

NEW YORK STATE BAR ASSOCIATION

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form—you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

Please turn in this form at the end of the program.

**Local and State Government Law Section
Spring Forum
April 29, 2019 - New York State Bar Center**

Name: _____
(please print)

I certify that I was present for the entire presentation of this program

Signature: _____ Date: _____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.



2019 Spring Forum

Local and State Government Law Section

April 29, 2019

New York State Bar Center

One Elk Street Albany, NY

Section Chair:

Richard K. Zuckerman, Esq.
Lamb & Barnosky LLP

Program Chairs:

Jeanette A. Koster, Esq.
New York Department of Correction, Office
of General Counsel

Alyse D. Terhune, Esq.
Lewis & McKenna

Thank You! This program is made possible by the generous donation of time and expertise by members and volunteers. Thank you to our volunteers—and to you, for choosing NYSBA Programs.

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.



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New York State Bar Association

Accessing the Online Electronic Course Materials

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online at:
www.nysba.org/LSGLSpring2019CourseMaterials

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at <https://get.adobe.com/reader/>
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **Local and State Government Law Spring Forum**

Date: April 29, 2019

Location: Albany, NY

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_1Rdo5bO75fPateJ

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **3.0 New York CLE credit hours**

Credit Category:

3.0 Areas of Professional Practice

This course is approved for credit for **experienced attorneys only**. This course is not transitional and therefore will not qualify for credit for newly admitted attorneys (admitted to the New York Bar for less than two years).

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

- 1) **Sign in** with registration staff
- 2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).



Spring Forum

April 29, 2019

New York State Bar Association | One Elk Street, Albany

2:00 - 3:00 p.m. Freedom of Information Law (FOIL) Updates

This course will offer a brief introduction to those laws, a description of the functions of this office and our website, and then take questions.

Robert J. Freeman, Esq.

Executive Director
NYS Department of State, NYS Committee on Open Government (COOG)
Delmar, New York

3:00 – 4:00 p.m. State Procurement Updates

This presentation as an introduction to agency procurement, addressing purchasing methods, contractual terms, and vendor responsibility

Robert C. Vanderbles

Office of the General Counsel
Albany, NY

4:00 - 5:00 p.m. Legislative Updates

This presentation will provide an update of legislation already adopted during the 2019 NYS Legislative Session Calendar, including the State Budget (assuming it is adopted by April 29th). In addition to highlighting legislation already adopted this Session, the presentation will discuss issues and bills the Legislature is likely to tackle before heading home at the end of June. Topics to be discussed include criminal justice reform, adult-use cannabis, e-scooters, election reforms, recycling reforms, the tax cap, red light and speed cameras, and more.

Wade Beltramo, Esq.

NY Conference of Mayors (NYCOM)
Schenectady, New York

5:00 -6:00 p.m. Networking Reception

3.0 MCLE Credits

3.0 Areas of Professional Practice



Lawyer Assistance Program 800.255.0569



Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website www.nysba.org/lap

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?
2. Is it difficult for me to maintain a routine and stay on top of responsibilities?
3. Have I experienced memory problems or an inability to concentrate?
4. Am I having difficulty managing emotions such as anger and sadness?
5. Have I missed appointments or appearances or failed to return phone calls?
Am I keeping up with correspondence?
6. Have my sleeping and eating habits changed?
7. Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?
8. Does my family have a history of alcoholism, substance abuse or depression?
9. Do I drink or take drugs to deal with my problems?
10. In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?
11. Is gambling making me careless of my financial responsibilities?
12. Do I feel so stressed, burned out and depressed that I have thoughts of suicide?

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

As a NYSBA member, **PLEASE BILL ME \$30 for Local and State Government Law Section dues.** (law student rate is \$15)

I wish to become a member of the NYSBA (please see Association membership dues categories) and the Local and State Government Law Section. **PLEASE BILL ME for both.**

I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

City _____ State _____ Zip _____

The above address is my Home Office Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ / _____ / _____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Local and State Government Law Section Committees

Please select which committees you would like to join. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

- Administrative Law Judges (MUNI3700)
- Attorneys in Public Service (MUNI4600)
- Awards (MUNI3800)
- Employment Relations (MUNI1900)
- Ethics and Professionalism (MUNI2000)
- Land Use, Green Development and Environmental (MUNI2100)
- Law Student (MUNI3400)
- Legislation (MUNI1030)
- Liability and Insurance (MUNI3200)
- Membership and Diversity (MUNI1040)
- Municipal Counsel (MUNI3000)
- Publications (MUNI3900)
- State Counsel (MUNI3600)
- State and Federal Constitutional Law (MUNI3100)
- Taxation, Finance and Economic Development (MUNI2200)

JOIN OUR SECTION

2019 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	\$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	\$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60

OTHER

Sustaining Member	\$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS

Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS

Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS

Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS

Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association

Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association

*Newly admitted = Attorneys admitted on or after April 1, 2018

Please return this application to:

MEMBER RESOURCE CENTER,

New York State Bar Association, One Elk Street, Albany NY 12207

Phone 800.582.2452/518.463.3200 • FAX 518.463.5993

E-mail mrc@nysba.org • www.nysba.org



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Freedom of Information Law (FOIL) Updates

Robert J. Freeman

NYS Department of State, NYS
Committee on Open Government
(COOG)

Delmar, New York

ONE HOUR CLE PROGRAM OUTLINE

ACCESS TO GOVERNMENT INFORMATION AND DECISION MAKING

I. ETHICAL BASIS OF FREEDOM OF INFORMATION LAW

- 5 Minutes
- A. The Freedom of Information Law is based largely on ethical considerations involving the relationship between the government and the public
 - B. Grounds for withholding records are based on possibility of harm to an individual, a commercial entity or the ability of government to carry out its duties
 - C. Examples of ethical considerations and fundamental fairness will be referenced in discussions of the basis for denying access to records and excluding the public from meetings

II. FREEDOM OF INFORMATION LAW

- 20 Minutes
- A. Original Law enacted in 1974
 - B. Repealed and replaced with current law, 1978
 - 1. Presumption of access
 - C. Definitions
 - 1. What is covered - agency
 - a. exclusion of State Legislature and Judiciary
 - 2. Record
 - a. creation of records
 - b. electronic information issues
 - D. Procedural Issues
 - 1. Time limits for response
 - 2. Email requests
 - E. General Rule - Access and Common Sense
 - 1. Presumption of access - would disclosure hurt?
 - 2. Portions of records
 - F. Grounds for Denial
 - 1. Statutory exemption
 - a. confidentiality
 - b. examples
- 35 Minutes
- 2. Unwarranted invasion of personal privacy
 - a. permissible invasion
 - b. re public employees - is it unethical for government to shield information from taxpayers that deal with the

- performance of public employees' duties?
- c. re public generally - is it fair and ethical to disclose intimate details of peoples' lives?
- 3. Impair contract awards or collective bargaining - ensuring fairness in contracting and negotiations
- 4. Trade secrets -
 - a. standard - substantial injury to com competitive position
 - b. lack of standard in federal Act
- 5. Records compiled for law enforcement purposes
- 6. Endanger life or safety
- 7. Inter-agency and intra-agency materials
 - a. heart of the law
 - b. secret law concept
- 8. Examination questions and answers - ethical consideration ensures fairness
- 9. Security of electronic information

5 Minutes

G. Burden of proof

- 1. On the agency - the government belongs to the public, and a high ethical standard is imposed on government
- 2. Cannot merely assert - must prove harmful effects of disclosure
- 3. Attorney's fees



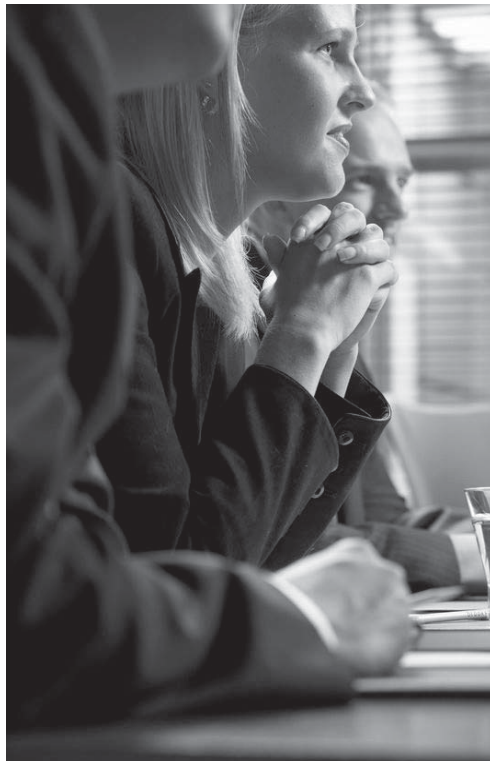
**Committee on
Open Government**

NEW YORK
DEPARTMENT OF STATE

COMMITTEE ON
OPEN GOVERNMENT

Your Right to Know

NEW YORK STATE
OPEN GOVERNMENT LAWS



Committee on Open Government

- **Freedom of Information Law**
- **Open Meetings Law**
- **Personal Privacy Protection Law**

The Committee

The Committee on Open Government is responsible for overseeing implementation of the Freedom of Information Law (Public Officers Law §§ 84-90) and the Open Meetings Law (Public Officers Law §§ 100-111). The Freedom of Information Law governs rights of access to government records, while the Open Meetings Law concerns the conduct of meetings of public bodies and the right to attend those meetings. The Committee also oversees the Personal Privacy Protection Law.

The Committee is composed of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the Committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law (“FOIL”) directs the Committee to furnish advice to agencies, the public and the news media, issue regulations and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the Committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations annually to the Legislature.

When questions arise under either the Freedom of Information or the Open Meetings Law, the Committee staff can provide written or oral advice and attempt to resolve controversies in which rights may be unclear. Since its creation in 1974, more than 24,000 written advisory opinions have been prepared by the Committee at the request of government, the public and the news media. In addition, hundreds of thousands of verbal opinions have been provided by telephone. Staff also provides training and educational programs for government, public interest and news media organizations, as well as students on campus.

Opinions prepared since early 1993 that have educational or precedential value are maintained online, identified by means of a series of key phrases in separate indices created in relation to the Freedom of Information Law and the Open Meetings Law.

The indexes can be accessed at the following links:

FOIL Advisory Opinions - www.dos.ny.gov/coog/foil_listing/findex.html

OML Advisory Opinions - www.dos.ny.gov/coog/oml_listing/oindex.html

Each index to advisory opinions is updated periodically to ensure that interested persons and government agencies have the ability to obtain opinions recently rendered.

The website also includes the following:

- The text of the Freedom of Information Law;
- Rules and Regulations of the Committee on Open Government (21 NYCRR Part 1401);
- Model Rules for Agencies;
- Sample Request for Records;
- Sample Request for Records via Email;
- Sample Appeal;
- Sample Appeal When Agency Fails to Respond in a Timely Manner;
- FOIL Case Law Summary;
- Frequently Asked Questions regarding FOIL;

- The text of the Open Meetings Law;
- Model Rules for Public Bodies;
- An Article on Boards of Ethics;
- OML Case Law Summary;
- Frequently Asked Questions regarding OML;
- The text of the Personal Privacy Protection Law (only applies to State Agencies);
- You Should Know, regarding the Personal Privacy Protection Law.

If you are unable to locate information on the website and need advice regarding either the Freedom of Information Law or the Open Meetings Law, feel free to contact:

Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave
Albany, NY 12231
(518) 474-2518 Tel
(518) 474-1927 Fax
coog@dos.ny.gov

Freedom of Information

The Freedom of Information Law, effective January 1, 1978, reaffirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law preserves the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the law

All agencies are subject to the Freedom of Information Law, and FOIL defines “agency” to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (§86(3)).

The term “agency” does not include the State Legislature or the courts. For purposes of clarity, “agency” will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, which will be discussed later.

What is a record?

All records are subject to the FOIL, and the law defines “record” as “any information kept, held, filed, produced or reproduced by, with or for an agency... in any physical form whatsoever. . .” (§86(4)). It is clear that items such as audio or visual recordings, data maintained electronically, and paper records fall within the definition of “record.” An agency is not required to create a new record or provide information in response to questions to comply with the law; however, the courts have held that an agency must provide records in the form requested if it has the ability to do so. For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

Accessible records

FOIL is based on a presumption of access, stating that all records are accessible, except records or portions of records that fall within one of eleven categories of deniable records (§87(2)).

Deniable records include records or portions thereof that:

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) would if disclosed result in an unwarranted invasion of personal privacy;
- (c) would if disclosed 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 relative to a criminal investigation; or
 - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- (f) could if disclosed endanger the life or safety of any person;
- (g) are inter-agency or intra-agency communications, except to the extent that such materials consist of:
 - 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;
- (h) are examination questions or answers that are requested prior to the final administration of such questions; or
- (i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
- * (j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

* NB Repealed December 1, 2019

* (k) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

* NB Repealed December 1, 2019

* (l) are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

* NB Repealed September 20, 2020

* (m) are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.

* NB Repealed August 30, 2018

* (n) are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-c of the vehicle and traffic law.

* NB There are 2 par (n)'s

* NB Repealed July 25, 2018

* (n) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.

* NB There are 2 par (n)'s

* NB Repealed August 21, 2019

* (o) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

* NB Repealed September 12, 2020

The categories of deniable records generally involve potentially harmful effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances “impair,” “cause substantial injury,” “interfere,” “deprive,” “endanger,” etc.

One category of deniable records that does not deal directly with the effects of disclosure is exception (g), which deals with inter-agency and intra-agency materials. The intent of the exception is twofold. Written communications transmitted from an official of one agency to an official of another or between officials within an agency may be denied insofar as they consist of advice, opinions or recommendations. For example, an opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. Statistical or factual information, on the other hand, as well as the policies and determinations upon which an agency relies in carrying out its duties are available, unless a different exception applies.

There are also special provisions in the law regarding the protection of trade secrets and critical infrastructure information. Those provisions pertain only to state agencies and enable a business entity submitting records to state agencies to request that records be kept separate and apart from all other agency records. When a request is made for records falling within these special provisions, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to the competitive position of commercial enterprise. A member of the public requesting records may challenge such a claim.

Generally, the law applies to existing records. Therefore, an agency need not create a record in response to a request. Nevertheless, each agency must maintain the following records:

- (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) reasonably detailed current list by subject matter of all records in possession of an agency, whether or not the records are accessible. (§87(3))

Protection of privacy

One of the exceptions to rights of access referenced earlier states that records may be withheld when disclosure would result in “an unwarranted invasion of personal privacy” (§87(2)(b)).

Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or herself.

When a request is made for records that constitute a list of names and home addresses or its equivalent, the agency is permitted to require that the applicant certify that such list will not be used for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists to any other person for the purpose of allowing that person to use such list for solicitation or fund-raising purposes (§89(3)(a)).

Since 2010, agencies have been prohibited from intentionally releasing social security numbers to the public (§96-a).

How to Obtain Records

Subject matter list

As noted earlier, each agency must maintain a “subject matter list” (§87(3)(c)). The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought, and it must be updated annually. Each state agency is required to post its subject matter list online. An alternative to and often a substitute for a subject matter list is a records retention schedule. Schedules regarding state and local government outside of New York City are prepared by the State Archives; those applicable in New York City are prepared by the NYC Department of Records and Information Services.

Regulations

Each agency must adopt standards based upon general regulations issued by the Committee. These procedures describe how you can inspect and copy records. The Committee’s regulations and a model designed to enable agencies to easily comply are available on the Committee’s website. See Regulations of the Committee on Open Government and Model Rules for Agencies.

Designation of records access officer

Under the Committee’s regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency’s response to public requests for records in a timely fashion. In addition, the records access officer is responsible for ensuring that agency personnel assist in identifying records sought, make the records promptly available or deny access in writing, provide copies of records or permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certify either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records

An agency may ask you to make your request in writing. See Sample Request for Records. The law requires you to “reasonably describe” the record in which you are interested (§ 89(3)(a)). Whether a request reasonably describes records often relates to the nature of an agency’s filing or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility of identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, file designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to find out how an agency keeps the records of your interest (i.e., alphabetically, chronologically or by location) so that a proper request can be made.

