercise of the village's authority under FOIL); *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375

(3d Dep't 1991) (agency's grant of access to voluminous files mooted requester's claims); *Schanbarger v. State Comm'r of Social Services*, 99 A.D.2d 621, 472 N.Y.S.2d 175 (3d Dep't 1984), *appeal denied*, 62 N.Y.2d 604, 467 N.E.2d 532, 478 N.Y.S.2d 1023 (1984) (Commissioner acted rationally in making voluminous records available on business days between 8:30 a.m. and 5:00 p.m.); *Town of Northumberland v. Eastman*, 129 Misc.2d 447, 493 N.Y.S.2d 93 (Sup. Ct. 1985) (records are accessible during reasonable hours at private residence of town bookkeeper); *Stemmer v. Agrasto*, No. 81-4 558 (Sup. Ct., Onondaga County, Aug. 17, 1981) (town records kept in residence must be made available during regular weekday hours and weekends by appointment). *Cf. Alexanian v. City of New York*, N.Y.L.J., July 2, 1992 (1st Dep't 1992) (parties agreed to schedule to review large number of documents over several visits).

Agency regulations may require access at a location more convenient to the requester. *Banigan v. Roberts*, 135 Misc.2d 614, 515 N.Y.S.2d 944 (Sup. Ct. 1986). An agency that transferred records to another agency may be required to recover and furnish the records. *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712 (3d Dep't 1990).

Voluminous records. An agency may not avoid compliance with a request by claiming shortage of manpower, *United Fed'n v. New York City Health and Hosp. Corp.*, 104 Misc.2d 623, 428 N.Y.S.2d 823 (Sup. Ct. 1980), or that retrieval of records would be "burdensome." *Young v. Smith*, No. 86-0307 (Sup. Ct., Essex County, Jan. 9, 1987). *See also Hudson River Fisherman's Association v. New York City Dept. of Environmental Protection*, No. 7679-90, (Sup. Ct., New York County, July 12, 1990) (shortage of manpower and volume of records are not a proper basis for denial of access); *Cf. White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991) (agency's grant of access to voluminous files mooted requester's claims).

A 2008 amendment to section 89(3)(a) ensures that that an agency cannot deny a request due to insufficient staff or other basis if an outside service can be retained to accommodate the applicant, and if the applicant agrees to pay the actual cost of reproducing the records.

Redaction. Access may be granted to all, or only a portion of, requested records, depending upon whether an exemption is applicable to any of the material. N.Y. Pub. Off. Law § 87(2) (McKinney 1988); *Brown v. Goord*, 45 A.D.3d 930, 845 N.Y.S.2d 495 (3rd Dep't 2007) (holding that when a portion of a document must be redacted, a state agency may refuse to allow inspection of that document, and instead require redacted copies of the document to be made and charge the established copying fee); *Wilson v. Town of Islip*, 179 A.D.2d 763, 578 N.Y.S.2d 642 (2d Dep't 1992) (granting access to portion of Homestead Program application to show whether applicants are past or present employees of town); *Dobranski v. Houper*, 154 A.D.2d 736, 546 N.Y.S.2d 180 (3d Dep't 1989) (redacting inmates' prison identification, dietary requirements and name and address of next of kin); *Polansky v. Regan*, 81 A.D.2d 102, 440 N.Y.S.2d 356 (3d Dep't l981) (portions of records may be denied); *In Re Norton*, 70 A.D.3d 833, 897 N.Y.S.2d 122 (2d Dep't 2010) (redactions in disclosed documents did not relate to request, therefore respondents were not in violation of judgment compelling disclosure).

A court may order redaction of videotapes to deny access to portions of the record. *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 174 A.D.2d 212, 578 N.Y.S.2d 928 (3d Dep't 1992); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712 (3d Dep't, 1990) (the court may order a description of what was redacted).

Deletion of identifying details. Under the privacy exemption, an agency has authority to delete identifying details prior to disclosure. N.Y. Pub. Off. Law § 89(2)(c)(1) (McKinney 1988).

Advisory opinions.

The FOIL mandated the establishment of a Committee on Open Government within the New York State Department of State. N.Y. Pub. Off. Law § 89(1) (McKinney 1988). The Committee is directed by statute: (1) to furnish advisory opinions and guidelines to agencies regarding FOIL, (2) to furnish advisory opinions and information on FOIL to any person so requesting, and (3) to promulgate general rules and regulations in conformity with FOIL for use by agencies in adopting their individual regulations on access. N.Y. Pub. Off. Law § 89(1)(b) (McKinney 1988). The Committee will provide individuals with advice in response to telephone inquiries. It will provide a written advisory opinion to those who so request in writing. The Committee's advisory opinions, while not binding, will be given such weight by a court as results from the strength of the reasoning and analysis they contain. *John P. v. Whalen*, 54 N.Y.2d 89, 429 N.E.2d 117, 444 N.Y.S.2d 598 (1981). The Committee's interpretation of FOIL should be upheld where not "irrational or unreasonable." *Buffalo News Inc. v. Buffalo Enterprise Development Corporation*, 173 A.D.2d 43, 578 N.Y.S.2d 945 (4th Dep't 1991); *Miracle Mile Ass'n v. Yudelson*, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), *appeal denied*, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979). *See Whitehead v. Morgenthau*, 146 Misc.2d 733, 552 N.Y.S.2d 518 (Sup. Ct. 1990); *Gannett Company v. James*, 108 Misc.2d 862, 438 N.Y.S.2d 901, *aff'd.*, 86 A.D.2d 744, 447 N.Y.S.2d 781 (4th Dep't 1982).

The Committee may be contacted as follows: Committee on Open Government, Robert Freeman, Executive Director, 41 State Street, Albany, New York 12231, Tel. (518) 474-2518.

B. How long to wait.

On May 3, 2005, FOIL amendments became effective that should help address the problem of unreasonable delays by agencies in granting access to records in New York State. These amendments are incorporated into the discussion below.

1. Statutory, regulatory or court-set time limits for agency response.

Under FOIL, an agency must respond within five business days upon receipt of a written request for a record reasonably described. N.Y. Pub. Off. Law § 89(3) (McKinney 1988). Within that time, the agency must do one of the following: (1) grant the request and, upon payment of or offer to pay the prescribed fee, provide a copy of the requested record and certify to its correctness if so requested; (2) deny the request in writing; or (3) provide a written acknowledgment of receipt of the request and a statement of the approximate date when such request will be granted or denied. If the agency fails to acknowledge the written request for a record within five business days, or fails to give an approximate date which is reasonable under the circumstances as to when the agency's decision to grant or deny access to the record will be made, then this non-compliance shall constitute a denial. *Public Officers Law* § 89(4)(a) (McKinney 2005). As is the case when the agency expressly denies access to the record, this form of denial gives the requester the right to appeal in writing to the head of the agency, who then has ten business days to either deny access to the record or grant access to it. *Id.*

If the agency determines to grant access to a record as indicated above, it has twenty business days from the date of its acknowledgement of the receipt of the request, to grant the requester access to the record. If there are reasonable circumstances as to why the agency cannot meet this twenty business day deadline, the agency shall inform the requester in writing of the reason why this deadline cannot be met, and provide as well a date certain when access to the record will be granted. *Public Officers Law* § 89(3) (McKinney 2005). If the agency fails to conform to these requirements, this shall constitute a denial of access to the record, which shall also be grounds for an appeal to the head of the agency or to the agency's designated appeals officer. As in other cases of denial of access to a record, the requester has thirty days to bring an appeal, and the appeal must be decided by the appeals officer within ten business days. *Id.*, § 89(4)(a).

See Rhino Assets, LLC v. New York City Dept. for Aging, 31 A.D.3d 292, 819 N.Y.S.2d 247 (1st Dep't 2006) (agency must respond to FOIL requests in accordance with the statute).

2. Informal telephone inquiry as to status.

While there is nothing to preclude telephone inquiries as to the status of a request, a requester should not rely upon a telephone conversation in order to claim appeal from an agency denial. See *Madonna v. Lankler*, N.Y.L.J., Oct. 2, 1981 (Sup. Ct., New York County, 1981) (petition denied for failure to exhaust administrative remedies where petitioner attempted to rely upon phone conversation with appeals officer to establish that an appeal was taken).

3. Is delay recognized as a denial for appeal purposes?

As stated above, according to the express terms of the May 2005 amendments to FOIL, an agency's failure to comply with the timing requirements set forth in the statute is deemed a denial of access that may be administratively appealed. *Public Officers Law* § 89(4)(a). The amendment should eliminate the need to rely on previous court decisions recognizing a constructive denial based on an agency's failure to response to a FOIL request within a reasonable period of time. *See, e.g., Inner City Press/Community on the Move v. New York City Dep't of Housing Preservation and Development*, Index No. 126653/93 (Sup. Ct. New York County November 9, 1993) (failure of the agency to respond results in a constructive denial of the request and authorizes an appeal). The time periods for agency compliance are now express and specific deadlines in the statute.

4. Any other recourse to encourage a response.

Any person may request an advisory opinion as to a FOIL request from the Committee on Open Government. N.Y. Pub. Off. Law § 89(1)(b)(ii) (McKinney 1988); *see e.g. Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993).

C. Administrative appeal.

1. Time limit.

Any person denied access to a record may, within thirty days, appeal such denial in writing. N.Y. Pub. Off. Law § 89(4)(a) (McKinney 2005). *See Malerba v. Kelly*, 211 A.D.2d 479, 621 N.Y.S.2d 318 (1st Dept. 1995) (holding proceeding moot insofar as it seeks documents already produced and dismissible as to other documents for failure to exhaust administrative remedies, but permitting administrative appeal due to agency's laxity in responding to petitioner's request); *Reubens v. Murray*, 194 A.D.2d 492, 599 N.Y.S.2d 580 (1st Dept. 1993) (failure to appeal the denial within 30 days constitutes failure to exhaust administrative remedies and precludes judicial relief); *Trump Management v. Sander*, 205 A.D.2d 786 (2d Dept. 1994) (affirming dismissal of proceeding for failure to timely seek administrative review). *See also Alliance for the Preservation of Religious Liberty v. State*, N.Y.L.J., April 10, 1979 (Sup. Ct., New York County, 1979) (the agency may waive an untimely appeal by entertaining it).

If the agency fails to make the record available to the requester or fails to acknowledge a written request for a record within five business days, this constitutes a denial governing the requester the right to appeal. *Public Officers Law* § 89(4)(a) (McKinney 2005). Each agency is required to promulgate rules and regulations including procedures for administrative appeal. *See Barrett v. Morgenthau*, 74 N.Y.2d 907, 548 N.E.2d 1300 (1989) (failure to establish procedures for appeal prevented claim of failure to exhaust administrative remedies).

2. To whom is an appeal directed?

a. Individual agencies.

An appeal is to be directed to the head, chief executive or governing body of the entity, or designee thereof. N.Y. Pub. Off. Law § 89(4)(a) (McKinney 1988). *Cf. Couch and Howard, P.C. v. Gridley*, No. 41724 (Sup. Ct., Otsego County, Jan. 25, 1985) (where request was initially directed to city manager, court held that it is presumed that he is head of City of Elmira and thus no administrative appeal need be taken from his actual or constructive denial prior to requesting judicial relief).

b. A state commission or ombudsman.

All appeals must be made to the head, chief executive or governing body of the entity to which the request for disclosure was made, or the designee thereof. N.Y. Pub. Off. Law § 89(4)(a) (McKinney 1988). There is no other appeal route or mechanism.

However, when an agency receives an appeal, it is required to immediately forward a copy of such appeal and the ensuing determination thereon to the Committee on Open Government. N.Y. Pub. Off. Law § 89(4)(a) (McKinney 1988); *see e.g. Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993).

c. State attorney general.

The State Attorney General does not hear appeals, but may represent the State in subsequent court proceedings.

3. Fee issues.

With respect to administrative appeals, the FOIL only expressly provides for appeal of a denial of access to records. N.Y. Pub. Off. Law § 89(4)(a) (McKinney 2005). However, fee amounts are appealable in the same manner. *See* Op. Comm'r Ed. Dep't, 18 Ed. Dep't Rep. 276 (1979).

4. Contents of appeal letter.

a. Description of records or portions of records denied.

The FOIL provides simply that the appeal be in writing. N.Y. Pub. Off. Law § 89(4)(a) (McKinney 1988). *See Madonna v. Lankler*, N.Y.L.J., Oct. 2, 1981 (Sup. Ct., New York County, 1981) (petitioner unsuccessfully attempted to rely upon a telephone conversation with an appeals officer to claim that an appeal had been taken).

b. Refuting the reasons for denial.

The requester does not need to refute the reasons for denial. A governmental body seeking an exemption from the disclosure requirements of FOIL has the burden of proving that a record falls within a statutory exemption. N.Y. Pub. Off. Law. § 89(4)(b) (McKinney 1988). *See Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *Washington Post v. Insurance Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984); *Doolan v. BOCES*, 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979); *see also Grune v. Alexanderson*, 168 A.D.2d 496, 562 N.Y.S.2d 739, (2d Dep't 1990) (agency failed to identify with specificity those portions of records claimed to be exempt).

Conclusory allegations are insufficient to meet the agency's burden of proof. *Mooney v. State Police*, 117 A.D.2d 445, 502 N.Y.S.2d 828 (3d Dep't 1986); *Hopkins v. City of Buffalo*, 107 A.D.2d 1028, 486 N.Y.S.2d 514 (4th Dep't 1985).

5. Waiting for a response.

A response to an appeal is due within 10 business days of its receipt, and shall either fully explain in writing the reasons for further denial, or provide access to the record sought. N.Y. Pub. Off. Law § 89(4)(a) (McKinney 2005). Failure to issue a determination upon appeal within the required ten business day period constitutes a denial of access entitling the requester to bring an Article 78 proceeding in New York State Supreme Court. *Public Officers Law* § 89(4)(b) (McKinney 2005). FOIL's 2005 amendments should render unnecessary reliance on a previous line of cases addressing constructive denials of appeals. *Floyd v. McGuire*, 87 A.D.2d 388, 390, 452 N.Y.S.2d 416 (lst Dep't 1982), *appeal dismissed*, 57 N.Y.2d 774 (1982) ("the time limitation should be read as directory rather than mandatory, and the consequences of failure by the agency to comply [is not mandatory disclosure of records but rather] . . . is that the applicant will be deemed to have exhausted his administrative remedies and will be entitled to seek his judicial remedy"). *Accord Vent v. Bates*, 89 A.D.2d 567, 452 N.Y.S.2d 98 (2d Dep't 1982); *Professional Standards Review of America v. New York State*

Department of Health, 193 A.D.2d 937 (3d Dept. 1993) (granting access to contract bid submitted by private organization and to factual and statistical data used by agency in making its final determination to award the contract); *New York Ass'n of Homes and Services for the Aging Inc. v. Axelrod*, No. 7414-85 (Sup. Ct., Albany County, Aug. 28, 1985).

6. Subsequent remedies.

No. Denial of access on appeal affords the requester the right to seek judicial review. N.Y. Pub. Off. Law § 89(4)(b) (McKinney 2005). *See also Reese v. Mahoney*, (Sup. Ct., Erie County, June 28, 1984) (rejecting a county's multi-tiered appeal procedure which was prescribed by local law as an addition to the appeal process of FOIL).

Is exhaustion of administrative remedies required?

Failure to pursue an administrative appeal from an initial denial of records will generally preclude subsequent judicial relief for failure to exhaust administrative remedies. *Malerba v. Kelly*, 211 A.D.2d 479, 621 N.Y.S.2d 318 (1st Dept. 1995) (holding proceeding moot insofar as it seeks documents already produced and dismissible as to other documents for failure to exhaust administrative remedies, but permitting administrative appeal due to agency's laxity in responding to petitioner's request); *Reubens v. Murray*, 194 A.D.2d 492, 599 N.Y.S.2d 580 (1st Dept. 1993) (failure to appeal the denial within 30 days constitutes failure to exhaust administrative remedies and precludes judicial relief); *Newton v. Police Dept. City of New York*, 183 A.D.2d 621, 585 N.Y.S.2d 5 (1st Dep't 1992); *City of Kingston v. Surles*, 180 A.D.2d 69, 582 N.Y.S.2d 844 (3d Dep't 1992); *Murphy v. State Educ. Dept.*, 148 A.D.2d 160, 543 N.Y.S.2d 70, (1st Dep't 1989); *Kurland v. McLaughlin*, 122 A.D.2d 947, 505 N.Y.S.2d 967 (2d Dep't 1986); *Town of Hempstead v. Commissioner*, 119 A.D.2d 582, 500 N.Y.S.2d 751 (2d Dep't 1986); *Johnson Newspaper Corp. v. Stainkamp*, 94 A.D.2d 825, 463 N.Y.S.2d 122 (3d Dep't 1983), *aff'd* 61 N.Y.2d 958 (1984); *Moussa v. State*, 91 A.D.2d 863, 458 N.Y.S.2d 377 (4th Dep't 1982); *Matter of Hightower*, (N.Y.L.J., Sup. Ct., November 23, 1993) (holding that an Article 78 proceeding to compel disclosure may not be maintained where there has been a failure to exhaust administrative remedies). *See also Irving Bank Corp. v. Considine*, 138 Misc.2d 849, 525 N.Y.S.2d 770 (Sup. Ct. 1988) (Public Officers Law § 89(5) sets forth a very detailed schedule within which applications for confidential treatment of commercial trade information and secrets and appeals therefrom must be made, and failure to follow this schedule can result in failure to exhaust administrative remedies).

Failure to exhaust administrative remedies is not always required. *Barrett v. Morgenthau*, 74 N.Y.2d 907, 548 N.E.2d 1300 (1989) (DA failed to demonstrate establishment of appeals procedure and failed to advise requester of availability of administrative appeal, therefore, he cannot complain of failure to exhaust administrative remedies); *New York News Inc. v. Grinker*, 142 Misc.2d 325, 537 N.Y.S.2d 770, (Sup. Ct. 1989) (failure to make formal application or to appeal agency's first decision was excused where agency's public statements demonstrated that a request would be futile); *Pasik v. State Bd. of Law Examiners*, 114 Misc.2d 397, 451 N.Y.S.2d 570 (Sup. Ct. 1982), *modified on other grounds*, 102 A.D.2d 395, 478 N.Y.S.2d 270 (lst Dep't 1984) (where agency claimed it was totally exempt from FOIL, exhaustion of administrative remedies doctrine was no bar); *Couch and Howard, P.C. v. Gridley*, No. 41724 (Sup. Ct., Otsego County, Jan. 25, 1985) (where request was initially directed to city manager, court held that he must be presumed head of city and therefore no administrative appeal need be taken prior to judicial review); *In Re Julie Purcell*, 77 A.D.3d 1328, 909 N.Y.S.2d 238 (4th Dep't 2010) (respondent properly exhausted her administrative remedies when she sent a letter objecting to the denial of her FOIL request and asking that the letter be considered an appeal).

D. Court action.

1. Who may sue?

Any person who is denied access to a record following an administrative appeal may bring a judicial proceeding for review of such denial pursuant to Article 78 of the New York Civil Practice Law and Rules. N.Y. Pub. Off. Law § 89(4)(b) (McKinney 1988).

While requesters have express authority to pursue a judicial remedy under FOIL, agencies do not, and courts have rejected efforts by an agency to sue under the law. *See Michael v. Communications Workers of America*, 130 Misc.2d 424, 495 N.Y.S.2d 569 (Sup. Ct. 1985) (a governmental agency cannot be merged with the "public" and therefore lacks standing to initiate suit under FOIL). *Contra Adirondack Park Local Government Review Board v. Adirondack Park Agency*, No. 273-81 (Sup. Ct., Essex County, June 24, 1981) (public board had capacity to initiate action under FOIL). *See also Town of Woodstock v. Goodson-Todman Enter.*, 133 Misc.2d 12, 505 N.Y.S.2d 540 (Sup. Ct. 1986) (holding that town's declaratory judgment action was improper as essentially involving the issuance of an advisory opinion).

Further, the FOIL statute does not specifically give an individual who did not request documents the right to intervene. In order to intervene, an individual must demonstrate that he has the right to intervene by showing that he is of the class to be protected by the statute and that the intent of the statute would allow intervention. *Rainbow News 12 Co. v. District Att'y of Suffolk County*, Index No: 1487/92 (Sup. Ct. Suffolk County July 31, 1992) (holding that the person to which the requested records applied could not intervene). Similarly, the Public Officer's Law does not provide for a cause of action against private parties, but only against government agencies. *George v. New York Newsday*, N.Y.L.J. (Sup. Ct., New York County, October 4, 1994).

2. Priority.

There is no special priority for FOIL litigation. An Article 78 proceeding, however, is an expedited proceeding with a return date set forth in the notice of petition. N.Y. Civ. Prac. L. & R. § 7804 (McKinney 1981).

