NEW YORK STATE BAR ASSOCIATION

Report of the New York State Bar Association **Task Force on Free Expression in the Digital Age: The Crisis in Local Journalism**

April 2020

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

REPORT & RECOMMENDATIONS OF THE TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE

The Crisis in Local Journalism

APRIL 2020

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CONTENTS

MEMBERS OF THE TASK FORCE **5**
ACKNOWLEDGEMENTS **7**
INTRODUCTION **9**
I. EXECUTIVE SUMMARY **10**
II. BACKGROUND ON TRENDS IN LOCAL JOURNALISM **12**
A. Data on the Decline 13
B. Why Newspapers Matter 14
C. Is There a Local News Crisis in the Media Capital of the World? 16
D. What's the Bottom Line? 17
III. LIBEL **17**
A. Overview 17
B. Areas of Concern with New York Law 18
1. Overview of SLAPP Suits 19
2. New York's anti-SLAPP Laws and Recommendations for Reform 19
C. Insurance 21
IV. FREEDOM OF INFORMATION LAW **21**
A. FOIL's Purposes and Operation 21
B. Overview of FOIL's Deficiencies 22
1. The Absence of Enforceable Timetables for Disclosure 23
2. Weak Provisions for Attorneys' Fees 24
3. Withholding Entire Documents in Lieu of Redactions 25
4. Overbroad Expection for Law Enforcement Records under Section 50-a 26
C. Recommendations for FOIL Reforms 28
1. Establish Clear Timetables to Remedy Delays 28
2. Strengthen the Fee-Shifting Provision 30
3. Explicitly Authorize Redaction 30
4. Repeal Section 50-a of the Civil Rights Law as an Exception to FOIL 31
5. Provide Necessary Resources to FOIL Offices 31
V. PRO-ACTIVE TRANSPARENCY EFFORTS **32**
A. Background 32

B. Recommendations 33
1. Identify Necessary Information for Disclosure 33
2. Improve Disclosure at the Local Level 33
3. Fix the Open Meetings Law 34
VI. NONPROFIT NEWS ORGANIZATIONS 34
A. The Growth of Nonprofit Journalism 34
B. The Challenges Facing Nonprofit News Organizations 36
C. Ways in Which the Bar Association Can Assist 37
VII. DISCOUNT AND PRO BONO LEGAL SERVICES 37
A. Background 37
B. Recommendation 39
APPENDIX A: Resources 40
APPENDIX B: Dissent of Mr. Mark H. Alcott to Portions of Section III 42

Members of the Task Force on Free Expression in the Digital Age

Cynthia S. Arato, Esq.
Co-Chair

David E. McCraw, Esq.
Co-Chair

Hon. Rolando T. Acosta*

Mark H. Alcott, Esq.^

Jennifer A. Borg, Esq.

Margaret J. Finerty, Esq.

Joseph M. Finnerty, Esq.

Hon. Victoria A. Graffeo

Michael J. Grygiel, Esq.

Caitlin J. Halligan, Esq.

Susan L. Harper, Esq.

Hon. Barbara Jaffe*

Joel L. Kurtzberg, Esq.

Jonathan Matthew Manes, Esq.

Patricia T. Northrop, Esq.

Lynn Beth Oberlander, Esq.

Hon. Karen K. Peters

Hon. Susan Phillips Read*

Prof. LaVonda Nichelle Reed

Hon. Robert S. Smith

Kenneth G. Standard, Esq.

Nabiha Binte Syed, Esq.

Non-Attorney Advisors

Errol Lewis

Judy Patrick

Rex Smith

In Memoriam

G. Robert Witmer, Jr., Esq.

NYSBA Staff

Thomas J. Richards, Esq.
Staff Liaison

Susan DeSantis
Chief Communications Strategist

Eunice Bencke
Administrative Support

* Hon. Rolando T. Acosta and Hon. Susan Phillips Read abstained from voting on Section IV of the Report; Hon. Barbara Jaffe abstained from voting on Sections III, IV, and VI of the Report.
^ Mr. Mark H. Alcott dissents from portions of Section III and has submitted a statement attached as Appendix B.

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Introduction

In 2019, the Bar Association launched a new Task Force initiative to look at "Freedom of Expression in the Digital Age." As its initial project, the Task Force took a deep look at the crisis in local journalism. Local journalism has been in a steady financial decline for at least the past decade, resulting in a dearth of journalists and publications to cover important issues impacting our daily lives and a growing number of "news deserts" (locales that are no longer served by a local newspaper). Much of the decline is attributable to the rise of digital platforms and their profound transformation of both America's information ecology and its advertising markets. That technological revolution has come at a price for local news sources and the citizens who have historically depended on them.

The crisis is rarely viewed as a legal issue. Its roots are in the changing nature of advertising and in the revolutionizing aspects of digital media. The advertising market is now dominated by national and international digital platforms that allow advertisers to reach consumers without going through the local newspaper or broadcaster. Digital media also can target readers and viewers with few of the costs shouldered by traditional media.

Nonetheless, the Task Force recognized that the law and the organized bar have a role to play in alleviating the crisis. Local journalism remains the heartbeat of civic engagement in New York's towns and cities. Local news organizations not only inform communities on the issues and events that have the most immediate impact on citizens' lives, but they also play a vital role in holding governments accountable. In examining the current state of local journalism in New York, the Task Force recognized that financially weakened news organizations are susceptible to threats of libel suits and other claims that often silence important reporting. News organizations also encounter roadblocks and frustrations in trying to get at government information, obstacles that seem baked into the Freedom of Information Law ("FOIL") and the FOIL request system, or arise from the law's implementation by agencies, its interpretation by the courts, or a lack of resources for the government's FOIL officers. Few struggling organizations have the resources to challenge in court improper denials of access or delays. Important as well is the body of law that dictates, independent of FOIL, what information should be available proactively to journalists and citizens. Technology empowers easy access to governmental data, but there needs to be a legal framework in place to ensure that information is available, up to date, and distributed as widely as possible. Increasingly, nonprofit news organizations are being formed to fill the gap left by the decline of traditional media, and their development should be encouraged as a public good. In addition, these nonprofits, along with for-profit local news entities, would benefit from legal assistance to facilitate their formation and continued operation.

Over the course of its work, the Task Force convened forums and meetings on the reform of New York's libel laws; the reform of FOIL and access to court records and proceedings; the status of government transparency outside of FOIL and ways to encourage and increase the release of government records and data to the public; the rise of nonprofit news organizations; and

initiatives designed to bring pro bono and low-cost legal services to news organizations. The Task Force met with Professor Penelope Abernathy of the University of North Carolina, a leading scholar in the field, to learn directly about her research on the decline of local journalism. The Task Force also heard from a range of journalists, media lawyers, nonprofit publishers, and public interest groups.

The focus of the Task Force's report is on legal reform in libel; amendment of FOIL; the advancement of government transparency outside of FOIL; support of nonprofit journalism; and the expansion of legal services for news organizations. One overarching topic is not addressed here, but was repeatedly referenced in our discussions: the role of the digital platforms in destabilizing traditional news organizations, in both urban centers and smaller cities, by their dominance of the advertising market and their ability to "free-ride" on content developed by news organizations through links and aggregation, and whether that dominance could and should be addressed through legislation or antitrust enforcement. Necessarily, those concerns invoked a further discussion of what the platforms could do to support local journalism and provide local communities with the information necessary for self-governance. Because of time constraints, this report does not address either those concerns or those possible solutions, but they warrant the close attention of the bar association and all New Yorkers concerned about sustaining civic engagement and government accountability.

I. Executive Summary

Local journalism has been deeply harmed by an industry-wide financial crisis set in motion by the rise of digital media as a source of information and entertainment and as a vehicle for advertising. Vibrant local journalism, which has traditionally played a powerful role in government oversight and civic engagement, has grown increasingly rare throughout New York, in both rural and urban areas. "News deserts," places that lack independent news organizations to cover local government and politics, are on the rise. The law and the legal profession do not have the ability to alter the financial and technological forces reshaping American journalism, but the law and the legal profession do have a role to play in making certain that vital journalism remains vital and published in New York despite the disruptions in the industry.

The Task Force report focuses on five principal topics: (a) legal reform in libel, (b) amendment of FOIL, (c) the advancement of government transparency outside of FOIL, (d) the growth of nonprofit journalism, and (e) the expansion of legal services for news organizations.

Libel reform: As news organizations face financial difficulties, they may become more prone to avoid difficult but necessary stories in the face of threatened or actual litigation. The "chilling effect," which has long been a driving force in libel reform, is exacerbated by the declining resources of news organizations, who cannot devote resources to outsized or even routine legal expenses. The Task Force found that New York libel law has been appropriately protective of press freedom with one exception. The state's anti-SLAPP law is decidedly weaker than that

found in many other states. SLAPP refers to strategic lawsuits against public participation. Anti-SLAPP statutes provide for early dismissal of such lawsuits when they lack legal merit and are designed primarily to silence critical comment. The statutes typically provide for mandatory fee shifting if a defendant prevails on the motion. New York's statute, however, is narrowly limited to communication about governmental permitting, such as a zoning change, and provides only for discretionary fee-shifting. The Task Force recommends that the statute be amended so that its provisions encompass news reporting and commentary about public matters more broadly and provide for a mandatory fee award to a prevailing defendant.

FOIL reform: New York's Freedom of Information Law, enacted in 1974, has long been a valuable tool for journalists to use in their coverage of local and state governments. It was written with a presumption that governmental records should be public unless one of the statute's enumerated exceptions applies, and that citizens would enjoy the benefits of a widely open government. The reality has become much different. The Task Force repeatedly heard from journalists and others about the flaws and failures of FOIL. Among the key problems: extended delays in getting agency responses, a lack of resources in both staffing and technology for FOIL units in their respective agencies, aggressive deployment of the exemptions to deny access at many agencies or local governmental bodies, and a weak statutory provision for shifting legal fees from the requester to the agency when the requester is forced to go to court to get documents. Because of the financial restraints most news organizations now work under, challenging FOIL denials through an Article 78 proceeding is increasingly rare. The Task Force recommends that FOIL be amended in several ways. Most significantly, FOIL should build into the statute enforceable deadlines and strengthening the fee-shifting provision so that news organizations with meritorious cases can challenge improper withholding without facing prohibitive financial costs. The Task Force also calls for reform of Section 50-a of the Civil Rights Law, which exempts from FOIL and cloaks in secrecy much police misconduct and police disciplinary processes. The law has become a major obstacle for news organizations providing oversight to the activities of local police agencies. The Task Force calls for its elimination and believes the release of the personnel records of the police should be governed by the statutory scheme set forth in FOIL, which governs all other personnel records. To the extent that there is truly sensitive information involving police misconduct or discipline, FOIL's current exemptions for personal privacy and certain law enforcement information protect those interests.