The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so. See Sample Request for Records via Email.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, which must be reasonable in consideration of attendant circumstances, such as the volume or complexity of the request. The approximate date ordinarily cannot exceed 20 business days from the date of the acknowledgment of the receipt of a request. If it is determined that more than 20 business days will be needed to grant a request in whole or in part, the agency’s acknowledgment must explain the reason and provide a specific date within which it will grant a request in whole or in part. When a response is delayed beyond 20 business days, it must be reasonable in relation to the circumstances of the request.

If the agency fails to abide by any of the requirements concerning the time within which it must respond to a request, the request is deemed denied, and the person seeking the records may appeal the denial. For more information, see Explanation of Time Limits for Responding to Requests.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute (an act of the State Legislature), an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (§87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction. There may be no basis to charge for copies of records that are transmitted electronically; however, when requesting electronic data, there are occasions when the agency can charge for employee time spent preparing the electronic data. For more information see 2008 News/Fees for Electronic Information.

Denial of access and appeal

Unless a denial of a request occurs due to a failure to respond in a timely manner, a denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (§89(4)(a)). A failure to determine an appeal within 10 business days of its receipt is considered a denial of the appeal.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based on an exception to rights of access, the agency has the burden of proving that the record sought falls within the exception (§89(4)(b)).

The Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees to a person denied access to records. To do so, a court must find that the person denied access "substantially prevailed", and either that the agency had no reasonable basis for denying access or that it failed to comply with the time limits for responding to a request or an appeal.

Access to Legislative Records

Section 88 of the Freedom of Information Law applies only to the State Legislature and provides access to the following records in its possession:

- (a) bills, fiscal notes, introducers' bill memoranda, resolutions and index records;
- (b) messages received from the Governor or the other house of the Legislature, as well as home rule messages;
- (c) legislative notification of the proposed adoption of rules by an agency;
- (d) transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and 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 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 records made available by any other provision of law; and
- (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.

In addition, each house of the Legislature must maintain and make available:

- (a) a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;
- (b) a payroll 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 record required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to the Freedom of Information Law, § 255 of the Judiciary Law has long required the clerk of a court to "diligently search the files, papers, records and dockets in his office" and upon payment of a fee make copies of such items. Justice Courts are covered by §2019-a of the Uniform Justice Court Act, which states that "records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

Agencies charged with the responsibility of administering the judicial branch are not courts and therefore are treated as agencies subject to the Freedom of Information Law.

Sample Letters

Requesting Records (Sample)

Records Access Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information

Law Request

Records Access Officer:

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to (or containing the following) _____ (attempt to identify the records in which you are interested as clearly as possible). If my request appears to be extensive or fails to reasonably describe the records, please contact me in writing or by phone at _____.

If there are any fees for copying the records requested, please inform me before filling the request (or: ... please supply the records without informing me if the fees are not in excess of \$_____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

Signature

Name

Address

City, State, ZIP code

Requesting Records via Email (Sample)

(It has been suggested that agencies create an email address dedicated to the receipt of requests. It is recommended that you review the website of the agency maintaining the records that you seek in order to locate its email address and its records access officer.)

(The subject line of your request should be "FOIL Request".)

Dear Records Access Officer:

Please email the following records if possible (include as much detail about the record as possible, such as relevant dates, names, descriptions, etc.):

OR

Please advise me of the appropriate time during normal business hours for inspecting the following records prior to obtaining copies (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.):

OR

Please inform me of the cost of providing paper copies of the following records (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.).

AND/OR

If all of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for reproducing the remainder of the records requested (\$0.25 per page or actual cost of reproduction).

If the requested records cannot be emailed to me due to the volume of records identified in response to my request, please advise me of the actual cost of copying all records onto a storage device or other media.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

If it is necessary to modify my request, and an email response is not preferred, please contact me at the following telephone number:

_____.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and email address of the person or body to whom an appeal should be directed.

(Name)

(Address, if records are to be mailed).

Appeal A Written Denial (Sample)

Name of Agency Official

Appeals Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information

Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include: _____ (describe the records that were denied to the extent possible and, if possible, offer reasons for disagreeing with the denial, i.e., by attaching an opinion of the Committee on Open Government acquired for its website).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,

Signature

Name

Address

City, State, ZIP code

Appeal A Denial due to an Agency's Failure to Respond in a Timely Manner (Sample)

FOIL Appeals Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information

Law Appeal

Dear _____:

I requested (describe the records) by written request made on _____ (date). More than five business days have passed since the receipt of the request without having received a response... or... Although the receipt of the request was acknowledged and I was informed that a response would be given by _____ (date), no response has been given. Consequently, I consider the request to have been denied, and I am appealing on that basis.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,

Signature

Name

Address

City, State, ZIP code

2017 and 2018 Freedom of Information Law Case Law Summaries

Major Decisions

- **Abate v. County of Erie**, 152 A.D.3d 177, 54 N.Y.S. 3d 821, Appellate Division, Fourth Department (June 30, 2017)

A request for 911 recordings was made by petitioner via CPLR Article 31 discovery. While court acknowledged that such recordings may not be disclosed in response to a FOIL request, the court “thus join[ed] our colleagues in the Second Department in concluding that County Law § 308 (4) ‘is not intended to prohibit the disclosure of matter that is material and relevant in a civil litigation, accessible by a so-ordered subpoena or directed by a court to be disclosed in a discovery order’ (*Anderson*, 134 AD3d at 1062).”

- **Empire Center for Public Policy, Inc. v. NYC Office of Payroll Administration**, 158 A.D.3d 529, 68 N.Y.S.3d 716, Appellate Division, First Department (February 15, 2018)

Petitioner’s request for payroll information regarding all NYC employees was granted in part, but the agency denied access to records reflecting undercover officers’ salaries, contending that disclosure would pose a security threat to those officers. A January 17, 2017 Supreme Court decision held that agency failed to demonstrate how the disclosure of the payroll information, without any accompanying identifying information, would pose a security threat to the officers. Supreme Court ordered disclosure. Respondents appealed and Appellate Division reversed and dismissed the petition on the ground that petitioner had failed to exhaust its administrative remedies. Petitioner had administratively appealed an alleged constructive denial, but did not appeal the agency’s determination regarding rights of access.

- **Matter of Friedman v. Rice**, 30 N.Y.3d 461, 68 N.Y.S.3d 1, Court of Appeals (November 21, 2017)

Court of Appeals clarified the proper interpretation of §87(2)(e)(iii) of FOIL, under which an agency may seek to exempt from public inspection those records, or a portion thereof, “compiled for law enforcement purposes and which, if disclosed, would . . . identify a confidential source or disclose confidential information relating to a criminal investigation.” Court held “that a government agency may rely on this exemption only if the agency establishes (1) that an express promise of confidentiality was made to the source, or (2) that the circumstances of the particular case are such that the confidentiality of the source or information can be reasonably inferred.”

- **Gartner v New York State Attorney General’s Office**, 160 AD3d 1087, 75 N.Y.S.3d 102, Appellate Division, Third Department (April 5, 2018)

There is no legal authority under FOIL to allow a petitioner or independent third party to conduct a search of an agency’s records to locate responsive documents; such a search would be improper because it would inevitably permit the person to view agency records that were not responsive or that were exempt from disclosure.

Inter-agency materials exception did not apply to prevent disclosure of communications between Attorney General’s office and counsel for another government entity involved with use of charitable endowments, when Attorney General’s office was not assisting the endowment agency as a government entity in its

endeavors, but instead was involved in the agency's transactions under the Attorney General's statutory obligations to protect charitable beneficiaries and the public in situations where a trustee or not-for-profit corporation desires to modify restrictions on a charitable endowment or sell substantially all of its assets.

- **Matter of Green v. Annuci**, 70 N.Y.S.3d 746, 59 Misc.3d 452, Supreme Court, Albany County (September 11, 2017)

Video footage of prison incident did not qualify as “personnel record” under Civil Rights Law §50-a, and, thus, did not fall within scope of FOIL exemption for information specifically authorized to be withheld by statute. Since video could be used for several purposes, including evaluating an officer, but video was not used exclusively to evaluate officers, video was record of event and incident that occurred at correctional facility, depicting actual acts and conduct of individuals, not unsubstantiated allegations or complaints, and any use of video to subsequently degrade, embarrass, or impeach integrity of an officer would be due to subjective fault of officer.

- **Matter of Jacobson v. Ithaca City School District**, 53 Misc.3d 1091, 39 N.Y.S.3d 904, Supreme Court, Tompkins County (September 23, 2016)

When determining whether the School District could pass along to the requestor the actual cost of redacting a video recording in order to blur images of students, muffle or obscure student voices, and/or eliminate references to student names or identifiers, the Court held that a “public agency generally may not impose its cost of complying with a FOIL request upon the requesting party; however, it may recover any costs directly associated with redaction of responsive records.” Committee note: “costs directly associate with redaction” (i.e., blurring/editing a video) should be distinguished from “review of the content of requested records to determine the extent to which records must be disclosed or may be withheld,” the “costs” for which the regulations promulgated by the Committee specifically prohibit an agency from passing along to the requestor (21 NYCRR 1401.8(a)(3)).

- **Matter of Kirsch v. Board of Education of Williamsville Central School District**, 152 A.D.3d 128, 57 N.Y.S. 3d 870, Appellate Division, Fourth Department (July 7, 2017)

Court held that Petitioner had standing to seek to compel school **board** and school district to comply with her FOIL request for certain e-mail records of superintendent of school district, although FOIL request was made by petitioner's attorney, where administrative appeal letter expressly stated that attorney was making the request on behalf of petitioner. Court also held that school district was required to provide petitioners with requested e-mails under FOIL, with any claimed exemptions from disclosure documented in a privilege log for review by the court; petitioners reasonably described requested e-mails to enable school district to identify and produce records, and school district could not evade broad disclosure provisions of statute upon naked allegation that request would require review of thousands of records.

- **Matter of Kosmider v. Whitney**, 75 N.Y.S.3d 305, 160 A.D.3d 1151, Appellate Division, Third Department (April 12, 2018)

Request for copies of the electronic voting ballot images recorded by voting machines was denied by Respondent County based on an interpretation of the Election Law. Respondents contended records could only be disclosed by court order. However, the request did not concern the actual paper ballots in

which the votes were cast, but rather electronic copies of those ballots that were transferred to a memory card. Court ruled that once copies of the paper ballots were transferred to an electronic media and therefore preserved, the likelihood that the images or data could be tampered with is non-existent and the request was ordered to be granted. Appellate Division affirmed stating “We conclude that, once electronic ballot images have been preserved in accordance with the procedures set forth in Election Law § 3-222(1), there is no statutory impediment to disclosure and they may be obtained through a FOIL request.” Has been appealed to Court of Appeals

- **Lucas v. Board of Education of East Ramapo Central School District**, Supreme Court, Rockland County (October 5, 2017)

Court, in its discretion, awarded attorney’s fees: “Respondent failed to acknowledge receipt of Petitioners’ FOIL requests, failed to either grant or deny Petitioners’ FOIL requests and failed to render a decision with respect to Petitioners’ appeals of the constructive denials of their FOIL requests... Rather, only after Petitioners commenced the within Article 78 proceeding did Respondent eventually provide the documents requested under FOIL. As such, the Court finds the purpose in permitting an award of attorney’s fees and costs in a proceeding such as this—to deter unreasonable delays and denials of access—is entirely warranted.”

- **Matter of Mazza v. Village of Croton-on-Hudson**, 140 A.D.3d 878, 33 N.Y.S.3d 426, Appellate Division, Second Department (June 8, 2016)

Petitioner made a request to the Village for police records relating to a criminal investigation regarding allegations Petitioner sexually abused minors. Village claimed entire file was exempt pursuant to Civil Rights Law 50-b(1). Trial court dismissed the petition and petitioner appeals. Appellate Division held: “Civil Rights Law § 50-b(1) ‘does not justify a blanket denial of a request for any documents relating to a sex crime. If a requested document does not contain information that tends to identify the victim of a sex crime, and the FOIL request is otherwise valid, the document must be disclosed’ (Matter of Fappiano v New York City Police Dept., 95 NY2d 738, 748). The agency must make a particularized showing that the statutory exemption from disclosure pursuant to Civil Rights Law § 50-b(1) applies to all the records that the petitioner seeks.” Appellate Division determined that trial court should have conducted an in-camera inspection and remanded the case for such review.

- **Matter of New York Civil Liberties Union v. New York City Police Dept.**, --- N.E.3d ----, 2018 N.Y. Slip Op. 08423

Order that compelled the NYPD to disclose redacted decisions of police officer disciplinary hearings reversed. Appellate court held that since the decisions are made confidential by Civil Rights Law, §50-a (police officers’ personnel records used to evaluate performance regarding continued employment or promotion), agency is not obligated to disclose records, even in redacted form. Appellate Division decision upheld by Court of Appeals

- **Matter of New York Times Co. v. New York State Executive Chamber**, 57 Misc.3d 40556 N.Y.S.3d 821, Supreme Court, Albany County (July 6, 2017)

Petitioner requested emails ranging from 2011-2016, daily schedules of a state employee, Percoco, from 2011 to 2015, records pertaining to Percoco’s return to the Executive Chamber, and emails between Percoco and members of the Executive branch staff. Executive Chamber contended that these documents were exempt because they were compiled for law enforcement purposes therefore, disclosure

would interfere with law enforcement investigation or judicial proceeding. For the law enforcement exemption to apply, the document must be created, gathered, or used by an agency for this purpose at some time before the agency invokes the exemption, and the court stated it had done so. However, Executive Chamber could not demonstrate that disclosure would interfere with an investigation or judicial proceeding because Chamber has no knowledge of prosecutor's strategy in the judicial proceeding. The Protective order issued by another court, the confidential informants, unwarranted invasion of personal privacy, and state or federal statute exemption do not apply because the Chamber failed to sustain their burden of proof that the record is exempt.

- **Outhouse v. Cortlandt Community Volunteer Ambulance Corps.**, Index No. 2776-16, Supreme Court, Westchester County (February 7, 2017)

Records requested regarding an application to become a member of the Volunteer Ambulance Corps. were denied based on the Corps.' position that it is not an "agency" as defined by FOIL. The court, relying on judicial precedent and an opinion prepared by the Committee, granted the petition and stated: "based on Respondent's relationship with the town, it is clear that Respondent is performing a governmental function and is an 'agency' within the meaning of FOIL."

- **Matter of Rauh v De Blasio**, 75 N.Y.S.3d 15, 161 AD3d 120, 2018 N.Y., Appellate Division, First Department (May 1, 2018)

Reporters requested copies of correspondences between the Mayor or members of his administration and a PR firm. Agency denied access asserting the "intra-agency" exemption, claiming the PR firm was an "agent of the city." The court ruled that since the mayor's office did not formally retain the PR firm, the inter/intra agency exemption would not apply, and ordered disclosure. The court stated: "respondents' belated production of approximately 1500 additional documents, more than a year after petitioners submitted their FOIL requests and approximately two months after this proceeding was filed, and their apparent decision not to claim the exemption with respect to such correspondence in the future, only underscores the lack of reasonable basis for denying access." For this reason, the court awarded attorney's fees. Decision affirmed in its entirety by Appellate Division.

- **Time Warner Cable News NY1 v. N.Y.C. Police Dep't**, 2017 NY Slip Op 30707(U), Supreme Court, New York County (April 17, 2017)

Follow-up to court's August 1, 2016 interim order (**Time Warner Cable News NY1 v. New York City Police Department**, 53 Misc. 3d 657, 36 N.Y.S.3d 579). Petitioner filed a motion to reargue the "burden" issue and both parties requested permission to appeal to the Appellate Division. Motions were granted. In addition, "respondents [were] directed to review the footage and determine, on an individual basis, whether the videos are subject to disclosure, and to provide petitioner a copy of those videos that do not contain exempt material within 60 days after this order is entered."