3. Pro se.

Procedurally, in New York a person may prosecute or defend a civil action in person, except that a corporation or voluntary association must appear by an attorney. N.Y. Civ. Prac. L. & R. § 321(a) (McKinney 1988).

4. Issues the court will address:

a. Denial.

The FOIL authorizes judicial review of a denial of access to a record through an Article 78 proceeding. N.Y. Pub. Off. Law § 89(4)(b) (McKinney 2005). In determining whether access should have been granted or denied, the court may need to address, among other things, whether that which is requested is a "record" under FOIL, whether the entity holding the record is an "agency" subject to FOIL, whether the record was reasonably described, and whether the requested record falls within a statutory exemption so that access may be withheld. *See, e.g., Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) ("record" and "agency" questions), *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 501 N.E.2d 1, 508 N.Y.S.2d 393 (1986) ("reasonably described" question); *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986) (entitlement to exemption question).

On the issue of whether or not an agency can withhold a given record, the agency has the burden to prove that a record falls within an exemption, N.Y. Pub. Off. Law § 89(4)(b) (McKinney 1988), and the court must determine whether the agency has met this burden of proof. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *Washington Post v. Insurance Dep't*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984); *Doolan v. BOCES*, 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979). *See also Grune v. Alexanderson*, 168 A.D.2d 496, 562 N.Y.S.2d 739, (2d Dep't 1990) (agency failed to identify with specificity those portions of records claimed to be exempt). If an agency claims it does not possess the desired record, the agency must provide sufficient evi-

dentiary proof that it does not have the requested record. *Key v. Hynes*, 205 A.D.2d 779 (2d Dep't 1994).

The standard of review is not whether the agency's determination was arbitrary or capricious or without rational basis. Rather the person resisting disclosure must prove entitlement to one of the exceptions. *Laureano v. Grimes*, 179 A.D.2d 602, 579 N.Y.S.2d 357 (1st Dep't 1992). Conclusory allegations do not satisfy the agency's burden to particularize that the material requested falls within an exemption. *Allen v. New York State Department of Motor Vehicles*, 147 A.D.2d 856, 538 N.Y.S.2d 78 (3d Dep't 1989); *Key v. Hynes*, 205 A.D.2d 779, 613 N.Y.S.2d 926 (2d Dept. 1994) (holding that an agency seeking to avoid disclosure of a document it allegedly cannot locate must provide sufficient evidentiary proof that it does not have such document similar to the proof necessary to sustain a FOIL exemption; conclusory allegations are insufficient).

b. Fees for records.

The court may review the amount charged for copies. *See, e.g., Sheehan v. City of Syracuse*, 137 Misc.2d 438, 521 N.Y.S.2d 207 (Sup. Ct. 1987); *Reese v. Mahoney*, (Sup. Ct., Erie County, June 28, 1984); *Szikszay v. Buelow*, 107 Misc.2d 886, 436 N.Y.S.2d 558 (Sup. Ct. 1981); R*eal Estate Data. Inc. v. County of Nassau*, No. 11364 (Sup. Ct., Nassau County, Sept. 18, 1981).

c. Delays.

As discussed above, issues of agency's failure to respond or delay in responding determine whether a requester has exhausted administrative remedies and whether judicial review is therefore appropriate. These matters are governed by express time requirements set forth in FOIL. *Public Officers Law* §§ 89(4)(a) and (b) (McKinney 2005). *See generally Malerba v. Kelly*, 211 A.D.2d 479, 621 N.Y.S.2d 318 (1st Dept. 1995) (holding proceeding moot insofar as it seeks documents already produced and dismissible as to other documents for failure to exhaust administrative remedies, but permitting administrative appeal due to agency's laxity in responding to petitioner's request); *Newton v. Police Department City of New York*, 183 A.D.2d 621, 585 N.Y.S.2d 5 (1st Dep't 1992) (requester's failure to appeal administratively normally would preclude judicial review, however, agency had been lax in responding). Administrative delay or default will not be determinative of whether or not access should have been granted. *Floyd v. McGuire*, 87 A.D.2d 388, 452 N.Y.S.2d 416 (lst Dep't 1982), *appeal dismissed*, 57 N.Y.2d 774 (1982) (agency default does not mandate disclosure of requested materials).

d. Patterns for future access (declaratory judgment).

Courts generally will not issue advisory opinions or declaratory judgments on future access questions. *See, e.g., Town of Woodstock v. Goodson-Todman Enter.*, 133 Misc.2d 12, 505 N.Y.S.2d 540 (Sup. Ct. 1986) (holding that town's declaratory judgment action on propriety of its denial was improper; court will not issue what would essentially be an advisory opinion); see *Paul Smith's College of Arts and Sciences v. Cuomo*, 186 A.D.2d 888, 589 N.Y.S.2d 106 (3d Dept. 1992); *cf Seeling v. Sielaff*, 201 A.D.2d 298, 607 N.Y.S.2d 300 (1st Dept. 1994) (converting Article 78 into a declaratory judgment and declaring that the release of Social Security numbers constitutes an unwarranted invasion of privacy).

Statutory construction. The FOIL is to be liberally construed. Statutory language is generally given its natural and most obvious meaning. *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987).

5. Pleading format.

An Article 78 proceeding is commenced by service of a notice of petition and verified petition. N.Y. Civ. Prac. L. & R. § 7804(c) (McKinney 1981). *See generally DiChiara v. Chesworth*, 139 A.D.2d 647, 527 N.Y.S.2d 284 (2d Dep't 1988) (service of notice of petition and petition by ordinary mail was insufficient). The verified petition may be accompanied by affidavits or other written proof. Subsequent pleadings include a verified answer, which must state pertinent and material facts, and a reply to any new matter in the answer. N.Y. Civ. Prac. L. & R. § 7804(d) (McKinney 1981). *See Walker v. Slaaten*, Index No. 3305/90 (Sup. Ct., Westchester County 1992) (failure to name record custodian in initial proceeding limits court's power to enforce disclosure order).

6. Time limit for filing suit.

A four month statute of limitations governs. N.Y. Civ. Prac. L. & R. § 217 (McKinney 1972). *Swinton v. Record Access Officers*, 198 A.D.2d 165 (1st Dept. 1993); *Corbin v. Ward*, 160 A.D.2d 596, 554 N.Y.S.2d 240 (1st Dep't 1990), *motion for leave to appeal denied*, 76 N.Y.2d 706 (1990); *Cosgrove v. Klingler*, 58 A.D.2d 910, 396 N.Y.S.2d 498 (3d Dep't 1977); *Pelt v. New York City Police Dept.*, N.Y.L.J. (July 22, 1994 Supreme Court New York County) (denying *pro se* application for disclosure of records for failure to timely commence Article 78 proceeding); *Community School Dist. 6 v. Anker*, N.Y.L.J., July 13, 1978 (Sup. Ct., New York County, 1978).

While the statute of limitations may bar a particular proceeding under FOIL, some courts have allowed a person to seek records again under applicable procedures. *Young v. Smith*, No. 86-0307 (Sup. Ct., Essex County, Jan. 9, 1987); *In re Mitchell*, N.Y.L.J., March 9, 1979 (Sup. Ct., Nassau County, 1979); *Zaleski v. Hicksville Union Free School Dist.*, N.Y.L.J., Dec. 27, 1978 (Sup; Ct., Nassau County, 1978). *Contra*, *Corbin v. Ward*, 160 A.D.2d 596, 554 N.Y.S.2d 240 (1st Dep't 1990), *motion for leave to appeal denied*, 76 N.Y.2d 706 (1990) (court refused to consider an appeal of a second denial of access, where the appeal appeared to be an effort to obtain reconsideration of the prior request without any change in circumstances); *Knapp v. Board of Education*, No. 63341, (Sup. Ct., Steuben County, Nov. 23, 1990) (requester was barred from raising objections which had not been raised at time of earlier response).

The period of limitations runs from the date of receipt of notice of denial of the appeal. *Church of Scientology v. State*, 46 N.Y.2d 906, 387 N.E.2d 1216, 414 N.Y.S.2d 900 (1979). The final negative determination of the agency triggers the limitations period. *Russo v. Nassau Community College*, 81 N.Y.2d 690, 603 N.E.2d 294, 623 N.Y.S.2d 15 (1993); *Laureano v. Grimes*, 179 A.D.2d 602, 579 N.Y.S.2d 357 (1st Dep't 1992); *Samuel v. Mace*, (Sup. Ct., Monroe County, Dec. 11, 1991).

Filing the petition with the clerk may extend the basic limitation period. *See Laureano v. Grimes*, 179 A.D.2d 602, 579 N.Y.S.2d 357 (1st Dep't 1992); citing *Treadway v. Town Bd. of Town of Ticonderoga*, 163 A.D.2d 637, 558 N.Y.S.2d 686 (3d Dep't 1990); *Matter of Medina v. Perales*, 138 Misc.2d 1010, 525 N.Y.S.2d 991 (Sup. Ct. 1988); *cf Matter of Long Island Citizens Campaign v. County of Nassau*, 165 A.D.2d 52, 565 N.Y.S.2d 852 (2d Dep't 1991).

7. What court.

The Article 78 proceeding should be brought in the Supreme Court. N.Y. Civ. Prac. L. & R. § 7804(b) (McKinney Supp. 1988). The proceeding generally should be commenced in any county within the judicial district where the decision to deny the request was made or where the principal office of the respondent is located. N.Y. Civ. Prac. L. & R. § 8506(b), 7804(b) (McKinney Supp. 1988). However, proceedings against the Regents of the University of the State of New York, the Commissioner of Education, the Commissioner of Tax and Finance, the Tax Appeals Tribunal, the Public Service Commission, the Department of Transportation in specific cases, the Water Resources Board, the Comptroller or the Department of Agriculture and Markets must be brought in the Supreme Court, Albany County. N.Y. Civ. Prac. L. & R. § 506(b)(2) (McKinney Supp. 1988). *See Mullgrav v. Santucci*, 195 A.D.2d 786, 600 N.Y.S.2d 382 (3d Dept. 1993) (holding that petitioner's proceeding brought in Ulster County involving records of a Grand Jury proceeding in Queens County may have been

improper venue, but that Supreme Court, Ulster County did not lack jurisdiction).

8. Judicial remedies available.

a. *Ordering disclosure*. Access may be granted to all, or only a portion, of the records requested. N.Y. Pub. Off. Law § 87(2) (McKinney 1988). *See Polansky v. Regan*, 81 A.D.2d 102, 440 N.Y.S.2d 356 (3d Dep't 1981). The court in its discretion may direct the agency to index the documents produced to facilitate identification of exempt documents and require detailed affidavits to determine the basis for any claims of exemption. *Billups v. Santucci*, 151 A.D.2d 663, 542 N.Y.S.2d 726 (2d Dep't 1989).

b. *In camera review*. An agency is "required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for *in camera* inspection, to exempt its records from disclosure." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979) (holding that certain documents were properly withheld under the law enforcement exemption, following an *in camera* inspection). *Accord Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) (ordering *in camera* inspection); *M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984) (proper procedure for reaching determination on whether agency records were exempt as inter-agency materials was by *in camera* inspection) *Westchester Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 408 N.E.2d 904, 430 N.Y.S 2d 574 (1980) (approving lower court's *in camera* inspection of documents to excise "privacy impinging" references); *Tate v. De Francesco*, 217 A.D.2d. 831, 629 N.Y.S.2d 529 (3d Dept. 1995) (denying, after *in camera* inspection, access to records regarding a prison altercation based on privacy, safety and intra-agency exemptions); *O'Shaughnessy v. New York State Division of State Police*, 202 A.D.2d 508 (2d Dept. 1994); *Metts v. Mackechnie*, Index No. 4647/93 (Sup. Ct., Kings County, September 27, 1993) (ordering *in camera* inspection of requested documents to determine whether they fall within an exemption); *Miracle Mile Ass'n v. Yudelson*, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), *appeal denied*, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979) (where the agency fails to give sufficiently detailed information with respect to the material allegedly exempt, *in camera* inspection is one vehicle for protecting all parties' rights); *Matter of Warner*, N.Y.L.J. (App.Div. 1st Dept. March 17, 1995) (ordering *in camera* inspection of police training material to determine whether exempt as criminal investigative techniques or procedures or would endanger life or safety of any person); *Professional Standards Review of America v. New York State Department of Health*, 193 A.D.2d 937 (3d Dept. 1993) (granting access to rating sheets used to make final determination, but remitting the matter for *in camera* inspection and redaction of any subjective commentary, opinions and recommendations); *Maffeo v. New York Organized Crime Task Force*, Index #92-18502 (Sup. Ct., Westchester County, March 19, 1993) (ordering *in camera* inspection of requested documents, along with a proposed redacted version).

For other cases discussing *in camera* inspection, see *Smith v. Capasso*, 200 A.D.2d 502, 608 N.Y.S.2d 815 (1st Dep't 1994); *Grune v. New York State Dept. of Correctional Services*, 166 A.D.2d 834, 562 N.Y.S.2d 826, (3d Dep't 1990) (*in camera* review is not necessary where agency submits detailed affidavits or other exhibits sufficient to permit the courts to decide the issue); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712, (3d Dep't 1990) (the court may order a description of what was excised sufficient to determine exemption without the need for *in camera* review); *Allen v. New York State Department of Motor Vehicles*, 147 A.D.2d 856, 538 N.Y.S.2d 78 (3d Dep't 1989) (*in camera* inspection is proper procedure even where agency fails to satisfy burden of particularizing exemption); *Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991) (*in camera* inspection is unnecessary where no specifics were presented to support the conclusion that inspection would be helpful); *Matter of Woods*, N.Y.L.J. February 2, 1995 (Sup. Ct., New York County, 1995) (Ordering *in camera* inspection of police follow-up reports (DD-5's) to determine if they contain exempt opinions); *Svaigsen v. City of New York*, 203 A.D.2d. 32, 609 N.Y.S.2d 894 (1st Dept. 1994) (remanding for *in camera* review of police investigation records to redact non-factual, exempted information); *Readh v. Hall*, Index No: 24361 (Sup. Ct., Suffolk County, December 4, 1992) (ordering *in camera* review to determine whether entire document falls within exemption).

c. *Redaction*. Access may be granted to all, or only a portion of, requested records depending upon whether an exemption is applicable to any of the material. N.Y. Pub. Off. Law § 87(2) (McKinney 1988); *Professional Standards Review of America v. New York State Department of Health*, 193 A.D.2d 937 (3d Dept. 1993) (granting access to rating sheets used to make final determination, but remitting the matter for *in camera* inspection and redaction of any subjective commentary, opinions and recommendations); *Wilson v. Town of Islip*, 179 A.D.2d 763, 578 N.Y.S.2d 642 (2d Dep't 1992) (granting access to portion of Homestead Program application to show whether applicants are past or present employees of town); *Dobranski v. Houper*, 154 A.D.2d 736, 546 N.Y.S.2d 180 (3d Dep't 1989) (redacting inmates prison identification, dietary requirements and name and address of next of kin); *Polansky v. Regan*, 81 A.D.2d 102, 440 N.Y.S.2d 356 (3d Dep't l981). A court may order redaction of videotapes to deny access to portions of the record. *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 174 A.D.2d 212, 578 N.Y.S.2d 928 (3d Dep't 1992); *Buffalo Broad. Company Inc. v. New York State Dep't of Correctional Services*, 155 A.D.2d 106, 552 N.Y.S.2d 712 (3d Dep't, 1990) (the court may order a description of what was redacted); *cf Gannett Co. v. Riley*, 559 Misc.2d 161, 613 N.Y.S.2d 559 (Sup. Ct. Monroe County 1994) (denying access to internal investigation and report of disturbance at county jail as personnel records exempt from disclosure under Civil Rights Law § 50-a; redacting the names is not sufficient to protect the confidentiality of records otherwise exempt under § 50-a).

d. *Deletion of identifying details*. Under the privacy exemption, an agency has authority to delete identifying details prior to disclosure. N.Y. Pub. Off. Law § 89(2)(c)(1) (McKinney 1988).

e. *Equitable estoppel*. A municipal corporation may be estopped from claiming an exemption under the FOIL, but the bar is used sparingly and only in truly unusual cases. *Miracle Mile Ass'n v. Yudelson*, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), *appeal denied*, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979) (requester failed to demonstrate reliance and a prejudicial change in position).

f. *Mootness*. Where the relief being sought is supplied during the pendency of litigation the matter may become moot. *Malerba v. Kelly*, 211 A.D.2d 479, 621 N.Y.S.2d 318 (1st Dept. 1995) (holding proceeding moot insofar as it seeks documents already produced and dismissible as to other documents for failure to exhaust administrative remedies, but permitting administrative appeal due to agency's laxity in responding to petitioner's request); *Newton v. Police Department City of New York*, 183 A.D.2d 621, 585 N.Y.S.2d 5 (1st Dep't 1992) (agreement to comply renders proceeding moot); *Niagara Mohawk Power Corporation v. New York State Department of Environmental Conservation*, 169 A.D.2d 943, 564 N.Y.S.2d 839 (3d Dep't 1991)(the exception to the mootness doctrine did not apply since the issue was not particularly significant or one which would be expected to typically evade review); *Duban v. State Board of Law Examiners*, 157 A.D.2d 946, 550 N.Y.S.2d 207 (3d Dep't 1990) (because the petitioner's exam had been legally destroyed, his petition was declared moot); *Waste-Stream Inc. v. Solid Waste Disposal Authority*, 166 Misc.2d 6. 630 N.Y.S.2d 1020 (Sup. Ct., St. Lawrence County, 1995) (personal privacy exemption rendered moot); *Walker v. Slaaten*, Index No. 3305/90 (Sup. Ct., Westchester County, 1992) (release of requested records renders proceeding moot); *Swinton v. Record Access Officers*, 198 A.D.2d 165 (1st Dept. 1993) (obligation to provide access to records was met where it was certified that after a diligent search the requested documents were not to be found); *O'Shaughnessy v. New York State Division of State Police*, 202 A.D.2d 508 (2d Dept. 1994) (denying petitioners request for records because petitioner already had been provided such documents); *Oakknoll v. De Francesco*, 608 N.Y.S.2d 850 (1994) (dismissing

proceeding where petitioner conceded that he received the requested item from another source); *Whitfield v. Moriello*, 71 A.D.3d 415, 895 N.Y.S.2d 405 (1st Dep't 2010) (FOIL request was properly denied because records had been destroyed by flood and there was no evidence supporting respondent's contention they had been preserved on CD-ROM); *In Re Ernest Curry*, 69 A.D.3d 622, 893 N.Y.S.2d 148 (2d Dep't 2010) (hearing was not necessary to determine whether respondent had conducted a diligent search for requested videotapes; letter certifying that they could not be found was sufficient); *Asian American Legal Defense and Educ. Fund v. New York City Police Dept*., 56 A.D.3d 321, 867 N.Y.S.2d 412 (1st Dep't 2008) (respondent properly rejected FOIL request since it established that it did not possess or maintain the records sought).

9. Litigation expenses.

The statute authorizes a court to award reasonable attorneys' fees and other litigation costs reasonably incurred in any case in which the requester has substantially prevailed, provided that the court finds: (1) "the record involved was, in fact, of clearly significant interest to the general public;" and (2) "the agency lacked a reasonable basis in law for withholding the record." N.Y. Pub. Off. Law § 89(4)(c) (McKinney 1988).

In October of 2005, the New York Court of Appeals held, based on the specific language of the statute, that "the records themselves must be of significant interest to the public, not just the event to which they relate." *Matter of Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 441, 808 N.Y.S.2d 568, 571 (2005) ("The legislative history underlying this provision further demonstrates that it is not enough that the records be of potential or speculative interest to the public.").