Pro-active transparency: New York has shown a commitment to make governmental data more readily available online. That is an important development for news organizations with limited resources and for citizens, because it frees journalists and citizens from the regimen of FOIL requests or visiting government offices to get information. The Task Force believes those efforts at pro-active transparency can be enhanced. Journalists and public interest groups expressed concerns that truly valuable information was not being included in the data portals and that many local governments were notoriously slow to adopt transparency initiatives or lack the technology to facilitate access to information. The Task Force recommends that the Legislature enact laws to

require local governments to make certain basic information readily available on governmental websites, that the open meetings law be amended to require the provision of key documents in advance of board or council meetings and that the agencies overseeing pro-active disclosures at the state level work with journalists and public interest groups to foster "smart disclosure." Disclosure initiatives should not be judged simply by the volume of data made public but by the value of the information being made available.

Encouragement of nonprofits: One of the most exciting and interesting developments the Task Force explored is the rise of nonprofit journalism organizations. Some nonprofits are issue-focused and cover topics like criminal justice or climate change; others are devoted to community journalism in the same way as their traditional print counterparts. Much of what the Task Force says in its report about libel, FOIL, pro bono services, insurance, and other initiatives applies with equal or greater force to nonprofits. But the Task Force recommends that the bar look deeper at the complex issue of government funding mechanisms that do not involve government content control (for instance, the model of the BBC).

Expansion of legal services: Outside of the national press, the journalism industry is marked today with startup news entities and traditional news outlets that have experienced significant financial troubles over the past decade. Both of those groups play a vital role in local democracy and the ability of citizens to have access to independent and comprehensive coverage of local government and politics. While journalism does not fall in any traditional category of need for the provision of legal services, the Task Force believes that providing legal assistance to news organization contributes to the public good. The Task Force recommends that the bar association create a legal referral network devoted to journalism clients and encourage practitioners to provide pro bono or discounted services to such clients. The needs of news organizations, especially nonprofit startups, extend beyond the usual areas of media law like libel and FOIA and encompass areas like employment, incorporation, and taxes. A NYSBA-sponsored referral service would not only assist in getting needed legal services to journalists and news organizations but stand as a distinguishing symbol of the bar association's commitment to a free press.

II. Background on Trends in Local Journalism

Local journalism has been in a state of crisis for the past 15 years, fueled by intense disruption and financial distress caused by the ascendency of search engines and digital platforms that deliver news and entertainment in various forms. During this time, local news outlets have faced crushing competition from these platforms for both readers' attention and advertising revenue. While New York's local newspapers remain an important vehicle for advertising and publication of legal notices, the financial strain has caused local news organizations to shut their doors at

alarming rates, leaving many U.S. communities without a daily news outlet and creating so-called "news deserts."[1]

This trend has consequences for our nation, since local journalists are at the frontline of communities, investigating and delivering the news that matters most to residents, and which leads to greater civic engagement and community bonds.[2]

A. Data on the Decline

Professor Abernathy's landmark study published by the Center for Innovation and Sustainability in Local Media at the University of North Carolina's School of Media and Journalism, documents that:

- The nation has lost 2,300 newspapers since 2008, leaving only 1,700 dailies and 5,000 weeklies in existence.
- More than one in five newspapers has closed over the past 15 years. That has left half of the 3,143 counties in the country with only one newspaper.[3]
- Almost 200 of the 3,143 counties in the country have no newspaper at all, affecting 3.2 million people.[4]
- Many of the surviving newspapers are ghosts of their former selves with staffs so "dramatically pared back that the remaining journalists can't adequately cover their communities."[5] It is estimated that staff has been cut in half at as many as 1,500 of the newspapers.[6]
- During a tumultuous decade and a half that saw a precipitous drop in print advertising, the largest 25 companies took control of newspapers at an astonishing pace. By 2018, these companies owned nearly one-third of all papers, up from 20 percent in 2004. When it comes to dailies, the numbers are even more striking—two out of three of all the daily newspapers, accounting for 812 publications, are owned by the top 25 firms.[7]
- Chain ownership has led to publications managed by out-of-town editors with less knowledge of local issues or connection to residents' concerns.
- Newspapers have retreated from outlying circulation areas that are less desirable to advertisers, helping expand news deserts across wide swaths of the nation.

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[1] Penny Muse Abernathy, "The Expanding News Desert," School of Media and Journalism, Center for Innovations and Sustainability in Local Media, UNC, 2018 at 16.
[2] "Putting a Price Tag on Local News," https://knightfoundation.org/wp-content/uploads/2019/11/Putting-a-Price-Tag-on-Local-News-final-updated.pdf, at p.1, n. 6.
[3] *Id*. at 8.
[4] Abernathy, *supra* n. 2, at 24.
[5] *Id*. (the analysis focuses on local newspapers and does not include The New York Times, Wall Street Journal, and USA Today or shopping circulars, magazines, or specialty publications.)
[6] *Id*. at 14.
[7] *Id*. at 31

- Cities with rival newspapers were once the norm, but now there are fewer than a dozen cities with competing publications.
- The nation has lost more newspaper jobs than coal-mining jobs.[8]

Here's how the economic collapse of newspapers played out in New York:

- There were only 303 newspapers (54 dailies and 249 weeklies) still publishing in the state in 2019 compared to 501 (62 dailies and 439 weeklies) in 2004, a 40 percent decrease.[9]
- New York has one county without a newspaper and 13 with just one newspaper, and most of those 13 are weeklies that don't cover all of the applicable counties.[10]
- As of 2018, the top 25 newspaper chains owned 61 of New York's newspapers, which amounts to 1 in 5.[11]
- In 2004, New York newspaper publishers distributed 9.3 million copies. By 2019, that was slashed to 3.4 million, a decrease of 63%. [12]
- New York lost 190 weekly newspapers between 2004 and 2019. [13] Thus, one of the most populous states (with 20 million residents) was also one of the states that saw the most weeklies go out of business.

B. Why Newspapers Matter

Research dating back to the 1970s shows that strong newspapers foster a sense of geographic identity and nurture social cohesion and grassroots political activism.[14] They do this by covering local developments over which communities can bond; informing citizens;[15] demanding accountability from local leaders;[16] and promoting fiscal responsibility and governmental efficiency.[17] When local newspapers shrink, fewer candidates run for local office and voter

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[8] *Id*. at 27; *see also* American Society of News Editors, 2008 and 2015 Newsroom Diversity Survey Census, 2008, 2015, https//www.asne.org/diversity-survey-2008, https//www.asne.org/diversity-survey-2015; Bob Papper, "TV New Employment Surpasses Newspapers," Radio Television Digital News Association/Hofstra University Newsroom Survey, April 16, 2018; Bureau of Labor Statistics, Employment Statistics Survey, 2018

[9] Abernathy, *supra* n. 2, at https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9

[10] Id. at https://www.usnewsdeserts.com/states/new-york/#1536357227273-1fcd2118-6dc6

[11] Id.at https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9

[12] Id. at https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9

[13] Id. at https://www.usnewsdeserts.com/states/new-york/#1536357280470-403f9cb7-ca48 (these statistics do not include *The New York Times, Wall Street Journal or USA Today*.)

[14] *Id*. at 5.

[15] Putting a Price Tag on Local News, https://knightfoundation.org/wp-content/uploads/2019/11/Putting-a-Price-Tag-on-Local-News-final-updated.pdf, at p.1, n. 6.

[16] Why Local News Matters, and What We Can Do to Save It, https://www.nysba.org/Journal/2019/Dec/Why_Local_News_Matters,_and_What_We_Can_Do_to_Save_It/, at 9.

[17] *Id*. at 11.

turnout suffers.[18] Even newspaper advertising performs an essential function: it helps a community's economy to grow by connecting businesses with consumers.[19]

A 2011 report by the Federal Communications Commission found that local newspapers are the best medium to provide the public service journalism that (1) shines a light on the major issues confronting communities and (2) gives residents the information they need to solve their problems.[20] These impacts disproportionately affect our nation's most vulnerable citizens, as studies have shown that residents of news deserts are poorer, older and less educated than the average American citizen,[21] and that residents of low-income areas have less access to traditional publications or digital start-ups.[22]

The loss of newspapers in one state can affect residents in neighboring states. Officials at the Centers for Disease Control and Prevention, for instance, say that it's harder to track the spread of disease without thriving newspapers. That's because news stories traditionally served as an early warning system for the agency, and social media has not done as well in providing that service. Without help from newspapers in identifying and publicizing public health risks, there could be more outbreaks and epidemics.[23] One Stanford University economist recently documented how investigative journalism saved lives and averted environmental disasters.[24]

The decline in local news is accompanied by a decline in readership, and print readers are disappearing at an even faster rate than print newspapers. Over the past 15 years, weekday circulation of dailies and weeklies declined from 122 million to 73 million, or 40%,[25] and the pace of the decline is accelerating. [26] If circulation continues to drop at the same rate, one-half of

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[18] Putting a Price Tag on Local News, *supra* n. 16 at 1, n. 6; *see also* Sarah Cavanagh, "Measuring Metropolitan Newspaper Pullback and Its Effects on Political Participation," Retrieved from the University of Minnesota Digital Conservancy, 2016, http://hdl.handle.net/11299/182213; Lee Shaker, "Dead Newspapers and Citizen's Civic Engagement, Communication Faculty Publications and Presentations, 2014, https://pdxscholar.library.pdx.edu/comm_fac/17

[19] Abernathy, *supra* n. 2, at 5.