- **White v. Annucci**, Supreme Court, Albany County, Index No. 6326-16 (July 21, 2017)

The Court found that the proposed fee for "Lt. Review Time" was inconsistent with FOIL as such fee does not involve the preparation of records, but rather involves the time needed to review the records to

determine what portions must be disclosed or may be withheld. Recognizing that such review is necessary to protect the safety and security of DOCCS' facilities and to protect the privacy of other inmates, the Court declined to interpret FOIL and its assorted regulations to include this review time as time required to "prepare a copy of the requested record" for which a fee may be charged.

Minor Decisions

- **Borukhova v. City of New York, Office of Chief Medical Examiner**, Supreme Court, New York County (December 5, 2017)

Petitioner requested records relating to the Office of the Chief Medical Examiner's (OCME) investigation into her husband's death, including autopsy reports. City denied access relying on §87(2)(a) and NYC Charter §557(g) which governs access to records of the OCME. Petitioner argued that rights of access should have been governed by NYS County Law 677(3)(b). Court upheld denial and held that NYC Charter §557(g) has force and effect of state law and governs access to OCME records.

- **Bronx Defenders v. N.Y. City Police Dep't**, Supreme Court, New York County, May 19, 2017

Court denied respondents motion to dismiss on ground that it had certified that it did not possess any records responsive to the request. Court determined that there were inconsistencies between agency's position that it had certified that it did not possess responsive records and the affidavit of the agency's employee regarding the burden of producing a responsive record. Court made reference to 21 NYCRR 1401.2(b)(2), which requires the records access officer to "assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records." Court ordered respondents to file an answer to the petition.

- **Matter of Brown v. DiFiore**, 39 A.D.3d 1048, 33 N.Y.S.3d 327, Appellate Division, Second Department (May 25, 2016)

Petitioner's request to District Attorney's office for "unusual occurrence addendums" and "scratch sheets" did not reasonably describe the records sought and was properly denied. Agency previously agreed to disclose copy of 911 recording but petitioner had yet to receive it. Appellate Division ordered disclosure.

- **Matter of Castorina v. De Blasio**, 56 Misc.3d 413, 55 N.Y.S.3d 599, Supreme Court, Richmond County (April 3, 2017)

Assemblymembers denied access to application materials connected with the NYC Identity Card program. The court held that petitioners did not have standing to challenge IDNYC law concerning the destruction of the records. Respondent stated that disclosure would constitute an unwarranted invasion of personal privacy, and redacting the personal information would be unreasonably difficult. In conclusion, the court held: "Petitioners however, have not specifically requested compliance with FOIL and a response to their FOIL requests. Considering the lack of a formal request, the unduly financially burdensome nature of the production, and lack of good cause shown, there is no reason for this Court to order the production."

- **Matter of Citizens for a Better Maspeth, Inc. v City of New York**, Supreme Court, Queens County (September 27, 2017)

Denial by City's Department of Homeless Services for client-level data upheld by court as records specifically exempt by state statute (Social Services Law §136). Also, disclosure would constitute unwarranted invasion of personal privacy and could endanger life or safety. Agency withheld RFP and proposals after homeless shelter conversion project had been discontinued on ground that disclosure would interfere with a current or imminent contract award. Since project had been discontinued, Court disagreed and ordered disclosure.

- **Cobado v. Benzinger**, 163 A.D.3d 1103, 80 N.Y.S.3d 529, Appellate Division, Third Department (May 29, 2018)

Petitioner requested records relating to his arrest from the New York State Police. Only obtained records after initiating an Article 78 proceeding. Appellate Division agreed with trial court that the matter was moot. However, the Appellate Division also determined that respondents failed to comply with the statutory time frames and that petitioner ultimately substantially prevailed and, as such, overturned the trial court's determination that the statutory prerequisites for awarding of attorney's fees had not been satisfied. Matter was remitted to Supreme Court for a determination as to whether petitioner is entitled to counsel fees and/or litigation costs and, if so, to calculate the reasonable amount of any award.

- **Matter of Collins v. New York City Police Dept.**, 55 Misc.3d 1214(A), 58 N.Y.S.3d 873, Supreme Court, New York County (April 27, 2017)

NYPD denied request for records pertaining to a 1991 murder case on the ground that disclosure would constitute an unwarranted invasion of personal privacy of the witnesses; would endanger life or safety of witnesses; interfere with an ongoing investigation; and reveal confidential sources and non-routine investigative techniques. The petitioner had agreed to receive documents that contained redactions, and certain witnesses had testified at trial making the NYPD's argument regarding an invasion of privacy and confidential sources moot. The argument regarding law enforcement interference failed because the NYPD could not demonstrate that there was an ongoing investigation. Respondents could not meet their burden of proof.

- **Matter of Cook v. Nassau County Police Department**, 140 A.D.3d 1059, 34 N.Y.S.3d 150, Appellate Division, Second Department (June 22, 2016)

Following the Appellate Court's determination on an earlier appeal regarding the disclosure of the requested records (see *Matter of Cook v Nassau County Police Dept.*, 110 AD3d 718), the petitioner moved pursuant to Public Officers Law § 89(4)(c) for an award of an attorney's fee and litigation expenses, and the Supreme Court granted the motion. Appellate Division reversed on the ground that while the agency was required to disclose certain records, the petitioner had not "substantially prevailed."

- **In re Correction Officers' Benevolent Association, et al. v. New York City Department of Correction, et al.**, 157 A.D.3d 643, 67 N.Y.S.3d 639, Appellate Division, First Department (January 30, 2018)

Appellate Division affirmed trial court's decision and held that Petitioners' argument that the requested documents are effectively the final documents relating to a decision not to promote the Petitioners because there are no later documents providing reasons for the failures to promote, other than the

conclusory notification letters that the candidates were passed over, is unavailing. Respondents explain that, while the decision makers, including the Chief of Department who was the primary orchestrator, considered the requested documents in determining whom to promote, no documents exist encapsulating the final decision, other than the notice to petitioners.

- **Matter of Crown Castle NG East, LLC v. The Town of Hempstead**, Supreme Court, Nassau County, Index No. 2063/2017 (November 28, 2017)

Town relied on **Pittari** in denying access to a variety of Town records on the basis that petitioner was a defendant in a criminal proceeding and disclosure would interfere with the adjudication of those proceedings and the statutory provisions controlling discovery. Court held that Town had not met its burden of proof as to how disclosure would cause the harm envisioned by the statute. Court denied Town's request that they be permitted to submit an answer providing additional justification for non-disclosure. Court determined that petitioner had substantially prevailed and awarded attorney's fees.

- **Matter of DeFreitas v. New York State Police Crime Lab**, 141 A.D.3d 1043, 35 N.Y.S.3d 598, Appellate Division, Third Department (July 28, 2016)

Respondent failed to respond to petitioner's FOIL request and FOIL appeal. Following the commencement of the Article 78 proceeding, respondent advised petitioner that 1,356 pages of records responsive to his request would be sent to him upon payment of the statutory copying fee. Appellate Court upheld Supreme Court's dismissal of petition as moot and stated "Where a petitioner receives an adequate response to a FOIL request during the pendency of his or her CPLR article 78 proceeding, the proceeding should be dismissed as moot because a determination will not affect the rights of the parties."

- **Empire Healthchoice Assurance, Inc. v. Metropolitan Transportation Authority**, 60 Misc.3d 1207(A), Supreme Court, New York County (June 19, 2018)

Court held that contrary to respondents' contention, the statistical and factual data on which respondents relied when reviewing RFP proposals are not exempt from disclosure. "Public Officers Law § 87(2)(g) expressly states that "statistical or factual tabulations or data" are not exempt as inter-agency or intra-agency materials. Presumably, agencies share statistical or factual data because the data might be useful in the decision-making process. Thus, respondents' analysis would render the exception to the exemption virtually meaningless." See also **Professional Standards Review Council of America Inc.**

- **Matter of Empire State Beer Distributors Association, Inc. v. New York State Liquor Authority**, 158 A.D.3d 480, 67 N.Y.S.3d 833, Appellate Division, First Department (February 8, 2018)

Appellate Division overturned trial court's order directing the Liquor Authority to disclose unredacted copies of stipulations entered into between Costco Wholesale Corporation and BJ's Wholesale Club, Inc. and the Authority (intervenors). Appellate Division held that the intervenors "met their burden of presenting 'specific, persuasive evidence that disclosure will cause [them] to suffer a competitive injury,' and did not 'merely rest on a speculative conclusion that disclosure might potentially cause harm' by leading to negative publicity." (internal citations omitted)

- **In re Energy & Environmental Legal Institute, et al. v. Attorney General of the State of New York**, 162 A.D.3d 458, 75 N.Y.S.3d 45, Appellate Division, First Department (June 7, 2018)

Appellate Division held that trial court had “correctly found that respondent's right to invoke the inter- or intra-agency exemption to FOIL as to an email message sent to respondent was not waived when the sender added a third party to the ‘cc’ field of the email and instructed the third party to print attached materials and deliver them to respondent, in the absence of any expectation that the third party would review the substance of those materials or disclose them to others.”

- **Ferncliff Cemetery Association v. Beville**, 2017 NY Slip Op 30551(U), Supreme Court, Westchester County (March 27, 2017)

Cemetery association sought all records sent or received from any town official, board member, employee or agent regarding the association’s right to build a cottage on its’ property. The town delivered some records but withheld others citing attorney-client privilege and the intra-agency exemptions. The records were submitted to the court for an in-camera review. The court agreed that some records could properly be withheld. However, the court ordered the town to pay attorney’s fees because it failed to timely provide the documents, set a date for when the request would be fully answered or give a reasonable basis for the denial of access to some of the records.

- **Gooden v. New York City Police Department**, 52 Misc.3d 1206(A), 41 N.Y.S.3d 719, Supreme Court, New York County (May 16, 2016)

“The petition is dismissed as barred under the statute of limitations. Petitioner's second FOIL request from 2014 is a belated attempt to seek judicial review of petitioner's first FOIL request from 18 years ago, 1996. Petitioner's challenge to the 2014 denial is ‘nothing more than an effort to obtain reconsideration of the prior request without any change in circumstances.’ (Matter of Corbin, 160 A.D.2d at 596, 554 N.Y.S.2d 240.)”

- **In the Matter of the Hearst Corporation et. al. v. New York State Department of Correction and Community Supervision**, Index No. 88-16, Supreme Court, Albany County (September 19, 2016)

Petitioners requested documents relating to inmate grievances involving physical abuse and/or assault from seven facilities and the ensuing arbitration orders, decisions, and awards for three years. DOCCS denied disclosure stating the requested records were not reasonably described, not kept in a format that permits practical retrieval, and that the records are exempt because they are personnel records used for evaluating job performance. The court agreed that the records were not reasonably described, because DOCCS does not have a retrieval system which would allow it to reasonably locate the files; no obligation to search for a needle in a haystack, and that they are exempt as personnel records used for evaluating performance under section 50-a of Civil Rights Law.

- **Hearst Corporation v. Town of Milton**, Supreme Court, Saratoga County (October 30, 2017)

Town denied access to a “confidential” settlement agreement between the Town and a Town employee involving allegations of misconduct by a Town official. Court ordered disclosure (with name of complainant redacted) and opined that “A blanket exemption from FOIL by a promise of confidentiality

would eviscerate the FOIL statutes (sic) and the legislative intent to foster transparency.” Court also awarded attorney’s fees on ground that “it took two appeals and approximately seven months for the respondent to release the settlement agreement.”

- **Huseman v. New York City Department of Education**, 2016 N.Y. Slip Op. 30959(U), Supreme Court, New York County (May 25, 2016)

Court found that “Here, even if the fields in the records requested in [by Petitioner] contain data that could be produced subject to redaction without violating FERPA, the DOE has established that it, is unable to do so without unreasonable difficulty because of the undue burden it would place on the agency and the extraordinary effort it would take.” Court also found that “that the DOE has sufficiently established that it cannot redact the information prohibited from disclosure by FERPA without unreasonable difficulty and thus, the remaining records sought in the First Request are exempt from disclosure under FOIL.”

- **In the Matter of Latinojustice PRLDEF v. South Country Central School District**, Supreme Court, Suffolk County, 2018 N.Y. Slip Op. 51440(U) (October 12, 2018)

Court offered the opinion that “here it ... seems inconceivable, and at the very least highly improbable, that the School District did not have and has not maintained any records, beyond a single, one-page flyer and a few code of conduct and disciplinary code and procedural provisions, that constitute, document, reflect or otherwise bear on its many efforts - including, but not limited to, gang-related school assembly programs and student meetings, administrator training in identifying gang-related activity, gang-resistance education programming, gang-related student disciplinary proceedings and suspensions, online monitoring related to detecting gang affiliation, activity and messaging, and the provision of instruction to suspended students - to address gang-related activity in its schools and among its students. Accordingly, the court finds that the petitioner has demonstrated sufficient factual bases to warrant a hearing as to whether there exist, or existed, within the School District's control.”

- **Levy v. Clarkstown Central School District**, Supreme Court, Rockland County, Index No. 001800/2017 (May 9, 2018)

Court found that “there is a reasonable concern that the release of children’s names, the exact time of pick-up and drop off of the children at their bus stops, the number of children at each bus stop, and the release of specific addresses where a single home is the location of the pick-up, may endanger the lives or safety of these children.” However, Court held that the safety exemption “does not warrant an outright denial of Petitioner’s request under FOIL to provide the bus routes.” Court directed the District to provide the bus route information, redacted so as not to identify the names of the bus drivers or the children, the times of pick-up and drop-off, the number of children at each stop, and the specific street number where a single home is the location of the stop.

- **Lipsitz v. UBF Faculty-Student Housing Corp.**, Supreme Court, Erie County, Index No. 808537/2017 (January 3, 2018)

Court relied on **Quigley v. University at Buffalo Foundation, Inc.** decision in determining that respondent Housing Corporation, a not-for-profit created to support the purposes of the University at Buffalo by acquiring, constructing, renovating, and maintaining residential and other facilities for the use

of the University's faculty and students, was not an agency subject to FOIL nor was its governing body subject to the OML.

- **Logue v. New York City Police Department**, Index No. 153965/16, Supreme Court, New York County, (February 6, 2017)

Applicant requested records from NYPD that included pictures, videos, audio recordings, data, metadata, and communications between and among NYPD personnel regarding protests that occurred at Grand Central station. The NYPD asserted several blanket grounds for denial (i.e., law enforcement, endangerment) but failed to establish a causal connection between disclosure and the harm envisioned by the statute. Respondents failed to meet their burden of proof and the court ordered partial disclosure.

- **Morris v. Patience, as Secretary of the Senate**, Supreme Court, Albany County, Index No. 905460-17 (April 10, 2018)

Court ordered Secretary of the Senate to disclose the "published mail guidelines referenced in the New York State Rules of the Senate, Rule X. §9" on the ground that the guidelines are "instructions to staff that affect members of the public." (§88(2)(f) of FOIL)

- **Matter of Netsmart Tech, Inc. v. New York State Office for People with Developmental Disabilities**, Index No. 4497-15, Supreme Court, Albany County (September 14, 2016)

Petitioners requested records regarding proposals and bids for a health records service system along with the scores of the bids, the methodologies for scoring, all internal communication involving the scores and all communications with bidders. The OPWDD denied the request based on two exemptions, first that disclosure of these records would impair present or imminent contract awards and second, that they involved inter and intra agency communications. OPWDD disclosed some records but not all after a bid was chosen. The court reviewed over 60 documents for in camera review. Court held that agency's denial was over-broad. Court granted access to some but upheld agency's denial of access to others. Still determined that petitioner had substantially prevailed and scheduled a hearing to determine attorney's fees.

- **Matter of O'Donnell v. New York City Police Department**, 56 Misc.3d 1213(A), 65 N.Y.S.3d 492, Supreme Court, New York County (July 14, 2017)

NYPD conducted additional searches as a result of petitioner's commencement of the Article 78 proceeding and subsequently produced the records sought prior to judicial intervention. As such, Court held that petitioner had substantially prevailed. As NYPD failed to respond to petitioner's appeal within the statutory time, petitioner had demonstrated his entitlement to attorney's fees and costs.