Assessment of fees and costs lies within the discretion of the court. *See In Re Julie Purcell*, 77 A.D.3d 1328, 909 N.Y.S.2d 238 (4th Dep't 2010) (an award of attorney's fees was appropriate because respondents failed to respond to petitioner's request or appeal within the statutory time); *Maddux v. New York State Police*, 64 A.D.3d 1069, 883 N.Y.S.2d 365 (1st Dep't 2009) (denial of counsel fees was not an abuse of discretion); *Henry Schein, Inc. v. Eristoff*, 35 A.D.3d 1124, 827 N.Y.S.2d 718 (3d Dep't 2006) (decision to award counsel's fees, even where statutory requisites are met, lies within the discretion of the court); *Leeds v. Burns*, 205 A.D.2d 540, 613 N.Y.S.2d 46 (2d Dept. 1994) (denying attorneys' fees to *pro se* petitioner because *pro se* litigant has not earned or incurred such fees); *Stockdale v. Hughes*, 173 A.D.2d 1075, 570 N.Y.S.2d 412, (3d Dep't 1991) (denying attorneys' fees where town granted some requests and other requests were resolved by stipulation); *Banchs v. Coughlin*, 168 A.D.2d 711, 563 N.Y.S.2d 864 (3d Dep't 1990) (lower court did not abuse its discretion in awarding legal fees of $3,000); *Wurster v. LeFevre*, 152 A.D.2d 810, 543 N.Y.S.2d 591 (3d Dep't 1989) (denial of fees was not an abuse of discretion where information was of little interest to the general public); *Friedland v. Maloney*, 148 A.D.2d 814, 538 N.Y.S.2d 650 (3d Dep't 1989) (no abuse of discretion to deny fees where agency had difficulty in locating and assembling extensive and complex records); *Powhida v. City of Albany*, 147 A.D.2d 236, 542 N.Y.S.2d 865 (3d Dep't 1989) (because records awarded in case were of public interest and petitioner had substantially prevailed the awarding of counsel fees was upheld); *Hopkins v. City of Buffalo*, 107 A.D.2d 1028, 486 N.Y.S.2d 514 (4th Dep't 1985) (granting access to records but disallowing a fee award as city held to have had a reasonable basis for withholding access); *Niagara Environmental Action v. City of Niagara Falls*, 100 A.D.2d 742, 473 N.Y.S.2d 653 (4th Dep't 1984), *aff'd*, 63 N.Y.2d 651, 468 N.E.2d 694, 479 N.Y.S.2d 512 (1984) (disallowing lower court's award of attorneys' fees); *Willson v. Washburn* (Sup. Ct., Oneida County, November 18, 1993) (failure to respond to repeated requests justifies imposition of costs and disbursements); *Inner City Press/Community on the Move v. New York City Dep't of Housing Preservation and Development*, Index No. 126653/93 (Sup. Ct. New York County November 9, 1993) (awarding attorneys' fees where agency withheld all statistical and factual data under the guise of a pre-decisional agency exemption and where such refusal to disclose deprived the public of the ability to evaluate factual data involved in selecting real estate developers); *Rold v. Coughlin*, 142 Misc.2d 877, 538 N.Y.S.2d 896, (Sup. Ct. 1989) (awarding attorneys' fees of $7,500); *Tri-State Publishing v. City of Port Jervis*, No. 7498-91 (Sup. Ct., Orange County, March 4, 1992) (determination to withhold records to protect the identities of low income tenants was not without reasonable basis, therefore, attorney fees were not granted); *Samuel v. Mace*, (Sup. Ct., Monroe County, Dec. 11, 1991) (the petitioner substantially prevailed, information was of significant interest to the public; therefore application for attorney fees was granted); *Hudson River Fisherman's Association v. New York City Dept. of Environmental Protection*, No. 7679-90, (Sup. Ct., New York County, July 12, 1990) (granting attorneys' fees); *Rold v. Cuomo*, No. 1909-88 (Sup. Ct., Albany County, May 31, 1988) (granting attorneys' fees and costs, dismissing an argument that petitioner, as an attorney for the Prisoners' Rights Project of the Legal Aid Society, was a *pro se* litigant and not entitled to remuneration); *Browning-Ferris Industries of New York v. Town of Coxsackie*, No. 86-910 (Sup. Ct., Greene County, Nov. 6, 1986) (granting access but disallowing attorneys' fees on the ground that the records were of personal rather than public interest); *Buffalo Evening News v. City of Lackawanna*, (Sup. Ct., Erie County, June 24, 1985) (denying request for attorneys' fees even though the court found that the information was of significant public interest and that the city had no reasonable basis for withholding); *William J. Kline and Son v. Fallows*, 124 Misc.2d 701, 478 N.Y.S.2d 524 (Sup. Ct. 1984) (holding that because agency released records after proceeding was initiated, case was moot, petitioner did not substantially prevail, and no fees would be awarded); *Steele v. Dep't of Health*, 119 Misc.2d 963, 464 N.Y.S.2d 925 (Sup. Ct. 1983) (granting attorneys' fees); *Schreibman v. Kripplebush-Lyonsville Fire Department Inc.*, Index No: 93-3772 (Sup. Ct. Ulster County September 23, 1994) (finding respondent in contempt of court for failure to comply with court's order directing the production of information under FOIL and imposing a fine).

a. Attorney fees.

See Fenstermaker v. Edgemont Union Free School Dist., 48 A.D.3d 564, 856 N.Y.S.2d 115 (1st Dep't 2008) (initiation of frivolous article 78 proceeding challenging the copying fee arrangement expressly provided for by statute, and which had no basis in law or fact, may be sanctioned by imposing costs, including attorney's fees, against the petitioner who initiated such action).

10. Fines.

There are no statutory provisions for fines under FOIL; *but see Schreibman v. Kripplebush-Lyonsville Fire Department Inc.*, Index No: 93-3772 (Sup. Ct. Ulster County September 23, 1994) (finding respondent in contempt of court for failure to comply with court's order directing the production of information under FOIL and imposing a fine).

11. Other penalties.

Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation. N.Y. Pub. Off. Law § 89(8) (McKinney Supp. 1993).

12. Settlement, pros and cons.

A requester, at any time, may decide to accept access to a portion of the requested records.

E. Appealing initial court decisions.

Issues on appeal. As a general rule, a court will not review on appeal an issue not raised below. Among the exceptions to the general rule are instances where questions affecting the public interest are raised. In the interest of justice, the intermediate appellate court in New York may always exercise its broad discretion to consider matters neither properly presented nor preserved below. *Mooney v. State Police*, 117 A.D.2d 445, 502 N.Y.S.2d 828 (3d Dep't 1986) (policeman challenging dismissal granted access to his records including complaints and

investigation reports).

1. Appeal routes.

The appeal procedure is that of any appeal from the Supreme Court. *See generally* N.Y. Civ. Prac. L. & R. Articles 55, 56, 57 (McKinney 1978). A Supreme Court order or judgment is first appealed to the Appellate Division in the department embracing the county in which the order or judgment appealed from is entered, N.Y. Civ. Prac. L. & R. § 5711 (McKinney 1978), and then to the Court of Appeals, Albany County.

2. Time limits for filing appeals.

An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry. N.Y. Civ. Prac. L. & R. § 5513(a) (McKinney 1978). A motion for permission to appeal must be made within thirty days of the date of service, upon the party seeking permission, of a copy of the order or judgment appealed from and written notice of its entry. N.Y. Civ. Prac. L. & R. § 5513(b) (McKinney 1978).

3. Contact of interested amici.

The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209. (703) 807-2100. (800) 336-4243.

Special Committee on Media Law, New York State Bar Association, One Elk Street, Albany, N.Y. 12207.

Communications Law Committee, Association of the Bar of the City of New York, 42 W. 44th Street, New York, N.Y. 10036.

New York Press Association, 1681 Western Avenue, Albany NY 12203-4307.

New York Newspaper Publishers Association Inc., 291 Hudson Avenue, Suite A, Albany, N.Y. 12210.

The New York State Broadcasters Association Inc., 1805 Western Avenue, Albany, N.Y. 12203.

New York State Society of Newspaper Editors, Newhouse Communications Center, Syracuse University, Syracuse, N.Y. 13244.

F. Addressing government suits against disclosure.

In *Village of Brockport v. Calandra*, 745 N.Y.S. 2d. 662 (N.Y. Sup., Monroe County, 2002), the Supreme Court held that the village's action of seeking a declaratory judgment to determine its obligation to disclose a settlement agreement with the chief of police under FOIL was acceptable because of the nature of the agreement. However, to the extent that a plaintiff seeks a declaration that its proposed responses to a defendants' FOIL requests are proper, the plaintiff would seek an impermissible advisory opinion from the Court because it would seek guidance on a contemplated future action. (The Committee on Open Government is charged with giving advisory opinions on the FOIL statute. *New York Public Interest Research Group Inc. v. Cohen*, 729 N.Y.S.2d. 379, 382 (N.Y. Sup. 2001).)

Open Meetings

I. STATUTE -- BASIC APPLICATION.

The purpose of New York State's Open Meetings Law, *Public Officers Law*, Article 7, §§ 100-111, is set forth in its legislative declaration:

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 commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.

N.Y. *Public Officers Law*, § 100 (McKinney 1988).

A. Who may attend?

The "general public" may attend meetings, other than executive sessions or meetings specifically exempted under the law. N.Y. Pub. Off. Law § 103(a) (McKinney 1988).

General accommodation requirements. As of 2010, public bodies are required to make reasonable efforts to hold meetings in rooms that can "adequately accommodate" members of the public who wish to attend. In the event of a contentious issue on the agenda and indications of substantial public interest, numerous letters to the editor, phone calls or emails regarding the topic, or perhaps a petition asking officials to take action, the new provision would require the public body to consider the number of people who might attend the meeting and take appropriate action to hold the meeting at a location that would accommodate those interested in attending, such as a school facility, a fire hall or other site. N.Y. Pub. Off. Law § 103(d) (McKinney 2010). Case law prior to this amendment paralleled this rule. *See Windsor Owners Corp. v. City Council of N.Y.C.*, 23 Misc.3d 490, 878 N.Y.S.2d 545 (Sup. Ct., 2009) (no violation; although the meeting room was small, the council provided additional seating and closed circuit television, and gave everyone who signed up to testify time to be heard); *Brander v. Town of Warren Town Bd.*, 18 Misc.3d 477, 847 N.Y.S.2d 450 (Sup. Ct. 2007) (where the facility is only able to seat a small number of people, and the general public must leave the building when an executive session is called, the facility was a factor in voiding the decision).

Access for people with disabilities. Public bodies shall make reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped. N.Y. Pub Off. Law § 103(b) (McKinney 1988); *Smith v. Town of Warwick*, 169 A.D.2d 976 (3d Dep't 1991); *Clark v. Lyon*, 147 A.D.2d 838 (3d Dep't 1989); *Fenton v. Randolph*, 92 Misc.2d 514, 400 N.Y.S.2d 987 (Sup. Ct. 1977).

Screening of attendees. Those attending meetings may not be unreasonably searched. *Goetschius v. Board of Education*, N.Y.L.J., March 10, 1999, Sup. Ct., Westchester County, 1999 (School board employed multiple "security" measures-including bomb-sniffing dogs, video cameras trained on audience, and metal detectors-and began meeting before members of public had been permitted entry; held to violate attendees' Fourth Amendment rights and OML.).

B. What governments are subject to the law?

Public bodies convened for the purpose of conducting public business are subject to the OML. N.Y. Pub. Off. Law § 102 (McKinney 1988). This includes state, county, local and municipal governmental entities.

1. State.

State governmental entities are subject to the OML. *See, e.g.*, *New York University v. Whalen*, 46 N.Y.2d 734, 386 N.E.2d 245, 413

N.Y.S.2d 637 (1978) (state health commissioner and state hospital review and planning council); *Bowen v. State Commission of Correction*, 104 A.D.2d 238, 484 N.Y.S.2d 210 (3d Dep't 1984) (state commission of correction).

2. County.

County governmental entities are subject to the law. *See*, *e.g.*, *Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 (4th Dep't 1981) (county legislature); *Village of Great Neck Plaza v. Nassau County Rent Guidelines Bd.*, 69 A.D.2d 528, 418 N.Y.S.2d 796 (2d Dep't 1979) (county rent guidelines board created by local legislative body); *Orange County Publications v. County of Orange*, No. 5686/78 (Sup. Ct., Orange County, Oct. 26, 1983) (county legislative subcommittee); *In re Holdsworth*, No. 80-1180 (Sup. Ct., Tompkins County, Nov. 13, 1980) (county board of representatives).

3. Local or municipal.

Local and municipal governmental entities are subject to the OML. *See*, *e.g.*, *Addesso v. Sharpe*, 44 N.Y.2d 925, 379 N.E.2d 1138, 908 N.Y.S.2d 8 (1978) (city zoning board of appeals); *Grossman v. Planning Bd.*, 126 A.D.2d 887, 510 N.Y.S.2d 929 (3d Dep't 1987) (town planning board); *Callanan Indus. v. City of Schenectady*, 116 A.D.2d 883, 498 N.Y.S.2d 490 (3d Dep't 1986) (city council); *Concerned Citizens to Review the Jefferson Mall v. Town Bd.*, 83 A.D.2d 612, 441 N.Y.S.2d 292 (2d Dep't 1981), *appeal dismissed*, 54 N.Y.2d 957, 429 N.E.2d 833, 445 N.Y.S.2d 154 (1981) (town board); *Kloepfer v. Commissioner of Education*, 82 A.D.2d 974, 440 N.Y.S.2d 785 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 687, 436 N.E.2d 1334, 451 N.Y.S.2d 732 (1982) (city board of education); *Orange County Publications v. Council of Newburgh*, 60 A.D.2d 409, 401 N.Y.S.2d 84 (2d Dep't 1978), *aff'd*, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978) (city council).

C. What bodies are covered by the law?

The OML is applicable to "public bodies" meeting for the purpose of conducting public business. N.Y. Pub. Off. Law §§ 102, 103(a) (McKinney 1988). A "public body" is defined by the OML to mean "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body." N.Y. Pub. Off. Law § 102(2) (McKinney 1988). General Construction Law § 66 defines "public corporation" to include "a municipal corporation, a district corporation, or a public benefit corporation." N.Y. Gen. Constr. Law § 66(1) (McKinney Supp. 1988).

The OML excludes federal bodies from its ambit. *American Society for the Prevention of Cruelty to Animals v. Board of Trustees*, 79 N.Y.2d 927, 582 N.Y.S.2d 983, 591 N.E.2d 1169 (1992) (Laboratory animal user committee of university derived its powers solely from federal law and was not a "public body" under the OML).

1. Executive branch agencies.

a. What officials are covered?

Executive officials acting as part of a public body for the purpose of conducting public business are covered by the OML. *See*, *e.g.*, *Warren v. Giambra*, 12 Misc.3d 650, 813 N.Y.S.2d 892 (Sup. Ct. 2006) (presence of the County Executive meant a meeting of the Democratic majority was not an exempt caucus under OML); *Oneonta Star v. Bd. of Trustees*, 66 A.D.2d 51, 412 N.Y.S.2d 927 (3d Dep't 1979) (meeting of mayor, local school board and city council committee). *See also In re Poughkeepsie Newspaper*, N.Y.L.J., June 12, 1987 (Sup. Ct., Dutchess County, 1987) ("public policy precludes an elected official (in this case Mayor Koch) from exculpating himself from the Open Meetings Law Statute through the subterfuge of acting through an Advisory Committee to study, report and recommend potential legislative action concerning a governmental function"). *But see NYPIRG v. Governor's Advisory Comm'n*, 133 Misc.2d 613, 507 N.Y.S.2d 798 (Sup. Ct. 1986) (advisory commission is not subject to OML where it merely makes recommendations and was created by executive order).

b. Are certain executive functions covered?

The OML requires every "meeting" of a public body to be open to the general public except in certain enumerated instances when executive sessions are allowed. N.Y. Pub. Off. Law § 103(a) (McKinney 1988). "Meeting" is defined by the OML to mean "the official convening of a public body for the purpose of conducting public business." N.Y. Pub. Off. Law § 102(1) (McKinney 1988). The term "conducting public business" is not statutorily defined.

There are exceptions to the broad rule. The statute specifically exempts and does not extend to: (1) judicial or quasi-judicial proceedings, (2) deliberations of political committees, conferences and caucuses in specified instances, and (3) matters made confidential by federal or state law. N.Y. Pub. Off. Law § 108 (McKinney 1988).

c. Are only certain agencies subject to the act?

The OML does not specifically include or exclude agencies from coverage. Rather, the statute states that meetings of a "public body" convened for the purpose of conducting public business are subject to the law. N.Y. Pub. Off. Law §§ 102, 103(a) (McKinney 1988). "Public body" is broadly defined to include "any entity for which a quorum is required . . . performing a governmental function for the state or for an agency or department thereof, or for a public corporation . . . or committee or subcommittee or other similar body of such public body." N.Y. Pub. Off. Law § 102(2) (McKinney 1988).

2. Legislative bodies.

State and local legislative bodies, including their committees and subcommittees, are covered by the OML. *See*, *e.g.*, *Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 (4th Dep't 1981) (county legislature); *Orange Co. Publications v. Council of Newburgh*, 60 A.D.2d 409, 401 N.Y.S.2d 84 (2d Dep't 1978), *aff'd*, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978) (city council); *Orange County Publications v. County of Orange*, No. 5686/78 (Sup. Ct., Orange County, Oct. 26, 1983) (county legislative subcommittee).

However, the OML does not extend to "deliberations of political committees, conferences, and caucuses." N.Y. Pub. Off. Law § 108(2)(a) (McKinney 1988). This is defined to mean "a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations." N.Y. Pub. Off. Law § 108(2)(b) (McKinney 1988). *Compare Urban Justice Center v. Pataki*, 38 A.D.3d 20, 828 N.Y.S.2d 12 (1st Dep't 2006) (single part caucus exempt from OML), *with Warren v. Giambra*, 12 Misc.3d 650, 813 N.Y.S.2d 892 (Sup. Ct. 2006) (presence of the County Executive meant a meeting of the Democratic majority was not an exempt caucus under OML).

3. Courts.

The OML expressly exempts from its coverage judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals. N.Y. Pub. Off. Law § 108(1) (McKinney 1988). *But see Warren v. Giambra*, 12 Misc.3d 650, 813 N.Y.S.2d 892 (Sup. Ct. 2006) (meeting between legislators and a mediator is not a judicial proceeding and is subject to OML).

4. Nongovernmental bodies receiving public funds or benefits.

The OML's definition of "public body" includes entities "performing a governmental function for the state or for an agency or depart-

ment thereof, or for a public corporation." N.Y. Pub. Off. Law § 102(2) (McKinney 1988). Thus, nongovernmental bodies receiving public funds or benefits may be held subject to the OML when performing a governmental function. *See, e.g., Holden v. Board of Trustees*, 80 A.D.2d 378, 440 N.Y.S.2d 58 (3d Dep't 1981) (meetings of the Cornell University board of trustees were held subject to the OML when the board's deliberations concerned its operation of statutory public colleges because, in this instance, the board was performing a governmental function).

5. Nongovernmental groups whose members include governmental officials.

Although not directly addressed by the OML, nongovernmental groups performing a governmental function may be deemed to fall within the statute's definition of "public body" and thus subject to the law. *See, e.g., Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984, 437 N.Y.S.2d 466 (4th Dep't 1981), *appeal dismissed*, 55 N.Y.2d 995, 434 N.E.2d 270, 449 N.Y.S.2d 201 (1982) (mayor's task force on abandoned housing and homestead committee).

6. Multi-state or regional bodies.

No cases located.

7. Advisory boards and commissions, quasi-governmental entities.

Subject to OML. Advisory committees, task forces and commissions which perform governmental functions have been held subject to the OML. *See Reese v. Daines*, 62 A.D.3d 1254, 887 N.Y.S.2d 801 (4th Dep't 2009) (Western New York Health System is a public body because it performs a "quintessentially governmental function . . . by overseeing the merger and consolidation of [county medical services]" and "has final decision-making authority to carry out that function"); *Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984, 437 N.Y.S.2d 466 (4th Dep't 1981), *appeal dismissed*, 55 N.Y.2d 995, 434 N.E.2d 270, 449 N.Y.S.2d 201 (1982) (mayor's task force on abandoned housing and homestead committee); *Flynn v. Citizen Review Bd.*, No. 96-094 (Sup. Ct., Onondaga County, March 11, 1996) (citizens board appointed to investigate police misconduct); *Pissare v. City of Glens Falls*, (Sup. Ct., Warren County, March 7, 1978) (civic center commission created by common council and appointed by mayor); *MFY Legal Services Inc. v. Toia*, 93 Misc.2d 147, 402 N.Y.S.2d 510 (Sup. Ct. 1977) (medical advisory committee appointed by Governor).

Not subject to OML. An advisory committee, task force or commission is not subject to the OML where it possesses no power and exists merely to provide advice and, therefore, is not a "public body" serving a governmental function. *See Goodson Todman Enterprises Ltd. v. Milan Town Board*, 151 A.D.2d 642, 542 N.Y.S.2d 373 (2d Dep't 1989) (town zoning revision committee's function was purely advisory and did not involve exercise of sovereign power); *Poughkeepsie Newspaper Division of Gannett Satellite Information Network et al. v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs*, 145 A.D.2d 65, 537 N.Y.S.2d 582 (2d Dep't 1989) (task force has no power on its own, and does not serve a governmental function); *NYPIRG v. Governor's Advisory Commission*, 133 Misc.2d 613, 507 N.Y.S.2d 798 (Sup. Ct. New York County 1986) (advisory commission is not subject to OML where it merely makes recommendations and was created by executive order); *Snyder v. Third Dep't Judicial Screening Comm.*, 18 A.D.3d 1100, 795 N.Y.S.2d 398 (3d Dep't 2005) (Snyder filed a petition to compel a judicial screening committee composed of members designated pursuant to an Executive Order issued by the Governor to disclose information about candidates seeking to fill the unexpired term of a county judgeship. Snyder sought information about highly rated candidates, along with post-appointment communications between the successful candidate and the screening committee. The committee responded that its records and deliberations were not subject to disclosure on the basis of 9 NYCRR § 5.10 (2)(d), which mandates confidentiality for the committee's deliberations, reports, and communications with candidates. Snyder sought review of a trial court judgment that granted the judicial screening committee's motion to dismiss the petition for failure to state a cause of action based on the committee's role as being merely advisory and, thus, outside the scope of the Freedom of Information Law and the Open Meetings Law. The intermediate appellate court affirmed, holding that confidentiality is necessary to the judicial selection process, and that the screening committee's role was limited to providing the Governor — who retained the discretionary power of judicial appointment under the state Constitution — with the names of potential candidates. Therefore, the information sought was not subject to FOIL, nor were the Open Meeting Law's requirements applicable); *Rowe v. Town of Chautauqua*, No. 10-02314, 524, 2011 WL 1733882 (4th Dep't, May 6, 2011) (institution has no power to act on the State's behalf, thus it is not a public body and not subject to OML).

