

LaVonda Reed: All right. Good afternoon everyone. I'm LaVonda Reed, Associate Provost for Faculty Affairs for Syracuse University and Professor of Law here at the College of Law. On behalf of College of Law, Dean Craig Boise, and our entire community. I welcome you to Syracuse University and beautiful Dineen hall. We are honored to host the first in a series of programs planned around the timely, dynamic, and critical issue of free expression in the digital age. This afternoon's program FOIL and the Future of Local Journalism, Rethinking Access to Information in a Digital Age, addressing the Freedom of Information laws, a central component to the news and information gathering, and reporting efforts, and thus is an appropriate and significant way to launch this program series. As is customary for all public events at the university, I acknowledged with respect the Onondaga Nation, firekeepers of the Haudenosaunee, the indigenous people on whose ancestral lands Syracuse University now stands.

In addition to welcoming our students, faculty, and staff, and members of the bar, I extend a special welcome and thank you to New York State Bar Association President and College of Law alumnus, Hank Greenberg, and the members of the Task Force on Free Expression in the Digital Age, particularly our outstanding task force co-chairs David McCraw and Cynthia Arato. Finally, welcome to our live participating audience and to those of you who are watching on the web via our live stream. I extend a special thank you to Syracuse University staff who have made this possible, including our hardworking and dedicated colleagues on the campus catering team, as well as the staff here at the College of Law, including Sarah Valenti, Joel Whitney, Sophie Dagenais, and Rob Conrad, and many others who work quietly behind the scenes in small and large ways, to make our guests feel welcome and to ensure that thousands of events run smoothly here each year.

At the end of the program I hope you will join us for reception in the atrium and before I welcome our task force chairs to the podium, I extend a sincere thank you to our panelists who have graciously given up their time and expertise this afternoon. At this time, please join me in welcoming to the podium, the two co-chairs of the New York State Bar Association Task Force on Free Expression in the Digital Age, partner at Shapiro, Arato, and Bach LLP, Cynthia Arato, and Senior Vice President and Deputy General Counsel of the New York Times Company, David McCraw.

Cynthia Arato: Thank you everyone. First, we just wanted to thank Syracuse University and the School of Law for hosting this event at this beautiful ceremonial courtroom. We're very excited to hold our inaugural forum of the York State Bar Association Task Force on Free Expression in the Digital Age, here, in the Orange. Our task force is one of several that the New York State Bar Association has rolled out this year, tackling and addressing some of the most challenging and cutting-edge legal issues that face everyone in New York State. This year our Task Force on Free Expression in the Digital Age is focusing on what the law and lawyers can do to stem the crisis in local journalism.

It has been said that a local newspaper is an anchor because it reminds a community every day of its collective identity, the stake we have in one another, and the lessons of our history. To that end, our task force is spending the year examining a number of the challenges to be surmounted if we are to have a robust local news system. That includes FOIL, that we're talking about today. We're also going to be examining libel laws, the role of not for profit institutions in local journalism, issues of government transparency, and the ways in which lawyers can help the effort. So I'm going to turn this over to David now who's going to talk about our specific forum today.

David McCraw: Thank you, Cynthia. And thank you, LaVonda. And many thanks to Syracuse for hosting us. And we want to get into this first panel but let me just set up a little bit how we came to this place. In thinking about what are some of the legal challenges that affect local journalism. One of the things we heard was reporters need to have easier access to information, and so FOIL became an obvious place to begin. It also is important because it's a citizens' tool, and as many journalistic organizations struggle financially, I think there's going to be a much greater need for citizens to have the ability to use FOIL, as their own personal tool to inform and to share information with their neighbors. And because of that FOIL became the opening topic that we wanted to address. We're actually going to have a second session on FOIL in New York City in January as part of the State Bar's annual meeting.

But it was important to us, and in talking to Hank Greenberg, the president of the State Bar, that we not become to New York City centric in this effort. And Cynthia and I both agreed with that. We thought hearing voices from upstate was an important part of our mission. So we're doing programs in Buffalo, here, and in Albany, as well as programs in New York City. And as Cynthia mentioned, dealing with a variety of topics. And in November, we'll be talking about nonprofit journalism as one of the ways to fill the gap. As local journalistic institutions struggle, is the nonprofit model one of the ways in which we can help assure that the citizens of New York have the information they need? But today we're talking about FOIL. There'll be two panels. This first panel of has more of a legal edge to it. The second panel has more of a journalistic angle to it. And we thought both of those perspectives were important.

And it's a chance for the people who are up here with me to share their thoughts, ask questions of each other, and for you to ask questions as well of them about their views on FOIL, both as a legal matter and as a practical matter used by citizens and journalists. So let me introduce the panel here today. Roy Gutterman is a professor at Syracuse's Newhouse School of Journalism, is director of the Tully Center for Free Speech. Next to him is Kristen O'Neill, Assistant Director of the Committee on Open Government, the government agency that plays a critical role in interpreting the Freedom of Information Law and assisting citizens as they seek information. Mike Grygiel is a partner at Greenberg Traurig, and has litigated many of the cases that we'll be talking about. It's a very active practice in the area of access and FOIL. And finally,

Kathryn Sheingold is an assistant solicitor general in the New York State Attorney General's office. Among her many duties are serving as a FOIL appeals officer. So she brings a different perspective as well, but a valuable one that we wanted to hear.