[20] *Id*. at 8; *see also* Steven Waldman, "The Information Needs of Communities: The changing media landscape in a broadband age," Federal Communications Commission, July 2011, https://transition.fcc.gov/osp/ inc-report/The_Information_ Needs_of_Communities.pdf

[21] Waldman, *supra* n. 21, at 16.

[22] Waldman, *supra* n. 21, at 17.

[23] Abernathy, *supra* n. 2, at 15; *see also* Helen Branswell, "As towns lose their newspapers, disease detectives are left to fly blind," STAT, March 20, 2018, https://www.statnews.com/2018/03/20/news-deserts-infectious-disease/

[24] James T. Hamilton, *Democracy's Detectives, The Economics of Investigative Journalism* 2016).

[25] Abernathy, *supra* n. 2, at 10.

[26] *Id*. at 14.

the surviving newspapers will fold by 2021, according to Nicco Mele, director of the Shorenstein Center for Media, Politics and Public Policy at Harvard University.[27]

C. Is There a Local News Crisis in the Media Capital of the World?

New York City is the media capital of the world, yet even in this city many communities lack sufficient local news coverage.[28] Here's why:

- The *New York Daily News* (winner of 15 Pulitzer Prizes) was sold in 2017 to the news conglomerate Tribune Publishing (then named "Tronc"), the country's fourth-largest newspaper chain. Tronc paid $1 and assumed the newspaper's liabilities. It cut the newsroom staff, which had already gone through many rounds of layoffs, leaving 50 journalists to cover the five boroughs.[29] By the time of its purchase, the publication's circulation already had declined to 200,000 from a high of two million in the mid-twentieth century.[30]
- The *Wall Street Journal* eliminated its "Greater New York" section and the reporters who worked for the section were reassigned or laid off.
- *The New York Times* stopped publishing its standalone Metro Section in 2008 and cut the scope of its metro coverage substantially since then. The *Daily Beast* quantified what that meant: *The Times* published 153 metro stories in the last week of January in 2001; 102 in 2009; and just 48 in 2017.[31]
- More than half of the staff at *AM New York* was laid off in October of 2019 after the newspaper was purchased by Schneps Media.[32] In December of 2019, Schneps also bought New York City's other free daily, *Metro NY.*
- The Tow study, *Media Mecca or News Desert? Covering Local News in New York City,* found that criminal justice, civil courts, and healthcare were going unreported. Several news outlets said environmental and climate change coverage was also lacking. There is

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[27] *Id*. at 14; *see also* Judith Miller, "News Deserts: No News Is Bad News," Urban Policy, 2018, Manhattan Institute, October 2, 2018, https://www.manhattaninstitute.org/html/urban-policy-2018-news-deserts-no-news-bad-news-1150.html.
[28] Sara Rafsky, *Media Mecca or News Desert? Covering Local News in New York City*, *CJR,* Jan. 21, 2020, at 1, https://www.cjr.org/tow_center_reports/local-news-deserts.php.
[29] Abernathy, *supra* n. 2, at 27.
[30] Jaclyn Peiser, "Daily News Newsroom Cut in Half by Tronc as Top Editor Is Ousted," The New York Times, July 23, 2018, https://www.nytimes.com/2018/07/23/business/media/tronc-daily-news-layoffs.html
[31] Paul Moses, *The Daily Beast,* Jan. 21, 2020, https://www.thedailybeast.com/the-new-york-times-turns-its-sights-away-from-new-york-city.
[32] Marc Tracy, "A New Owner, and Layoffs, for amNewYork," The New York Times, Oct. 11, 2019.

comparatively less coverage of Staten Island than the other boroughs. Government meetings go largely unreported.[33]

- Hardly any of the news outlets in the Tow study said they had much time for investigative stories.[34]

D. What's the Bottom Line?

The nation's largest newspaper organizations are ill-equipped to devote time and resources to coverage of local government meetings, investigative stories, and public service journalism. That means that the type of journalism that research shows is most crucial to our democracy is almost non-existent. And that's as true in affluent parts of New York City as it is in rural upstate areas of New York State. Taken to its most extreme, the collapse of the news ecosystem leaves some residents without any source of credible news. And the crisis is only deepening.

III. Libel

A. Overview

The Task Force paid special attention to libel law in considering the impact of law on local journalism. Since the nation's founding, the law of libel has been the province of state law, both as a matter of statute and common law. And as local news organizations faced new and daunting economic challenges, the threat or reality of libel suits took on new significance. In simplest terms, a fear of legal liability can lead publishers to avoid controversial topics or decline to investigate issues that may offend powerful interests in the community.

That concern is not new. In 1964, the U.S. Supreme Court, in its groundbreaking decision in *New York Times v. Sullivan*, recognized that libel laws, intended to vindicate individual reputation, were often misused for another purpose: to silence critics and squelch reporting on subjects that threatened powerful interests. *Sullivan* itself was a case in point. L.B. Sullivan, a police commissioner in Montgomery, Alabama, sued *The New York Times* over an ad placed by supporters of Martin Luther King, Jr. Although the plaintiff was not referenced in the ad, the Alabama courts found that he was defamed by statements in the ad, some of which were slightly inaccurate, about the misconduct of the Montgomery police. In *Sullivan*, the Supreme Court held for the first time that the First Amendment imposed limits on state libel laws. Most significantly, the court held that a public official had to show not only that the story was factually inaccurate and harmed the plaintiff's reputation, but also that the news organization had acted with reckless disregard of the truth—actual malice—in publishing the false statements. At the heart of the Court's ruling was the belief that journalists would engage in self-censorship if the rules of liability were too restrictive and that such a chilling effect would mean that truthful information,

[33] *Id.*
[34] *Id.*

not just falsehoods, would not reach the public. The *Sullivan* rule was subsequently expanded to public figures, and the *Sullivan* decision ushered in a series of decisions interposing the First Amendment as a limit on state-law claims that were likely to chill press freedom.

Sullivan and its progeny have undoubtedly reduced the number of successful libel suits brought by public figures and officials. Press defendants also have benefited over the past 50 years from the courts' broad interpretation of what constitutes an opinion (which cannot support a libel claim) and the scope of the fair report privilege (which permits vigorous coverage of a range of government documents and proceedings). Still, news organizations, especially small ones, may be deterred from reporting controversial or investigative stories by the mere threat of litigation. As protective as *Sullivan* is, actual malice is rarely decided on a preliminary motion. It has historically been dealt with as a factual question requiring proof of the publisher's state of mind, often discerned from an exploration of the facts surrounding the reporting, writing, and editing of the story at issue. That means that time-consuming and expensive discovery is often required to establish the defense. In essence, the chilling effect that worried the *Sullivan* court is often not obviated by the *Sullivan* rule because litigation risk alone can deter reporting. When the website Gawker was forced into bankruptcy by a privacy suit won by the wrestler Hulk Hogan (funded, at least initially in secret, by a Silicon Valley billionaire), news organizations were put on notice that in extreme circumstances litigation can threaten the survival of news organizations.

With libel law, the challenge for lawmakers in New York and elsewhere is to calibrate the law so that it gives appropriate protection to individuals' reputational interests while freeing news organizations from unwarranted litigation threats, and their attendant costs, intended to silence reporting and commentary needed by citizens.

B. Areas of Concern with New York Law

The Task Force found that New York's libel law was largely sound—with one notable exception. New York lags the nation in protecting news organizations, journalists, and concerned citizens from vindictive lawsuits brought to stifle a speaker's commentary, criticism, or dissent. These lawsuits—known as Strategic Lawsuits Against Public Participation or SLAPP suits—typically involve moneyed interests filing legal claims for libel, slander, or other professed torts against individuals or entities who have exercised their First Amendment rights to speak out on a topic. Although SLAPP plaintiffs profess to seek redress through the court system, SLAPP plaintiffs typically file legally flawed claims that cannot survive real judicial scrutiny and thus do not file their claims to obtain a legal victory. Rather, SLAPP plaintiffs bring their claims to burden their targets with expensive and time-consuming litigation and to weaken or silence the speakers.

1. Overview of SLAPP Suits

SLAPP lawsuits can target an array of activity protected by the First Amendment, including the right to petition the government for redress of grievances, the right of free speech, and the right of a free press. With respect to petitioning, a SLAPP suit can be brought by a real estate developer who sues those opposing the developer's request for a zoning variance; by a restaurant chain suing those opposing the restaurant's request for a liquor license; or by either against news organizations or journalists reporting on such opposition. SLAPP suits also are brought to silence speech over the many matters of public concern that fall outside petitioning activities, such as when a company sues activists who have opposed the company's labor practices or a news organization that publishes an investigative news piece about the company. Even if SLAPP suits filed against news organizations or journalists lack legal merit and are eventually dismissed, the lawsuits still damage their targets. Even a meritless lawsuit can drag on for years, draining a defendant's resources through costly and time-consuming litigation and discovery, making it more difficult and expensive for the defendant to continue its news reporting operation. Such a lawsuit can also harm the defendant's reputation and morale, regardless of its outcome. Small news organizations and individuals are the most vulnerable to these tactics, given their typically limited resources, and it can be difficult for them to withstand the pressure to settle these suits in exchange for their silence. SLAPP suits can inflict serious harm even before they are filed, since the mere threat of such a lawsuit (with its attendant high costs and delays) can act to chill criticism and debate and the exercise of First Amendment rights that are critical to a robust free press.

Many states across the nation have enacted so-called anti-SLAPP laws to deter people from using courts, and potential threats of litigation, to silence speech. These laws typically provide SLAPP defendants with special procedures to obtain prompt dismissals of meritless SLAPP suits and impose penalties on plaintiffs who file these suits, including payment of a defendant's legal fees.

2. New York's anti-SLAPP Laws and Recommendations for Reform

New York's current anti-SLAPP laws are some of the narrowest in the country and their protections should be broadened so that they can meaningfully quell the filing of vexatious SLAPP suits and prevent SLAPP plaintiffs from abusing the court system to silence criticism of matters of public concern.

New York's anti-SLAPP laws (N.Y. Civ. Rights Law §§ 70-a, 76-a and N.Y. C.P.LR. §§ 3211[g], 3212[h]) currently cover vindictive lawsuits seeking to stifle speech related to a single very narrow area: government petitioning activities. The laws do not cover lawsuits seeking to stifle speech on other matters of general public importance. New York's current anti-SLAPP laws also do not provide clear timetables for early resolution of SLAPP suits or for mandatory

attorneys' fees (or any other mandatory compensatory award) to a defendant that wins dismissal of the SLAPP suit.