Meetings of committees and subcommittees. Several court decisions rendered soon after the enactment of the OML held that meetings of committees without authority to take final or binding action were not "meetings" within the meaning of the law. *See, e.g., Daily Gazette Co. v. North Colonie Bd. of Educ.*, 67 A.D.2d 803, 412 N.Y.S.2d 494 (3d Dep't 1979) (standing committee of board of education); *Bigman v. Siegel* (Sup. Ct., Queens County, Sept. 29, 1977) (Queens College committee on faculty personnel and budget). The OML was amended, effective October 1, 1979, to include committees and subcommittees within the definition of the term "public body," thus clarifying that such entities are within the scope of coverage of the OML.

8. Other bodies to which governmental or public functions are delegated.

School boards and educational institutions. The meetings of boards of public educational institutions are covered by the OML. *See, e.g., Brown v. Casier*, 95 A.D.2d 574, 469 N.Y.S.2d 165 (3d Dep't 1983) (community college board of trustees); *White v. Battaglia*, 79 A.D.2d 880, 434 N.Y.S.2d 537 (4th Dep't 1980), *mot. lv. appeal denied*, 53 N.Y.2d 603, 421 N.E.2d 854, 439 N.Y.S.2d 1027 (1981) (school board); *Binghamton Press Co. v. Board of Educ.*, 67 A.D.2d 797, 412 N.Y.S.2d 492 (3d Dep't 1979) (city school board).

9. Appointed as well as elected bodies.

The OML covers appointed as well as elected public bodies. *See, e.g., Burgher v. Purcell*, 87 A.D.2d 888, 449 N.Y.S.2d 527 (2d Dep't 1982) (the OML's term "public body" includes trustees appointed by town supervisor to administer a testamentary trust for the town's poor).

D. What constitutes a meeting subject to the law.

See below.

1. Number that must be present.

See below.

a. Must a minimum number be present to constitute a "meeting"?

The OML defines "meeting" as "the official convening of a public body for the purpose of conducting public business." N.Y. Pub. Off. Law § 102(1) (McKinney 1988). A "public body" is an "entity for which a quorum is required in order to conduct public business and which consists of 2 or more members . . . ." N.Y. Pub. Off. Law § 102(2) (McKinney 1988).

These provisions have been read to require that a quorum be present to constitute a meeting. *See, e.g., Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 (4th Dep't 1981). A quorum is a majority of the entire body and not less than a majority of the whole number may act. An entire body is the total number of members with no vacancies or disqualifications. N.Y. Gen. Constr. Law § 41 (McKinney 1951); *D.E.P. Resources Inc. v. Planning Bd.*, 131 A.D.2d 757, 516 N.Y.S.2d 954 (2d Dep't 1987); *Reiff v. City Conciliation and Appeals Bd*, N.Y.L.J., July 3, 1985 (Sup. Ct., N.Y. County, 1985)

b. What effect does absence of a quorum have?

The OML applies to any gathering or meeting of a quorum of a public body for the purpose of transacting public business. *Orange County Publications v. Council of Newburgh*, 60 A.D.2d 409, 401 N.Y.S.2d 84 (2d Dep't 1978), *aff'd*, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978). In the absence of a quorum, there can be no "meeting" and thus no violation of the OML. *Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 (4th Dep't 1981); *Montano v. Watervliet*, No. 5529-03, 2006 WL 6145663 (Sup. Ct., Albany County, Oct. 13, 2006); *Pirrotti v. Town of Greenburgh*, 2009 WL 3834399 (Sup. Ct. 2009). However, a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body should not be used to thwart the purposes of the OML. *Tri-Village Publishers v. St. Johnsville Bd. of Educ.*, 110 A.D.2d 932, 487 N.Y.S.2d 181 (3d Dep't 1985). A planned meeting at which a quorum is eventually present is a meeting under the OML. *Goodson Todman Enterprises v. City of Kingston Common Council*, 153 A.D.2d 103, 550 N.Y.S.2d 157 (3d Dep't 1990).

2. Nature of business subject to the law.

The OML requires all meetings of a public body to be open to the general public regardless of the nature of its business, unless the business to be discussed falls within either one of 3 categories of exemptions or one of 8 specified categories for which executive sessions are allowed.

Certain deliberations are exempt entirely from the OML's coverage. By its express terms, the OML does not extend to (1) judicial or quasi-judicial proceedings except proceedings of the public service commission and zoning boards of appeals, (2) deliberations of political committees, conferences and caucuses in certain instances, and (3) deliberations on any matter made confidential by federal or state law. N.Y. Pub. Off. Law § 108 (McKinney 1988).

Executive sessions may be conducted for the following purposes: (a) matters which will imperil the public safety if disclosed; (b) any matter which may disclose the identity of a law enforcement agent or informer; (c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed; (d) discussions regarding proposed, pending or current litigation; (e) collective negotiations pursuant to article fourteen of the civil service law; (f) 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; (g) the preparation, grading or administration of examinations; and (h) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body when publicity would substantially affect the value thereof. N.Y. Pub. Off. Law § 105 (McKinney 1988).

a. "Information gathering" and "fact-finding" sessions.

The statute applies not only to formal or regular meetings, but to any gathering or meeting of a quorum of a public body for the purpose of transacting public business. *Tri-Village Publishers v. St. Johnsville Bd. of Educ.*, 110 A.D.2d 932, 487 N.Y.S.2d 181 (3d Dep't 1985). This includes "work sessions," "agenda sessions," "conferences," "organizational meetings," and the like, where a quorum is present, during which public business is discussed, even if no formal action is taken. *Goodson Todman Enterprises v. City of Kingston Common Council*, 153 A.D.2d 103, 550 N.Y.S.2d 157 (3d Dep't 1990) (planned informal conference); *Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 (4th Dep't 1981) (it is of no significance that formal action is not taken or that gatherings are denominated "work sessions" or "agenda sessions"); *Orange County Publications v. Council of Newburgh*, 60 A.D.2d 409, 401 N.Y.S.2d 84 (2d Dep't 1978), *aff'd*, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978) (it is the entire decision-making process that the Legislature intended to affect by the enactment of the OML); *Kessel v. D'Amato*, 97 Misc.2d 675, 412 N.Y.S.2d 303 (Sup. Ct. 1979) (dinner gathering between two open meetings did not violate OML; prearranged gathering to pick up work sheets for later meeting did not violate OML; but luncheon gathering at which staff reported to board was technical violation). *Cf. Residents For a More Beautiful Port Washington v. Town of North Hempstead*, 153 A.D.2d 727, 155 A.D.2d 521, 545 N.Y.S.2d 303 (2d Dep't 1989), *appeal denied*, 75 N.Y.2d 703 (1990) (negotiations between parties' attorneys was not meeting subject to OML); *City of New Rochelle v. Public Service Commission of the State of New York*, 150 A.D.2d 441, 541 N.Y.S.2d 49 (2d Dep't 1989) (OML was not violated when Public Service Commissioners toured proposed routes prior to certifying site for placement of transition station, and a summary report of the tour was properly provided to interested parties); *Cioci v. Mondello*, No. 28261/90 (Sup. Ct., Nassau County, March 18, 1991) (regular gathering of supervisors for informal discussions prior to meeting does not violate the OML); *Warren v. Giambra*, 12 Misc.3d 650, 813 N.Y.S.2d 892 (Sup. Ct. 2006) (county legislators meeting with state legislators for an instructional session on restoring fiscal stability is "the official convening of a public body for the purpose of conducting public business" under OML); *Finger Lakes Preservation Ass'n v. Town Bd. the Town of Italy*, 25 Misc.3d 1115, 887 N.Y.S.2d 499 (Sup. Ct., Yates County, Oct. 8, 2010) (outing by three members of the board to visit a wind farm to study the effects of its noise was not an official convening because the proposed law was not discussed

b. Deliberations toward decisions.

The OML has been held to apply to the entire decision-making process, and to cover all acts leading to and through the formal act of voting. *See, e.g., Gold v. Zoning Bd. of Appeals*, No. 010551/10, 2010 WL 31182821 (Sup. Ct., Nassau County, Jul. 27, 2010) (zoning board violated OML by "barring access to its deliberative and voting session"); *Goodson Todman Enterprises v. City of Kingston Common Council*, 153 A.D.2d 103, 550 N.Y.S.2d 157 (3d Dep't 1990) (planned informal conference); *Orange County Publications v. Council of Newburgh*, 60 A.D.2d 409, 401 N.Y.S.2d 84 (2d Dep't 1978), *aff'd*, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978). *But see Hill v. Planning Bd.*, 140 A.D.2d 967, 529 N.Y.S.2d 642 (4th Dep't 1988) (conference of several members of planning board with town attorney regarding prior action taken was not meeting under OML, as no determinations were made which affected the public).

3. Electronic meetings.

The statue particularly addresses meetings conducted via videoconference, stating:

1. A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.

2. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

N.Y. Pub. Off. Law §§ 103(c) & 104(4).

a. Conference calls and video/Internet conferencing.

Cheever v. Town of Union, Sup. Ct., Broome County 1998 (four members of five-member board discussed an issue in a series of telephone calls; held to be a public meeting subject to Open Meetings Law because "the failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of" the OML; action taken was voided).

b. E-mail.

Not addressed.

c. Text messages.

Not addressed.

d. Instant messaging.

Not addressed.

e. Social media and online discussion boards.

Not addressed.

E. Categories of meetings subject to the law.

See below.

1. Regular meetings.

a. Definition.

"Meeting" is defined by the statute as "the official convening of a public body for the purpose of conducting public business." N.Y. Pub. Off. Law § 102(1) (McKinney 1988).

"[T]he courts have construed the Open Meetings Law liberally and have held that gatherings by a public body to discuss public business fall within its provisions," provided a quorum is present, even if no formal action is taken. *Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 (4th Dep't 1981). *See also Orange County Publications v. Council of Newburgh*, 60 A.D.2d 409, 401 N.Y.S.2d 84 (2d Dep't 1978), *aff'd*, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978). *But see Hill v. Planning Bd.*, 140 A.D.2d 967, 529 N.Y.S.2d 642 (4th Dep't 1988) (conference of several members of planning board with town attorney regarding prior action taken was not meeting under OML, as no determinations were made which affected the public).

b. Notice.

(1). Time limit for giving notice.

Various State and local laws require public notice of the time and place of certain meetings. In addition, the OML requires that:

1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

N.Y. Pub. Off. Law § 104(1) and (2) (McKinney 1988).

See Bowen v. State Comm'n of Correction, 104 A.D.2d 238, 484 N.Y.S.2d 210 (3d Dep't 1984) (where meeting was scheduled less than a week in advance, notice given almost immediately after scheduling was reasonable and satisfied public notice requirement); *White v. Battaglia*, 79 A.D.2d 880, 434 N.Y.S.2d 537 (4th Dep't 1980), *mot. lv. appeal denied*, 53 N.Y.2d 603, 421 N.E.2d 854, 439 N.Y.S.2d 1027 (1981) (notice posted on bulletin board without any notice to the media was not reasonable and was patently inadequate for meeting called on 3 1/2 hours notice).

(2). To whom notice is given.

Notice shall be given to the news media and the public. N.Y. Pub. Off. Law § 104(1) and (2) (McKinney 1988); *See White v. Battaglia*, 79 A.D.2d 880, 434 N.Y.S.2d 537 (4th Dep't 1980), *mot. lv. appeal denied*, 53 N.Y.2d 603, 421 N.E.2d 854, 439 N.Y.S.2d 1027 (1981) (notice posted on bulletin board without any notice to the media was not reasonable and was patently inadequate for meeting called on 3 1/2 hours notice).

(3). Where posted.

Public notice shall be conspicuously posted in one or more designated public locations, and when the public body has the ability to do so, notice must be posted on the body's Internet website.

N.Y. Pub. Off. Law § 104(1), (2) & (4) (McKinney 2011 Pocket Part).

See Britt v. County of Niagara, 82 A.D.2d 65, 440 N.Y.S.2d 790 (4th Dep't 1981) (technical violation because no public notice was "conspicuously" posted was not alone sufficient ground to invalidate action taken where press was in fact notified and attended); *Rivers v. Young*, 26 Misc.3d 946, 892 N.Y.S.2d 747 (Sup. Ct. 2009) ("While . . . updat[ing a website] regularly may be inconvenient, inconvenience should not excuse failure to comply with statutory mandates.").

(4). Public agenda items required.

The OML does not require notice of public agenda items. The statute only mandates notice of the time and place of the meeting. N.Y. Pub. Off. Law § 104 (McKinney 1988). *See Parents v. Bd. of Educ.*, (Sup. Ct., Ulster County, Sept. 22, 1982); *Exmore House, LLC v. Vill. of Millbrook Planning Bd.*, 82 A.D.3d 763, 917 N.Y.S.2d 905 (2d Dep't 2011) (notice of the agenda of a special meeting need not be given to the public).

(5). Other information required in notice.

Only the time and place of a meeting are required to be noticed. N.Y. Pub. Off. Law § 104(1) and (2) (McKinney 1988). If video conference is being used the various locations must be noticed. N.Y. Pub. Off. Law § 104(4).

The OML expressly states that "[t]he public notice provided for by this section shall not be construed to require publication as a legal notice." N.Y. Pub. Off. Law § 104(3) (McKinney 1988).

(6). Penalties and remedies for failure to give adequate notice.

The courts have the power, in their discretion and upon good cause shown, to declare void any action taken in violation of the OML. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). However, an unintentional failure to fully comply with the notice provisions of the OML shall not alone be grounds for invalidating action taken at a meeting of a public body. N.Y. Pub. Off. Law § 107(1) (McKinney 1988); *Center Square Ass'n Inc. v. City of Albany Bd. of Zoning Appeals*, 19 A.D.3d 968, 798 N.Y.S.2d 756 (3d Dep't 2005) (Prior to conducting a noticed public meeting, as required by *Public Officers Law* § 104, the City of Albany Board of Zoning Appeals held an informal open meeting without providing any notice to the public. This prior informal meeting arguably violated the Open Meetings Law, but because the determination at issue was adopted at a subsequent public session of the Board, and because the prior informal meeting had itself been open to the public, an intermediate appellate court determined that good cause did not exist to declare the Board's action void.) *Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S 2d 790 (4th Dep't 1981). *See also Phillips v. Cnty. of Monroe*, 49 A.D.3d 1353, 853 N.Y.S.2d 820 (4th Dep't 2008) *aff'g* No. 2001/14206, 2007 WL 4884524 (Sup. Ct., Monroe County, Dec. 10, 2007) (the fact that at least two members of the public were able to attend showed the public was not adversely affected by the truncated notice period, thus there was not good cause to nullify the ruling); *Monroe-Livingston Sanitary Landfill Inc. v. Bickford*, 107 A.D.2d 1062, 486 N.Y.S.2d 566 (4th Dep't 1985), *mot. lv. appeal dismissed*, 65 N.Y.2d 1025, 484 N.E.2d 668, 494 N.Y.S.2d 305 (1985) (even if notice was not in full compliance with the OML, it was reasonable under the circumstances and invalidation of town board's action was not warranted); *White v. Battaglia*, 79 A.D.2d 880, 434 N.Y.S.2d 537 (4th Dep't 1980), *mot. lv. appeal denied*, 53 N.Y.2d 603, 421 N.E.2d 854, 439 N.Y.S.2d 1027 (1981) (where violations of notice provisions appeared intentional, invalidation of school board's action would be upheld); *Szurnicki v. Janisch*, N.Y.L.J., Feb. 13, 1992 (Sup. Ct. Suffolk County, 1992) (failure to give notice of special meeting was unintentional and a technical failure to comply with the OML is insufficient to invalidate action of school board); *Dicesare v. Board of Education*, No. 2907/88, (Sup. Ct., Dutchess County, Jan. 9, 1989) (unintentional fail-

ure to fully comply with notice provisions is not sufficient grounds to invalidate action); *Crain v. Reynolds*, N.Y.L.J., Aug. 12, 1998 (Sup Ct. New York County, 1998) (action taken at meeting was voided in part because chair of board had been quoted in newspaper as saying that she didn't "think there will be a vote" on the issue, and she confirmed the quote was correct).

Misleading information given to press. Misleading information given to the press may invalidate notice. *Crain v. Reynolds*, N.Y.L.J., Aug. 12, 1998 (Sup Ct. New York County, 1998) (action taken at meeting was voided in part because chair of board had been quoted in newspaper as saying that she didn't "think there will be a vote" on the issue, and she confirmed the quote was correct).

c. Minutes.

(1). Information required.

Minutes shall consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." N.Y. Pub. Off. Law § 106(1) (McKinney 1988). "[W]hen action is taken by a formal vote at open or executive sessions, the Freedom of Information Law and Open Meetings Law both require open voting and a record of the manner in which each member voted." *Smithson v. Ilion Housing Authority*, 130 A D.2d 965, 516 N.Y.S.2d 564 (4th Dep't 1987), *aff'd*, 72 N.Y.2d 1034, 531 N.E.2d 651, 534 N.Y.S.2d 930 (1988).

(2). Are minutes public record?

The OML states that minutes of open meetings of all public bodies shall be available to the public in accordance with the provisions of the Freedom of Information Law within two weeks from the date of the open meeting. N.Y. Pub. Off. Law § 106 (3) (McKinney 1988).

See generally Mitchell v. Bd. of Educ., 113 A.D.2d 924, 493 N.Y.S.2d 826 (2d Dep't 1985) (the imposition of the duty to take minutes and make them available to the public does not preclude all other methods of recordation); *Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984, 437 N.Y.S.2d 466 (4th Dep't 1981), *appeal dismissed*, 55 N.Y.2d 995, 434 N.E.2d 270, 449 N.Y.S.2d 201 (1982) (where minutes were made without contemplation of public exposure, *in camera* review ordered to redact information which impinged upon privacy of various individuals).

2. Special or emergency meetings.

a. Definition.

The statute does not specifically address special or emergency meetings. It does, however, in its notice provisions, address meetings which have not been scheduled at least one week in advance. N.Y. Pub. Off. Law § 104(2) (McKinney 1988).

b. Notice requirements.

The statute requires notice to be given at a "reasonable time prior" to a meeting which has not been scheduled at least one week in advance. N.Y. Pub. Off. Law § 104(2) (McKinney 1988). *Szurnicki v. Janisch*, N.Y.L.J., Feb. 13, 1992 (Sup. Ct. Suffolk County, 1992) (notice of special meeting shall be given to the extent practicable); *Finger Lakes Preservation Ass'n v. Town Bd. of the Town of Italy*, 25 Misc.3d 1115, 887 N.Y.S.2d 499 (Sup. Ct., Yates County, Oct. 8, 2010) (because the meeting was scheduled on short notice, it was sufficient that notice was not posted in the newspaper, but at Town Hall, in a location where notice is always posted); *Phillips v. Cnty. of Monroe*, 49 A.D.3d 1353, 853 N.Y.S.2d 820 (4th Dep't 2008) *aff'g*, No. 2001/14206, 2007 WL 4884524 (Sup. Ct., Monroe County, Dec. 10, 2007) (notice period of two days was sufficient when notice was provided through news media, Internet, and other channels).

All other provisions regarding special or emergency meetings are the same as for regular meetings.

c. Minutes.

Provisions regarding minutes of special or emergency meetings are the same as for regular meetings.

3. Closed meetings or executive sessions.

a. Definition.

As defined by the OML, an "executive session" is "that portion of a meeting not open to the general public." N.Y. Pub. Off. Law § 102(3) (McKinney 1988). An executive session is permissible only in eight specific categories:

(1) matters which will imperil the public safety if disclosed;

(2) any matter which may disclose the identity of a law enforcement agent or informer;

(3) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

(4) discussions regarding proposed, pending or current litigation;

(5) collective negotiations pursuant to article fourteen of the civil service law;

(6) 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;

(7) the preparation, grading or administration of examinations; and

(8) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

b. Notice requirements.