- **Matter of Pasek v. New York State Department of Health**, 151 A.D.3d, 1250, 56 N.Y.S.3d 627, Appellate Division, Third Department (June 8, 2017)

Provision of Education Law prohibiting disclosure of records relating to performance of a medical or a quality assurance review function only shields records from discovery in civil actions and does not protect them from a FOIL request. However, Statement of deficiencies and plan of correction, as well as

complaint/incident investigation report, compiled by DOH in the course of its investigation of hospital's treatment of patient, incorporated information collected by the hospital for quality assurance purposes that was exempt from disclosure under Public Health Law, and thus DOH, in responding to FOIL request, properly redacted such information pursuant to FOIL exception for records exempt from disclosure by state or federal statute.

- **Matter of Pendell v. Columbia County District Attorney's Office**, 166 A.D.3d 1088, 88 N.Y.S.3d 268, Appellate Division, Third Department (November 1, 2018)

The Appellate Division dismissed petitioner's appeal as academic. Although "[a] court is limited to considering only those exemptions to disclosure that are invoked by the party from whom disclosure is sought" (Matter of Rose v Albany County Dist. Attorney's Off., 141 AD3d 912, 914 [2016]), it is also well settled that a court "may take judicial notice of a record in the same court of either the pending matter or of some other action" (Matter of Allen v Strough, 301 AD2d 11, 18 [2002]). Appellate Division noted that the requested records and exhibits were furnished to petitioner's appellate counsel; therefore, respondent was under no obligation to furnish additional copies. Court also held that as petitioner received the requested records through his appellate counsel, whether respondent properly denied his Freedom of Information Law request had been rendered academic, and the appeal was dismissed.

- **In the Matter of Police Benevolent Association of New York State, Inc. v. State of New York et al.**, 165 A.D.3d 1434, 86 N.Y.S.3d 246, Appellate Division, Third Department (October 18, 2018)

Petitioner's requested copies of records related to the hiring of certain individuals for high-ranking positions within the police departments of four SUNY institutions. Respondent denied on the ground that disclosure of the applications would constitute an unwarranted invasion of personal privacy and that the applications could not be redacted sufficiently to protect the identities of the applicants. Appellate Court opined that "it is possible, or even likely, that certain applications, or components thereof, may need to be redacted in their entirety given the distinctiveness of an applicant's education or employment history; however, such circumstances with respect to a single, or even several, applicants cannot justify a blanket denial of the release of 1,344 pages of application information from numerous applicants." Court directed SUNY institutions to release the documents sought with sufficient redactions to protect the identities of the applicants.

- **Matter of Rose v. Albany County. District Attorney's Office**, 141 A.D.3d 91234 N.Y.S.3d 753, Appellate Division, Third Department (July 14, 2016)

Court held "A court is limited to considering only those exemptions to disclosure that are invoked by the party from whom disclosure is sought." Also held that letter from county district attorney's office in response to individual's inquiry regarding whether he or she would receive reward in exchange for his or her testimony did not fall within scope of FOIL's safety exemption in its entirety. Could be disclosed in redacted form. See also: **Rose v. Albany County District Attorney's Office**, 111 AD3d 1123, 975 NYS2d 258 (3d Dept. 2013)

- **Matter of Shooters Committee on Political Education, Inc. v. Cuomo**, 147 A.D.3d 1244, 47 N.Y.S.3d 512, Appellate Division, Third Department (February 27, 2017)

The lower court's order partially granting disclosure of inter-agency documents was reversed because inter-agency communications along with privileged attorney-client communications justified denial of access. The court determined that these records were drafted for discussion purposes and not for final policy decisions.

- **Matter of Spring v. County of Monroe**, 141 A.D.3d 1151, 36 N.Y.S.3d 330, Appellate Division, Fourth Department (July 8, 2016)

Petitioner requested disclosure of approximately 200 documents, emails, and reports. After Supreme Court conducted an in-camera review, it directed disclosure of several documents. Respondents appealed. Appellate Court ruled that some of the records in question were exempt from disclosure due to attorney-client privilege, attorney work product and inter-agency exemptions.

- **Matter of Whitehead v. Warren County Board of Supervisors**, 165 A.D.3d 145286 N.Y.S.3d 241, Appellate Division, Third Department (October 18, 2018)

Petitioner requested copy of an engineering report. County denied on ground that records were "intra-agency" material. Subsequent to initiation of the Article 78 proceeding, respondent County disclosed copy of report. Trial court dismissed entire petition as moot. Petitioner appealed on ground that trial court should not have dismissed petition relating to costs and fees. The Appellate Division held that it was unable to conduct the necessary review to determine whether respondent reasonably withheld its initial disclosure of the report on the ground that it constituted inter- or intra-agency material that was not "statistical or factual tabulations or data" and remitted the matter to Supreme Court to conduct an in camera review of the responsive materials provided and determine whether respondent had a reasonable basis for denying petitioner's FOIL request. Appellate court ordered that if the Supreme Court determined that respondent lacked a reasonable basis to withhold the subject documents, Supreme Court should then determine, in its discretion, whether petitioner is entitled to the requested filing fees and costs.

- **Wright v. New York State Office of Temporary and Disability Assistance**, Index No. 508-16, Supreme Court, Albany County (February 15, 2017)

Applicant requested, pursuant to FOIL and the PPPL, records from the Office of Temporary and Disability Assistance(OTDA) that discuss or make reference to the applicant. ODTA denied access on the ground that records were "intra-agency material" (87(2)(g)). Petitioner asserted that "intra-agency material" is not a permissible ground for denial when records are requested pursuant to the PPPL. The court disagreed and upheld the agency's denial of access. Court also determined that the responsive e-mails, while records subject to FOIL, fell outside the PPPL's definition of record.

State Procurement Updates

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INTRODUCTION TO PROCUREMENT FOR NYS AGENCIES

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This presentation and any opinions expressed are my own and do not necessarily represent the views or opinions of my employer or any other agency.

1

PURPOSE

- Facilitate agency's mission
- Promote fairness in contracting
- Guard against favoritism, improvidence, extravagance, fraud, and corruption

2

BEFORE CONDUCTING A NEW PROCUREMENT

- Order of Precedence for method
- Procurement Guidelines that agencies must follow

3

BEFORE CONDUCTING A NEW PROCUREMENT

- Preferred Sources
 - Corcraft, etc.
- May complain to Procurement Council if not used by agency

4

BEFORE CONDUCTING A NEW PROCUREMENT

- Over one thousand centralized contract awards
- Agencies can negotiate a lower price
- P.O.s not subject to OSC pre-audit approval

5

CONDUCTING A NEW PROCUREMENT

- Formal competitive procurement not required for purchases under \$50,000.00
- Cannot split contracts to fit beneath threshold
- Discretionary threshold up to \$200,000.00 for purchases from MWBEs, SDVOBs, NYS Small Business, for recycled commodities/tech, agricultural products produced or harvested in NY

6

CONDUCTING A NEW PROCUREMENT

- Competitive Procurements for:
 - Commodities= lowest price, Invitation for Bids
 - Services= best value, Request for Proposals

7

CONDUCTING A NEW PROCUREMENT

- Contracts over \$50,000.00 must be listed in contract reporter at least 15 days before bid is due
 - OSC Bid Protest
 - Contract Reporter Exemption Request

8

CONDUCTING A NEW PROCUREMENT

- If receive advertising exemption approval, agency must still publish notice of award and reasons for exemption.
- Non-competitive awards also include recipient, value, purpose

9

CONDUCTING A NEW PROCUREMENT

- Single source: although two or more offerors can meet agency need, agency documents written findings setting forth reasons for award to one
- Sole source: only one offeror is capable of supplying needed services or commodities
- Subject to OSC approval

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CONDUCTING A NEW PROCUREMENT

- Single source- factors
 - Circumstances for leading to selection of vendor
 - Alternatives considered
 - Rationale for selecting specific vendor
 - Cost reasonableness

11

CONDUCTING A NEW PROCUREMENT

- Single source-in CRER
 - Description of goods/services
 - Circumstances and material and substantial reasons why competitive procurement not feasible
 - Vendor selection justification
 - Why the period of time requested is the minimum necessary to ameliorate the circumstances which created the material and substantial reasons for this request
 - If a future competitive process is anticipated, provide key dates such as CR publication, bid due dates, bid opening dates, evaluation, and notice of award
 - Justification of price

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CONDUCTING A NEW PROCUREMENT

- sole source
 - Is the procurement unmotivated by arbitrary restrictions?
 - Is the product/service unique?
 - Is the benefit unique?
 - Is the price reasonable?

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CONTRACT TERMS

- Appendix A
 - Order of precedence
 - MWBE, SDVOB, funding requirements

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CONTRACT TERMS

- Master Contract for Grants
 - Req'd over \$10,000.00
- Article 11-B, competitive procurement, and approval environment

15

CONTRACT TERMS

- Indemnification
 - Identify whether needed for this procurement
 - Broad indemnification may cause issues after award at time of contract execution

16

CONTRACT TERMS

- Publicity/confidentiality
 - Promotional signs for site based projects
 - Procedure by which contractor can identify trade secrets
 - Consider constraints of FOIL

17

CONTRACT TERMS

- ITS Technology policies
 - Date and time conversion language
 - Cyber incident response
 - Procedure by which to request waiver from policy

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VENDOR RESPONSIBILITY

- Agency determines responsibility prior to award
- Elastic term
- FLIP analysis

19

VENDOR RESPONSIBILITY

- Financial and organizational capacity
 - Audits
 - Contractor experience

20

VENDOR RESPONSIBILITY

- Legal Authority
 - Licenses
 - Charities registration
 - Debarment

21

VENDOR RESPONSIBILITY

- Integrity
 - Indictments and convictions
 - Investigations
 - Responsiveness and hostility

22

VENDOR RESPONSIBILITY

- Past Performance
 - Prior monitoring
 - Failure to complete projects
 - Inability to follow directions
 - Litigation

23

VENDOR RESPONSIBILITY

- What is isn't:
 - Disregarding procurement criteria to award to a different contractor who is "more responsible"

24

VENDOR RESPONSIBILITY

- OSC may return a contract unapproved because of its own vendor responsibility determination

25

VENDOR RESPONSIBILITY

- Resources and tools
 - Vendor Responsibility Questionnaire for contracts, and subcontractors known at time of award, over \$100,000.00.
 - Some entities exempt from VRQ, but OSC reserves right to request one

26

VENDOR RESPONSIBILITY

- Resources and tools
 - E-courts/PACER
 - Charities Bureau
 - OpenBookNY
 - Your preferred search engine

27

VENDOR RESPONSIBILITY

- Flags, findings, and follow up
 - Reach out, request documents
 - If issue is unresolved, determine who will monitor
 - Identify corrective action taken

28

VENDOR RESPONSIBILITY

- Non-Responsibility Determination
 - Liberty interest → Due process
 - Written notice, more than a mere gesture

29

VENDOR RESPONSIBILITY

- Non-Responsibility Determination
 - Authority to determine responsibility
 - Statement of preliminary finding of non-responsibility
 - Conduct that gave rise to preliminary finding
 - Opportunity to provide additional information and evidence
 - Deadline

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VENDOR RESPONSIBILITY

- Non-Responsibility Determination
 - Opportunity to be heard does not need to be formal hearing on the record
 - Can be by letter
 - If meet, take minutes and provide chance to agree on accuracy

31

VENDOR RESPONSIBILITY

- Determination of non-responsibility should not operate as debarment for all future contracting, absent statutory authority.

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VENDOR RESPONSIBILITY

- Executive Order No. 192
 - Attention to vendor responsibility should not end with the contract award
 - Must rely on responsibility determinations made by other state entities
 - Waiver procedure
 - Selection absent waiver is breach of duty as public officer

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VENDOR RESPONSIBILITY

- Contract terms for continued review
 - Master Grant Contract(IV)(N)
 - Appendix A, Records
 - Consider your own reporting language
 - Rock Stars, Candy, and Contracts

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Introduction to New York State Agency Procurement

Robert Vanderbles, Senior Attorney
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Purpose of Competitive Procurement

1. Facilitate agency's mission while protecting the interests of the state and taxpayers, and promote fairness in contracting with the business community. State Finance Law § 163(2).
2. Guard against favoritism, improvidence, extravagance, fraud and corruption. *Jered Contracting Corp. v New York City Transit Authority*, 22 N.Y.2d 187 (1968); *Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 236 A.D.2d 48 (3rd 1997).

Before Conducting Your Own Procurement

1. State Agency means: "all state departments, boards, commissions, offices or institutions but excludes, however, for the purposes of subdivision five of section three hundred fifty-five of the education law, the state university of New York and excludes, for the purposes of subdivision a of section sixty-two hundred eighteen of the education law, the city university of New York; provided, however, that the state university of New York and the city university of New York shall be subject to the provisions of section one hundred sixty-five-a of this article. Furthermore, such term shall not include the legislature or the judiciary." State Finance Law § 160(9).
2. State Finance Law § 163 sets forth an order of precedence that agencies must follow.
3. Procurement Guidelines.²
 - a. State agencies are to purchase services or commodities "consistent with" or "pursuant" to guidelines issued by the state procurement council. State Finance Law § 163(3)(a)(v), (vi).
4. Can agency's need be met through a Preferred Source?
 - a. State Finance Law § 163(3)(a)(i).
 - b. OGS Preferred Source Guidelines.³
 - i. Provides step by step instructions for Preferred Source procurement.
 - ii. Preferred Source may allege before the Procurement Council that an agency has failure to purchase from Preferred Sources. Procurement

¹ This presentation and any opinions expressed are my own and do not necessarily represent the views or opinions of my employer or any other agency.

² <https://ogs.ny.gov/system/files/documents/2018/08/psnys-procurement-guidelines.pdf>

³ <https://www.ogs.state.ny.us/procurecounc/pdfdoc/psguide.pdf>

Council may review agency's procurement record and send copy of decision to Comptroller.

iii. OGS List of Preferred Sources⁴

1. Corcraft.
2. NYS Preferred Source Program for People who are Blind.
3. New York State Industries for the Disabled, Inc.

5. Can agency's need be met through a Centralized Contract?

- a. "any contract for the purchase of commodities or services, established or approved by the commissioner of general services as meeting the state's requirements including, but not limited to, any contract let by the federal government, other state or local governments or purchasing consortia." State Finance Law § 160(1).
- b. Over one thousand Centralized Contract awards.⁵
- c. Agencies obligated to purchase services and commodities from Centralized Contracts that meet the agency's needs.
- d. Agencies can seek to negotiate a lower price.
- e. Purchase Orders issued through a centralized contract are not subject to OSC pre-audit approval.
- f. SED, OSC, OAG not obligated to use centralized contracts for services and technology.⁶
- g. Agencies may conduct competitive procurement where commodities can be secured at lower price than listed in centralized contract. State Finance Law § 163(3)(a)(v).

6. Can an already established agency contract meet the agency's needs?

Agency Procurement

1. How much will this cost?

- a. Agencies are not required to conduct a formal competitive procurement for services and commodities that do not exceed \$50,000.00. State Finance Law § 163(6).

⁴ <https://www.ogs.state.ny.us/procurecounc/pdfdoc/pslist.pdf>

⁵ <https://ogs.ny.gov/procurement/ogs-centralized-awards-list>

⁶ New York State Procurement Guidelines, pg 5.

- b. Competitive procurements for commodities shall be awarded on the basis of lowest price. Competitive procurements for services shall be awarded on the basis of best value. State Finance Law § 163(10).
 - i. Procurement Guidelines contain specific guidance for different competitive procurement vehicles. Requests for Proposals are typically used for procuring services and technology where best value is the criterion. Invitations for Bids are typically used for commodities where lowest price is the criterion.
 - c. Agencies should conduct discretionary procurement in accordance with Discretionary Purchasing Guidelines, and their own internal policies.
 - d. Agencies are not required to conduct a formal competitive procurement for commodities or services up to \$200,000.00 from MWBEs, SDVOBs, or New York State Small Business, recycled commodities or technology, and food grown, produced or harvested in New York.
 - e. Must consider the annual aggregate amount anticipated within the next twelve month period. Dividing procurements to fit beneath the discretionary threshold is explicitly prohibited. State Finance Law § 163(6-b).
 - f. Contracts greater than \$50,000.00 must be approved by OSC prior to becoming effective. Contracts through OGS require approval for those greater than \$85,000.00. Centralized contracts and purchase orders issued under centralized contracts are exempt. State Finance Law § 112(2)(a).
 - i. Purpose of OSC approval prior to execution of contract is to protect against government misconduct and improvidence. *City of New York v State of New York*, 87 N.Y.2d 982 (1996).
2. Procurements over \$50,000.00 must be advertised in the Contract Reporter.⁷ State Finance Law § 163(8).
 3. OSC is prohibited from approving a contract over \$50,000.00 unless the opportunity was published at least fifteen days prior to the date the bids were due. Economic Development Law § 146.
 - a. Advertising procurement after selection of MWBE, where cost exceeded \$50,000.00 but was below \$200,000.00, where substantial work was already performed by contractor and facts indicated there was no actual procurement opportunity as reflected in the advertisement resulted in OSC's non-approval of contract. OSC opined the appropriate avenue would have been to seek a contract reporter exemption request. OSC Matter of Bid Protest filed by Technology Innovation & Strategy, Inc., SF-20160095.