Legislators have for years considered amending New York's anti-SLAPP laws to expand their protections and to bring New York in line with the majority of states in this nation that provide broad rights and protections to the targets of SLAPP suits.[35] There has been renewed interest in the Legislature this spring in considering an anti-SLAPP bill.

The Task Force recommends that New York amend the anti-SLAPP laws to accomplish these goals:

- The anti-SLAPP laws should be broadened to protect against vindictive lawsuits seeking to chill speech on any matter of public concern and not just government petitioning activities.
- The anti-SLAPP laws should exempt from their reach legitimate legal advocacy that does not implicate First Amendment concerns—for instance, those related to commercial speech and public interest litigation. A commercial speech exemption would prevent corporate defendants from using anti-SLAPP protections in consumer litigation regarding alleged false advertising or deceptive or fraudulent business practices. A public interest exemption would prevent the use of anti-SLAPP laws in so-called impact litigation that a nonprofit would typically file to obtain equitable relief to advance a moral goal.[36]
- The anti-SLAPP laws should provide a mandatory attorneys' fee award to a defendant who obtains dismissal of the suit.
- The anti-SLAPP laws should make the stay of discovery contained in CPLR 3214 mandatory while a motion to dismiss the suit is pending.
- The anti-SLAPP laws currently provide that the court shall grant preference in the hearing of an anti-SLAPP motion. To provide certainty regarding speedy resolutions of anti-SLAPP motions, the statute should provide for set time limits by which a court will hear and resolve the motion.
- The anti-SLAPP laws should provide a defendant with an immediate interlocutory appeal should the defendant's motion to dismiss the case be denied. [37]

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[35] Most recently, Senate Bill S52 and Assembly Bill A5991 were introduced in early 2019, seeking to amend New York's anti-SLAPP laws. The Assembly bill passed the Judiciary, Codes, and Rules committees and made it to the floor calendar. The Senate bill was introduced and remained in the Code committee.

[36] In 2003, California enacted such exemptions to its anti-SLAPP laws, and they are codified at Cal. Civ. Proc. Code § 425.17(b) and (c).

[37] The Task Force was not unanimous in all of these recommendations. One Task Force member dissents from the recommendations regarding mandatory attorneys' fees, the discovery stay, and the right to an interlocutory appeal, for the reasons he explains in his dissent attached here at

C. Insurance

The ability of news organizations to withstand unwarranted litigation often depends on the adequacy of insurance coverage. For smaller news organizations facing difficult economic times, the price of policies needed to address the full scope of risk can itself be prohibitive. Lawyers who regularly represent news organizations repeatedly raised this concern to the Task Force. Many general liability policies exclude coverage for media liability. Specific media liability policies are typically expensive. Even when such coverage exists, coverage disputes can limit or eviscerate the value of such coverage.

A full investigation of the problem was beyond the Task Force's mandate and capacity, but we believe the issue deserves serious consideration as a legal issue. Accordingly, the Task Force recommends that NYSBA Insurance Law Committee examine potential legal and commercial solutions to help local news organizations obtain affordable media liability coverage.

IV. Freedom of Information Law

A. FOIL's Purposes and Operation

The purpose of FOIL is to promote the public's right to be informed about the processes of executive branch decision-making by affording access to government records. *Capital Newspapers, Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565 (1986); *Town of Waterford v. N.Y.S. Dep't of Envt'l Conserv.*, 18 N.Y.3d 652, 656-67 (2012) (FOIL is premised "on the overriding policy consideration that the public is vested with an inherent right to know" government operations). The statute was enacted by the Legislature because access to governmental information "should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." Legislative Declaration, *Public Officers Law* § 84. In signing FOIL into law in 1974, then Governor Wilson stressed the importance of open government to a free society and the need for FOIL to engender public understanding and participation. Governor's Memorandum L. 1974, Chs. 578, 579, 580, 1974 Legis. Ann., at 392, *cited in Russo v. Nassau Community College*, 81 N.Y.2d 690, 697 (1993); *see also Capital Newspapers,* 67 N.Y.2d at 565-66 (FOIL ensures public oversight of the "day-to-day functioning of state and local government[,] thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities"). Accordingly, the Court of Appeals has consistently held "that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Newsday, Inc. v. Sise*, 71 N.Y.2d 156, 150 (1987), *cert. denied*, 486

Appendix B. The Task Force respects this member's genuinely held views and thanks him for sharing them as part of this report.

U.S. 1056 (1988). The burden of proof rests upon the government agency claiming the exemption to establish that the requested material is exempt from disclosure. *Pub. Off. Law* § 89(4)(b); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 697-98 (1993).

The press—including community newspapers—has routinely relied on FOIL as a means of obtaining information from and reporting on the activities of a wide array of executive agencies at the State, county, and municipal levels of government. For example, FOIL requests have resulted in public access to booking logs and arrest reports from local police departments and the New York State Police; criminal prosecution records from County District Attorneys' offices; public school board planning and personnel decisions; the dispensation of State tax benefits in connection with economic zone revitalization initiatives; Health Department investigation and oversight records, including restaurant inspection violation reports; real estate development applications and zoning approvals; and license and permit applications and permissions, for example.[38]

B. Overview of FOIL's Deficiencies

New York State's community newspapers and the public they serve have a direct and vital interest in an effective and reliable Freedom of Information Law. In the course of the Task Force's public hearings, however, journalists and press lawyers complained about the ineffectiveness of FOIL. They pointed to undue delay and the aggressive use of exemptions by many agencies.[39] At the same time, a lack of resources devoted by governmental bodies to FOIL

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[38] *See*, *e.g.*, *N.Y. Civ. Lib. Union v. City of Schenectady*, 2 N.Y.3d 657 (2004) (incident reports prepared by city police officers pertaining to use of force); *Moore v. Santucci*, 151 A.D.2d 677, 677 (2d Dep't 1989); *Scarola v. Morgenthau*, 246 A.D.2d 417 (1st Dep't 1998) (documents used by District Attorney in prior criminal prosecution were subject to FOIL); *LaRocca v. Board of Education,* 220 A.D.2d 424 (2d Dep't 1995) (holding settlement agreement among school board and former principal); *Miracle Mile Associates v. Yudelson*, 68 A.D.2d 176 (4th Dep't 1979) (records relating to development of a shopping center); *Matter of West Harlem Bus. Group v. Empire State Dev. Corp.,* 13 N.Y.3d 882, 886 (2009) (documents related to Columbia University's construction of new 17-acre campus in West Harlem); *Kwitny v. McGuire*, 53 N.Y.2d 968, 969 (1981) (approved pistol permit license applications on file with the New York City Police Department).

[39] Indeed, professional journalists in this State have described government agencies' all-too-frequent noncompliance and delay tactics in objecting to FOIL's ineffectiveness as a means of obtaining the release of non-exempt information. *See, e.g.*, Mark C. Mahoney, "Uphill Battle for Transparency in Government Continues," *The Daily Gazette*, Mar. 15, 2019, https://perma.cc/KFP6-SENH (stating that government officials regularly decide not to follow FOIL and noting that "[a]lmost every day, journalists and citizens encounter public officials who routinely deny access to records without trying to comply with the law, who refuse to follow established deadlines for notification and compliance. . . . Citizens routinely have to fight for basic public documents."); Jerry Moore, "Partly Cloudy on Sunshine

offices and necessary technology to manage the information flow has compounded the problems, making it harder for requesters to get timely and considered responses even when FOIL officers are serious about disclosure. Requesters also contend with the reality that court decisions have broadened the authority of agencies to deny access to documents in a variety of circumstances.

The Task Force believes there are two fundamental deficiencies in FOIL as drafted: (1) the statute's lack of enforceable deadlines for responses to FOIL requests and (2) the inability of a requester to recover attorneys' fees when prevailing in a FOIL action. In addition, certain court decisions have abetted the lack of disclosure. FOIL has long been understood to require agencies to redact documents and produce them to requesters once properly withheld information is removed. That was seen as the preferred, and in fact required, alternative to withholding an entire document. Court decisions have now cast doubt on the use of redaction to enable the partial release of documents. Second, Section 50-a of the Civil Rights Law, which shields the personnel records of law enforcement officers, has been broadly construed by the courts to keep secret police disciplinary records and other materials that would shed light on police misconduct and the effectiveness of internal disciplinary processes.

1. The Absence of Enforceable Timetables for Disclosure

FOIL's provisions governing the timing of agency disclosures permit delays that can severely diminish if not extinguish altogether the topical news value of requested information. The procedures governing an agency's response to a FOIL request are set forth in § 89(3)(a) of the statute. Under Pub. Off. Law § 89(3)(a), an agency must respond within five business days of receipt of a written request. That response must grant the request, deny the request in writing, or—in a particularly troublesome alternative—provide a statement of the *approximate* date by which the request will be granted or denied, which must be "reasonable under the circumstances." *Id*. This provision means that agencies never confront a firm deadline to make a determination in response to the request. If and when the agency decides to grant the request (in whole or in part), it must do so within 20 days or, if there are reasonable circumstances preventing the agency from complying with that deadline, inform the requester in writing of the reason the deadline cannot be met and provide a date certain "within a reasonable period" when access will be granted. *Id*.

As a practical matter, the interplay of the above provisions has licensed some government agencies to respond to pending FOIL requests—whether discrete or voluminous—by periodically issuing standard form letters acknowledging receipt of the FOIL request and setting

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Week," *Watertown Daily Times* (Mar. 13, 2019) https://perma.cc/KFP6-SENH (stating that because "New York has an incredibly dysfunctional system when it comes to enforcing the state's FOIL . . . there's little incentive for government authorities in New York to adhere to FOIL").

rolling deadlines for a response. Whether those delays are caused by a lack of resources at an agency or a willful and improper attempt by an agency to keep sensitive information out of the public domain, the effect for news organizations is the same: the public is denied timely access to potentially newsworthy information.[40]

Unreasonable delays in disclosure effectively amount to denials of public access and contravene FOIL's premise that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (citing *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (internal quotation marks omitted).[41]

2. Weak Provisions for Attorneys' Fees

When requesters are denied information, whether for legitimate reasons or otherwise, the most likely outcome is that the denial will never be challenged in court. In other words, a statutory system that contemplated having the courts be the impartial arbiter of FOIL instead has become a system where agency FOIL officers have the final say.