A public body may go into executive session "upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered." N.Y. Pub. Off. Law § 105(1) (McKinney 1988). An executive session may not be had until the appropriate motion is made and adopted at an open meeting of the public entity involved. *Oneonta Star v. Bd. of Trustees*, 66 A.D.2d 51, 412 N.Y.S.2d 927 (3d Dep't 1979).

(1). Time limit for giving notice.

Closed sessions are authorized only upon a majority vote, taken in an open meeting, on a motion to go into executive session. N.Y. Pub. Off. Law § 105(1) (McKinney 1988). It is improper for a public body to schedule an executive session in advance of an open meeting. *Doolittle v. Board of Educ.*, No. 81-1942 (Sup. Ct., Chemung County, Oct. 20, 1981); *Steele v. City of Niagara Falls*, (Sup. Ct., Niagara County, March 31, 1980); *Contra Previdi v. Hirsch*, 138 Misc.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988) (posting of a single notice on a school bulletin board is inadequate notice of an executive session held later the same day; the executive session could have been scheduled for another date and more extensive notice given); *Stephenson v. Bd. of Educ. of Hamburg Cent. Sch. Dist.*, No. 12597/2010, 2011 WL 1877621 (Sup. Ct., Erie County, May 17, 2011) (executive session improperly scheduled before a properly noticed public meeting violated OML).

(2). To whom notice is given.

Notice is provided to those present during the closure vote taken in the open meeting. N.Y. Pub. Off. Law § 105(1) (McKinney 1988).

(3). Where posted.

Not applicable.

(4). Public agenda items required.

The OML does not require that notice of a meeting include a proposed agenda. *Parents v. Board of Educ.*, (Sup. Ct., Ulster County, Sept. 22, 1982); *Exmore House, LLC v. Vill. of Millbrook Planning Bd.*, 82 A.D.3d 763, 917 N.Y.S.2d 905 (2d Dep't 2011) (notice of the agenda

of a special meeting need not be given to the public).

(5). Other information required in notice.

Not applicable.

(6). Penalties and remedies for failure to give adequate notice.

A court has the power, in its discretion and upon good cause shown, to declare void any action taken in violation of the OML. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). This discretion may be exercised in instances of violations relating to executive sessions; however, "[i] nclusion by the legislature of this language vesting in the courts the discretion to grant remedial relief makes it abundantly clear that not every breach of the Open Meetings Law automatically triggers its enforcement sanctions." *New York University v. Whalen*, 46 N.Y.2d 734, 386 N.E.2d 245, 413 N.Y.S.2d 637 (1978); *Compare*, *e.g.*, *Weatherwax v. Town of Stony Point*, 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983) (invalidating action taken by town board which was made at an improperly convened executive session after which no notice was provided that action had been taken) with *Sanna v. Lindenhurst Bd. of Educ.*, 58 N.Y.2d 626, 444 N.E.2d 975, 458 N.Y.S.2d 511 (1982) (upholding school board's decision to dismiss a teacher even though made at improperly convened executive session); *Specht v. Town of Cornwall*, 13 A.D.3d 380, 786 N.Y.S.2d 546 (2d Dep't 2004) (The Town of Cornwall fired Specht, a probationary employee in its police department, for performance reasons. At the request of the Chief of Police, the Town Board unanimously voted to terminate her employment. Because the Board failed to record this decision in the minutes of its executive session, the trial court found that it had violated the Open Meetings Law, *Public Officers Law* § 106(2). The intermediate appellate court reversed and dismissed the appeal, holding that the Board's action was merely a technical violation of the Open Meetings Law that did not require the determination to be annulled because it was not prejudicial. Proof of the termination decision was contained in affidavits and record entry that the Board had adjourned to executive session to meet with counsel and discuss the employment history of an employee. Further, the violation could be corrected if the Board recorded its vote in the minutes of its executive session.).

c. Minutes.

(1). Information required.

The OML requires that:

minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law.

N.Y. Pub. Off. Law § 106(2) (McKinney 1988).

See Plattsburgh Publishing Company v. City of Plattsburgh, 185 A.D.2d 518, 586 N.Y.S.2d 346 (3d Dep't 1992) (no minutes required where no formal vote taken and binding decision came at open meeting); *Smithson v. Ilion Housing Authority*, 130 A.D.2d 965, 516 N.Y.S.2d 564 (4th Dep't 1987), *aff'd*, 72 N.Y.2d 1034, 531 N.E.2d 651, 534 N.Y.S.2d 930 (1988) (use of a secret ballot for voting purposes was improper under the OML; when action is taken by vote at executive sessions, the OML requires open voting and a record of each member's vote); *Previdi v. Hirsch*, 138 Misc.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988) (the fact that respondents characterize the vote as taken by "consensus" does not exclude the recording of same as a "formal vote"; "moreover, 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion of remedies"); *In re Rainbow News 12 Company*, No. 16786/87 (Sup. Ct., Nassau County, Dec. 4, 1987) (where no formal vote or action was taken, the OML was not violated by the lack of minutes of an executive session).

(2). Are minutes a public record?

The minutes of an executive session shall be available to the public in accordance with the provisions of the Freedom of Information Law within one week from the date of the executive session. N.Y. Pub. Off. Law § 106(3) (McKinney 1988).

See Syracuse United Neighbors v. City of Syracuse, 80 A.D.2d 984, 437 N.Y.S.2d 466 (4th Dep't 1981), *appeal dismissed*, 55 N.Y.2d 995, 434 N.E.2d 270, 449 N.Y.S.2d 201 (1982) (remitting case for an *in camera* review to redact information which impinged upon privacy of various individuals where minutes had been made without contemplation of public exposure); *Lakeville Journal v. Village Board of Millerton*, No. 3769/85 (Sup. Ct., Dutchess County, Dec. 6, 1985) (ordering the village board to produce minutes of any action taken at executive session).

d. Requirement to meet in public before closing meeting.

An executive session may only be entered into upon a majority vote taken at an open meeting. N.Y. Pub. Off. Law § 105(1) (McKinney 1988); *Kloepfer v. Commissioner of Ed.*, 82 A.D.2d 974, 440 N.Y.S.2d 785 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 687, 436 N.E.2d 1334, 451 N.Y.S.2d 732 (1982); *see also Matthes v. Town of E. Fishkill*, 785 F.2d 43 (2d Cir. 1986) (vote at open meeting to convene in executive session at next meeting was improper, but is not sufficient ground to invalidate action); *Doolittle v. Board of Educ.*, No. 81-1942 (Sup. Ct., Chemung County, Oct. 20, 1981) (it is improper for a public body to schedule an executive session in advance of an open meeting); *Steele v. City of Niagara Falls*, (Sup. Ct., Niagara County, March 31, 1980) (executive session procedure cannot be utilized until an appropriate motion is made and adopted at an open meeting); *but see Previdi v. Hirsch*, 138 Misc.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988) (indicating that the executive session in question could have been scheduled in advance, with adequate notice given); *Stephenson v. Bd. of Educ. of Hamburg Cent. School. Dist.*, No. 12597/2010, 2011 WL 1877621 (Sup. Ct., Erie County, May 17, 2011) (executive session improperly scheduled before a properly noticed public meeting violated OML).

e. Requirement to state statutory authority for closing meetings before closure.

A motion identifying the general area or areas of the subject or subjects to be considered must be made prior to conducting an executive session. N.Y. Pub. Off. Law. § 105(1) (McKinney 1988). The subject areas must be identified with particularity. *See Dicesare v. Board of Education*, No. 2907/88 (Sup. Ct., Dutchess County, Jan. 9, 1989) (merely reiterating statutory language is insufficient, but is not good cause to invalidate action at executive session); *Daily Gazette Co. v. Town Bd.*, 111 Misc.2d 303, 444 N.Y.S.2d 44 (Sup. Ct. 1981) ("it is insufficient to merely regurgitate the statutory language . . . boilerplate recitation does not comply with the intent of the statute"); *Doolittle v. Board of Educ.*, No. 81-1942 (Sup. Ct., Chemung County, Oct. 20, 1981) (identifying the general subject area as "personnel," "negotiations" or "legal problems" is not sufficient to comply with the OML). *See also Previdi v. Hirsch*, 138 Misc.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988) (OML was violated by a notice of an executive session stating purpose was "to discuss personnel matters and negotiations"). *But see Stephenson v. Bd. of Educ. of Hamburg Cent. School. Dist.*, No. 12597/2010, 2011 WL 1877621 (Sup. Ct., Erie County, May 17, 2011) ("to discuss litigation" is sufficient; specificity such as "to discuss litigation concerning Jane Doe" is not required).

f. Tape recording requirements.

The OML does not require tape recording of meetings.

F. Recording/broadcast of meetings.

Amendments effective April 2011 confirmed prior court holdings that anyone may record open meetings, so long as use of the recording device is not disruptive or obtrusive. Further, the legislation allows

meetings to be photographed, broadcast, webcast or otherwise recorded and/or transmitted to those not present, and states that public bodies may adopt reasonable rules governing the use of cameras and recording devices during open meetings, in which case such rules must be written, conspicuously posted, and provided to those in attendance upon request. N.Y. Pub. Off. Law § 103(d) (McKinney 2011 Pocket Part). As of this writing there have been no attempts to challenge this provision, which is in keeping with prior case law.

1. Sound recordings allowed.

See e.g., *Mitchell v. Board of Educ.*, 113 A.D.2d 924, 493 N.Y.S.2d 826 (2d Dep't 1985); *People v. Ystueta*, 99 Misc.2d 1105, 418 N.Y.S.2d 508 (Dist. Ct., Suffolk County, June 5, 1979) (by-law prohibiting tape recording of meeting violates OML); *Feldman v. Town of Bethel*, 106 A.D.2d 695, 484 N.Y.S.2d 147 (3d Dep't 1984) (although plaintiff did apparently have the authority to tape record a public meeting, he could not under Penal Law § 240.20(4), with intent to cause public inconvenience, annoyance or alarm and without lawful authority, disturb any lawful assembly or meeting).

2. Photographic recordings allowed.

See e.g., *Csorny v. Shoreham-Wading River Cent. Sch. Dist.*, 305 A.D.2d 83, 795 N.Y.S.2d 513 (2d Dep't 2002) (A board of education adopted a resolution that allowed members of the public to make audio recordings of its meetings but prohibited the use of video cameras for that purpose. Petitioner filed an Article 78 proceeding challenging the resolution. The trial court dismissed the action. The intermediate appellate court held that the board had the authority to reasonably regulate the public's use of video cameras at its public meetings, but that it did not have the authority to impose a categorical ban on the use of cameras, which violated the Open Meetings Law.); *Peloquin v. Arsenault*, 162 Misc.2d 306, 616 N.Y.S.2d 716 (Sup. Ct. 1994) (board policy banning all cameras and camcorders violates the OML).

G. Are there sanctions for noncompliance?

For violations of the open meetings law, a court may void action taken at an improperly closed meeting and . Until recently, a court could award costs and attorney's fees to the prevailing party at its discretion. However, the 2008 amendments require the award of attorney fees when it is found that a public body voted in private "in material violation" of the law, "or that substantial deliberations occurred in private" that should have occurred in public. Note that, in other instances, such as a failure to fully comply with notice requirements, the sufficiency of a motion for entry into executive session, or the preparation of minutes in a timely manner, the award of attorney's fees by a court would remain, as it has since 1977, discretionary. N.Y. Pub. Off. Law § 107 (McKinney 2008).

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

The OML exempts entirely from its coverage certain proceedings and deliberations. It also delineates specified instances in which executive sessions are allowed during the course of meetings that are otherwise required to be open to the public. Exemptions and executive sessions are discussed separately below.

A. Exemptions in the open meetings statute.

1. Character of exemptions.

a. General or specific.

The OML exemptions are specific in nature. The statute expressly states that specified proceedings, deliberations and matters are not subject to the provisions of the OML. N.Y. Pub. Off. Law § 108 (McKinney 1988).

b. Mandatory or discretionary closure.

The statute does not mandate closure of exempt meetings. Rather, it states that the OML is not applicable to the exempt proceedings, deliberations and matters. N.Y. Pub. Off. Law § 108 (McKinney 1988).

2. Description of each exemption.

(For provisions for executive sessions as opposed to exemptions, *see* N.Y. Pub. Off. Law § 105(1) (McKinney 1988))

There are three categories of statutory exemptions. The OML provides as follows:

Nothing contained in this article shall be construed as extending the provisions hereof to:

(1) judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals;

(2) a. deliberations of political committees, conferences and caucuses.

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

(3) any matter made confidential by federal or state law."

N.Y. Pub. Off. Law § 108 (McKinney 1988).

a. *Judicial or quasi-judicial proceedings.* Judicial or quasi-judicial proceedings are exempt from the OML. N.Y. Pub. Off. Law § 108(1) (McKinney 1988). Thus, when a public body acts in a judicial manner, exclusion of the public does not contravene the OML. *Grossman v. Planning Bd.*, 126 A.D.2d 887, 890, 510 N.Y.S.2d 929 (3d Dep't 1987) (town planning board did not have to admit public to a meeting where it considered whether or not to approve a development plan relative to the building of a proposed shopping center).

Action is judicial or quasi-judicial when there is an opportunity to be heard, evidence presented and a decision made. *Johnson Newspaper Corp. v. Howland* (Sup. Ct., Jefferson County, July 27, 1982).

The OML was amended in 1983 to make it clear that proceedings of zoning boards of appeals are not covered by the exemption and are subject to the statute. (1983 N.Y. Laws ch. 80, § 3). Prior to the 1983 amendment, a number of courts had held that certain proceedings of zoning boards were judicial or quasi-judicial in nature and, therefore, exempt from the OML. *See*, *e.g.*, *Concerned Citizens Against Crossgates v. Town of Guilderland Zoning Bd. of Appeals*, 91 A.D.2d 763, 458 N.Y.S.2d 13 (3d Dep't 1982); *Orange County Publications v. Council of Newburgh*, 60 A.D.2d 409, 401 N.Y.S.2d 84 (2d Dep't 1978), *aff'd*, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978).

b. *Political committees, conferences and caucuses.* The deliberations of political committees, conferences and caucuses are exempt from the law's coverage. N.Y. Pub. Off. Law § 108(2)(a) (McKinney 1988). The "deliberations of political committees, conferences and caucuses" is defined to mean "a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations." N.Y. Pub. Off. Law § 108(2)(b) (McKinney 1988). However, where the matter at issue goes beyond a candid discussion and amounts to the conduct of public business this would violate the OML. *Humphrey v. Posluszny*, 175 A.D.2d 587, 573 N.Y.S.2d 790 (4th Dep't 1991), *appeal dismissed*, 78 N.Y.2d 1072, 576 N.Y.S.2d 222, 582 N.E.2d 605.

The exemption for political caucuses may not apply where the entire legislature is of one party. *Buffalo News v. City of Buffalo Common*

Council, 154 Misc.2d 400, 585 N.Y.S.2d 275 (Sup. Ct. 1992) (closure of meeting where entire legislature of one political party and stated purpose was to adopt plan addressing budget deficit was in violation of OML).

Prior to 1985, judicial decisions had held that this exemption applied only to discussions of political, as opposed to public, business. *See, e.g., Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 (4th Dep't 1981); *Sciolino v. Ryan*, 103 Misc.2d 1021, 431 N.Y.S.2d 664 (Sup. Ct. 1980), *aff'd*, 81 A.D.2d 475, 440 N.Y.S.2d 795 (4th Dep't 1981). In 1985, the Legislature amended the law to make it clear that the exemption was intended to apply to discussions of public as well as political business. 1985 N.Y. Laws ch. 135, § 2. The legislative declaration which prefaced the amendment stated that "[s]uch exemption was enacted in furtherance of the legislature's recognition that the public interest is well served by the political party system in legislative bodies because such parties serve as mediating institutions between disparate interest groups and government and promote continuity, stability and orderliness in government. The performance of this function requires the private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies." *See also Oneonta Star v. Schoharie County*, 112 A.D.2d 622, 492 N.Y.S.2d 145 (3d Dep't 1985).

c. *State or federal confidentiality.* Matters made confidential by federal or state law are not subject to the OML. N.Y. Pub. Off. Law § 108(3) (McKinney 1988). *Shibley v. Miller*, 212 A.D.2d 799, 623 N.Y.S.2d 283 (2d Dep't 1995) (executive session to obtain advice of counsel does not require vacatur of subsequent determination); *Young v. Bd. of Appeals*, 194 A.D.2d 796, 599 N.Y.S.2d 632 (2d Dep't 1993) (confidential communications between board and counsel were exempt from OML).

B. Any other statutory requirements for closed or open meetings.

Executive Sessions.

1. Character of exceptions for executive sessions.

a. *General or specific.* The OML requires all meetings of a public body to be open to the general public, except in eight specific enumerated categories where an executive session is permissible. N.Y. Pub. Off. Law § 103(a), 105(1) (McKinney 1988).

b. *Mandatory or discretionary closure.* Closure is discretionary under the OML. N.Y. Pub. Off. Law § 105(1) (McKinney 1988) ("a public body may conduct an executive session . . ."). In the instance where a meeting is closed to the general public, "[a]ttendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." N.Y. Pub. Off. Law § 105(2) (McKinney 1988).

2. *Description of each instance in which an executive session is allowed.* An executive session is authorized only for the following enumerated purposes:

(a) matters which will imperil the public safety if disclosed;

(b) any matter which may disclose the identity of a law enforcement agent or informer;

(c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

(d) discussions regarding proposed, pending or current litigation;

(e) collective negotiations pursuant to article fourteen of the civil service law;

(f) 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;

(g) the preparation, grading or administration of examinations; and

(h) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

N.Y. Pub. Off. Law § 105(1) (McKinney 1988).

The exceptions allowing executive sessions are to be "narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder." *Weatherwax v. Town of Stony Point*, 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983); *see also Daily Gazette Co. v. Town Bd., Town of Cobleskill*, 111 Misc.2d 303, 444 N.Y.S.2d 44 (1981); *accord, Matter of Sanna v. Lindenhurst Bd. of Educ.*, 107 Misc.2d 267, 268-270, 433 N.Y.S.2d 976 (1980), *mod on other grounds* 85 A.D.2d 157, 447 N.Y.S.2d 733 (1982), *aff'd*. 58 N.Y.2d 626, 458 N.Y.S.2d 511, 444 N.E.2d 975 (1982). Additionally, the statute itself states that "[a]ny provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article." N.Y. Pub. Off. Law § 110(1) (McKinney 1988).

A body of case law has developed under the executive session authorization relating to litigation, collective bargaining, personnel, and acquisition and sale of real estate and securities.

C. Court mandated opening, closing.

The court's powers with regard to open meetings are powers of enforcement under the OML. N.Y. Pub. Off. Law § 107(1) (McKinney 1988) ("any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief").

Under the language of the OML, the court, in its discretion and upon good cause shown, may declare void any action taken in violation of the statute. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). The court also may order future meetings open to the public, enjoin a public body from proceeding contrary to the provisions of the OML, and use its contempt powers for persistent violations of the law. *See, e.g., Goetschius v. Bd. of Educ. of Greenburgh Eleven Union Free Sch. Dist.*, 281 A.D.2d 416, 721 N.Y.S.2d 386 (2d Dep't 2001) (The intermediate appellate court interpreted the Open Meetings Law liberally in accordance with the statute's purposes and concluded that a school district's Board of Education had engaged in a persistent pattern of deliberately violating its letter and spirit by improperly convening executive sessions and conducting official business in a manner inaudible to the public audience. Accordingly, the appellate court affirmed the trial court's annulment of the Board's determinations made in violation of the Open Meetings Law and also upheld an award of attorneys' fees to petitioners.); *Orange County Publications v. County of Orange*, 120 A.D.2d 596, 502 N.Y.S.2d 71 (2d Dep't 1986), *appeal dismissed*, 68 N.Y.2d 807, 498 N.E.2d 437, 506 N.Y.S.2d 1037 (1986) ("inasmuch as the respondents have been directed to comply with the OML by court orders, we find the respondents, in their persistent dereliction of the mandates of the statute, to be in contempt of court"); *Orange County Publications v. County of Orange*, No. 5686/78 (Sup. Ct., Orange County, Dec. 26, 1978) (enjoining the Orange County legislature from convening any executive session without first complying with the OML and further enjoining the legislature from excluding the public and press from meetings except legitimately convened executive sessions).

III. MEETING CATEGORIES -- OPEN OR CLOSED.

A. Adjudications by administrative bodies.

The provisions of the OML do not extend to judicial or quasi-judi-

cial proceedings, except proceedings of the public service commission and zoning boards of appeals. N.Y. Pub. Off. Law § 108(1) (McKinney 1988).