So with that, I've asked the panel to make brief five-minute opening statements. Then we'll have a discussion and invite all of you in. And as you can see from the agenda, we will be taking a break shortly before four. So with that, why don't we begin. Roy, do you want to start?

Roy Gutterman:

I'm here. I might as well. All right. So one of the questions that was sent out in preparation for this is how well was FOIL working? And I got to thinking, and I'm going to borrow some language from the Court of Appeals on this, that I can neither confirm nor deny how well FOIL is working these days because it's such a hodgepodge of enforcement and requests. In one hand we've got, we've had some amendments for lawyers' fees, which are good. We've had the Open FOIL New York website open up. On the other hand, we've heard some mixed reviews of the centralized FOIL system. And then we've had some other decisions, particularly the court of appeals, incorporating and bringing in the so-called Glomar exception, that the government cannot confirm or deny the existence of a record. So it's kind of a mixed bag of success, and limited success, and possibly failures as well.

The other way it's kind of difficult to gauge is that it's such a range of agencies and media and requesters across the state. On one hand we've got the upper level of government, the state agencies that have a tremendous reach and authority. And then it trickles all the way down to local reporters trying to get innocuous documents from government officials. So I'm not sure there's really a way to gauge how well anything really is working because you add to this the appeals process and possible litigation. And as far as I can tell, I'm not familiar with any clearing house that will really tell us exactly how many cases are out there.

The Committee for Open Government does a phenomenal job of advising, and issuing opinions and status reports, and I think you're one of the best in the country that does that, just the wealth of information on just about any kind of FOIL request you can find an advisory opinion on. And I would be interested to hear how you interact with some of the other agencies that you might end up issuing a report on or a decision that they're not interested in. So on that hand, it's really hard to gauge how well anything is really operating.

I think we can get a little guidance as well, from a recent US Supreme court case, a FOIA case, a federal FOIA case that dealt with trade secrets. And the opinion that came down in the FMI versus Argus Leader case, I think might also set a standard for state courts to be a little more expansive with what would constitute a trade secret. So from a trickle-down standpoint, I'm kind of

troubled, or at least concerned, that that might be a something that we're going to see at the state level as well.

The federal exception for trade secrets is dealt with, with an analogous a state exception as well. So I will be interested to hear what the journalistic side of the discussion has to say on all of this as well. I remember my days as a reporter filing FOILs and FOIAs, at a variety of levels, and getting a whole range of successes and failures as well. So I'd be interested to hear from that that side of the table, as well. So I'm interested to hear what the professionals here have to say as well. So with that I will pass the microphone.

David McCraw: Thank you. And you raised some very good points about how hard it is to assess. And I think some of the feelings that it doesn't work so well. One of the things I noted this morning was the Washington Post had a story that they're hiring their first FOIA manager. This is a step the New York Times took a couple of years ago. But it's interesting to see that despite all the complaining about how FOIL and FOIL works, that there seems to be a commitment in some newsrooms, again, to try to make it work. But Kristen, why don't you pick it up there. From the perspective of the Committee on Open Government, how are things going and what are you seeing?

Kristen O'Neill: I agree that it's hard to gauge probably because I only hear the bad news. If you're calling my office, it's probably because you're having, someone's having a hard time. Either it's a member of the public, or a reporter, who is having a difficult time getting access to the records that they believe they're entitled to under the law. Or a problem with the Open Meetings law, maybe there's concerns that meetings that should be open to the public are being held behind closed doors. Or on the other hand too, I also deal with really wonderful public servants, like Kathryn and all the town clerks across the state of New York. I think they are not given enough credit for all the work they do. And they call me, and sometimes I hear, "I couldn't sleep last night. I was so worried about this FOIL request."

And so I see it from both perspectives. I see sometimes the government is probably not doing what they're supposed to do, and sometimes you have members of the public that are just very difficult to deal with and don't understand the limitations of what, time limitations and money in terms of being able to fund staffing, and that affects all the way up to the highest level. When I was the Records Access Officer at the Office of Mental Health, I was it for the entire state agency. I was the Records Access Officer. And going back to the idea of town clerks or village clerks, school district clerks, FOIL is one of many obligations that they have under the statute. So my thought, what I would like to see come out of this task force is, are there ways that we can help both sides meet in the middle to make life easier for both parties?

And I think one important way is proactive disclosure, which takes a lot of work upfront, but hopefully will make life easier on the back end for everyone. I get

questions all the time. Why weren't the meeting minutes posted online? Why don't they just post all of their policies and their procedural manuals? Why isn't that just all online? And part of the answer probably is because it's work intensive. Somebody has to be, put, time has to be set aside to do that task and that's time being taken away from doing other things, such as processing FOIL requests.