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[40] Courts have repeatedly recognized that temporal guarantees are indispensable to effective news reporting. As the Supreme Court reasoned in *Bridges v. California*, 314 U.S. 252, 269 (1941), a ban on reporting news "just at the time [the] audience would be most receptive" would equate to "a deliberate statutory scheme of censorship." *See also United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972) ("timeliness of publication is the hallmark of 'news,' and the difference between 'news' and 'history' is merely a matter of hours"); *Grove Fresh. Distributors, Inc. vs. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir. 1994) ("The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.") superseded on other grounds as recognized by *Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."); *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is in the spreading of it while it is fresh.").

[41] When former Governor George Pataki signed the current version of Pub. Off. Law § 89(3)(a) into law in 2005, he noted that avoiding delays in obtaining responsive documents would "ultimately [] result in a more open and accountable government. In addition, the new provision ensuring that records are timely disclosed after an agency determines to grant a FOIL request will prevent unjustified delays in turning over material that FOIL requires to be disclosed to the public." Mem. filed with Assembly Bill No. 6714, at 3, Bill Jacket, L.2005, ch. 22. In practice, and as discussed above in the text, the 2005 amendment has resulted in exactly the opposite by facilitating agency delays in making records available to the public under FOIL.

The statute's weak provisions for awarding fees to requesters when they prevail in FOIL litigation contribute to that reality. Requesters have no assurance of a fee recovery in even the most meritorious cases, making it financially perilous for requesters to initiate even plainly meritorious litigation. The Legislature recognized when adopting FOIL's current attorneys' fees provision in 1982, that a fee-shifting provision was needed to combat a "sue us" attitude within those governmental agencies that did not want to release records. *See N.Y. State Defenders Ass'n v. N.Y. State Police*, 927 N.Y.S.2d 423, 425 n.2 (3d Dep't 2011) (quoting Assembly Mem. in Support, at 4, Bill Jacket, L.1982, ch. 73); *see also* S. Budget Report on Bills, at 11-12, Bill Jacket, L.1982, ch. 73.

In its current form, the attorneys' fee provision has both a mandatory and discretionary component. Fees are mandatory where the requester "substantially prevailed" in a FOIL litigation and the agency had "no reasonable basis for denying access." Fees are discretionary when a requester denied access has "substantially prevailed" in a FOIL litigation and the agency's response was untimely. N.Y Pub. Off. Law §§ 89(4)(c)(i), (ii). Based on reports given at the Task Force's public hearings, reviewing courts appear reluctant to grant fee-shifting awards, even when the agency engaged in long delays.

3. Withholding Entire Documents In lieu of Redactions

Recent judicial decisions have suggested that agencies can withhold all parts of an otherwise public document if any part of the document contains exempt information, even though standard practice under FOIL has been, when practicable, to redact the exempt material and release the remainder of the document. Accordingly, there is now significant doubt about the longstanding and fundamental principle that agencies should only refuse to disclose particular information that squarely falls within an exemption enacted by statute. In a 2018 decision, the Court of Appeals was asked to decide whether police personnel records, which are generally exempt from disclosure under Section 50-a of the Civil Rights Law, could be released once information identifying the officers was redacted. *See New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556 (2018). The Court determined that a police agency was not required to use redaction to disclose police personnel records.

The Appellate Division, First Department, has taken the reasoning of the Court of Appeals a significant step further, holding that the use of redaction to allow for the disclosure of otherwise public documents is required in only one circumstance: "Redactions to records sought under FOIL are available only under the personal privacy exemption." *Judicial Watch, Inc. v. City of New York*, No. 160286/17 (1st Dep't Dec. 17, 2019). Under this decision, agencies can now withhold documents if the documents contain any information exempt from disclosure under a different FOIL exemption.

Advocates for requesters believe those decisions not only undermine public access but are at odds with the statutory language of FOIL's § 87(2), which states, "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access records *or portions thereof* that" fall within a statutory exemption (emphasis added). In addition, they point to *Gould v. N.Y.C. Police Dept.*, 89 N.Y.2d 267, 275 (1996), where the Court said, "If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material." If redaction is in fact no longer part of New York law, it puts the state at odds with the standard practice used under the federal Freedom of Information Act and under the open records law of multiple states.[42] As Judge Rivera said in her dissent in *New York Civil Liberties Union*, the majority's opinion could mean that "redaction is unavailable even where it may be the sole method to effectuate the statutory goal of promoting government transparency to hold the governors accountable to the governed" (internal quotation marks omitted).

4. Overbroad Exception for Law Enforcement Records under Section 50-a

The Task Force heard of widespread concerns with Section 50-a of the Civil Rights Law, which has come to broadly impede local reporting on matters relating to police and law enforcement. Section 50-a provides that personnel records of law enforcement officials are confidential and therefore not subject to disclosure under FOIL. In practice, the exemption has been used to withhold most documents that would reveal a police officer's disciplinary record and how the officer's police force dealt with the matter.[43] As applied in that broad manner, the law impedes meaningful community-based reporting on police activities and is out of step with laws in other large and diverse states that permit broad access to police disciplinary records. *See, e.g.*, *Kalven v. City of Chicago*, 7 N.E.3d 741 (Ill. App. Ct. 2014).

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[42] *See*, *e.g.*, *New York Times Co. v. NSA*, 205 F. Supp. 3d 374, 381 (S.D.N.Y. 2016) ("Even where a FOIA exemption applies, the withholding must be narrow, such that '[a]ny reasonably segregable portion of a record shall be provided … after deletion of the portions which are exempt.'") (quoting 5 U.S.C. §552(b));]; New Jersey's Open Public Record Act specifically requires a custodian to "delete or excise from a copy of the public record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record". *N.J.S.A.* 47: 1A-5(g).

[43] *See* Report on Legislation, Civil Rights Committee and Committee on Criminal Courts, New York City Bar Association, May 2018 (https://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf); 2018 Report to the Governor and Legislature, Committee on Open Government, December 2018 (https://www.dos.ny.gov/coog/pdfs/2018%20Annual%20Report.pdf)

Originally enacted in 1976, the Civil Rights Law prohibits police and other law enforcement agencies from releasing a discrete category of records—"[a]ll personnel records used to evaluate performance toward continued employment or promotion" that are "under the [agency's] control" —without the consent of the officer. The text of the statute is in many respects ambiguous, but over time (and particularly as of late) the courts have erred on the side of expanding 50-a, often to a degree and in a manner irreconcilable with FOIL's mandate of transparency.

The Court of Appeals initially—and correctly—recognized that Section 50-a was enacted with a narrow purpose: to protect police officers from "time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 569 (1986) (internal quotation marks and citation omitted). In *Burns*, accordingly, the Court declined to apply section 50-a to preclude disclosure in "a nonlitigation context." *Id.*

The Court's subsequent cases, however, have unmoored Section 50-a from that narrow legislative goal. Just two years after *Burns*, the Court applied Section 50-a outside the context of pending litigation and held that it barred disclosure of inmate grievances against correction officers (as well as related administrative decisions) sought under FOIL. *Prisoners' Legal Servs. v. N.Y.S. Dep't of Correctional Servs.*, 73 N.Y.2d 26 (1988). The Court also took a broad view of the records covered by 50-a, stressing that "[d]ocuments pertaining to misconduct or rules violations by correction officers . . . are the very sort of record" that the law intended to keep confidential. *Id.* at 31. Over a decade later, the Court relied on *Burns* in denying FOIL requests for the disciplinary records of 18 police officers punished for their role in an off-duty incident with civilians. *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145 (1999). The Court reasoned that there remained a risk that the records would be used "to embarrass or humiliate the officers involved," even absent any pending or even threatened civil or criminal action. *Id.* at 159.

As interpreted, then, Section 50-a makes opaque to the public much of the disciplinary process within law enforcement agencies concerning individuals entrusted to protect citizen safety and empowered to use force against them; namely, any record "of significance to a superior in considering continued employment or promotion." *Luongo*, 150 A.D.3d at 19.[44] And the law is

[44] To their credit, some lower courts have rejected attempts to broaden the scope of "personnel records" to include all documents with some possible bearing on officer discipline. *See Patrolmen's Benevolent Ass'n of the City of N.Y. v. de Blasio*, 171 A.D.3d 636 (1st Dep't 2019) (body-worn camera footage); *Prisoners' Legal Servs. of N.Y. v N.Y.S. Dep't. of Corr. & Community Supervision*, 173 A.D.3d 8, 14 (3d Dep't 2019) (unusual incident reports, use of force reports and misbehavior reports). *See also Matter of New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556 (2018) (agency cannot be compelled to disclosure redacted record of a record constituting a "personnel record" as described in Civil

categorical: disclosure is forbidden even where an officer's reasonable expectation of privacy is minimal and the public interest in disclosure is significant (say, because the misconduct was severe and the allegations were found substantiated). The state of New York is "nearly alone" in maintaining such a law.[45] As an independent panel commissioned by the NYPD pointed out in a January 2019 report, the statute "keeps the public in the dark about police discipline, breeds mistrust, and reduces accountability."[46]

C. Recommendations for FOIL Reforms

1. Establish Clear Timetables to Remedy Delays

To prevent unjustifiable delays in the release of non-exempt government records, the Task Force supports an amendment establishing a clear and concise timeframe for agencies to respond to FOIL requests, as follows:

- A grant or denial of the right to inspect or copy records provided for under this article shall be made to the person or entity requesting the right by the agency official who has custody or control of the public record within 10 business days of the request. In the event of a denial, that official shall in writing give the specific reasons for the denial and indicate the procedures for appealing the denial. Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the agency.
- Failure to comply with a request to inspect or copy agency records within the 10-business day period shall be deemed a denial of the request and permit a requester to commence an Article 78 proceeding without filing an administrative appeal. However, an agency shall be exempted from the 10-day requirement if it certifies to the requester that the request appears to call for production of more than 500 pages of records or that the agency is facing exceptional circumstances that go beyond predictable agency workload. Such a certification will extend the initial period of 10 business days to 30 business days.