Action is judicial or quasi-judicial when there is an opportunity to be heard, evidence presented and a decision made. *Johnson Newspaper Corp. v. Howland*, (Sup. Ct., Jefferson County, July 27, 1982). *See also Grossman v. Planning Bd.*, 126 A.D.2d 887, 510 N.Y.S.2d 929 (3d Dep't 1987) (when a public body acts in a judicial nature, exclusion of the public does not contravene the OML; thus, town planning board did not have to admit public when considering whether to approve a development plan for building of a proposed shopping center).

B. Budget sessions.

Buffalo News v. City of Buffalo Common Council, 585 N.Y.S.2d 275 (Sup. Ct. 1992) (closure of meeting where entire legislature of one political party and stated purpose was to adopt plan addressing budget deficit was in violation of OML); *Puka v. Greco*, 104 A.D.2d 362, 479 N.Y.S.2d 150 (2d Dep't 1984) (while violation of OML clearly did occur as a matter of law, without the requisite showing of good cause, the village budget cannot be invalidated on the grounds that it was adopted in contravention of the law); *Kessel v. D'Amato*, 97 Misc.2d 675, 412 N.Y.S.2d 303 (Sup. Ct. 1979) (informal luncheon gathering at which staff reported on budget was meeting subject to OML); *Orange County Publications v. City of Middletown*, No. 5685/78 (Sup. Ct., Orange County, Dec. 26, 1978) (lay-offs of municipal firemen are primarily budgetary matters and not personnel matters, and thus executive session was not authorized).

C. Business and industry relations.

LaCorte Electrical Construction and Maintenance v. County of Rensselaer, 177 A.D.2d 786, 576 N.Y.S.2d 397 (3d Dep't 1991), *rev'd on other grounds*, 80 N.Y.2d 232, 604 N.E.2d 88, 590 N.Y.S.2d 26 (1992) (discussion of bidder's financial, credit, and employment history in closed session was proper); *Callanan Indus. v. City of Schenectady*, 116 A.D.2d 883, 498 N.Y.S.2d 490 (3d Dep't 1986) (in the absence of a showing of good cause, city council's lack of compliance with OML did not provide basis for annulling construction contract award). *Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984, 437 N.Y.S.2d 466 (4th Dep't 1981), *appeal dismissed*, 55 N.Y.2d 995, 434 N.E.2d 270, 449 N.Y.S.2d 201 (1982) (advisory committees concerned with urban blight and loss of tax revenue are "public bodies" subject to OML).

D. Federal programs.

The provisions of the OML do not extend to any matter made confidential by federal law. N.Y. Pub. Off. Law § 108(3) (McKinney 1988). *See also Oneonta Star v. Bd. of Trustees*, 66 A.D.2d 41, 54, 412 N.Y.S.2d 927 (3d Dep't 1979) (applications for federal funds are matters of public concern and the public's business and should be discussed at an open meeting).

E. Financial data of public bodies.

An executive session may be conducted to discuss the financial, credit or employment history of a particular person or corporation. N.Y. Pub. Off. Law § 105(1)(f) (McKinney 1988). *See Student Ass'n of the State Univ. v. Wharton*, (Sup. Ct., Albany County, March 6, 1980) (executive session held to consider dormitory rental increase was permissible as discussion related to the financial situation and credit history of the university and, thus, came within statutory criteria for executive session).

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

An executive session may be conducted to discuss the financial, credit or employment history of a particular person or corporation. N.Y. Pub. Off. Law § 105(1)(f) (McKinney 1988). *See LaCorte Electrical Construction and Maintenance v. County of Rensselaer*, 177 A.D.2d 786, 576 N.Y.S.2d 397 (3d Dep't 1991), *rev'd on other grounds*, 80 N.Y.2d 232, 604 N.E.2d 88, 590 N.Y.S.2d 26 (1992) (discussion of bidder's financial, credit, and employment history in closed session was proper); *Weatherwax v. Town of Stony Point*, 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983) (executive session held by town board was in violation of OML; the board's policy decision not to extend insurance benefits to police officers on disability retirement applied equally to all retirees, even though decision affected only one person when made, and thus it could not be said that the meeting was to discuss the "medical, financial, credit or employment history of a particular person"); *Orange County Publications v. County of Orange*, No. 5686-78 (Sup. Ct., Orange County, Oct. 26, 1983) (executive session held by a local legislative committee to discuss salaries for two elected positions was in violation of the OML, as "the salary histories of the positions were discussed and not the particular persons involved").

G. Gifts, trusts and honorary degrees.

Burgher v. Purcell, 87 A.D.2d 888, 449 N.Y.S.2d 527 (2d Dep't 1982) (the OML's term "public body" includes trustees appointed by town supervisor to administer a testamentary trust for the town's poor).

H. Grand jury testimony by public employees.

An executive session may be conducted to discuss information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed. N.Y. Pub. Off. Law § 105(1)(c) (McKinney 1988).

I. Licensing examinations.

An executive session may be conducted for the preparation, grading or administration of examinations. N.Y. Pub. Off. Law § 105(1)(g) (McKinney 1988).

J. Litigation; pending litigation or other attorney-client privileges.

An executive session may be conducted in order to discuss proposed, pending or current litigation. N.Y. Pub. Off. Law § 105(1)(d) (McKinney 1988). Communications subject to the attorney-client privilege are exempt from the provisions of the OML. N.Y. Pub. Off. Law § 108(3) (McKinney 1996). *See Gernatt Asphalt Products v. Sardinia*, 87 N.Y.2d 668, 664 N.E.2d 1226, 642 N.Y.S.2d 664 (1996), (executive session permitted to obtain legal opinion from town's counsel about adoption of proposed amendments and to discuss pending litigation); *McGovern v. Tatten*, 213 A.D.2d 778, 623 N.Y.S.2d 370 (3d Dep't 1995) (executive session to discuss abandonment of road was in violation of OML); *Shibley v. Miller*, 212 A.D.2d 799, 623 N.Y.S.2d 283 (2d Dep't 1995) (executive session to obtain advice of counsel does not require vacatur of subsequent determination); *Roberts v. Town Bd. of Carmel*, 207 A.D.2d 404, 615 N.Y.S.2d 725 (2d Dep't 1994) (discussion of redesign work pursuant to a consent order was under the "litigation" category); *Young v. Bd. of Appeals*, 194 A.D.2d 796, 599 N.Y.S.2d 632 (2d Dep't 1993) (confidential communications between board and counsel were exempt from OML); *Weatherwax v. Town of Stony Point*, 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983) (belief that action taken at a meeting "would almost certainly lead to litigation" cannot justify an executive session); *Matter of Concerned Citizens to Review the Jefferson Mall v. Town Bd.*, 83 A.D.2d 612, 441 N.Y.S.2d 292 (2d Dep't 1981), *appeal dismissed*, 54 N.Y.2d 957, 429 N.E.2d 833, 445 N.Y.S.2d 154 (1981) (the authorization to hold an executive session to discuss litigation should not be used to shield private discussions between a public body and a private litigant; the purpose of the exception is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary); *Kloepfer v. Comm'r of Educ.*, 82 A.D.2d 974, 440 N.Y.S.2d 785 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 687, 436 N.E.2d 1334, 451 N.Y.S.2d 732 (1982) (executive session held to discuss authorization of an appeal to commissioner was not in violation of the OML, but executive session should first be authorized at an open meeting); *Cioci v. Mondello*, No. 28261/90, (Sup. Ct., Nassau County, March 18, 1991) (discussions with the County Attorney relating to pending litigation are exempt from OML, however, the presence of a third party represents a waiver of the privilege); *Previdi v. Hirsch*, 138 Misc.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988)

(executive session improper where school board failed to identify with particularity the current litigation and counsel for litigant suing board was present); *Lakeville Journal v. Village Bd.*, No. 3769/85 (Sup. Ct., Dutchess County, Dec. 6, 1985) (the litigation exception does not permit confidential discussion simply because the village attorney is present and legal advice is sought); *Kopald v. Planning Bd.*, No. 5001, 1983 (Sup. Ct., Orange County, Feb. 24, 1984) ("potential" litigation is not an appropriate topic for discussion in executive session; *Daily Gazette Co. v. Town Bd.*, 111 Misc.2d 303, 444 N.Y.S.2d 44 (Sup. Ct. 1981) (while discussion of "proposed" litigation was an appropriate matter for inclusion on the agenda of an executive session, the closed session was not properly convened when the public body failed to identify with particularity the proposed litigation to be discussed); *Smothers v. Bd. of Educ.*, No. 11050/81 (Sup. Ct., Westchester County, Aug. 26, 1981) (executive session held to discuss "threatened" litigation with counsel was not in violation of the OML); *Brander v. Town of Warren Town Bd.*, 18 Misc.3d 477, 847 N.Y.S.2d 450 (Sup. Ct. 2007) (held, general discussion of negotiations with an attorney are not a valid basis for an executive session).

K. Negotiations and collective bargaining of public employees.

An executive session may be conducted for "collective negotiations pursuant to article fourteen of the civil service law." N.Y. Pub. Off. Law § 105(1)(e) (McKinney 1988). *See County of Saratoga v. Newman*, 124 Misc.2d 626, 476 N.Y.S.2d 1020 (Sup. Ct. 1984) (the OML does not apply to collective bargaining sessions between public employers and public employee organizations under the Taylor Law [Article 14 of the Civil Service Law]).

L. Parole board meetings, or meetings involving parole board decisions.

An executive session may be conducted to discuss matters which will imperil public safety if disclosed, or matters which may disclose the identity of a law enforcement agent or informer. N.Y. Pub. Off. Law § 105(1)(a) and (b) (McKinney 1988).

M. Patients; discussions on individual patients.

An executive session may be conducted to discuss the medical history of a particular person. N.Y. Pub. Off. Law § 105(1)(f) (McKinney 1988).

N. Personnel matters.

Other personnel matters. Specht v. Town of Cornwall, 13A.D.3d 380, 786 N.Y.S.2d 546 (2d Dep't 2004) (town's termination of probationary police department employee in technical violation of Open Meetings Law was not annulled because no prejudice resulted and violation could be corrected by recording vote on termination in minutes of executive session); *Weatherwax v. Town of Stony Point*, 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983) (executive session held by town board was in violation of OML; the board's policy decision not to extend insurance benefits to police officers on disability retirement applied equally to all retirees, even though decision affected only one person when made, and thus it could not be said that the meeting was to discuss the "medical, financial, credit or employment history of a particular person"); *White v. Battaglia*, 79 A.D.2d 880, 434 N.Y.S.2d 537 (4th Dep't 1980), *mot. lv. appeal denied*, 53 N.Y.2d 603, 421 N.E.2d 854, 439 N.Y.S.2d 1027 (1981) (appointment of school board member to fill vacancy was invalidated where meeting called on 3 1/2 hour notice with patent inadequacy of the notice); *Orange County Publications v. County of Orange*, No. 5686/78 (Sup. Ct., Orange County, Oct. 26, 1983) (possible salary increases for county clerk and sheriff should not have been discussed in executive session where discussion was of salary histories of the positions and not the particular persons involved).

1. Interviews for public employment.

An executive session may be called regarding matters leading to the appointment or employment of a particular person. N.Y. Pub. Off. Law § 105(1)(f) (McKinney 1988). Attendance at an executive session shall be permitted to any person authorized by the public body. N.Y. Pub. Off. Law § 105(2) (McKinney 1988); *Zehner v. Bd. of Educ. of Jordan-Elbridge Cent. Sch. Dist.*, No. 2010-4926, 2010 WL 3895339 (Sup. Ct., Onondaga County, Oct. 1, 2010) (general discussion regarding search for a new superintendent is not a valid subject for executive session; however, discussion to address confidential matters regarding the appointment of a particular individual may be valid).

2. Disciplinary matters, performance or ethics of public employees.

An executive session may be conducted to discuss matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation. N.Y. Pub. Off. Law § 105(1)(f) (McKinney 1988).

See Johnson Newspaper Corp. v. Howland, (Sup. Ct., Jefferson County, July 27, 1982) (committee of county board of supervisors investigating the conduct and performance of officers and employees of the county jail and sheriff's department would be authorized to conduct executive sessions for matters stated to be under investigation); *Jennings v. N.Y. City Council*, No. 111597/05, 2006 WL 140399 (Sup. Ct., York County, Jan. 9, 2006) (board properly entered executive session to discuss possible discipline of a particular employee).

3. Dismissal; considering dismissal of public employees.

An executive session may be conducted to discuss suspension, dismissal or removal of a particular person or corporation. N.Y. Pub. Off. Law § lO5(1)(f) (McKinney 1988). *See Sanna v. Lindenhurst Bd. of Educ.*, 58 N.Y.2d 626, 444 N.E.2d 975, 458 N.Y.S.2d 511 (1982) (upholding school board's decision to dismiss a teacher even though made at improperly convened executive session); *Plattsburgh Publishing Company v. City of Plattsburgh*, 586 N.Y.S.2d 346 (3d Dep't 1992) (discussion of job performance and employment history in closed session is permitted even though personnel action results from fiscal constraints); *Smithson v. Ilion Housing Authority*, 130 A.D.2d 965, 516 N.Y.S.2d 564 (4th Dep't 1987) (board of commissioners had the authority to enter into executive session to vote on the dismissal of the executive director of the housing authority); *Tri-Village Publishers v. St. Johnsville Bd. of Educ.*, 110 A.D.2d 932, 487 N.Y.S.2d 181 (3d Dep't 1985) (executive session may be held to accept resignation of school superintendent and grant severance pay); *Kloepfer v. Comm'r of Educ.*, 82 A.D.2d 974, 440 N.Y.S.2d 785 (3d Dep't 1982), *aff'd* 56 N.Y.2d 687, 436 N.E.2d 1334, 451 N.Y.S.2d 732 (1982) (executive session to discuss appeal of a tenure hearing decision of dismissal was permissible under the OML); *Becker v. Town of Roxbury*, No. 83-142 (Sup. Ct., Delaware County, Apr. 1, 1983) (executive session held by town board to consider abolition of town constable position was in violation of the OML, as the OML only permits closed discussions which focus on particular individuals or corporations); *Orange County Publications v. City of Middletown*, No. 5685/78 (Sup. Ct., Orange County, Dec. 26, 1978) (executive session held to discuss budgetary lay-offs of municipal personnel was in violation of OML, as lay-offs were primarily budgetary matters and not personnel matters); *Bogulski v. Erie County Medical Center*, No. 97/95 (Sup. Ct., Erie County, Jan. 13, 1998 (executive session held by hospital board to discuss layoffs held to violate OML, as OML only permits closed discussions which focus on particular persons or corporations).

O. Real estate negotiations.

An executive session may be conducted to discuss the proposed acquisition, sale or lease of real property, but only when publicity would substantially affect the value. N.Y. Pub. Off. Law § 105(1)(h) (McKinney 1988).

See Glens Falls Newspapers v. Warren County Board of Supervisors, 195 A.D.2d 898, 601 N.Y.S.2d 29 (3d Dep't 1993) (executive session permitted where board failed to place any evidence in the record that publicity would have affected the value of the real property); *Oneonta*

Star v. Bd. of Trustees, 66 A.D.2d 51, 412 N.Y.S.2d 927 (3d Dep't 1979) (board would have had to show that publicity would have substantially affected the value of the property in order to enter into an executive session to discuss the possible sale of a junior high school); *Orange County Publications v. Council of City of Newburgh*, No. 5645/1982 (Sup. Ct., Orange County, March 4, 1983) (executive session held to discuss development plan for blighted area of the city which involved transactions affecting real property was in violation of the OML); *Botwin v. Bd. of Educ.*, 114 Misc.2d 291, 451 N.Y.S.2d 577 (Sup. Ct. 1982) (where board held closed meeting allegedly to protect integrity of real estate offers and to secure the best financial return, the executive sessions held to discuss proposals for the purchase of vacant school property did not violate the OML); *Devitt v. Heimbach*, 109 Misc.2d 463, 440 N.Y.S.2d 465 (Sup. Ct. 1981) (executive session was improper where it was not first shown that publicity would substantially affect the value of the property); *Jones v. Common Council*, No. 80-506 (Sup. Ct., Chenango County, Aug. 13, 1980) (closed meeting was improper where publicity would not affect value of real property).

P. Security, national and/or state, of buildings, personnel or other.

An executive session may be conducted to discuss matters which will imperil the public safety if disclosed, matters which may disclose the identity of a law enforcement agent or informer, or information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed. N.Y. Pub. Off. Law § 105(1)(a)(b) and (c) McKinney 1988).

Discussion or deliberation of any matter made confidential by federal or state law is exempt from the provisions of the OML. N.Y. Pub. Off. Law § 108(3) (McKinney 1988).

Q. Students; discussions on individual students.

An executive session may be conducted to discuss the discipline of a particular person or discuss the medical, financial, credit or employment history of a particular person. N.Y Pub. Off. Law § 105(1)(f) (McKinney 1988). Executive sessions are also allowed for matters relating to the preparation, grading or administration of examinations. N.Y. Pub. Off. Law § 105(1)(g) (McKinney 1988).

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

A. When to challenge.

1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

Although there is no expedited procedure specifically under the OML for reviewing a request to attend an upcoming meeting, an aggrieved person may commence an Article 78 proceeding of the New York Civil Practice Law and Rules or an action for declaratory judgment and/or injunctive relief. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). The Civil Practice Law and Rules provides for expedited procedures to seek a preliminary or permanent injunction which could require an agency to provide access to an upcoming meeting. N.Y. Civ. Prac. L.&R. Art. 63 (McKinney 1980). As part of the relief granted, courts have ordered a public body to admit the general public to public meetings in the future and have enjoined the public body from excluding the public from future meetings other than legitimately convened executive sessions.

2. When barred from attending.

An aggrieved person may commence an Article 78 proceeding of the New York Civil Practice Law and Rules or an action for declaratory judgment and/or injunctive relief. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). The Civil Practice Law and Rules provides for expedited procedures to seek a preliminary or permanent injunction which could require an agency to provide access to an upcoming meeting. N.Y. Civ. Prac. L.&R. Art. 63 (McKinney 1980). As part of the relief granted, courts have ordered a public body to admit the general public to public meetings in the future and have enjoined the public body from excluding the public from future meetings other than legitimately convened executive sessions.

3. To set aside decision.

The court has discretionary power to declare void any action taken in violation of the OML. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). However, this power can be exercised only "upon good cause shown." N.Y. Pub. Off. Law § 107(1) (McKinney 1988). *See, e.g.*, *Weatherwax v. Town of Stony Point*, 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983); *Concerned Citizens to Review the Jefferson Mall v. Town Bd.*, 83 A.D.2d 612, 441 N.Y.S.2d 292 (2d Dep't 1981), *appeal dismissed*, 54 N.Y.2d 957, 429 N.E.2d 833, 445 N.Y.S.2d 154 (1981).

The burden is on the complaining party to establish good cause to nullify action taken in violation of the OML. *Kloepfer v. Comm'r of Educ.*, 82 A.D.2d 974, 440 N.Y.S.2d 785 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 687, 436 N.E.2d 1334, 451 N.Y.S.2d 732 (1982) (petitioner failed to show that prejudice resulted from board's failure to properly convene an executive session).

4. For ruling on future meetings.

An aggrieved person may commence an Article 78 proceeding or an action for declaratory judgment and/or injunctive relief. N.Y. Pub. Off. Law § 107(1) (McKinney 1988).

As part of the relief granted, courts have ordered a public body to admit the general public to public meetings in the future and have enjoined the public body from excluding the public from future meetings other than legitimately convened executive sessions.

B. How to start.

1. Where to ask for ruling.

See below.

a. Administrative forum.

See below.

(1). Agency procedure for challenge.

There are no administrative procedures or forums set forth in the OML for asserting rights of access. The sole enforcement mechanism is a judicial proceeding. N.Y. Pub. Off. Law § 107(1) (McKinney 1988) ("any aggrieved person shall have standing to enforce the provisions of this article against a public body by commencement of a proceeding . . ."). *See Dombroske v. Bd. of Educ.*, 118 Misc.2d 800, 462 N.Y.S.2d 146 (Sup. Ct. 1983) (although section 310 of the Education Law provides for review of school board action, the Commissioner of Education has no authority to declare void action taken in violation of the OML); *Mayhew v. State*, No. 113284, 2007 WL 1289513 (Ct. Cl., Apr. 4, 2007) (Court of claims has no authority to void action taken in violation of OML).

(2). Commission or independent agency.

A Committee on Open Government has been established within the New York Department of State, as mandated by the New York Freedom of Information Law. N.Y. Pub. Off. Law § 89(1) (McKinney 1988). The Committee "shall issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the Open Meetings Law." N.Y. Pub. Off. Law § 109 (McKinney 1988). The Committee's advisory opinions, while not binding, should be credited when they are neither irrational nor unreasonable. *Holden v. Bd. of Trustees*, 80 A.D.2d 378, 440 N.Y.S.2d 58 (3d Dep't 1981). *See also County of Saratoga v. Newman*, 124 Misc.2d 626, 628, 476 N.Y.S.2d 1020 (Sup. Ct. 1984).