⁷ <https://www.nyscr.ny.gov/>

4. If an agency receives an exemption from publication, the agency must still publish notice of the award of the contract and reasons for the exemption in the contract reporter as soon as practicable, unless OSC determines publication would affect law enforcement investigations or negatively impact an agency's ability to protect security operations. Exemptions from publication of non-competitive awards shall also state the recipient, term, estimated value, and include a brief description of the procurement's purpose. Economic Development Law § 144(2)(e).
5. Single and Sole Source.
 - a. Is the agency's need best met by conducting a competitive procurement? If not, then agency may seek an exemption from competitive procurement and contract reporter requirement through either a single source or sole source.
 - b. Single and sole source procurements may be made without a formal competitive process, subject to review by OSC, and should be made only under unusual circumstances, when a formal competitive process is not feasible, and specifications should be fairly created. State Finance Law § 163(10)(b)(i).
 - c. Single Source: "A procurement in which although two or more offerors can supply the required commodities or services, the commissioner or state agency, upon written findings setting forth the material and substantial reasons therefor, may award a contract or non-technical amendment to a contract to one offeror over the other. The commissioner or state agency shall document in the procurement record the circumstances leading to the selection of the vendor, including the alternatives considered, the rationale for selecting the specific vendor and the basis upon which it determined the cost was reasonable." State Finance Law § 163(1)(h).
 - i. In addition to these factors, OSC's Electronic Documents Submission System will also ask agencies to provide:
 1. A description of the goods or service being procured.
 2. The circumstances and material and substantial reasons why a formal competitive process is not feasible.
 3. The vendor selection justification.
 4. Why the period of time requested is the minimum necessary to ameliorate the circumstances which created the material and substantial reasons for this request.
 5. If a future competitive process is anticipated, provide key dates such as publication in the Contract Reporter, bid due dates, bid opening dates, evaluation and notice of award dates.
 6. The price justification for the request.

- ii. Consider issuing a Request for Information to gather feedback from potential contractors and gauge interest, or lack thereof.⁸
- d. Sole Source: “a procurement in which only one offeror is capable of supplying the required commodities or services.” State Finance Law § 163(1)(g).
 - i. In OSC’s Determination of Bid Protest SG-0898-057, citing to *Gerzof v Sweeney*, 16 N.Y.2d 206 (1965), considered:
 - 1. Was the procuring agency acting in good faith, motivated with intent to arbitrarily restrict competition, and motivated without intent to reward one particular manufacturer?
 - 2. Is the product or service unique? Is there a generic equivalent?
 - 3. Are the benefits from the product or service unique? Does any other product or service has substantially similar benefits?
 - 4. Is the price reasonable in comparison with other products when the particular benefits are considered?
 - ii. Does the contractor have a patent?
 - iii. Is there a statutory restriction on who can receive the funds?
 - iv. Proposed contract for exercise equipment returned unapproved where the sole source justification did not evince any intent to arbitrarily restrict competition and the product was unique, but the benefits provided by the product and terms upon which it was offered was not unique, and slight advantage of product did not provide an adequate basis for a higher price. OSC Matter of Bid Protest filed with respect to acquisition of exercise equipment, SF-0898/057.

Contract Language Considerations

- 1. Appendix A.⁹
 - a. Required for all agency contracts.
 - b. Appendix A terms control if there is a conflict with other contractual provisions.
 - c. Additional language may be required for the contract.
 - i. MWBE

⁸ Is There a Procurement Opportunity? Best practices for advertising Single and Sole Source contracts. Office of the State Comptroller. Fall Conference, 2018. Available at: https://www.osc.state.ny.us/agencies/outreach/fallconfer2018/presentations/2018_boc_is_there_a_procurement_opportunity_final.pdf

⁹ <https://ogs.ny.gov/procurement/appendix>

- ii. SDVOB
 - iii. Programmatic, appropriation, or federal requirements.
- 2. Master Contract for Grants.¹⁰
 - a. Required for grants over \$10,000.00.
 - b. Agency's A-1 should include programmatic needs, A-2 can be drafted to take precedence over other terms where federal requirements control.
 - c. Applicability of Master Contract for Grants:
 - i. The definition of services omits contracts approved under Article 11-B. State Finance Law § 160(7).
 - ii. OSC's Guide to Financial Operations, Chpt. XI, § 4.B directs agencies to the Division of Budget for questions on applicability.
 - iii. Discussing grant contracts, OSC approval, and federal funds. *Church Avenue Merchants Block Association, Inc. v State*, 35 Misc.3d 1231(A) (Ct Cl 2011).
 - iv. OSC's Matter of Bid Protest filed by Green Jobs Training Center, SF-20170207, states:

“While Article 11-B does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that state contracts are awarded in the best interest of the State, requires that agencies undertake a competitive process for grant awards or, alternatively, document why competition is not appropriate or feasible. Thus, notwithstanding the inapplicability of SFL § 163, this Office generally requires that grant contracts be awarded after a fair and impartial competitive procurement process which provides a level playing field for all potential award recipients, except where the agency can document sole source, single source or emergency justification for a non-competitive award (consistent with the documentation for such awards under SFL § 163).”
- 3. Publicity and confidentiality.
 - a. Prior notice, or notice and permission, before media or academic release.
 - i. Ex. Master Grants Contract IV(G).
 - b. Signage requirements for site-based projects.
 - c. Will confidentiality extend beyond term of contract?

¹⁰ <https://grantsmanagement.ny.gov/system/files/documents/2018/09/sample-complete-nys-mcg.pdf>

- d. Does the agency wish to provide the contractor with a procedure to identify confidential materials?
 - e. In drafting confidentiality and publicity clauses, consider constraints of FOIL.
 - i. Confidentiality clause in village's severance agreement with official could not act as bar to FOIL request, and was void as against public policy. *Village of Brockport v Calandra*, 191 Misc.2d 718 (Sup Ct Monroe County 2002) *aff'd* 305 A.D.2d 1030 (4th Dept 2003).
 - f. Ex. OGS Appendix B.
4. Indemnification.
- a. Consider whether indemnification is needed for the procurement.
 - b. Opportunity to limit agency exposure from contractor's bad acts.
 - c. Consider whether to place a limit on the contractor's liability under an indemnification provision.
 - d. A contract that includes an agency's indemnification of a contractor will likely experience questions from control agencies.
 - e. Expansive indemnification provisions may discourage potential bidders and contractors.
 - i. Indemnification was material requirement within the RFP and bidder's refusal to agree to indemnification provided good faith reason to end negotiations and award the procurement to another bidder. OSC Determination of Appeal filed by The Peebles Corporation, SF-20140322.
5. ITS Technology Policies.¹¹
- a. State Technology Law § 103(10) provides authority to ITS to promulgate technology policies; Executive Order No. 117.
 - b. Contracts required to include warranty language that software can perform date and time conversions. ITS Policy NYS-P98-003.
 - c. Cyber Incident Response Policy, NYS-S13-005.
 - i. General Business Law § 899-aa has notification requirements for security breaches involving personal information and is contained in Appendix A.
 - d. Information Security Exception Policy, NYS-P13-001, provides a procedure to request a waiver from applicable ITS policies.

¹¹ <https://its.ny.gov/tables/technologypolicyindex>

Vendor Responsibility

1. Prior to the award of a contract an agency shall make a determination of responsibility of the proposed contractor. State Finance Law § 163(9)(f); Highway Law § 38; Public Buildings Law § 8; General Municipal Law § 103.
2. Responsible means “financial ability, legal capacity, integrity, and past performance of a business entity and as such terms have been interpreted relative to public procurements.” State Finance Law § 163(1)(c). It is an “elastic” term. *Matter of P & C Giampilis Constr. Corp. v Diamond*, 210 A.D.2d 64 (1st Dept 1994); OSC Guide to Financial Operations, Chpt. 11, § 16.¹²
3. FLIP analysis.
 - a. Financial and organizational capacity.
 - i. Rational basis existed to reject lowest bidder as not responsible where company had recently filed for bankruptcy and financial records raised questions of solvency. *Matter of Adelaide Env'tl. Health Assoc. v New York State Off. of Gen. Servs.*, 248 A.D.2d 861 (3d Dept 1998).
 - b. Legal authority.
 - i. Search Department of State’s business entity database.¹³
 - ii. OAG Charities Registration.¹⁴
 - iii. Debarments.
 - iv. Required licensure.
 1. Municipality had rational basis to determine electrician non-responsible where, on seven prior occasions, it had failed to have electrical work supervised by licensed electrician and concealed those events on questionnaires. *Matter of Deol Elec. Contr. V Barrios-Paoli*, 258 A.D.2d 327 (1st Dept 1999).
 - c. Integrity.
 - i. Rational basis existed to determine bidder was non-responsible because of lack of integrity where bidder was subject of multiple concurrent investigations into bidder’s connections with organized crime. *Matter of Interstate Indus. Corp. v Murphy*, 1 A.D.3d 751 (3d Dept 2003).

¹² <https://www.osc.state.ny.us/agencies/guide/MyWebHelp/Content/XI/16.htm>

¹³ https://www.dos.ny.gov/corps/bus_entity_search.html

¹⁴ https://www.charitiesnys.com/RegistrySearch/search_charities.jsp

- ii. Criminal indictment or investigation, prior felony convictions, and willful labor law violations can provide a rational basis for finding a bidder is not responsible. *Matter of LaCorte Elec. Constr. & Maintenance v County of Rensselaer*, 195 A.D.2d 923 (3d Dept 1993).
 - iii. County properly determined bidder was not lowest responsible bidder pursuant to General Municipal Law § 103 where the county's attempts to secure information related to bidder's skill and qualification were met with unresponsiveness and hostility, which court found related to bidder's reliability, accountability and judgment. *Matter of Bay Harbour Elec. v County of Chautauqua*, 210 A.D.2d 919 (4th Dept 1994).
- d. Past Performance.
- i. Poor service on prior contract and high fees charged to the public provided agency with rational basis to reject lowest bid. *Matter of Bortle v Tofany*, 42 A.D.2d 1007 (3d Dept 1973).
 - ii. Subcontractor's numerous failures to make timely deliveries on purchase orders and substantial nonconformance to contractual requirements provided rational basis to reject proposed subcontractor. *Matter of Franbilt Inc. v New York State Thruway Auth.* 282 A.D.2d 963 (3d Dept 2001).
 - iii. Where successful completion of project of similar size was proposal prerequisite, bidder had submitted prior project with public benefits corporation that was subject of breach of contract suit, and authority had found bidder had failed to perform on time, complete work, follow directions, obtain adequate permits, disrupted occupants, received stop work orders, and damaged property. Rationale basis existed to reject proposal because of poor past performance. *Matter of Framan Mech., Inc. v State Univ. Constr. Fund*, 151 A.D.3d 1429 (3d Dept 2017).
 - iv. Town properly rejected lowest bid where bidder failed to submit documentation, despite follow up requests, demonstrating experience with handling project of size and complexity of the subject procurement. *Matter of Eldor Contracting Corp. v Town of Islip*, 277 A.D.2d 233 (2d Dept 2000).
 - v. Rational basis existed not to award contract to lowest bidder on basis of poor past performance, lack of cooperation, and failure to list prior penalty assessments on experience questionnaire. *Matter of J.N. Futia Co. v Office of Gen. Servs. of State of N.Y.*, 39 A.D.2d 136 (3d Dept 1972).
- e. Successfully Challenged Responsibility Determination.

- i. Town rejected lowest bid on qualitative factors not identified in procurement, in effect determined second lowest bidder to be “more responsible” than lowest bidder, rather than finding lowest bidder non-responsible. *Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast*, 17 N.Y.3d 136 (2011).

4. OSC Vendor Responsibility Determinations.

- a. While State Finance Law § 163 requires the agency to make responsibility determination, OSC’s decision not approve a contract after receiving a grand jury subpoena involving an investigation into public corruption in the award of contracts was not arbitrary or capricious. *Konski Engineers PC v Levitt*, 69 A.D.2d 940 (3d Dept 1980) *aff’d* 49 N.Y.2d 850 (1980).
- b. When acting in response to a request from a public corporation to review a proposed contract, OSC did not exceed its mandate in finding proposed contractor non-responsible. Ultimate determination rested with the authority, and Court did not reach determination as to whether OSC could reject a contract absent the authority’s request. *Matter of Worth Constr. Co., Inc. v Hevesi*, 32 AD3d 629 (2007).

5. Procedure.

a. Vendor Responsibility Questionnaire.

- i. Required for contracts greater than \$100,000.00, and for subcontracts greater than \$100,000.00 that are known at the time of award.
- ii. If less than \$100,000.00, agency is still required to make a determination regarding the vendor’s responsibility.
- iii. OSC’s Vendor Responsibility Profile AC 3273-S contains checklist for agency actions on vendor responsibility determinations and issues.
- iv. Some entities are exempt from OSC’s documentation requirements.¹⁵
 1. Ex.: municipalities, federal government, public benefit corporations, public colleges and universities, Indian Nations, preferred sources, and purchase orders on statewide contracts.
 2. But, OSC states it reserves the right to request a Vendor Responsibility Profile, even if otherwise exempt.

b. Resources.

- i. Your preferred search engine.

¹⁵ https://www.osc.state.ny.us/vendrep/resources_docreq_agency.htm

1. Create alerts, if able.
- ii. OSC Vendor Responsibility Resource Guide.¹⁶
 1. SAM.gov for federal debarment actions.
 2. E-Courts and PACER.
 3. For not for profits: AG Charities Bureau and Federal Audit Clearinghouse.¹⁷
- iii. OSC's Open Book New York for prior contracts and to assess past performance.¹⁸
- iv. Past performance on agency's own contracts.
- c. Investigating flags on the Vendor Responsibility Questionnaire.
 - i. Don't hesitate to ask questions.
 - ii. If the issue remains unresolved (litigation, investigation), establish a plan for how the issues will be monitored, and who will do so.
 - iii. Verify statements about the status of monitoring or corrective action with other agencies.
6. Determining that a vendor is not responsible.
 - a. A determination of non-responsibility negatively impacts a contractor's ability to carry on business, and thus contractors have a cognizable liberty interest that requires an agency to provide them with due process. Written notice must give contractor enough information such that it is aware of the concerns. *Matter of Schiavone Constr. Co. v Larocca*, 117 A.D.2d 440 (3d Dept 1986).
 - b. The opportunity to be heard does not need to be a hearing on the record. *New York State Asphalt Pavement Assn. v White*, 131 Misc.2d 28 (Sup Ct, Albany County 1988).
 - c. Notice should include:
 - i. Authority to determine responsibility.
 - ii. Statement of preliminary finding of non-responsibility.
 - iii. Contractor conduct giving rise to preliminary determination of non-responsibility.

¹⁶ https://www.osc.state.ny.us/vendrep/documents/vendrep/resource_guide.pdf

¹⁷ <https://harvester.census.gov/facweb/>

¹⁸ <http://www.openbooknewyork.com/>

- iv. Opportunity for contractor to present additional information and evidence by writing, meeting, or both.
 - v. A deadline to respond.
 - vi. Time and place of meeting or address where to provide information.
 - vii. Failure to provide adequate information or respond may result in a final determination of non-responsibility, rejection of bid or termination of contract, as appropriate.
- d. Municipalities non-responsibility determination due to prior bid rigging, made after contractor and counsel was permitted to present arguments in person and in writing, which was reviewed through three levels of agency, was rationally based. *Romano Enters. of N.Y. v New York City Dept. of Transp.*, 254 A.D.2d 233 (1st Dept 1998).