Rights Law §50-a); *Matter of Luongo v. Records Access Appeals Officer*, 168 A.D.3d 504 (1st Dep't 2019) (denying petition to compel disclosure of personnel orders "which contain factual details regarding misconduct allegations and punishments imposed on officers").

[45] The Report of the Independent Panel on the Disciplinary System of the New York City Police Department (Jan. 25, 2019), https://www.independentpanelreportnypd.net/assets/report.pdf at 44 (hereinafter, "Independent Panel Report).

[46] *Id.* at 5.

The proposed amendment expands the initial agency response time from the five business days in current law to a more practicable 10 business days, which affords agencies double the time in which to respond to FOIL requests. The goal is to promote more meaningful and informed agency responses at their inception, rather than the reflexive issuing of form acknowledgment-of-receipt letters.[47] Further, when FOIL requests for non-exempt records require the disclosure of extensive documents that may require redaction or are otherwise burdensome for an agency, the agency has the flexibility of extending the deadline by 20 business days. By establishing a controlling legal deadline of 30 business days for the production of responsive records, the proposed amendment lends clarification while accommodating the interest of the agency by providing a reasonable time period in which to comply with FOIL requests for even voluminous non-exempt records, as well as the interest of newsrooms in obtaining government information without protracted delays.[48]

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[47] Notwithstanding the enlarged time for an initial agency response proposed by the amendment, the Task Force strongly recommends that agencies make documents routinely compiled in the course of performing their governmental responsibilities—*e.g.*, meeting agendas and minutes—readily accessible by posting them on their official websites within five business days.

[48] For examples of states that have adopted specific deadlines for responding to open records act requests, *see* ARK. CODE ANN. §25-19-105(e) ("If a public record is in active use or storage and therefore not available at the time a citizen asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within three (3) working days at which time the record will be available for the exercise of the right given by this chapter."); MISS. CODE ANN. §25-61-5(1)(a) ("a public record of the public body shall be provided within one (1) working day after a written request for a public record is made. No public body shall adopt procedures which will authorize the public body to produce or deny production of a public record later than seven (7) working days from the date of the receipt of the request for the production of the record."), *see also* MISS. CODE. ANN. §25-61-5(1)(b) ("in no event shall the date for the public body's production of the requested records be any later than fourteen (14) working days from the receipt by the public body of the original request."); N.M. STAT. ANN. §14-2-8(D) ("A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin until the written request is delivered to the office of the custodian."); R.I. GEN. LAWS. §38-2-3(e) ("A public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request. If the inspection or copying is not permitted within ten (10) business days, the public body shall forthwith explain in writing the need for additional time to comply with the request [and] may have up to an additional twenty (20) business days to comply with the request [under certain circumstances].").

Significantly, under the proposal, an agency's failure to meet the deadlines will free the requester to seek judicial redress through an Article 78 action. Under current law, a requester cannot file suit until the FOIL officer denies her request and she commences an administrative appeal that is denied. Requesters are often left in limbo with no opportunity to go to court because there is no opportunity to appeal when the initial decision is delayed, short of declaring the delay a "constructive denial." By amending the law to permit requesters to go to court after the deadlines are missed, the law would afford a remedy to requesters and bring state FOIL into line with the practice in the federal Freedom of Information Act.

2. Strengthen the Fee-Shifting Provision

Fee shifts are important in FOIL to incentivize agencies to meet their obligations and to stop the practice of forcing journalists and other requesters to pay the costs of getting records that they are entitled to have and should have been given without litigation.

The Task Force, accordingly, supports the following amendment to § 89(4)(c) of the Public Officers Law to provide for mandatory fee shifting in appropriate circumstances:

> A court with jurisdiction shall order an agency found to have unlawfully denied access to public records to provide the records at no cost to the prevailing petitioner and, further, shall award reasonable attorneys' fees and costs to the prevailing petitioner. A petitioner shall also be awarded such fees and costs when the filing of an Article 78 petition is a cause of an agency's grant of access to public records that had previously been denied to the petitioner.

The proposed amendment would encourage state and local government agencies to comply in good faith with FOIL's disclosure requirements. In addition, the proposal, in line with federal law, addresses the problem created when an agency forces requesters to file suit and then moots the case by releasing the documents rather than risking an unfavorable court decision, leaving the requesters to bear their own cost for the unnecessary litigation.

3. Explicitly Authorize Redaction

The recent court holdings cast doubt on the use of redaction, which has been an important device for releasing public documents that also contain some information that can be properly withheld. The key provision of FOIL provides that "Each agency shall . . . make available for public inspection and copying all records, except that such agency may deny access to records *or portions thereof*" that fall within an enumerated exemption. *Pub. Off. Law* § 87(2) (emphasis added). To assure that the legislative intent is fully realized, the Task Force recommends that FOIL be amended to make clear that agencies have an obligation to segregate disclosable

information from exempt information and release the material in redacted form when such segregation is practicable.

4. Repeal Section 50-a of the Civil Rights Law as an Exception to FOIL

As discussed above, the application of Section 50-a to restrict disclosure under FOIL has become an obstacle to the public's understanding of the actions of police and other law enforcement personnel and the efforts by law enforcement agencies to investigate and address misconduct. All government employees enjoy protection from unwarranted disclosure of their personnel records through FOIL's privacy exemption. In addition, records can be shielded from disclosure through FOIL's law enforcement exemption when there is risk of interference with a criminal investigation or proceeding, or when disclosure could endanger the life or safety of any person.[49] As the state's Committee on Open Government said in its 2018 report, those exemptions adequately address concern for the privacy of law enforcement officers. We are concerned that Section 50-a, as a result of the broad interpretation of the statute given by the courts, has denied the public needed access to important police records. To reinstate the proper balance between confidentiality and disclosure, the Task Force believes that Section 50-a should, at a minimum, be amended such that it does not apply to FOIL requests, and access to law enforcement personnel records is determined by the exemptions set out in FOIL.[50]

5. Provide Necessary Resources to FOIL Offices

In our public sessions, requesters often voiced their frustration with FOIL officers who engaged in foot-dragging or proffered inappropriate and meritless reasons to withhold a document. But we also met with government employees who impressed us with their concern about public access. However, a common refrain in the testimony was that many agencies and local governments are simply underfunding their FOIL offices or failing to make FOIL operations a

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[49] *See Pub. Off. Law* § 87(2)(b), (e), (f). In particular, the personal privacy exemption recognizes that there is typically—but not always—a stronger privacy interest (and correspondingly weaker public interest) in disclosure of unsubstantiated allegations of wrongdoing. *See, e.g.*, *Scaccia v. N.Y.S. Div. of State Police*, 138 A.D.2d 50, 53-54 (3d Dep't 1988) (finding that "final decision sustaining charges of misconduct" following internal disciplinary proceeding did not fall within privacy exemption); *Daily News L.P. v. Giuliani*, 1997 N.Y. Misc. LEXIS 750, *32 (Sup. Ct. N.Y. Cnty. Apr. 21, 1997) (requiring that Department of Investigation disclose name and identifying details of employee in closing memorandum that substantiated charge of misconduct); *but see Thomas v. N.Y.C. Dep't of Educ.*, 103 A.D.3d 495, 497 (1st Dep't 2013) (noting that "why a government agency determined that a complaint concerning a violation of federal law . . . is allegedly unsubstantiated" is "of significant public interest").

[50] The question of whether the limits on court orders for production of law enforcement personnel records in civil and criminal matters, which are now found in 50-a, should be maintained, modified, or repealed, is beyond the scope of the Task Force's work.

budgetary priority. The root causes of FOIL's failures are many. But adequate funding and staffing of FOIL units and upgrading needed technology to manage agency information is the one step that could cure many of the problems facing FOIL requesters and strike a blow for real transparency. The Task Force urges the Legislature to show a real commitment to openness by earmarking funds specifically to finance expanded FOIL operations at the state agencies that are the leading recipients of FOIL requests.

V. Pro-Active Transparency Efforts

A. Background

Pro-active disclosures practices—that is, an agency's disclosure of information without waiting for a FOIL request—is an important ingredient in helping assure that necessary government information is available to journalists and to citizens.[51] In 2013, Governor Cuomo issued Executive Order 95, "Using Technology to Promote Transparency, Improve Government Performance and Enhance Citizen Engagement. The principal focus of the executive order was the creation of an open data website, which would allow New York citizens to access governmental data without the need for a FOIL request. Through the New York State Office of Information Technology and Services ("ITS"), the state launched OpenNY. The City of New York has undertaken a similar effort, launching NYC Open Data. The State Comptroller provides similar open data through Open Book New York. Agencies have been working to identify information that can be made available through these open sources.

As a result of these efforts, millions of data points about government in New York are available and are being accessed by New York citizens and businesses. At a time when news organizations have fewer resources to devote to reporting, the availability of data is critical to how the press operations as a watchdog on government spending and activities. The efforts undertaken by ITS, the City of New York, and the State Comptroller are valuable and should be encouraged and expanded.

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[51] In its sessions seeking public input, the Task Force also heard about another vital area of pro-active transparency: the ability of journalists and citizens to have access to both court documents and proceedings. Over the past decade, New York has significantly expanded the use of online dockets to provide remote access to those seeking information about court proceedings and access to judicial documents. With smaller newsroom budgets, regular coverage of the courts has declined in many parts of the state. Such coverage is vital tool in enhancing the public's understanding of the courts and in ensuring that the courts administer justice fairly and efficiently. However, the Task Force heard of otherwise public documents not being placed on public court dockets. Full review of the court's transparency initiatives is beyond the scope of this report, but the Task Force endorses efforts to make court records more accessible digitally and to remove the procedural obstacles news organizations often encounter in challenging court sealing or closing in individual cases.