The Committee may be contacted as follows: Committee on Open Government, Robert Freeman, Executive Director, 41 State Street, Albany, New York 12207, Tel. (518) 474-2518.

b. State attorney general.

The state Attorney General does not issue rulings with respect to the OML, but may represent the state in court proceedings related to the law.

c. Court.

The statutory remedy for persons alleging a violation of the OML is commencement of an Article 78 proceeding or action for declaratory judgment and injunctive relief. N.Y. Pub. Off. Law § 107(1) (McKinney 1988).

2. Applicable time limits.

There are no administrative procedures or forums set forth in the OML for asserting rights of access. The sole enforcement mechanism is a judicial proceeding. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). A four-month statute of limitations governs. N.Y. Civ. Prac. L. & R. § 217 (McKinney 1972). The statute of limitations with respect to an action taken at executive session begins to run from the date the minutes of such executive session have been made available to the public. N.Y. Pub. Off. Law § 107(3) (McKinney 1988); *Village of Philmont v. X-Tyal Int'l Corp.*, 67 A.D.2d 1039, 413 N.Y.S.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988). The statute of limitations otherwise runs from the time the determination to be reviewed becomes final or from the refusal to perform a prescribed duty. N.Y. Civ. Prac. L. & R. § 217 (McKinney 1972).

3. Contents of request for ruling.

There are no administrative procedures or forums set forth in the OML for asserting rights of access. The sole enforcement mechanism is a judicial proceeding. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). The Committee on Open Government, however, may issue advisory opinions and inform public bodies of interpretations of the OML.

4. How long should you wait for a response?

There are no administrative procedures or forums set forth in the OML for asserting rights of access. The sole enforcement mechanism is a judicial proceeding. N.Y. Pub. Off. Law § 107(1) (McKinney 1988).

5. Are subsequent or concurrent measures (formal or informal) available?

There are no administrative procedures or forums set forth in the OML for asserting rights of access. The sole enforcement mechanism is a judicial proceeding. N.Y. Pub. Off. Law § 107(1) (McKinney 1988).

C. Court review of administrative decision.

1. Who may sue?

"Any aggrieved person" shall have standing to enforce the provisions of the OML against a public body. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). A party seeking to enjoin future violations of the OML will be considered aggrieved and has standing to seek Article 78 relief after violations have occurred, regardless of whether the public body has taken any final action. *See In re Parents Action Comm.*, N.Y.L.J., Dec. 28, 1984 (Sup. Ct., Richmond County, 1984) (where petitioners seek to compel respondents to comply with the OML, there is no merit to respondents' argument that petitioners are not aggrieved in the absence of a final determination by respondents). *See generally Friends of Pine Bush v. Planning Bd.*, 71 A.D.2d 780, 419 N.Y.S.2d 295 (3d Dep't 1979), *mot. lv. appeal dismissed*, 49 N.Y.2d 860, 404 N.E.2d 1338, 427 N.Y.S.2d 797 (1980) (city residents have standing to challenge decision of planning board, but for an association to have standing it must meet appropriate standards regarding size and composition); *Zehner v. Bd. of Educ. of Jordan-Elbridge Cent. Sch. Dist.*, No. 2010-4926, 2010 WL 3895339 (Sup. Ct., Onondaga County, Oct. 1, 2010) ("As a lawful attendee of the meeting in question, the petitioner is an aggrieved party and has standing to challenge . . . ."); *Rivers v. Young*, 26 Misc.3d 946, 892 N.Y.S.2d 747 (Sup. Ct. 2009) (contending a "matter is one of vital or 'wide pubic concern' does not confer standing on a [member of the general public,]" unless "he or she will in fact be injured"); *Diederich v. Rockland Cnty. Police Cheifs' Ass'n*, 33 A.D.3d, 823 N.Y.S.2d 106 (2d Dep't 2006) (petitioner who could not show he would suffer an injury in fact, distinct from the general public, therefore lacked standing); *Concerned Taxpayers of Stony Point v. Town of Stony Point*, 28 A.D.3d 657, 813 N.Y.S.2d 227 (2d Dep't 2006) (taxpayers do not have automatic standing).

2. Will the court give priority to the pleading?

There is no special priority for OML litigation. An Article 78 proceeding, however, is an expedited proceeding with a return date set forth in the notice of petition. N.Y. Civ. Prac. L. & R. § 7804 (McKinney 1981).

3. Pro se possibility, advisability.

Pro se litigants have been successful in pursuing violation of the OML. It is advisable to contact the Committee on Open Government: Robert Freeman, Executive Director, 41 State Street, Albany, New York 12207, Tel. (518) 474-2518.

The Committee is easily accessible to the public and will provide without charge an advisory opinion about your rights under the OML.

There are no administrative procedures to assert rights of access or to object to violations of OML. As a practical matter, providing an advisory opinion from the Committee directly to the government agency may assist in asserting rights of access. The statutory remedy for persons alleging a violation of the OML is commencement of an Article 78 proceeding or action for declaratory judgment and injunctive relief. The Committee's advisory opinions, while not binding on the courts, often are followed when they are neither irrational nor unreasonable.

The process of challenging an OML violation is not difficult, but does involve a number of technical issues. Procedurally, in New York a person may prosecute or defend a civil action in person, except that a corporation or voluntary association must appear by an attorney. N.Y. Civ. Prac. L. & R. § 321 (a) (McKinney 1988). However, due to the time limits and complexity involved in an Article 78 proceeding, it is advised that an attorney with knowledge of the proper procedure be consulted.

4. What issues will the court address?

a. Open the meeting.

The court has the power to grant declaratory or injunctive relief to require that a meeting be open to the public. N.Y. Pub. Off. Law § 107(1) (McKinney 1988).

b. Invalidate the decision.

The court has the discretionary power, upon a showing by the petitioner of good cause, to invalidate any action taken in violation of the OML, other than unintentional violations relating to notice. N.Y. Pub. Off. Law § 107(1) (McKinney 1988).

The statute specifically states as follows:

> In any such action or proceedings, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.
>
> An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.

N.Y. Pub. Off. Law § 107(1) (McKinney 1988).

See Zehner v. Bd. of Educ. of Jordan-Elbridge Cent. Sch. Dist., No. 2010-6515, 2011 WL 1549480 (Sup. Ct., Onondaga County, Jan. 20, 2011) ("for purpose of discussing matters related to the appointment or employment of a particular person" was insufficient when actual purpose was to discuss the search for school superintendent); *Chenkin v. N.Y. City Council*, 72 A.d.3d 548, 898 N.Y.S.2d 839 (1st Dep't 2010) ("inadvertence or slight negligence" is not good cause to void the decision); *Stephenson v. Bd. of Educ. of Hamburg Cent. Sch. Dist.*, No. 12597/2010, 2011 WL 1877621 (Sup. Ct., Erie County, May 17, 2011) (numerous but inadvertent violations of OML not grounds to void school board's actions); *In re Application of Stop BHOD v. N.Y.C.*, No. 31301/08, 2009 WL 602080 (Sup. Ct., Kings County, Mar. 13, 2009) (the board's failure to provide proper notice was a "mere unintentional technical violation," and petitioners made no showing the board "sought to minimize public awareness" of the issue, thus decision was not set aside); *Reese v. Daines*, 62 A.D.3d 1254, 887 N.Y.S.2d 801 (4th Dep't 2009) ("Respondents did not engage in 'a persistent pattern of deliberate violations of the [OML]'"); *N.Y.S. Tenants & Neighbors Coal., Inc. v. Nassau Cnty. Rent Guidelines Bd.*, No. 1250/2006, 2006 WL 6351219 (Sup. Ct., Nassau County, Oct. 16, 2006) (executive session to discuss low-income guidelines was improper, violated OML, and was overturned); *Carrier v. Town of Palmyra Zoning Bd. of Appeals*, 30 A.D.3d 1036, 816 N.Y.S.2d 647 (4th Dep't 2006) (discussion of petitioner's use of property was not a proper matter for executive session, but petitioner failed to show good cause to void the board's determination); *Gernatt Asphalt Products v. Sardinia*, 87 N.Y.2d 668, 664 N.E.2d 1226, 642 N.Y.S.2d 164 (1996) (it is the challenger's burden to show good cause warranting judicial relief); *Sanna v. Lindenhurst Bd. of Educ.*, 58 N.Y.2d 626, 444 N.E.2d 975, 458 N.Y.S.2d 511 (1982) (whether to declare void an action taken in violation of the OML is a matter for the court's discretion); *Nextel Partners Inc. v. Town of Fort Ann*, 1 A.D.3d 89, 766 N.Y.S.2d 712 (3d Dep't 2003) (Appellate court excused a Town Board's noncompliance with the Open Meetings Law as not resulting in any prejudice: "[L]ittle discussion is warranted regarding Nextel's cross appeal addressed to that portion of Supreme Court's decision declining to find that the Town Board violated the Open Meetings Law. While the record of the public hearings contains support for the conclusion that some aspects of the Town Board's proceedings on this request were improperly conducted in private in violation of the Open Meetings Law, no resulting prejudice is shown and we find unwarranted any award of counsel fees or costs (*see Public Officers Law* § 107[2])."); *DeMaria v. Smith*, 197 A.D.2d 114, 610 N.Y.S.2d 689 (3d Dep't 1994) (mere fact that board had previous discussions or held prior meetings in violation of OML is not "good cause" for overturning action); *New York University v. Whalen*, 46 N.Y.2d 734, 386 N.E.2d 245, 413 N.Y.S.2d 637 (1978) (judicial relief is warranted only upon a showing of good cause, a burden which is on petitioner); *Roberts v. Town Bd. of Carmel*, 207 A.D.2d 404, 615 N.Y.S.2d 725 (2d Dep't 1994) (board's failure, if any, to comply precisely with OML is mere negligence which was not a sufficient ground to invalidate action); *McGovern v. Tatten*, 213 A.D.2d 778, 623 N.Y.S.2d 370 (3d Dep't 1995) (petitioner failed to submit proof of existence of good cause to void board action); *Town of Moriah v. Cole-Layer-Trumble Company*, 200 A.D.2d 879, 606 N.Y.S.2d 825 (3d Dep't 1994) (vote in executive session in violation of OML was not good cause to void action where board later ratified decision at regular meeting and there was no showing of prejudice); *Matthes v. Town of E. Fishkill*, 785 F.2d 43 (2d Cir. 1986) (vote at open meeting to convene in executive session at next meeting was improper, but is not sufficient ground to invalidate action); *Ireland v. Town of Queensbury Zoning Board*, 169 A.D.2d 73, 571 N.Y.S.2d 834 (3d Dep't 1991) (action at meeting if improperly closed is voidable; not void, but no showing of good cause in this case); *Goodson Todman Enterprises v. City of Kingston Common Council*, 153 A.D.2d 103, 550 N.Y.S.2d 157 (3d Dep't 1990) (no finding of bad faith where prior meetings were duly noticed and open to the public); *Smithson v. Ilion Housing Authority*, 130 A.D.2d 965, 516 N.Y.S.2d 564 (4th Dep't 1987) (erroneous use of secret ballot to terminate employee did not warrant annulment of determination); *Callanan Industries v. City of Schenectady*, 116 A.D.2d 883, 498 N.Y.S.2d 490 (3d Dep't 1986) (in the absence of a sufficient showing of good cause, city council's determination on a contract bid will not be vacated despite OML violations); *Monroe-Livingston Sanitary Landfill Inc. v. Bickford*, 107 A.D.2d 1062, 486 N.Y.S.2d 566 (4th Dep't 1985), *mot. lv. appeal dismissed*, 65 N.Y.2d 1025, 484 N.E.2d 668, 494 N.Y.S.2d 305 (1985) (even if the notice given was not in full compliance with the OML, invalidation of town board's action on a landfill permit was not warranted under the circumstances where petitioner had a full opportunity to present its case); *Weatherwax v. Town of Stoney Point*, 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983) (where petitioner was unaware of insurance termination and had to spend his own monies for medical treatment, good cause has been shown to void town board's decision to terminate insurance coverage which was made in an improper closed session); *Concerned Citizens to Review Jefferson Mall v. Town Bd.*, 83 A.D.2d 612, 441 N.Y.S.2d 292 (2d Dep't 1981), *appeal dismissed*, 54 N.Y.2d 957, 429 N.E.2d 833, 445 N.Y.S.2d 154 (1981) (petitioners failed to allege sufficient facts to warrant a finding of good cause to nullify the town board's action, particularly in view of the ample opportunity for public comment and resulting modifications to the proposed site plan); *Woll v. Erie County Legislature*, 83 A.D.2d 792, 440 N.Y.S.2d 146 (4th Dep't 1981), *aff'd*, 53 N.Y.2d 1030, 425 N.E.2d 886, 442 N.Y.S.2d 498 (1981) (earlier violations of the OML which led to invalidation of reapportionment plan were sufficiently cured by two subsequent public meetings); *Kloepfer v. Comm'r of Educ.*, 82 A.D.2d 974, 440 N.Y.S.2d 785 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 687, 436 N.E.2d 1334, 451 N.Y.S.2d 732 (1982) (since petitioner has shown no prejudice to her resulting from the board's action, she has not met her burden of good cause necessary to nullify board's appeal decision taken in executive session); *White v. Battaglia*, 79 A.D.2d 880, 434 N.Y.S.2d 537 (4th Dep't 1980), *mot. lv. appeal denied*, 53 N.Y.2d 603, 421 N.E.2d 854, 439 N.Y.S.2d 1027 (1981) (apparent intentional violation of the notice provisions of the OML warrants invalidation of board's action); *Szurnicki v. Janisch*, N.Y.L.J., Feb. 13, 1992 (Sup. Ct. Suffolk County, 1992) (failure to give notice of special meeting was unintentional and a technical failure to comply with the OML is insufficient to invalidate action of school board); *Schofield v. Community Sch. Bd.*, N.Y.L.J., May 15, 1990 (Sup. Ct., Bronx County, 1990) (failure to provide proper notice was not sufficient good cause to invalidate action taken at meeting); *Previdi v. Hirsch*, 138 Misc.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988) (intentional violations justify voiding actions taken in illegal executive sessions); *Gilbert v. Bd. of Educ.* (Sup. Ct., Steuben County, June 10, 1986) (because most of the board's discussions were held in executive session, and because of the number and concern of the persons affected by the decision, good cause is shown to void school board's decision regarding transfer out of its handicapped children's program); *Dombroske v. Bd. of Educ.*, 118 Misc.2d 800, 462 N.Y.S.2d 146 (Sup. Ct. 1983) (a violation of the OML does not taint a subsequently held legal meeting at which challenged action is taken; rather, the subsequent legal meeting may cure the prior illegality); *Muriel Towers Co. v. City of New York*, 117 Misc.2d 837, 459 N.Y.S.2d 390 (Sup. Ct. 1983) (action taken at open meeting would not be invalidated because of unruly crowd and circus atmosphere); *Devitt v. Heimbach*, 109 Misc.2d 463, 440 N.Y.S.2d 465 (Sup. Ct. 1981) (petitioner did not meet burden of proof to invalidate the sale of county-owned property where improper executive session lasted 30 minutes); *Kessel v. D'Amato*, 97 Misc.2d 675, 412 N.Y.S.2d 303 (Sup. Ct. 1979) (informal luncheon gathering at which staff gave report was technical violation of OML, but was not grounds to invalidate budget); *Rent Stabilization Ass'n. v. Rent Guidelines Bd.*, 98 Misc.2d 312, 413 N.Y.S.2d 950 (Sup. Ct. 1978) (the board's failure to open meetings to the public and failure to give notice to the press or public requires that implementation of the rent guidelines order be enjoined and that the matter be remanded to the board for further public hearings); *Stephenson v. Bd. of Educ. of Hamburg Cent. School. Dist.*, No. 12597/2010, 2011 WL 1877621 (Sup. Ct., Erie County, May 17, 2011) (numerous but inadvertent violations of OML not grounds to void school board's actions, but petitioner was awarded costs and attorney fees); .

c. Order future meetings open.

An aggrieved person may seek declaratory and/or injunctive relief to prevent a future breach of the OML. N.Y. Pub. Off. Law § 107(1) (McKinney 1988).

See Goodson Todman Enterprises, Ltd. v. Dutchess County Legislature, 159 A.D.2d 460, 552 N.Y.S.2d 313 (2d Dep't 1990) (dismissed as academic, in light of fact that meetings in question had been concluded and committee disbanded); *Goodson Todman Enterprises v. City of Kingston Common Council*, 153 A.D.2d 103, 550 N.Y.S.2d 157 (3d Dep't 1990) (no reason to resort to drastic remedy of injunctive relief where prior meetings were duly noticed and open to the public); *Holden v. Bd. of Trustees*, 80 A.D.2d 378, 440 N.Y.S.2d 58 (3d Dep't 1981) (ordering board of trustees to open its meetings to the public when it performs governmental function); *Binghamton Press Co. v. Board of Educ.*, 67 A.D.2d 797, 412 N.Y.S.2d 492 (3d Dep't 1979) (granting declaratory relief holding that work sessions are "meetings," but denying injunctive relief in light of board's amendment to its by-laws, after commencement of the lawsuit, providing that its work sessions be open to the public); *Buffalo News v. City of Buffalo Common Council*, 154 Misc.2d 400, 585 N.Y.S.2d 275 (Sup. Ct. 1992) (court declined to issue prospective order to open every meeting of council regarding budget crisis); *Buffalo News v. Niagara Frontier Transportation Authority*, No. 1424/89 (Sup. Ct., Erie County, March 30, 1989) (prohibiting secret meetings); *Orange County Publications v. County of Orange*, No. 5686/78 (Sup. Ct., Orange County, Oct. 26, 1983) (directing the Orange County legislature to admit petitioner and the public to all public meetings); *Jones v. Common Council*, No. 80-506 (Sup. Ct., Chenango County, Aug. 13, 1980) (ordering all future meetings of the common council to be conducted in strict compliance with the OML); *Orange County Publications v. County of Orange*, No. 5686/78 (Sup. Ct., Orange County, Dec. 26, 1978) (enjoining the Orange County legislature from convening any executive session without first complying with the OML and further enjoining the legislature from excluding the public and press from meetings except legitimately convened executive sessions); *Bogulski v. Erie County Medical Center*, No. 97/95 (Sup. Ct., Erie County, Jan. 13, 1998 (ordering future meetings of the Board of Managers of hospital to comply with OML).

d. Mandated Training.

Amendments in 2010 gave courts the authority to require the members of the public body to receive training given by the Committee on Open Government. N.Y. Pub. Off. Law § 107(1) (McKinney 2010). *Zehner v. Bd. of Educ. of Jordan-Elbridge Cent. Sch. Dist.*, No. 2010-6515, 2011 WL 1549480 (Sup. Ct., Onondaga County, Jan. 20, 2011) (ordering school board members "to participate in a training session concerning the obligations imposed by OML, conducted by the staff of the Committee on Open Government");

d. Other.

For cases which address other enforcement issues relating to the conduct of meetings under the OML, see *Addesso v. Sharpe*, 44 N.Y.2d 925, 379 N.E.2d 1138, 908 N.Y.S.2d 8 (1978) (annulling a determination of a mayor removing petitioners from their positions on a zoning board of appeals for alleged willful and intentional violation of the OML, the court found that petitioners acted in good faith and not in deliberate violation of the law); *Gersen v. Mills*, 290 A.D.2d 839, 737 N.Y.S.2d 137 (3d Dep't 2002) (Intermediate appellate court dismissed an Article 78 proceeding commenced by petitioner, the Superintendent of Schools, where the minutes of the Board of Education's executive session in which the action was apparently authorized did not contain a record of any vote or a summary of the final determination of such action, as required by § 106(2) of the Open Meetings Law; under the circumstances of the case, allowing the proceeding to be maintained in the absence of a properly voted authorization would have prejudiced petitioner's adversary by allowing the Board to circumvent the applicable statute of limitations); *Smith v. Town of Warwick*, 169 A.D.2d 976 (3d Dep't 1991) (ordering all future public meetings at barrier-free facility); *Mitchell v. Board of Educ.*, 113 A.D.2d 924, 493 N.Y.S.2d 826 (2d Dep't 1985) (affirming judgment which annulled resolution adopted by a board of education prohibiting use of tape recorders at public meetings); *In re Holdsworth*, No. 80-1180 (Sup. Ct., Tompkins County, Nov. 13, 1980) (directing the county board of representatives to hold all future meetings except executive sessions and hearings at places which provide barrier-free physical access to the physically handicapped, as required by the OML); *Fenton v. Randolph*, 92 Misc.2d 514, 400 N.Y.S.2d 987 (Sup. Ct. 1977) (directing the town board to conduct its public meetings at barrier-free facilities).

5. Pleading format.

The line between what is properly the function of an Article 78 proceeding and what is properly the function of a declaratory action is obscure. *See* Siegel, *New York Practice* §§ 437, 557 (West Publishing 1991).