7. Debarment.

- a. Determination of non-responsibility should not act as debarment from all future contracting opportunities, rather an agency should consider responsibility and whether the bidder has remedied the causes of prior non-responsibility determinations. *Matter of Callanan Indus. V White*, 118 A.D.2d 167 (3d Dept 1986).
- b. Agency could not use list of federally debarred contractors to automatically debar contractors on fully state funded contracts absent legislative authority to do so. *Matter of Liquid Asphalt Distribs. Assn. v White*, 137 A.D.2d 913 (3d Dept 1988).
- c. Statutory authority for debarment includes:
 - i. Two final determinations within a consecutive six year period that contractor has willfully failed to pay prevailing wage, or one final determination that contractor has falsified payroll records or engaged in wage kickbacks operates as bar to public works contracts for five years. New York Labor Law Art. 8 and 9. Searchable website.¹⁹
 - ii. Debarment from public works contracts for five years if contractor is subject of a civil fine, stop work order, or conviction Workers' Compensation Law § 141-b.
 - iii. Restrictions on contacts during the procurement process. A finding that an offeror has knowingly and willfully violated statute shall result in a determination of non-responsibility. Another finding that offeror has violated statute within four years shall result in debarment for four years. State Finance Law § 139-j.

¹⁹ <https://applications.labor.ny.gov/EDList/searchPage.do>

8. Executive Order No. 192- Continuing Vendor Integrity Requirements in State Contracts.

- a. “the State’s attention to vendor responsibility should not end with the contract award.”
- b. List of non-responsible entities.²⁰
- c. Must rely on determinations made by other state entities when determining responsibility, ineligibility, debarment of contractor in current or future procurement.
- d. Selection of a contractor deemed non-responsible, debarred or otherwise ineligible, absent an approved waiver, shall be breaching their duty as a public officer.

9. Contract language that can assist with continuing vendor responsibility reviews:

- a. Master Contract for Grants (IV)(N) requires a contractor to update the Vendor Responsibility Questionnaire as new information material to such Questionnaire becomes available.
 - i. Contractor is obligated to promptly report the initiation of an investigation or audit by a government entity with respect to any alleged violation of federal or state law within five days.
 - ii. Agency reserved rights to:
 1. Require updates or clarifications to Questionnaire.
 2. Inquire about information within, or omitted from, Questionnaire.
 3. Require contractor to provide such information to state within reasonable timeframe.
 4. Require as a condition precedent to entering into the contract that contractor agree to conditions that are necessary to satisfy the agency that the contractor is, and will remain, a responsible vendor.
 5. Suspend activities under the contract when it discovers information that calls into question the responsibility of the contract.
- b. Appendix A
 - i. Does not directly address vendor responsibility.

²⁰ <https://ogs.ny.gov/non-responsible-entities>

- ii. Paragraph 10, Records, does require the contract to create and maintain records relevant to its performance under the contract, and permit access to its records by the agency, OSC, and OAG during normal business hours.
- c. May wish to consider including contract language that:
 - i. Obligates a contractor to update the vendor responsibility questionnaire throughout the contract.
 - ii. Set timeframes under which a contractor must report material changes to questions in the vendor responsibility questionnaire.
 - iii. Includes required notice from the contractor on issues specific to the procurement that would impact financial and organizational capacity, legal authority, integrity, and past performance.
 - 1. If the procurement is for a service by a licensed professional, the contract may include a requirement that the professional remain licensed, and to notify the agency if the license is threatened.
 - 2. If the agency is a pass-through for federal funds, require the contractor to share the results of any federal awarding agency monitoring. Requirements of pass-through entities, 2 C.F.R. 200.331(b)
- d. Consider how agency will assess whether the contractor has operationalized the terms of the contract.²¹

²¹ Jacob Ganz, *The Truth About Van Halen and Those Brown M&Ms*, National Public Radio, February 14, 2012, available at <https://www.npr.org/sections/therecord/2012/02/14/146880432/the-truth-about-van-halen-and-those-brown-m-ms>.



State of New York

Executive Chamber

No. 192

EXECUTIVE ORDER

EXECUTIVE ORDER IMPOSING CONTINUING VENDOR INTEGRITY REQUIREMENTS IN STATE CONTRACTS

WHEREAS, New York State, through its agencies and authorities, contracts with a wide variety of vendors, suppliers, service firms, and other contractors to construct public works and obtain goods, services, and technology in various capacities;

WHEREAS, it is imperative that the State conduct business only with responsible entities to ensure that taxpayer dollars are not paid to entities or individuals that lack integrity, are incapable of providing satisfactory performance, or fail to comply with existing laws;

WHEREAS, New York law and public policy have long required that entities wishing to bid for State contracts be found to be responsible at the time of contract award by demonstrating that they have the requisite financial and organizational capacity, legal authority, and integrity (of both the entity and its principals), and, where appropriate, have shown satisfactory performance on prior government contracts;

WHEREAS, State agencies and authorities currently have the ability to debar or deem ineligible for future bidding any contractors, vendors, or grantees that have violated certain statutory provisions, which include, but are not limited to, violations of Labor Law Article 8 and 9 for the willful and intentional failure to pay the prevailing rate of wages; violations of Labor Law Article 25-B (Construction Industry Fair Play Act) and Labor Law Article 25-C (Commercial Goods Transportation Industry Fair Play Act); being listed by the federal government as excluded from receiving federal contracts and certain subcontracts, assistance or benefits, pursuant to 48 C.F.R. Subpart 9-4; being convicted of a crime defined in Penal Law Article 200 (Bribery Involving Public Servants and Related Offenses), Article 496 (Corrupting the Government), or § 195.20 (Defrauding the Government); being subject to a final assessment of civil fines or penalties or a stop-work order, or being convicted of a misdemeanor for violation of Workers Compensation Law §§ 26, 52, or 131; being the subject of a finding of fraudulent or intentional misrepresentation or willful and intentional disregard of the minority- and women-owned participation requirements on a project; and more; and

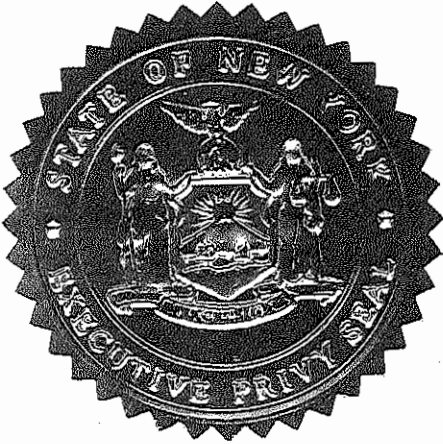
WHEREAS, the State's attention to vendor responsibility should not end with the contract award process, and State agencies and authorities should ensure that contractors, vendors, and grantees remain responsible throughout the term of the contracts and that such contractors, vendors, and grantees who are the subject of debarment or are found to be non-responsible are not able to bid on public procurements.

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby order and direct as follows:

1. "State Entities" shall mean (i) all agencies and departments over which the Governor has executive authority and as defined in subdivision 3, section 2-a of the State Finance Law; and (ii) all public benefit corporations, public authorities, boards, and commissions for which the Governor appoints the Chair, the Chief Executive, or at least 50% of the Board Members.
2. "Contract" shall mean any contract, lease, grant or equivalent legal instrument.
3. State Entities are directed to evaluate – utilizing the existing vendor responsibility determination process – whether bidders are responsible, based in pertinent part upon the following factors: (i) financial and organization capacity; (ii) legal authority; (iii) integrity; and (iv) past performance. Moreover, State Entities are required to determine whether a contractor, vendor, or grantee has failed to comply with any statutory provisions relating to debarment.
4. If a State Entity discovers information that indicates a contractor, vendor, or grantee may not be responsible, may no longer be responsible during the term of the contract, or be subject to debarment for violation of a statutory provision or provisions, the State Entity is directed, as applicable, (i) to conduct an analysis, review, hearing, or investigation, which may include, but is not limited to, conducting a document review supplemented by interviews involving the questioning of the contractor, vendor, or grantee and their representatives; and (ii) to make a determination following such review, hearing or investigation.
5. All State Entities are required to maintain information on contractors, vendors, or grantees that have been deemed non-responsible or ineligible to bid on future contracts or grants and are directed to submit a list of such contractors, vendors, or grantees to the Office of General Services ("OGS") for posting on the OGS website within 5 days. This list should include the name of such contractor, vendor, or grantee, the date, and the basis of the determination, and shall be provided in a manner to be determined by OGS.
6. OGS is directed to post a list of the non-responsibility and debarment determinations on the OGS public website. Such names of debarred contractors, vendors, or grantees shall remain posted on the OGS website for the period designated in the relevant statutory provision allowing for such debarment. In all other cases, determinations shall remain on the list until OGS receives notice of a finding by a court of competent jurisdiction that the non-responsibility or debarment determination was in error or until such time as a waiver has been approved by the Counsel to the Governor, in a manner to be determined by OGS.

7. All State Entities and their state-approved directors must rely on the determination made by other State Entities in ascertaining the responsibility, ineligibility, or debarment of a contractor, vendor, or grantee in current and future procurements.

8. Any commissioner, agency or department head, or member of a board of directors of a State Entity who selects, absent an approved waiver, a contractor, vendor, or grantee, who has been deemed non-responsible, debarred, or otherwise ineligible shall be breaching their duty as a public officer and/or fiduciary duty as a board member.



G I V E N under my hand and the Privy Seal of the
State in the City of Albany this fifteenth
day of January in the year two thousand
nineteen.

BY THE GOVERNOR

A handwritten signature in cursive script, appearing to read "Mr. C.", written in black ink.

Secretary to the Governor

A handwritten signature in cursive script, appearing to read "Ad. Cuomo", written in black ink.

Legislative Updates

Wade Beltramo

NY Conference of Mayors

(NYCOM)

Schenectady, NY

Legislative Update

March 25, 2019

New York State Budget Proposals for FY 2019-2020

On January 15, 2019, Governor Cuomo announced his 2019-2020 Executive Budget. The Assembly and the Senate each passed their own one-house budget bills on March 13, 2019. The following is a summary of the provisions in each of the budgets.

AIM Funding

The Governor's Proposed Budget

While cities would receive the same amount as they do currently, the Governor originally proposed eliminating AIM funding for those villages and towns whose AIM amount is less than 2% of their local fiscal year 2017 expenditures. This would take a total of \$16.4 million away from 480 of the 531 villages across the State and \$42.7 million away from 846 towns. The list of proposed AIM amounts may be found at <https://www.budget.ny.gov/pubs/archive/fy20/exec/local/aim/fy20aim-villages.pdf> and <https://www.budget.ny.gov/pubs/archive/fy20/exec/local/aim/fy20aim-towns.pdf>. Additionally, the Budget eliminates \$48,000 in Miscellaneous Financial Assistance for the three most recently incorporated villages (Woodbury, South Blooming Grove and Sagaponack).

The governor subsequent proposed restoring the AIM cuts by allocating funds from the anticipated internet sales tax revenues that would go to the counties.

The Legislative Response

Both the Senate and Assembly one- house budgets restore the entire cut in AIM funding. In addition, the Senate Budget includes \$70 million for distressed local governments including the City of Albany and the City of Yonkers. At this time it is unclear who else will be eligible to receive these funds or how such money will be allocated.

Transportation Aid

The Governor's Proposed Budget

Funding for CHIPS and Marchiselli Aid in the 2019-20 Executive Budget would remain at current year levels of \$438 million and \$39.7 million, respectively. In addition, PAVE NY would be funded at \$100 million and BRIDGE NY at \$100 million. PAVE NY money is allocated according to the CHIPS formula and BRIDGE NY is competitively awarded. It should be noted that the \$65 million Extreme Winter Recovery Money for the repair and resurfacing of local roads was not included in the Governor's proposal.

The Legislative Response

The Assembly budget restores the \$65 million Extreme Winter Recovery money. The Senate budget increases CHIPS base funding by \$150 million and restores the \$65 million in Extreme Winter Recovery money. It is also worth noting that the Assembly budget includes an increase in the arterial maintenance reimbursement rate (from \$.85 to \$1.87 per square yard) phased in over three years for the 38 cities that maintain State highways.

Water and Sewer Infrastructure Funding

The Governor's Proposed Budget

An additional \$2.5 billion -- including \$500 million in the 2019-20 State fiscal year -- would be provided for drinking water and wastewater infrastructure, as well as water quality protection over a five year period. This money would supplement the amounts already made available under the five-year \$2.5 billion Clean Water Infrastructure Act that was created in 2017-18.

The Legislative Response

The Assembly agrees with the Governor's proposal to add a total of \$2.5 billion over a five year period, of which \$500 million will be allocated in 2019-20. The Senate also agreed to \$2.5 billion for clean water infrastructure over a multi-year period but included the entire \$2.5 billion in their one-house bill.

Tax Cap

The Governor's Proposed Budget

The Governor proposes to make the tax cap permanent and includes no changes with respect to how the tax cap is calculated or administered.

The Legislative Response

The Assembly budget does not include a tax cap proposal. The Senate previously passed a bill that would make the tax cap permanent (see S.1904).

Internet Sales Tax

The Governor's Proposed Budget

The Executive Budget includes a proposal that would require marketplace providers to collect sales and use tax on the taxable sale of tangible personal property that they facilitate. This initiative relieves sellers using marketplace providers of the responsibility to collect the tax. This proposal would increase local sales tax revenue by an estimated \$280 million annually, including \$121.8 million for NYC and \$17 million for other cities and villages. In addition to the marketplace providers proposal, and consistent with the United States Supreme Court ruling in *South Dakota v. Wayfair, Inc.*, out-of-state retailers whose sales in New York exceed \$300,000 or 100 transactions will be notified by the Tax Department that they are required under the New York Tax Law to collect and remit sales tax. This would generate approximately \$110 million in sales tax annually, including \$47.8 million for NYC and \$6.7 million for other cities and villages.

The Legislative Response

Both the Senate and Assembly accepted the Governor's Internet sales tax proposal.

ESCO Sales Tax

The Governor's Proposed Budget

The 2019-20 Executive Budget would eliminate the sales tax exemption on the non-residential transmission and distribution of gas or electricity when purchased from an ESCO (Energy Service Company), which would increase city (outside NYC) and village sales tax revenue by \$4.5 million annually and county revenues up to \$48 million.

Legalization of Recreational Marijuana

The Governor's Proposed Budget

The Budget would legalize recreational marijuana for those 21 years of age and older. County governments would have the authority to opt-out of the provisions of Article 4 of the Cannabis Law which would allow them to prohibit any establishment or operation involving the cultivation, processing, distribution and sale of adult-use cannabis within the boundaries of the county. If a county does not opt out, a city with a population over 100,000 in that county could elect to opt out. In addition, the proposed law expressly preserves the authority for municipalities to regulate the time, place, and manner of licensed adult-use cannabis retail dispensaries, so long as the regulations do not make the operation of dispensaries "unreasonably impracticable."

Marijuana sold by wholesalers to retailers would be subject to three different taxes including: a tax on the cultivation of cannabis at the rate of \$1 per dry weight gram of cannabis flower and \$0.25 per dry weight gram of cannabis trim; a tax on the sale by a wholesaler to a retail dispensary at the rate of 20 percent of the invoice price; and a tax on the same sale by a wholesaler to a retail dispensary at the rate of 2%. Revenue from the 2% tax would be collected in trust for and on account of the county in

which the retail dispensary is located. Revenues from the other two cannabis taxes would be deposited in the New York State Cannabis Revenue Fund and used for cannabis-related purposes.

The State's Division of the Budget estimates that the Act would increase All Funds revenue by \$83 million in FY 2021, \$85 million in FY 2022, \$141 million in FY 2023 and \$184 million in FY 2024.

The Legislative Response

Neither the Assembly nor the Senate included the Governor's language in their one-house budgets since both have different views on a variety of issues including program administration and the allocation and use of revenues. The Assembly did include \$35 million in its budget for the creation of a state marijuana regulatory office.