But in looking at the issue of pro-active transparency, the Task Force discovered three significant gaps in the effort to make governmental information more freely available. First, many local governments lag far behind. They either lack sufficient technology or are not using the technology they have effectively. In some localities, finding even basic information, like a town code, can be challenging for even veteran government watchers. Second, concerns were expressed that the information made available through the portals was often not the kind of information that journalists and local news organizations find most valuable in providing government oversight. As a result, they still had to resort to FOIL requests and face the problems discussed above. Third, the open meetings law (Public Officers Law, Article 7), which is designed to implement pro-active transparency, remains flawed and regularly unenforced. The law requires, for instance, that meeting notices go out one week in advance of a meeting. It also contains provisions for making meetings available through live streaming. The law also requires that resolutions, laws, and other materials to be discussed at a meeting be made available "to the extent practicable as determined by the agency or department." The law also encourages records to be posted on the governmental website, but again only when "practicable as determined by the agency or department." Because of the qualifying clause, local governments are free to make minimal effort or no effort to make materials available.

B. Recommendations

The Task Force encourages state and local governments to continue to fund initiatives to make data available pro-actively. But, in conjunction with such expansion, the Task Force has three recommendations.

1. Identify Necessary Information for Disclosure

State and local agencies should engage with activists and journalists to try to better define the kind of information that would be most useful in their efforts to provide real oversight to government. The agencies face problems in making sure protected personal information is not released and in identifying the kind of information that is most valuable to journalists and others. Nonetheless, releasing data for the sake of releasing data rarely leads to real transparency, despite the amount of money and effort spent on such disclosure regimes. "Smart release"—crafted disclosures that target the kinds of information citizens really want and need and are entitled to have—is both a better use of resources and a better approach to transparency.

2. Improve Disclosure at the Local Level

The Legislature should enact laws that require counties, towns, and villages to make certain basic information about governance, from meeting dates and meeting agendas to codes and board decisions, available online through the local government's website in a format that prominently displays the links to the information. Journalists and citizens should be able to come to a municipal or county website and see immediately the most basic documents of governance.

3. Fix the Open Meetings Law

The Task Force recommends that the Legislature amend the open meetings law in two ways: (1) the enumerated document disclosures set out in the statute should be mandatory not elective and (2) there should be meaningful deadlines for disclosures designed to put documents into the hands of citizens prior to meetings. As an enforcement mechanism, board and council decisions should be voidable if undertaken in violation of the notice requirements.

VI. **Nonprofit News Organizations**

As traditional for-profit local journalism has declined over the past decade, nonprofit news organizations have worked to fill the void. Given the difficulty of finding robust revenue models to support for-profit efforts, nonprofit news organizations have seen a rapid expansion over the last decade and may offer the best chance to restore local coverage and to deliver news and information to communities in New York. While nonprofits can help alleviate the crisis in local journalism, these newer players require philanthropy, investment, and support to become sustainable.

A. The Growth of Nonprofit Journalism

There are now more than 200 nonprofit news organizations throughout the country, employing over 2,200 journalists and generating revenue of over $350 million. https://inn.org/innindex/; https://www.bloomberg.com/news/articles/2019-04-25/silicon-valley-is-killing-local-news-can-charity-bring-it-back. These nonprofit organizations have worked to fill critical gaps in news coverage and have made significant impact.

The nonprofit world of news is becoming increasingly complex, as nonprofit ventures seek different ways to engage with communities, funders, and philanthropic organizations and to reshape how local news is thought of and supported. Nonprofit models to meet local journalism needs have taken a variety of forms, at the national, state, and local level.

Nationally, a number of exciting initiatives have emerged to support local journalism, including (1) the American Journalism Project (http://www.theajp.org/), a venture philanthropy fund that invests in nonprofit local news startups and provides them with business and technical expertise; (2) the ProPublica Local Reporting Network (https://www.propublica.org/local-reporting-network/), an arm of the nationally known investigative reporting nonprofit ProPublica, brings its investigative resources to local reporting entities to help cover one topic in-depth; (3) Report for America (https://www.reportforamerica.org/), which places reporters in existing newsrooms in need, and funds half of their salaries, in order to foster reporting as public service; (4) NewsMatch (https://www.newsmatch.org/), a national matching-gift campaign launched by the Knight Foundation to grow fundraising capacity in nonprofit newsrooms and promote giving to journalism among U.S. donors (available to members of the Institute for Nonprofit News); and

(5) Philadelphia's Solutions Journalism project, which brought together 15 news organizations to report for one year on a single topic of prisoner re-entry into society and is premised on the idea of collaboration and creating local news ecosystems.

States and statewide organizations also are working to support local journalism. The Colorado Media Project (https://coloradomediaproject.com/) has engaged a broad-based coalition of civic leaders, students, academics, philanthropists, business leaders and journalists, among others, to strengthen Colorado's diverse local news ecosystem and to develop partnerships and programs designed to increase newsroom capacity, support collaboration, and engage community.

New Jersey enacted legislation to create the Civic Information Consortium, a first of state-level public charity to support local news. The consortium is charged with strengthening local-news coverage and boosting civic engagement by funding innovative media and civic-technology projects throughout the state. The bill establishing the consortium passed the state legislature with overwhelming bipartisan support in 2018 and was signed into law by Gov. Murphy, although the state has struggled to fully fund the effort, with partial funding starting only in 2020.

At the local level, the *Salt Lake City Tribune* recently converted from a profit-seeking entity into a tax-exempt organization. *The Tampa Bay Times* transferred its ownership to a nonprofit organization while keeping the news organization as a taxable for-profit. *The Philadelphia Inquirer* is pursuing a hybrid model, where the news company was transferred to a newly formed public benefit corporation that operates alongside a separate endowment designed to encourage innovation. *The Seattle Times* partners with an existing community foundation to fund coverage of various local issues, and it has sparked the creation of similar partnerships in news organizations around the country.

In addition to these larger local news organizations, smaller local entities are also pursuing innovative nonprofit models.

The City is an independent, nonprofit, digital news outlet that debuted in April 2019. It is dedicated to hard-hitting and impact-oriented reporting covering local news in New York City. It is backed by almost $10 million in starting capital from major philanthropies and individuals. https://thecity.nyc/.

The Akron Devil is a monthly arts and culture print magazine that broke new ground by transitioning to a cooperative ownership model that allows its readers to share ownership of the publication at various levels. https://thedevilstrip.com/co-op/.

Next City, a Philadelphia based nonprofit publisher with a focus on helping improve social, economic, and environmental change in cities launched an innovative pay-what-you-want-for-content model to view its webinars. https://nextcity.org/.

The New Jersey Sustainability Reporting Hub pursues collaborative journalism projects, including national/local partnerships and local outlets teaming up. https://srhub.org/.

B. The Challenges Facing Nonprofit News Organizations

Local journalism nonprofits and reporting collectives (nonprofit organizations that share resources in gathering news) face challenges to their success and sustainability.

1. Local journalism as a public good. Despite growing evidence that the crisis of local journalism is also a crisis of democracy, the public is accustomed to thinking about local news as a for-profit revenue product and not a public good. For nonprofit local journalism to succeed in a meaningful way over the long term, local journalism must be thought of as a public good and a civic service, akin to hospitals, libraries, and universities, which both communities and funders should support philanthropically as a cornerstone to our democracy. Journalism, however, is not on the list of causes and institutions that the public naturally thinks of when choosing philanthropic causes to support. Absent this cultural shift and growing of the philanthropic pie, it will remain challenging for nonprofit entities to obtain the financial support required to sustain nonprofit local journalism.

2. Complex legal landscape. Each of the nonprofit models highlighted above carries different legal liabilities. Transitioning from a for-profit to a nonprofit model is particularly challenging and requires expert legal advice to navigate successfully. The form the transition takes can vary, including (for example) an asset transfer or a merger with an existing 501(c)(3) organization as the surviving entity There is the potential for significant tax liability depending on the structure of the organization and the way the assets are sold or converted to a tax-exempt vehicle. Nonprofit news organizations also need to comply with various laws and tax regulations that impact how a news entity can function (*e.g*, bars on endorsing political candidates or lobbying governments). There are also important corporate governance practices that nonprofit news organizations should follow, as mandated, for instance by New York's Not-for-Profit Corporation Law and the federal tax code.

3. Lack of resources to fund legal attacks and access to information. All news organizations need legal resources to defend against unfounded legal attacks and harassment and to protect public access to information. This need is especially acute for local news organizations lacking robust resources of their own.

4. Perceived First Amendment barriers to government assistance. Both journalists and the public at large may believe that governments must stay out of local journalism because governments cannot support journalistic efforts consistent with the First Amendment. There certainly are constitutional barriers to what government can do to help solve the crisis in local journalism, but we have seen both in the U.S. (with some public support for public broadcasting) and abroad (with organizations like the BBC) that government support can be undertaken

without compromising journalistic independence. In addition, it is possible to consider non-content-based legislative initiatives, like tax relief, that do not raise the same concerns about independence.

5. Insurance. Nonprofits face the same challenges regarding insurance coverage discussed above.

C. Ways in Which the Bar Association Can Assist

Rather than make unique recommendations in respect to nonprofits, the Task Force instead underscores that the recommendations identified throughout this report in regard to libel reform, amendment of FOIL, insurance, and pro bono initiatives, will enhance the burgeoning work of nonprofits. In addition, we believe NYSBA has a role to play in initiating an important public conversation about the viability of public funding of nonprofit news organizations (and, more broadly, news organizations however they are organized as incorporated entities). The issues are complicated, and for that reason the Task Force recommends that NYSBA launch a longer-term study of the feasibility of legislative support for local news, including whether New York State could replicate New Jersey's Civic Information Consortium in some shape or form or provide unique tax incentives for subscribers to news outlets or to owners who donate community business assets and seed philanthropic trusts to meet local needs. There are a variety of proposals for governmental support that are actively being discussed.[52] NYSBA, as the preeminent association of lawyers in the state, is uniquely situated to help New York explore the possibility of public support because of its expertise in the areas of law that would be implicated and the association's broader concern for civic engagement, checks and balances on government, and the imperative of honest government.

VII. Discount and Pro Bono Legal Services

One of the more direct ways that the legal profession can support "free expression in the digital age" is by providing legal services to underfunded news organizations on a free (pro bono) or discounted basis. The Task Force examined several existing methods and identified gaps.