An Article 78 proceeding is commenced by service of a notice of petition and verified petition. N.Y. Civ. Prac. L. & R. § 7804(c) (McKinney 1981). The verified petition may be accompanied by affidavits or other written proof. Subsequent pleadings include a verified answer, which must state pertinent and material facts, and a reply to any new matter in the answer. N.Y. Civ. Prac. L. & R. § 7804(d) (McKinney 1981).

Where the nature of relief sought is an injunction and a declaration that actions were improper a declaratory judgment action should be commenced. *Glens Falls Newspapers v. Warren County Board of Supervisors*, 195 A.D.2d 898, 601 N.Y.S.2d 29 (3d Dep't 1993) (converting CPLR article 78 proceeding into a declaratory judgment action); *Plattsburgh Publishing Company v. City of Plattsburgh*, 185 A.D.2d 518, 586 N.Y.S.2d 346 (3d Dep't 1992) (converting CPLR article 78 proceeding into a declaratory judgment action); *Humphrey v Posluszny*, 175 A.D.2d 587, 573 N.Y.S.2d 790 (4th Dep't 1991) *appeal dismissed*, 78 N.Y.2d 1072, 576 N.Y.S.2d 222, 582 N.E.2d 605. *See* Siegel, *New York Practice* §§ 436-441 (West Publishing 1991).

6. Time limit for filing suit.

A four-month statute of limitations governs. N.Y. Civ. Prac. L. & R. § 217 (McKinney 1972). The statute of limitations with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public. N.Y. Pub. Off. Law § 107(3) (McKinney 1988); *Village of Philmont v. X-Tyal Int'l Corp.*, 67 A.D.2d 1039, 413 N.Y.S.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988). The statute of limitations otherwise runs from the time the determination to be reviewed becomes final or from the refusal to perform a prescribed duty. N.Y. Civ. Prac. L. & R. § 217 (McKinney 1972).

7. What court.

The Article 78 proceeding should be brought in the Supreme Court. N.Y. Civ. Prac. L. & R. § 7804(b) (McKinney 1988). The proceeding generally should be commenced in any county within the judicial district where the action complained of was made or where the principal office of the respondent is located. N.Y. Civ. Prac. L. & R. §§ 506(b), 7804(b) (McKinney Supp. 1988). However, proceedings against the Regents of the University of the State of New York, the Commissioner of Tax and Finance, the Tax Appeals Tribunal, the Public Service Commission, the Department of Transportation in specified cases, the Water Resource Board, the Comptroller, or the Department of Agriculture and Markets must be brought in the Supreme Court, Albany County, N.Y. Civ. Prac. L. & R. § 506(b)(2) (McKinney Supp. 1988).

Venue in a declaratory action is governed by CPLR sections 503-505. N.Y. Civ. Prac. L. & .R. §§ 503-505 (McKinney 1988).

8. Judicial remedies available.

The court has the discretionary power, upon good cause shown, to declare void any action or part thereof taken in violation of the OML. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). *See, e.g., Sanna v. Lindenhurst Bd. of Educ.*, 58 N.Y.2d 626, 444 N.E.2d 975, 458 N.Y.S.2d

511 (1982). The court may also grant declaratory and injunctive relief. N.Y. Pub. Off. Law § 107(1) (McKinney 1988). *See*, *e.g.*, *Binghamton Press Co. v. Board of Educ.*, 67 A.D.2d 797, 412 N.Y.S.2d 492 (3d Dep't 1979). In the instance of persistent violations in the face of previous court orders, the court may exercise its prerogative of holding a public body in contempt of court. *See*, *e.g.*, *Orange County Publications v. County of Orange*, 120 A.D.2d 596, 502 N.Y.S.2d 71 (2d Dep't 1986), *appeal dismissed*, 68 N.Y.2d 807, 498 N.E.2d 437, 506 N.Y.S.2d 1037 (1986).

9. Availability of court costs and attorneys' fees.

Until recently, a court could award costs and attorney's fees to the prevailing party at its discretion. However, the 2008 amendments require the award of attorney fees when it is found that a public body voted in private "in material violation" of the law, "or that substantial deliberations occurred in private" that should have occurred in public. Note that, in other instances, such as a failure to fully comply with notice requirements, the sufficiency of a motion for entry into executive session, or the preparation of minutes in a timely manner, the award of attorney's fees by a court would remain, as it has since 1977, discretionary. N.Y. Pub. Off. Law § 107 (McKinney 2008).

"[N]ot every violation of the Open Meetings Law automatically triggers its enforcement sanctions." (*New York Univ. v. Whalen*, 46 N.Y.2d 734, 413 N.Y.S.2d 637, 386 N.E.2d 245; *see also*, *Matter of Goodson Todman Enterprises v. City of Kingston Common Council*, 153 A.D.2d 103, 550 N.Y.S.2d 157). In contrast to the provisions of federal and state civil rights laws, awards of attorneys' fees under the Open Meetings Law should not be granted by courts to the prevailing party simply as a matter of course. *Compare*, *Matter of Thomasel v. Perales*, 78 N.Y.2d 561, 585 N.E.2d 359, 578 N.Y.S.2d 110, (42 U.S.C. § 1988); *Matter of Northeast Cent. School Dist. v. Sobol*, 79 N.Y.2d 598, 595 N.E.2d 339, 584 N.Y.S.2d 525 (20 USC § 1415); *see also*, *Gordon v. Village of Monticello*, 87 N.Y.2d 124, 661 N.E.2d 691, 637 N.Y.S.2d 961, 963 (1995). *Matter of New York State Clinical Lab. Ass'n v. Kaladjian*, 85 N.Y.2d 346, 649 N.E.2d 811, 625 N.Y.S.2d 463.

Attorneys' fees granted. Where "the court finds that defendants' actions 'took place in such a manner as to circumvent the Open Meetings Law quorum requirement' (*see* Public Officers Law § 105[1]), that defendants later 'stretched credulity' in describing their conduct to the court, that there was good cause shown to void the actions taken (Public Officers Law § 107[1]), and that there had been 'obvious prejudice' to plaintiffs as a result of defendants' intentional and deceitful conduct, an award of fees is justified." *Gordon v. Village of Monticello*, 87 N.Y.2d 124, 127, 661 N.E.2d 691, 693, 637 N.Y.S.2d 961, 964 (1995) (*see*, *e.g.*, *Matter of Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790); *Goetschius v. Bd. of Educ. of Greenbush Eleven Union Free Sch. Dist.*, 281 A.D.2d 416, 721 N.Y.S.2d 386 (2d Dep't 2001) (attorneys' fees award to petitioners upheld where Board of Education persistently violated letter and spirit of Open Meetings Law by improperly convening executive sessions).

In addition, "the fact that a defendant has repeatedly violated the Open Meetings Law is certainly the kind of evidence that may justify an award of attorneys' fees." *Gordon v. Village of Monticello*, 87 N.Y.2d 124, 128, 661 N.E.2d 691, 693, 637 N.Y.S.2d 961, 964 (1995). (*See Matter of Orange County Publs.*, 120 A.D.2d 596, 597, 502 N.Y.S.2d 71, *supra*). The Court of Appeals has held, however, that failure to demonstrate repeated violations "is of no moment since it is inconceivable that the Legislature had only such recidivist offenders in mind when it vested Trial Judges with the authority to award costs and fees in the first place. In fact, it is very often the possibility of recovering costs and attorneys' fees that gives private citizens . . . the impetus they need to bring meritorious lawsuits to enforce the Open Meetings Law thus advancing the statutory policy of keeping New Yorkers better apprised of the actions of their elected officials." *Id.* (*See Baker v. Edwards*, No. 2039-94 (Sup. Ct., Suffolk County, June 27, 1994) (board vote invalidated and counsel fees of $750 awarded); *Gordon v. Village of Monticello*, 87 N.Y.2d 124, 661 N.E.2d 691, 637 N.Y.S.2d 961 (1995). (The Open Meetings Law contains no requirement, for an award of attorneys' fees, that the information withheld from the public be of "clearly significant interest" and that there be no "reasonable basis" for withholding it (*compare* Public Officers Law § 89[4][c];

Cunney v. Bd. of Trs. of Vill of Grand View, 72 A.D.3d 960, 900 N.Y.S.2d 110 (2d Dep't 2010) (violation of OML found where there was a failure to vote in public session, but petitioner failed to establish good cause to void the decision); *Gold v. Zoning Bd. of Appeals*, No. 010551/10, 2010 WL 31182821 (Sup. Ct., Nassau County, Jul. 27, 2010) (record did not support annulling board's decision, but costs and attorney fees were awarded); *Humphrey v. Posluszny*, 175 A.D.2d 587, 573 N.Y.S.2d 790 (4th Dep't 1991) *appeal dismissed*, 78 N.Y.2d 1072, 582 N.E.2d 605, 576 N.Y.S.2d 222 (matter remitted to determine any entitlement to costs and attorney fees where political party improperly conducted public business); *Orange County Publications v. County of Orange*, 120 A.D.2d 596, 502 N.Y.S.2d 71 (2d Dep't 1986), *appeal dismissed*, 68 N.Y.2d 807, 498 N.E.2d 437, 506 N.Y.S.2d 1037 (1986) (county legislature's persistent dereliction of the mandates of the OML, contrary to previous court orders to comply, permit a fine for contempt of court and an award of attorneys' fees); *Sanna v. Lindenhurst Bd. of Educ.*, 85 A.D.2d 157, 447 N.Y.S.2d 733 (2d Dep't 1982), *aff'd*, 58 N.Y.2d 626, 444 N.E.2d 975, 458 N.Y.S.2d 511 (1982) (awarding attorneys' fees); *Lakeville Journal v. Village Bd.*, No. 3769/85 (Sup. Ct. Dutchess County, Dec. 6, 1985) (awarding costs and reasonable attorneys' fees in the sum of $1,000); *Orange County Publications v. Council of City of Newburgh*, No. 5645/1982 (Sup. Ct., Orange County, March 4, 1983) (awarding attorneys' fees and costs in the amount of $500); *Orange County Publications v. County of Orange*, No. 5686/78 (Sup. Ct., Orange County, Oct. 26, 1983) (awarding attorneys' fees of $1,500); *In re Holdsworth*, No. 80-1180 (Sup. Ct., Tompkins County, Nov. 13, 1980) (awarding attorneys' fees of $320.00 due to lack of reasonable or timely effort to comply with the OML requirement of access for physically handicapped); *Jones v. Common Council*, No. 80-506 (Sup. Ct., Chenango County, Aug. 13, 1980) (awarding taxable costs and disbursements); *Steele v. City of Niagara Falls*, (Sup. Ct., Niagara County, March 31, 1980) (awarding attorneys' fees of $2,150).

Attorneys' fees denied. Attorneys' fees are not granted to the prevailing party simply as a matter of course. *Gordon v. Village of Monticello*, 87 N.Y.2d 124, 127, 661 N.E.2d 691, 693, 637 N.Y.S.2d 961, 963 (1995). "Thus, as with awards of injunctive relief (*see* Public Officers Law § 107[1]), purely technical and non-prejudicial infractions (*e.g.*, *Town of Moriah v. Cole-Layer-Trumble Co.*, 200 A.D.2d 879, 606 N.Y.S.2d 822; *Monroe-Livingston Sanitary Landfill v. Bickford*, 107 A.D.2d 1062, 486 N.Y.S.2d 566) or wholly unintentional violations (*e.g.*, *Addesso v. Sharpe*, 44 N.Y.2d 925, 379 N.E.2d 1138, 408 N.Y.S.2d 8; *Matter of New York Horse & Carriage Ass'n v. Counsel of City of N.Y.*, 169 A.D.2d 547, 564 N.Y.S.2d 399; *see also*, Public Officers Law § 107[1]) do not rise to the level of supporting an award of attorneys' fees. Similarly, where the defendant has made a good faith, reasonable effort to comply with the statute, attorneys' fees may not be warranted (*.e.g.*, *Matter of Clark v. Lyon*, 147 A.D.2d 838, 537 N.Y.S.2d 934; *see also*, Public Officers Law § 193[b])." *Gordon v. Village of Monticello*, 87 N.Y.2d 124, 127-28, 661 N.E.2d 691, 694, 637 N.Y.S.2d 961, 963-64 (1995).

See Plattsburgh Publishing Company v. City of Plattsburgh, 185 A.D.2d 518, 586 N.Y.S.2d 346 (3d Dep't 1992) (no proof of bad faith); *Clark v. Lyon*, 147 A.D.2d 838, 537 N.Y.S.2d 934 (3d Dep't 1989) (no abuse of discretion to deny fees where county was making efforts to provide access to person with a disability); *Jones v. Koch*, 117 A.D.2d 647, 498 N.Y.S.2d 166 (2d Dep't 1986), *mot. lv. appeal dismissed*, 68 N.Y.2d 608, 498 N.E.2d 435, 506 N.Y.S.2d 1033 (1987) (reversing lower court's award of attorneys' fees which had been based upon board's gross disregard of statutory rules which bordered on bad faith; plaintiffs could not be deemed "successful parties" where the appointment issued in violation of the OML was withdrawn); *Previdi v. Hirsch*, 138 Misc.2d 436, 524 N.Y.S.2d 643 (Sup. Ct. 1988) (denying an award of attorneys' fees in the court's "exercise of discretion," even though petitioner had prevailed).

10. Fines.

There are no statutory provisions for fines in the OML, but the court has the power to fine a party for contempt. *Orange County Publications v. County of Orange*, 120 A.D.2d 596, 502 N.Y.S.2d 71 (2d Dep't 1986), *appeal dismissed*, 68 N.Y.2d 807, 498 N.E.2d 437, 506 N.Y.S.2d 1037 (1986) (county legislature's persistent dereliction of the mandates of the OML, contrary to previous court orders to comply, permit a fine for contempt of court and an award of attorneys' fees); *Prisco v. Community School Bd. 31*, No. 082767/94 (Sup. Ct., Richmond County, Feb. 24, 1995) (school board in contempt of court for violating OML by-laws and prior court order).

11. Other penalties.

There are no statutory provisions for other penalties in the OML.

D. Appealing initial court decisions.

1. Appeal routes.

The appeal procedure is that of any appeal from the Supreme Court. *See generally* N.Y. Civ. Prac. L. & R. Articles 55, 56, 57 (McKinney 1978). A Supreme Court order or judgment is first appealed to the Appellate Division in the department embracing the county in which the order or judgment appealed from is entered, N.Y. Civ. Prac. L. & R. § 5711 (McKinney 1978), and then to the Court of Appeals, Albany County.

2. Time limits for filing appeals.

An appeal of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry. N.Y. Civ. Prac. L. & R. § 5513(a) (McKinney 1978). A motion for permission to appeal must be made within thirty days of the date of service, upon the party seeking permission, of a copy of the order or judgment appealed from and written notice of its entry. N.Y. Civ. Prac. L. & R. § 5513(b) (McKinney 1978).

3. Contact of interested amici.

The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1910, Arlington, Virginia 22209. (703) 807-2100. (800) 336-4243

Committee on Media Law, New York State Bar Association, One Elk Street, Albany, N.Y. 12207

Communications Law Committee, Association of the Bar of the City of New York, 42 W. 44th, New York, N.Y. 10036

New York Newspaper Publishers Association Inc., 291 Hudson Avenue, Suite A, Albany, N.Y. 12210

New York Press Association, 1681 Western Avenue, Albany, N.Y. 12203

New York State Broadcasters Association Inc., 1805 Western Ave, Albany, N.Y. 12203

New York State Society of Newspaper Editors, Newhouse Communications Center, Syracuse University, Syracuse, N.Y. 13244

Student Press Law Center Inc., 1101 Wilson Blvd., Suite 1910, Arlington, Virginia 22209. (703) 807-1904

V. ASSERTING A RIGHT TO COMMENT.

The New York law is silent with respect to public participation. While public bodies are not required to allow the public to speak, many choose to permit public participation. In those instances, public bodies are advised to treat all persons in a like manner. For instance, the public body can adopt reasonable rules to ensure fairness — i.e., allowing those who want to speak a specific period of time to express their views.

Statute

Open Records

Laws of New York

Public Officers Law

Chapter 47 Of the Consolidated Laws

Article 6. Freedom of Information Law

§ 84. Legislative declaration

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

The legislature therefore declares 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 in accordance with the provisions of this article.

§ 85. Short title

This article shall be known and may be cited as the "Freedom of Information Law."

§ 86. Definitions

As used in this article, unless the context requires otherwise:

1. "Judiciary" means the courts of the state, including any municipal or district court, whether or not of record.

2. "State legislature" means the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof.

3. "Agency" means 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.

4. "Record" means 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.

5. "Critical infrastructure" means systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.

§ 87. Access to agency records

1.

(a) Within sixty days after the effective date of this article, the governing

body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article.

(b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:

i. the times and places such records are available;

ii. the persons from whom such records may be obtained, and

iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute.

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

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

(e) are compiled for law enforcement purposes and which, if disclosed, 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;

(f) if disclosed could endanger the life or safety of any person;

(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;

iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or

(h) are examination questions or answers which are requested prior to the final administration of such questions.

(i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(j) [Eff. until Dec. 1, 2009, pursuant to L.1988, c. 746, § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

3. Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article.

4. (a) Each state agency which maintains records containing trade secrets, to which access may be denied pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;

(2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;

(3) the manner of safeguarding against any unauthorized access to the records.

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

§ 88. Access to state legislative records

1. The temporary president of the senate and the speaker of the assembly shall promulgate rules and regulations for their respective houses in conformity with the provisions of this article, pertaining to the availability, location and nature of records, including, but not limited to:

(a) the times and places such records are available;

(b) the persons from whom such records may be obtained;

(c) the fees for copies of such records, which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law.

2. The state legislature shall, in accordance with its published rules, make available for public inspection and copying:

(a) bills and amendments thereto, fiscal notes, introducers' bill memoranda, resolutions and amendments thereto, and index records;

(b) messages received from the governor or the other house of the legislature, and home rule messages;

(c) legislative notification of the proposed adoption of rules by an agency;

(d) transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken;

(e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;

(f) administrative staff manuals and instructions to staff that affect members of the public;

(g) final reports and formal opinions submitted to the legislature;

(h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the legislature;

(i) any other files, records, papers or documents required by law to be made available for public inspection and copying.

(j) external audits conducted pursuant to section ninety-two of the legislative law and schedules issued pursuant to subdivision two of section ninety of the legislative law.

3. Each house shall maintain and make available for public inspection and copying:

(a) a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes;

(b) a record setting forth the name, public office address, title, and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any records required to be made available for public inspection and copying pursuant to this section.

§ 89. General provisions relating to access to records; certain cases

The provisions of this section apply to access to all records, except as hereinafter specified:

1.

(a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties.

(b) The committee shall:

i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;

ii. furnish to any person advisory opinions or other appropriate information regarding this article;

iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;

iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and

v. report on its activities and findings regarding articles six and seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

2. (a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

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 commercial 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; or

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 one hundred ten-a of the workers' compensation law.

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;

ii. when the person to whom a record pertains consents in writing to disclosure;

iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him.

2-a. Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

3. Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article.

4.

(a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

(c) The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:

i. the record involved was, in fact, of clearly significant interest to the general public; and

ii. the agency lacked a reasonable basis in law for withholding the record.

5.

(a)

(1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions

thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.

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

(b) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

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

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

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

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

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

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

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

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

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

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

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

6. Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.

7. Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

8. Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

§ 90. Severability

If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.

Open Meetings

Public Officers Law

Chapter 47. Of the Consolidated Laws

Article 7. Open Meetings Law

§ 100. Legislative declaration

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.

§ 101. Short title

This article shall be known and may be cited as "Open Meetings Law".

§ 102. Definitions

As used in this article:

1. "Meeting" means the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.

2. "Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.

3. "Executive session" means that portion of a meeting not open to the general public.

§ 103. Open meetings and executive sessions

(a) Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five of this article.

(b) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law.

(c) A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.

§ 104. Public notice

1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice.

4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

§ 105. Conduct of executive sessions

1. Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:

a. matters which will imperil the public safety if disclosed;

b. any matter which may disclose the identity of a law enforcement agent or informer;

c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

d. discussions regarding proposed, pending or current litigation;

e. collective negotiations pursuant to article fourteen of the civil service law;

f. 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;

g. the preparation, grading or administration of examinations; and

h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

2. Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.

§ 106. Minutes

1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law is added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

§ 107. Enforcement

1. Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.

An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.

2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party.

3. The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public.

§ 108. Exemptions

Nothing contained in this article shall be construed as extending the provisions hereof to:

1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals;

2.

a. deliberations of political committees, conferences and caucuses.

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

3. any matter made confidential by federal or state law.

§ 109. Committee on open government

The committee on open government, created by paragraph (a) of subdivision one of section eighty-nine of this chapter, shall issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law.

§ 110. Construction with other laws

1. Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article.

2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby.

3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article.

§ 111. Severability

If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.