Downtown Revitalization Initiative

The Governor's Proposed Budget

The 2019-20 Executive Budget proposes another \$100 million for a fourth round of the Downtown Revitalization Initiative which will provide ten downtowns \$10 million each to invest in transformative housing, economic development, transportation and community projects that will attract and retain residents, visitors and businesses. Similar to the first three rounds, one community's downtown would be chosen by each of the 10 REDCs.

Regional Economic Development Councils (REDC)

The Governor's Proposed Budget

The 2019-20 Executive Budget would continue the regional economic development approach and provide \$220 million to support a ninth round of the REDC awards. This will include core funding of \$150 million and \$70 million in tax credits. This will be combined with a wide range of existing agency programs to provide a total of \$750 million for this purpose.

Interest Rate on Judgments

The Governor's Proposed Budget

The 2019-20 Executive Budget proposes an interest rate on judgments and accrued claims that is tied to a market-rate as opposed to the current fixed rate of 9%. If enacted this would not only generate savings for local governments, but would also remove the incentive for plaintiffs to unnecessarily delay proceedings. Linking the rate of judgment interest to the market rate is already the law in many other states.

Binding Arbitration Extender

The Governor's Proposed Budget

The 2019-20 Executive Budget proposes to extend binding arbitration for public safety unions for an additional five years, until 2024.

Consolidation and Restructuring Programs

The Governor's Proposed Budget

The 2019-20 Executive Budget includes \$64 million to support the Citizens Empowerment Tax Credits, the Citizen Reorganization Empowerment Grants, Local Government Efficiency Grants and the Municipal Restructuring Fund.

Citizen Empowerment Tax Credits (CETC)

The Governor's Proposed Budget

Funding is available to incentivize local government consolidation or dissolution, providing a bonus equal to 15% of the newly combined local government's tax levy. At least 70% of such amount must be used for direct relief to property taxpayers.

Citizens Reorganization Empowerment Grants

[The Governor's Proposed Budget](#)

Funding is available for grants up to \$100,000 for local governments to cover costs associated with studies, plans and implementation efforts related to local government reorganization activities. The local match for planning or study grants initiated by the local government would be 50%. However, upon approval of the local government reorganization, 90% of the local match would be refunded.

Local Government Performance and Efficiency Grants

[The Governor's Proposed Budget](#)

Funding of \$4 million will continue to cover costs associated with local government efficiency projects, such as planning for and/or implementation of a functional consolidation, shared or cooperative services, and regionalized delivery of services. The local match for planning grants or study grants is 50%. However, if a local government implements a previously completed planning project, the local match for the planning project would be refunded (up to the local share for implementation). The maximum implementation grant award is \$200,000 per municipality/\$1 million per grant, and the maximum planning grant award is \$12,500 per municipality/\$100,000 per grant.

Municipal Restructuring Fund

[The Governor's Proposed Budget](#)

Funding of approximately \$11 million is available for local government projects that will substantially transform the delivery of services or consolidate government entities resulting in permanent property tax reductions.

Property Tax Administration

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget would make several changes affecting property tax administration including: allowing local governments to provide assessment relief when a disaster is declared; allowing a county to appoint members of an assessing unit's board of assessment review at local option; allowing certain statutory notices currently mailed to assessors to be transmitted via email or by website posting; and, requiring electric generating facilities to file an inventory and income report to assist with the appraisals of such facilities.

Expansion of the State's MWBE Requirement

[The Governor's Proposed Budget](#)

In 2014, Governor Cuomo established a goal requiring that 30% of all State contracts go to minority- and woman-owned enterprises (MWBE). The 2019-20 Executive Budget includes language that would expand this 30% requirement to include those local government contracts supported by State funding, and to those entities that subcontract with such local governments.

Financial Disclosure

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget would require all local elected officials who earn an annual government salary of more than \$50,000 to file annual statements of financial disclosure with the Joint Commission on Public Ethics.

Union Member Privacy Protections

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget includes language that would prohibit all public employers, including local governments, from disclosing personal information about their employees, except: 1) in matters under the jurisprudence of the Public Employment Relations Board regarding union enrollment and

employee organization representation; or 2) where compelled to do so by lawful service of process, subpoena, court order, or as otherwise required by law. The Budget also includes language authorizing public employers to provide employee organizations the name, address, job title, employing agency and work location of their members (i.e., upon request, not more than quarterly).

Environmental Protection Fund (EPF)

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget would maintain funding for the Environmental Protection Fund at \$300 million, including \$38.2 million for the Solid Waste Program, \$88.4 million for the Parks and Recreation Program, \$152.2 million for the Open Space Program, and \$21.2 million for the Climate Change Mitigation and Adaptation Program.

Superfund Program

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget would continue to fund the State's Superfund Program with a \$100 million appropriation, of which 10% would go toward the Environmental Restoration Program.

Recycling Reforms

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget proposes to ban the use of plastic bags and preempt any such local bans. This statewide ban would not apply to prepackaged bags for sale (e.g., trash bags, Ziploc bags), plastic bags provided by food service establishments, or bags used to contain or wrap things like meat, nuts, candy, newspapers or garments. The Executive Budget would also expand the definition of beverages for purposes of the Bottle Bill to include sports drinks, energy drinks, fruit and vegetable beverages and ready-to-drink teas and coffee.

Upstate Transit Aid

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget increases upstate transit aid by 5.3%, or \$11 million. This would be paid for by expanding the auto rental surcharge that is currently in place for vehicles in the Metropolitan Commuter Transportation District.

Red Light Cameras

[The Governor's Proposed Budget](#)

The Executive Budget proposes to extend red light camera enforcement programs five years until December 1, 2024 for Albany, Mount Vernon, New Rochelle, New York City, White Plains, Yonkers, and Nassau and Suffolk Counties.

Bail Reform

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget includes a proposal that would eliminate cash bail and require the release of most defendants on non-monetary conditions. Furthermore, the proposal would require police to issue appearance tickets for most misdemeanors and Class E felonies.

Amend the Criminal Trial Discovery Process

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget would repeal Article 240 of the Criminal Procedures Law and add a new Article 245, Discovery, which would require prosecutors and the defense to share information before a trial takes place, including disclosure of evidence and information favorable to the defense; intended exhibits; expert opinion evidence; witnesses' criminal history information; and search warrant information will be made available to defendants in a timely and consistent manner.

Speedy Trial Access

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget would require courts to take a more proactive role in actively advising litigants regarding how time will be charged and will not take at face value an assertion that the government is ready to proceed with trial. Specifically, courts would be required to inquire into the district attorney's actual readiness for trial.

Indigent Defense

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget proposes a \$50 increase in indigent defense aid to help compliance with the *Hurrell-Harring* Settlement and the expansion of its reforms statewide.

State and Municipal Facilities Program (SAM)

[The Governor's Proposed Budget](#)

The Executive Budget provides no new funding for this purpose but it does reappropriate \$1.9 billion of the \$2.4 billion authorized in prior years. Entities that are eligible to receive SAM funding include the state, local governments, school districts, colleges and universities, public authorities, public libraries, and water, sewer and fire districts. The remaining \$90 million is earmarked for a variety of projects and purposes. As has been the case in prior years, there is little detail as to how these funds will be allocated but it our understanding that it is ultimately controlled by the Governor, with undefined suballocations designated for the Senate and Assembly and their members. State legislators are able to apply for these funds for projects in their districts.

Attorney Biennial Registration Fees

[The Governor's Proposed Budget](#)

The 2019-20 Executive Budget proposes to increase attorney biennial registration fees from \$375.00 to \$425.00. This fee is required of every attorney admitted and licensed to practice law in New York State. The revenue from this fee increase would be directed to the Indigent Legal Services Fund.

Prevailing Wage

[The Governor's Proposed Budget](#)

While the Governor has made clear his interest in expanding prevailing wage, the Executive Budget did not include language in this regard.

[The Legislative Response](#)

However, both the Senate and Assembly budgets include language that would expand prevailing wage to cover a greater portion of publicly subsidized development projects. To summarize, the Assembly proposal would include construction projects receiving a certain amount of public money as well as where there is certain amount of public involvement. The Senate language also expands prevailing wage requirements to projects "supported by public dollars" but acknowledges that consideration should be given to concerns involving such issues as regional cost differentials, IDA and LDC incentives, affordable housing and MWBE opportunities.

Enacted Stand Alone Legislation

Reproductive Health Act

Added a new Article 25-A Reproductive Health Act to the NYS Public Health Law. In addition, the Penal Law, Criminal Procedure Law, the County Law, and the Judiciary Law were amended in relation to abortion. Effective: January 22, 2019. Chapter 1 of the Laws of 2019.

Authorizes Voter Pre-Registration

Allows persons who are at least 16 to pre-register to vote and requires local boards of education to adopt policies to encourage student voter registration. Effective: January 1, 2020. Chapter 2 of the Laws of 2019.

Transfers Voter Registration

Facilitates the transfer of voter registration when a person moves within the state (this is an expansion of the requirements currently in place for when a person moves within the county). Effective: March 25, 2019. Chapter 3 of the Laws of 2019.

Limits Political Contributions of Limited Liability Corporations

Expands existing restrictions of political contributions by corporations to LLCs and other corporate entities; requires LLCs that make political contributions to file with the State Board of Elections; attributes contributions made by an LLC to each member of the LLC in proportion to their ownership stake and requires State Board of Election to establish regulations for the compliance with the attribution of the contributions. Effective: January 31, 2019. Chapter 4 of the Laws of 2019.

Amends Election Filings and Consolidates Primary Day

Establishes that election filings (e.g. certificates and petitions of designation or nomination, certificates of acceptance, objections and specifications of objections), filed outside of NYC, will be accepted considered timely when filed by mail and received not later than 2 business days after the last day to file; failure of the post office (or other means of delivery) to deliver the filing will be a fatal defect; consolidates the primary date for federal, state, and local elections for both parties to the 4th Tuesday in June; changes the notice requirement for referenda conducted by county boards of elections; provides for military voters to receive primary ballots. Effective: Immediately. Chapter 5 of the Laws of 2019.

Early Voting

Amends the NYS Election Law, establishing in-person early voting beginning 10 days before any general, primary, run-off, or special election; requires the county board of elections to designate polling places for in-person early voting; and provide at least one early polling place for every 50k voters; *specifically exempts villages conducting their own elections*. Effective: Immediately. Chapter 6 of the Laws of 2019.

Gender Identity & Expression Discrimination

Prohibits discrimination based on gender identity or expression and Includes offenses regarding gender identity or expression under New York's hate crimes statute. Effective: February 24, 2019. Chapter 8 of the Laws of 2019.

Statute of Limitations for Actions for Sexual Offenses Committed Against Children

Amends the NYS Criminal Procedure Law and the NYS Civil Practice Law and Rules to extend the statute of limitations by five years to 23 years of age for criminal proceedings and until the victim reaches 55 years of age for civil actions. Effective: Immediately. Chapter 11 of the Laws of 2019.

Firearm Purchase Extreme Risk Protection Order

Amends the Civil Practice Law and Rules by adding a new Article 63-A, which establishes extreme risk protection orders as a court-issued order of protection prohibiting a person from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun. Also, allows for a temporary extreme risk protection order. Effective: August 24, 2019. Chapter 19 of the Laws of 2019.

Legislation Passed Both Houses, Awaiting Delivery to the Governor

School Zone Speed Violation Monitoring System Authorization – City of Buffalo

Authorizes a demonstration program for photo enforcement of school zone speed violations in the City of Buffalo. A.951/S.231 – Assembly: Passed/Senate: Passed.

Expands New York City’s school speed zoning photo violation monitoring system. A.6449/S.4331 - Assembly: Passed/Senate: Passed.

State Commission on Prosecutorial Conduct

Amends the provisions relating to the appointment of Commissioners and clarifies the procedures of the Commission on Prosecutorial Conduct. A.781/S.1190. Assembly: Passed/Senate: Passed.

The Jose Peralta New York State DREAM Act

Would amend the Education Law to create the New York DREAM Fund Commission and the DREAM Fund to advance educational opportunities for immigrants’ children. Amends A.782/S.1250. Assembly: Passed/Senate: Passed.

Firearm Background Check

Would amend the Penal Law and the General Business Law, establishing an extension of up to the 30 days of National Instant Background Checks. A.2690/S.2374. Assembly: Passed/Senate: Passed.

Firearm Safe Storage

Would amend the NYS Penal Law to require safe storage of firearms in residences where there is a resident under 16 years of age and in instances where the firearm owner/custodian has reason to know that a person under 16 years of age is likely to gain access to the firearm. A.2686-A/S.2450-A. Assembly: Passed/Senate: Passed.

Municipal Gun Buyback Program

Would add a Section 233 to the NYS Executive Law, which would authorize a municipal gun buyback program. Would also establish a municipal gun buyback program fund. A.2685/S.2449. Assembly: Passed/Senate: Passed.

Bump Stock Ban

Would amend the NYS Penal Law to prohibit the possession of bump stock devices. A.2684/S.2448. Assembly: Passed/Senate: Passed.

Elimination of the 10-Day Voter Registration Cut-Off

Constitutional amendment eliminating the requirement that voters register 10 days before the election. Effective: After State Legislature 2021-2022 passes and then approved at statewide referendum. A.777/S.1048. Assembly: Passed/ Senate: Passed.

Authorizes Ballot by Mail/Expands Absentee Voting

Constitutional amendment eliminating the reasons why a person may vote absentee and authorizes ballot by mail for any reason. Effective: After State Legislature 2021-2022 passes and then approved at statewide referendum. A.778/S.1049. Assembly: Passed/Senate: Passed.

Potential Legislative Issues Remaining for the 2019 NYS Legislative Session

Adult-Use Cannabis

Governor Cuomo's Recreational Marijuana Proposal

Part VV of Governor Cuomo's Revenue Article VII Legislation would enact the Cannabis Regulation and Taxation Act. The stated purpose of the Act is to create and amend existing laws to legalize adult-use cannabis, consolidate governance of all forms of cannabis and create a regulatory structure to oversee the licensure, cultivation, production, distribution, sale and taxation of cannabis within New York State.

The Governor's Act would create a new chapter of New York State Law, entitled the Cannabis Law, which would include new regulations for adult-use and hemp cannabis while merging existing New York State Law regulating medical cannabis.

This Cannabis Law would establish the Office of Cannabis Management (OCM) within the Division of Alcohol Beverage Control, and consolidate governance of adult-use, medical and hemp cannabis. OCM would be tasked with establishing cultivation and processing standards, licensing all business entities in the production and distribution chain, inspecting and enforcing the program standards, and developing and issuing program regulations.

Article 3 of the Cannabis Law would govern New York State's Medical Cannabis Program.

Article 4 of the Cannabis Law would regulate and control the cultivation, processing, manufacturing, distribution and sale of cannabis products for adults over 21 years of age. Specifically, the Act would establish a three-tier market structure for the adult-use cannabis industry, which prohibits vertical integration, limits licenses and supply management to control market concentration and to encourage social equity applicant participation. The proposed law provides for social equity licensing and an incubator program that would provide technical assistance, training, loans and mentoring to social equity applicants.

County governments may opt-out of the provisions of Article 4 of the Cannabis Law. If a county does not opt out, a city with a population over 100,000 in that county could elect to opt out. In addition, the proposed law expressly preserves the authority for municipalities to regulate the time, place, and manner of licensed adult-use cannabis retail dispensaries, so long as the regulations do not make the operation of dispensaries "unreasonable impracticable." Local governments would be preempted from adopting any other regulations regarding adult-use cannabis.

The Act would also establish a program to review and seal prior cannabis convictions and eliminate the collateral consequences of conviction while ensuring that the enforcement framework of legalization does not replicate the arrest disparities and criminalization of prohibition.

Article 5 of the Cannabis Law would provide a regulatory framework to for regulating hemp cannabis.