A. Background

It is critical for a news organization to have access to adequate legal services, in order to serve its own needs as an organization, and to serve its audience. One lawsuit can put a news organization—even a large one—out of business as we saw in the Gawker case. And one stonewalled Freedom of Information request can prevent a community from having access to important information about its government and elected officials.

[52] *See* Nicholas Lemann, "Can Journalism Be Saved?," N.Y. Review of Books, Feb. 27, 2020.

However, it is not just high-profile or urgent matters that require legal support. While today's news outlets tend to be less profitable than the media powerhouses of the past, they still have basic enterprise needs—contracts, tax, HR issues—that require legal support.[53] Thus, support is needed not just from bar's media lawyers but from those with expertise in contracts, labor and employment, and other business areas.

Various models exist for providing free or low-cost legal services, and for connecting those in need of such services with those who provide them in various areas of the law. There are also similar efforts aimed at journalists. (*See* Appendix A.) The Student Press Law Center provides legal support for campus-based journalists. The Reporters Committee for Freedom of the Press (RCFP) recently launched the Local Legal Initiative, a foundation-funded initiative to embed legal resources in states most in need of them. However, this effort will only support five states initially, and New York is not among them. Moreover, there is only so much a single attorney can do to help an entire state's worth of news outlets. In addition, law school clinics provide free legal services on a pro bono basis, in a variety of fields. In the last few years, a number of new clinics have launched with a focus on First Amendment free speech issues, some with funding from the Stanton Foundation; including, in New York State, one at Cornell Law School[54] and the Civil Liberties & Transparency Clinic at University of Buffalo School of Law. The Yale Law School houses the Media Freedom Information and Access Clinic. Such clinics typically function as a small private law firm. The advantage is that they are generally free to those who qualify and are selected as clients. However, clinics may be limited by geography and bar admissions in terms of representing individuals or organizations in court, and they are further limited by the constraints of a student-driven resource whose primary purpose is pedagogical (i.e., they are not fully resourced year-round and are limited by student schedules).

A common theme with law school clinics and other projects such as the RCFP's Local Legal Initiative is their reliance on one or a few major funders. Like a poorly diversified stock portfolio, this can translate to risk and uncertainty for a project's long-term sustainability, as they are vulnerable to shifts in funders' priorities and resources, and funding is not guaranteed in

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53 *The Legal Needs of Emerging Online Media: The Online Media Legal Network After 500 Referrals*, Digital Medial Law Project of the Berkman Center for Internet & Society at Harvard University (April 2014) at 15. "When the OMLN was launched [in 2009], the DMLP expected a majority of its work would involve urgent responses to legal threats. The DMLP was surprised to see how few matters required urgent referral, and how many matters were instead from clients proactively considering their legal needs." And "…there remains much that has not changed in the nature and needs of journalism as it flourishes online. Rather, what has changed is journalists' monetary ability to obtain counsel for the sorts of issues that these ventures have always faced." Id. at 14.

54 Clinics have been established across the country, including at Vanderbilt, Duke, and Arizona State.

perpetuity. As a result, those dependent on such gifts would be well advised to devote at least some time to fundraising to ensure their longevity.

B. Recommendation

The Task Force believes that there is a concrete step that the bar association can take to help connect smaller news organizations with legal resources: a bar-sponsored referral network. The Task Force recommends that the association investigate creating such a network aimed exclusively at services for journalists and news organizations. Such a dedicated network would be a visible testament to the association's commitment to marshaling legal resources in the aid of transparency and democracy. There are models that the state bar could draw upon in designing a network:

- The Institute for Nonprofit News, formerly known as the Investigative News Network ("INN"), has partnered with the nonprofit Media Law Resource Center ("MLRC") to create a "Legal Connect" project that helps connect nonprofit news organizations that are members of INN with affordable counsel. INN membership is available to nonprofit news organizations.

- From 2009 to 2017, the now-defunct Online Media Legal Network provided a nationwide referral network to connect independent online journalists and journalism organizations with affordable legal services. The OMLN model is instructive. The referrals themselves were free; participating lawyers and firms were encouraged but not required to offer services pro bono. The network made over 500 referrals for over 260 clients. While the model was successful, it was forced to shut down when its funding was not renewed; however, the online portal still exists and could be re-activated if a new entity were willing to take it on.

The precise scope of the network, including the nature of services to be offered, the fee structure, and the eligibility of those who can access it, would require further study but such a network would fill an obvious need and play to traditional strengths of the bar association: connecting lawyers to New Yorkers will legal needs in pursuit of a greater good.

The Task Force also recommends that NYSBA develop programs and initiatives to provide pro bono legal representation to local news organizations defending against SLAPP suits or seeking access to information. The bar association can sponsor programs specifically designed to educate practitioners outside of New York City on basics of media law. It can also encourage the recognition of assistance to organizations as important pro bono work, especially within New York's innovative Pro Bono Scholars Program for third-year law students. Such programs would allow the bar association to form alliances with existing press-freedom groups that provide support to news organizations.

Appendix A

Resources

There are numerous organizations and partnerships that provide legal services in support of local journalism. Below are listings of organizations that provide pro bono (free) legal services to news organizations; referral networks that help connect news outlets with media counsel, often on a discounted basis; and other resources.

Pro Bono Legal Services

- **The American Civil Liberties Union** and its local affiliates take on a variety of cases championing individual rights, including freedom of speech. https://nyclu.org
- **The First Amendment Coalition** defends the public's right to know and freedom of speech. https://firstamendmentcoalition.org/
- **The Knight First Amendment Institute at Columbia University** defends the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. https://knightcolumbia.org
- **The Press Freedom Defense Fund** provides essential legal support for journalists, news organizations and whistleblowers "targeted by powerful figures." https://www.pressfreedomdefensefund.org/
- **Reporters Committee for Freedom of the Press** provides pro bono legal support for public interest journalism. https://www.rcfp.org/feln-announcement/
- **Law School Legal Clinics** operate like small, student-driven law firms, taking on selected clients pro bono. Clinics serving media clients in New York State include:
  - **Cornell Law School First Amendment Clinic** represents the interests of news outlets, journalists, researchers and other newsgatherers. https://www.lawschool.cornell.edu/Clinical-Programs/first-amendment-clinic/About-us.cfm
  - **University at Buffalo Law School - Civil Liberties & Transparency Clinic** defends free speech, privacy and other individual rights while pressing for greater transparency and accountability in government. https://www.law.buffalo.edu/beyond/clinics/civil-liberties.html
  - **Yale Law School Media Freedom & First Amendment Clinic** aims to support robust investigative journalism in the digital age and to advance the public's right of access to information needed for democracy to function. https://law.yale.edu/mfia The clinic recently launched a **Local News Initiative** to provide journalists at small and nonprofit news sites in New England with pro bono legal services to support their newsgathering and defend their publications. https://law.yale.edu/mfia/projects/local-news-initiative

(Other law schools with clinics devoted to First Amendment and freedom of expression legal matters include those at Arizona State University, Duke, George Mason University, Michigan State University, Southern Methodist University (launching fall 2020), Tulane, UCLA, University of Georgia, University of Virginia, Vanderbilt, and Washington University in St. Louis.)

Referral Networks

- **MLRC Legal Connect, in partnership with the Institute for Nonprofit News (INN) –** a referral service connecting nonprofit news organizations with affordable media law specialists. Available to INN member organizations. https://inn.org/inn-support-services/legal/legal-connect-referral-services/

Grant-Making Foundations

There are also a number of foundations that make grants to strengthen local journalism. For example:

- **Knight Foundation**: https://knightfoundation.org/press/releases/knight-foundation-focuses-on-building-the-future-of-local-news-in-300-million-five-year-commitment/

Appendix B

Dissent of Mr. Mark H. Alcott to Portions of Section III

I agree with virtually all of this outstanding report. I commend the committee for its prodigious effort in bringing this important issue to the House.

However, I disagree with and dissent from the proposals for mandatory fee – shifting, automatic discovery stays and interlocutory appeals in anti-– SLAPP lawsuits. This is strongly contrary to the general practice trends in civil litigation in New York, which trends are supported by strong policy considerations and have historically been advocated by NYSBA. I don't see why this one type of case and one category of parties should be singled out for such extreme preferential treatment, and the report does not make a persuasive argument for doing so.

Like most US jurisdictions, New York generally adheres to the American Rule, pursuant to which each side bears its own legal fees regardless of outcome. The few departures from this doctrine are designed to benefit impecunious individual plaintiffs who otherwise could not sue. Uniquely, the proposal in this report would benefit the corporate defendant – and only the defendant. (The proposal does not require defendants who lose libel cases to pay the plaintiff's legal fees.) The report understandably decries the plight of small media companies who have difficulty financing the defense of libel cases (although nothing is said about the role of insurance.) However, most libel cases are brought by individuals against cooperate media companies whose resources dwarf those of the plaintiff. Those large corporations too would get the benefit of fee-shifting under this proposal.

The proposals for automatic discovery stays and interlocutory appeals are also troublesome. At one time, these were standard under New York practice, and they made litigation in our state courts cumbersome and time-consuming. Corporate defendants routinely moved to dismiss at the threshold, and then appealed the denial of such a motion, thereby staying all discovery, substantially delaying the case and effectively tying the plaintiff up in knots. Our Association advocated reforms that substantially eliminated such dilatory tactics. This proposal brings them back.

The law provides remedies for abuse of process, malicious prosecution and improper litigation practices. This report does not explain why these are inadequate and must be augmented for libel cases, but only for libel cases.

It is particularly troublesome that these provisions, especially fee-shifting, would be mandatory and not left for adjudication based on the facts and circumstances of the particular case. I am not aware of any other New York statute to that effect, and the report offers no good explanation for it.

In the aggregate, these provisions are access – barring. They put the would - be libel plaintiff at such great risk that some valid or plausible claims will not be brought. That is not something that the State Bar should support.

Finally, in the interest of full disclosure, I must report that I have nothing to disclose. I have never represented a libel plaintiff against a media company. I have represented libel defendants in many cases, and at one time gave frequent libel advice to a daily newspaper. It has been many years since I have had a libel matter of any kind. In short, I have no axe to grind. My only interest is in ensuring a fair statute and process.

NEW YORK STATE BAR ASSOCIATION
One Elk Street
Albany, NY 12207