Additionally, this legislation would amend the New York State Tax Law to add a new Article 20-C, Tax on Adult-Use Cannabis Products, to impose three taxes:

1. A tax on the cultivation of cannabis at the rate of \$1 per dry weight gram of cannabis flower and \$0.25 per dry weight gram of cannabis trim;
2. A tax on the sale by a wholesaler to a retail dispensary at the rate of 20 percent of the invoice price; and
3. A tax on the same sale by a wholesaler to a retail dispensary at the rate of 2 percent of the invoice price but collected in trust for and on account of the county in which the retail dispensary is located.

Revenues from these cannabis taxes will be deposited in the New York State Cannabis Revenue Fund and expended for the following purposes:

1. Administering the cannabis program,
2. Data gathering, monitoring and reporting,
3. The Governor's traffic safety committee,
4. Small business development and loans,
5. Substance abuse, harm reduction and mental health treatment and prevention,
6. Public health education and intervention,
7. Research on cannabis uses and applications,
8. Program evaluation and improvements, and
9. Any other identified purpose recommended by the director of the Office of Cannabis Management and approved by the Director of the Budget.

The State's Division of the Budget estimates that the Act would increase All Funds revenue by \$83 million in FY 2021, \$85 million in FY 2022, \$141 million in FY 2023 and \$184 million in FY 2024.

Most of the provisions of this legislation would take effect immediately, with some exceptions. Despite the laws effective date, establishment of the recreational marijuana market is expected to take months.

Senate & Assembly Proposals

Electric Scooters & Electric Bicycles

The Governor's Proposed Budget

The 2019-20 Executive Budget includes language that would authorize electric scooters and bicycles to be used on dedicated bicycle lanes and streets with posted speed limits of 30 M.P.H. or less. Electric scooters and bicycles could only be ridden by one person at a time and may not be capable of traveling faster than 20 m.p.h. Local governments would be given substantial authority to further regulate electric scooters and bicycles, including establishing maximum speed limits, and time, place, and manner restrictions. Local governments would also be able to authorize their use on sidewalks. The Governor's was not included in the enacted budget

Bicycles & Scooters: What Has Changed?

People have been using bicycles and scooters to traverse cities for almost 150 years, but their prevalence and use has, until recently, been limited to a degree that neither state governments nor the federal government have deemed it necessary to seriously address their use. So why are we now seeing an explosion of them in communities across the country, and why are multi-billion dollar companies like Uber and Ford getting in the bicycle and scooter business?

Advances in technology have radically transformed electric bicycles (e-bikes) and electric scooters (e-scooters), and companies are rushing to establish themselves as the Google of the e-bike and e-scooter markets. Three factors are driving the proliferation of these technologies:

- 1) Advances in battery, GPS, and wireless network technology have made the electric bicycles and scooters more economical and user-friendly;
- 2) A resurgence in downtowns and mixed-use, walkable communities are driving bicycle and scooter use as complements to walking and mass transit; and
- 3) The future of transportation, particularly with respect to autonomous vehicles, is increasingly looking to include a system where users eschew owning their own car in favor of a subscription transportation system that is comprised of a network of bicycles, scooters, and autonomous cars and vans, all married to mass transit.ⁱ

A recent report by the National Association of City Transportation Officials highlighted the growth in bike share programs, noting that 35 million trips were taken using bike share programs in 2017, a 25%

increase year over year. This proliferation was due in part to an increase in the number of bike share companies as well as the implementation of dockless bike share systems. A consequence of the growth in bike share programs was the doubling of the number of bikes these programs are putting on the streets, from 42,500 at the end of 2016 to approximately 100,000 in 2017.ⁱⁱ

Additionally, E-bikes are increasingly being embraced by bike share companies. A recent report by the National Conference of State Legislatures noted some examples of how e-bikes are being integrated into bike share systems:

In 2011, the University of Tennessee-Knoxville launched the country's first electric bicycle sharing system, with two bike-share stations on their campus. In 2015, Birmingham, Ala., unveiled a citywide bike-share system with 100 e-bikes in the fleet of 400 bikes, in the hopes the program will attract more novice riders. With the aid of private funds, Utah has unveiled a small electric bike-share system at their State Capitol complex. Richmond, Va., will be unveiling an electric bicycle sharing system soon. Dockless bike-sharing systems are also rapidly integrating e-bikes into their fleets; companies such as LimeBike, JUMP Bike and Motivate now offer dockless e-bikes in cities such as Austin, Denver and Sacramento.ⁱⁱⁱ

And e-scooters are quickly following suit. Consequently, e-bikes and e-scooters are likely here to stay. But state, federal, and local governments have found themselves flat-footed as these products have arrived in their communities. Because e-bike, e-scooter, and bike share programs are only going to become more prevalent, local officials need to be preparing for their arrival and integration into their communities transportation network.

Bike and Scooter Operation Regulations Generally

Any discussion of the local government role in regulating e-bikes, e- scooters, and bike and scooter share programs has to start with a discussion of the role of the federal and State governments. Generally, regulation of motor vehicles is divided between the federal government and the states, with the federal government regulating vehicle safety, including establishing safety standards, while states have the responsibility of regulating insurance requirements and rules of the road.

Federal Regulation

At the federal level, electric bicycles are not regulated by the National Highway Traffic Safety Administration. Rather, in 2002, Congress defined "low-speed electric bicycles" as "a two- or three-wheeled vehicle with fully operable pedals and an electric motor of less than 750 watts (1 h.p.), whose maximum speed on a paved level surface, when powered solely by such a motor while ridden by an operator who weighs 170 pounds, is less than 20 mph"^{iv} and authorized the Consumer Product Safety Commission (CPSC) to promulgate necessary and appropriate regulations. To date, the CPSC has promulgated nominal regulations.

This definition highlights an important issue. E-bikes can be of two types: (1) bicycles which must be pedaled to operate but which have an electric motor that assists the pedaling and only operates when the rider is pedaling ("pedal-assist" e-bikes), and (2) bicycles which have fully-operable pedals but have a motor that can operate the bicycle whether the operator is pedaling or not ("throttle-assist" e-bikes).

Regarding electric scooters, federal statutes and regulations are effectively silent.

Current New York State Regulations

E-Bikes

The State of New York has not expressly defined e-bikes, which has led to no shortage of confusion about their legality. New York State Vehicle and Traffic Law (VTL) defines "bicycle" in relevant part as "Every two or three wheeled device upon which a person or persons may ride, propelled by human

power through a belt, a chain or gears, with such wheels in a tandem or tricycle.”^v Both “pedal-assist” and “throttle-assist” e-bikes fit this definition. However, e-bikes can also fall within the definition of a motorcycle under New York State Law.

The VTL defines motor vehicle as a “vehicle operated or driven upon a public highway which is propelled by any power other than muscular power.”^{vi} “Public highway” is defined as “Any highway, road, street, avenue, alley, public place, public driveway or any other public way.”^{vii}

Motorcycles are in turn defined as motor vehicles “having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor.”^{viii} “Limited use motorcycles” are a sub-classification of motorcycles, defined based upon their maximum speeds, with Class C motorcycles having a maximum performance speed of not more than 20 m.p.h.^{ix} This definition clearly includes “throttle-assist” e-bikes, and the New York State Department of Motor Vehicles has advised that “throttle-assist” e-bikes are not allowed to be registered in New York or operated on public roads.^x

Regarding “pedal-assist” e-bikes, the City of New York and New York City bike share operator Citi Bike have concluded that “pedal-assist” bicycles are not required to be registered and thus may be operated on public streets.^{xi} Other communities have taken a more cautious approach to implementing e-bikes, and legislation has been introduced that would legalize both “pedal-assist” and “throttle-assist” e-bikes.^{xii}

E-Scooters

Like “throttle-assist” e-bikes, e-scooters have been determined not to be allowed on public roads in New York. In a 1997 case, *Reilley v. New York*,^{xiii} the court addressed the question of the legality of operating e-scooters on public streets. The petitioner in the *Reilley* case described the scooter at issue as “a lightweight, portable motorized scooter” which was started by muscle power for the first 15 or 20 feet at which point a 1.2 horsepower motor capable of a speed of 20 miles per hour takes over. The police officer who ticketed the petitioner described the scooter as a “motorized skateboard” with a “T-bar attached to it for the operator to hold onto” and “a throttle control lever attached to the T-shaped bar.” The court concluded that the scooter fit squarely within the definition of “motor vehicle” under Vehicle and Traffic Law § 125 as a “vehicle ... propelled by any power other than muscular power,” for which insurance is required under Vehicle and Traffic Law § 312 and § 319(1). The court noted that “[t]he exceptions in [VTL] section 125 do not include ‘lightweight’ vehicles or vehicles not capable of causing serious injury if operated improperly.” The court also ruled, “To the extent that it can be said that the Goped is not a ‘vehicle’ as that term is commonly understood, we defer to [the Department of Motor Vehicle’s] construction of a broad term contained in a statute it is responsible for enforcing.”^{xiv}

Consequently, absent a clarification from the New York State Department of Motor Vehicles or a clear amendment to State law, as of December 2018, e-scooters are not authorized to be operated on New York’s public roads.

Regulating Bike Share Programs

Regardless of the type of bicycle being used or the future of e-bikes and e-scooters in New York, bike share programs present a separate set of challenges local officials need to address. Bike share programs come in two flavors: docked and dockless. Docked bike shares use a series of fixed stations where bikes are parked. Bike share subscribers utilize a mobile app to determine which docking stations have bikes available and which docking stations have spaces available to drop bikes off.

Advances in technology have allowed bike share companies to go dockless, meaning that bicycles can be left anywhere and subscribers use the mobile app to locate available bikes that are transmitting their location using built-in GPS technology and network connectivity. The bikes are limited to a specific geographic area (referred to as geo-fencing), and users are charged extra if they take a bicycle out of

its zone. Dockless bike share bicycles have built-in locking devices that prevent them from being ridden. A subscriber enters the bicycles unique code to unlock the bike.

Dockless bike share programs have many advantages over their dock-based brethren: they can be more convenient for users and the operators, the operator does not need to acquire space for docks, and the operator does not need to maintain docking stations. Dockless bike share programs are not without their disadvantages, however. The biggest complaint is that dockless bikes are left everywhere, taking up valuable sidewalk space and obstructing pedestrians.

Luckily, local governments have broad authority pursuant to Municipal Home Rule Law § 10 to regulate bike share programs. The National Association of City Transportation Officials has provided guidance for local officials for regulating and managing private bike share programs.

Regulating the Public Right-of-Way

Municipalities should consider addressing the following issues when adopting local bike share regulations:

- 1) Requiring bike share companies to obtain a revocable license or permit to operate within the municipality and in the public right-of-way,
- 2) Limiting the number of companies operating within the municipality as well as the number of bicycles they can place on sidewalks;
- 3) Establishing operating zones in which bike share operations must be limited;
- 4) Imposing a fee to cover the local government's cost of administering the bike share regulations;
- 5) Requiring companies to hold insurance and to indemnify the municipality;
- 6) Requiring companies to remove damaged, abandoned, improperly placed bicycles within a specific time frame and assessing penalties for failing to do so;
- 7) Requiring companies to comply with procedures and protocol for:
 - Extreme weather (e.g., snowstorms and flooding);
 - Emergencies;
 - Special events (e.g. races, parades, festivals, film shoots); and
 - Municipal Street Maintenance (e.g. snow and trash removal);
- 8) Requiring companies to provide 24/7 contact information (name, phone number, and email) of a locally-based manager/operations staff with decision-making power who can respond to city requests, emergencies, and other issues at any time; and
- 9) Requiring companies operating in the public right of way to provide the municipality with accurate, complete, and timely data about how the bike share services are used and, in an appropriately anonymized fashion, who is riding.

Regulating Dockless Bike Share Parking

Local governments should also consider whether to designate locations where bike share bicycles may be parked in order to ensure an efficient and fair use of the public right-of-way. Some cities allow unrestricted or "free floating" bicycle parking, meaning that customers may leave bikes and scooters anywhere. Other municipalities allow bike share bicycles to be parked in only specific areas. A combination of these approaches can also be utilized, allowing "free floating" parking in some neighborhoods and restricting parking on specific blocks to designated areas. Enforcement of parking regulations can be a challenge, however, due to limitations in the GPS accuracy.

Transportation Equity

Local government officials should also consider requiring bike share operators to ensure that their transportation systems are accessible and usable by everyone in the community. This would include participating in a public engagement program and pricing options that address the needs of the community's low-income population.

- i “Uber’s shot at replacing personal car ownership starts with Jump Bikes,” by David Peisner, *Fast Company*, www.fastcompany.com/90254182/ubers-shot-at-replacing-personal-car-ownership-starts-with-jump-bikes.
- ii “Bike Share in the U.S.: 2017,” National Association of City Transportation Officials, <https://nacto.org/bike-share-statistics-2017/>.
- iii “State Electric Bicycle Laws: A Legislative Primer,” www.ncsl.org/research/transportation/state-electric-bicycle-laws-a-legislative-primer.aspx.
- iv 15 U.S. Code § 2085.
- v N.Y. Veh. & Traf. Law § 102.
- vi N.Y. Veh. & Traf. Law § 125.
- vii N.Y. Veh. & Traf. Law § 134.
- viii N.Y. Veh. & Traf. Law § 123.
- ix N.Y. Veh. & Traf. Law § 121-b.
- x Note that pursuant N.Y. Veh. & Traf. Law § 400-a, the Department of Motor Vehicles Commissioner has broad authority regarding registering vehicles the Commissioner determines is unsafe. Under this authority, the Department of Motor Vehicles has concluded that motor-assisted bicycles do not qualify for registration and thus may not be operated on public highways. See <https://dmv.ny.gov/registration/motorized-devices-cannot-be-registered-new-york>.
- xi See www1.nyc.gov/office-of-the-mayor/news/165-18/mayor-de-blasio-new-framework-clarify-legality-pedal-assist-bicycles; see also www.citibikenyc.com/how-it-works/electric-faqs.
- xii See A.1018 (Gantt)/S.2888 (Dilan), which would defined “electric assisted bicycle.”
- xiii 240 A.D.2d 296, 296 (1st Dept. 1997).
- xiv *Reilly* referencing *Matter of Howard v. Wyman*, 28 N.Y.2d 434, 438.

Speaker Biographies

Wade Beltramo

Wade Beltramo is General Counsel for the New York State Conference of Mayors and Municipal Officials (NYCOM), a voluntary membership association which represents villages and cities in the State of New York. As NYCOM General Counsel, he oversees the NYCOM legal department and *amicus* program. He is also responsible for handling general municipal legal matters as well as building code, planning and zoning, cannabis, property maintenance, justice court, parking and traffic regulations, community and economic development, and local government consolidation and dissolution issues. He has been with NYCOM since April 2002.

Mr. Beltramo joined NYCOM after serving as Assistant Corporation Counsel in the New York City Law Department, where he litigated both civil and criminal cases on behalf of the City's Department of Buildings, Department of Health, Taxi and Limousine Commission, Department of Environmental Protection, and Fire and Police Departments. Prior to working for New York City's Corporation Counsel, he was an analyst in the New York City Mayor's Office of Operations.

Mr. Beltramo graduated from Grinnell College, with a Bachelor of Arts degree in Political Science. He received his Juris Doctorate from Brooklyn Law School.

ROBERT J. FREEMAN
Executive Director
New York State Committee on Open Government

Bob Freeman has worked for the Committee since its creation in 1974 and was appointed executive director in 1976. He received his law degree from New York University and a BS in Foreign Service from Georgetown University.

He has addressed numerous government related organizations, bar associations, media groups and has lectured at various colleges and universities in the US, Europe, Asia and Latin America and is the recipient of numerous honors. Most recently, Freeman was given the Lifetime Achievement Award by the New York State Associated Press Association.

Robert C. Vanderbles Bio

Rob Vanderbles is a senior attorney with the New York Department of State. He is counsel to the Bureau of Fiscal Management and Division of Community Services where he ensures grantee compliance and negotiates contracts. Prior to joining the Department of State Rob worked for the Legal Aid Society of Northeastern New York where he represented low income individuals against debt collectors, landlords, and foreclosing banks. He is proud to have been selected for the Sargent Shriver National Center on Poverty Law's intensive Leadership Academy. Rob received his B.A. from SUNY Albany and J.D. from Albany Law School. He is licensed to practice in New York.