But if there are ways that we can make funding for those programs easier, and maybe somebody making access to websites for local governments, making the ability for town clerks, local government officials, all the way up to the top, making it easier to get that information out to the public without the public having to ask for it. There's always going to be FOIL requests. There's always going to be requests for information that cannot be posted online because it's a mix of public and nonpublic information. But there's so much out there that could be proactively disclosed. That if that was done that would make life easier for both sides of the spectrum. So that's my thought.

David McCraw: Mike, I guess people call you when there is not proactive or even reactive disclosure. So from your perspective what are you seeing as trends in FOIL or as possible [crosstalk 00:17:14]

Mike Grygiel: Sure. And my view will be necessarily I think different than Kristen's and Kathryn's. So first let me say it's great to be here at Syracuse University, my co-panelist Roy Gutterman and I do an awful lot of work pro bono, for The Daily Orange, crusading a very impressive group of young journalists that we've had the privilege of working with closely over the years. So it is great to be back here. Someone who is practiced law for over 30 years, I was thinking about it in preparation for this panel and I've probably litigated than four dozen cases. And of course if you're in a litigation context, that necessarily means you have not achieved, your client hasn't achieved the disclosure that they're looking for in the first instance. As a result of that experience, I've largely become persuaded that, I wouldn't say FOIL is broken, but what I would say is it isn't really operating the way it was intended to in many instances.

And as a result, in practice, it's often ineffective in serving the goals of promoting governmental transparency and public accountability, which of course is the purpose of the statute, so that the people who are governed can understand how the governors are working. And just for the students here, you probably know this, but every one of you is entitled to submit a FOIL request. You don't have to be a lawyer to do it. All you have to be is, I'm not even sure you have to be a resident of New York State. If you're looking for information from an executive branch agency, state, local, municipal level, you can submit a FOIL request. And it's the burden on the agency to justify any nondisclosure by claiming an exemption and putting forth a particularized justification. The two principal deficiencies that I see in the current FOIL regime are, number one, unacceptable delays in disclosure, and number two, arguably, no meaningful

incentive for agency compliance with their disclosure obligations under the statute.

So let me take each of those in term. First, the timing question. The procedures of FOIL are unwieldy and cumbersome and unclear. They're set forth in Section 89(3)(a) of the statute, and often they end up frustrating rather than facilitating disclosure. Because here's how it works. You submit a FOIL request and an agency has five business days to either grant the relief and give you the record, deny it, or they can simply acknowledge the receipt of the request and then provide an approximate reasonable date of when they will get back to you. I've had occasions, rare, where agencies have given records within the five business days. And I think probably, Kathryn will tell me five business days really isn't a lot of time. It's not all that reasonable as a benchmark for starters, and I would probably agree with that.

But keep in mind if you just get the acknowledgement, "We've got your request. We're looking at it. We haven't decided if you're going to get it, or whether we're going to deny it." At that point you're in FOIL limbo land. And what's happened in several high-profile cases, where news organizations have been looking for information from government agencies in the course of investigative reporting. I've seen situations where there's been a series of these letters coming out, every 20 days, saying, "We haven't forgotten you. We have it. We're not going to tell you if you're getting it or if you're not getting it. But keep in mind you're on our radar screen." Well, in our business, news delayed is news denied. And when that happens it puts the requester in a difficult position. At some point you need to go to your client and say, "This is a constructive denial. Let's treat it as such and take an appeal."

But it's hard to know exactly when that is. And the more important point, is the agencies are aware of the indefiniteness of this process, and they often manipulate it when they don't want to disclose embarrassing or sensitive information, in the hope that the requesting news organization will decide the news has lost its value. It's no longer worth pursuing. And I think that is an issue that needs to be addressed.

At the risk of being presumptuous. There's a case that David litigated that went to the first department in 2013, an intermediate appellate court in Manhattan, where the New York times was looking to get disclosure of certain database records, pistol permit records and arrest reports, as I recall. And they also included, in the lawsuit against the NYPD, a request for a declaratory judgment, asking a court to say that the NYPD's repeated practice of not disclosing information timely, in response to FOIL requests, was itself unlawful.

And if you look at the underlying decision in the Supreme Court, and correct me if I'm wrong, it seems to me that the NYPD didn't even really contest this. They more or less acknowledged that if you're going to submit a FOIL request to the NYPD, nothing happens for 90 days. That's a long time in the news cycle.

Nevertheless, the appellate court denied the request for declaratory relief, and said "public officer's law Section 89(3) mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute." So this delay process, and stringing the press along, is now effectively enshrined as a matter of case law precedent, which is a rather unhealthy situation to be in. Okay, that's point one.

Point two, quickly, agencies often don't have an incentive to comply because they're aware that if they refuse to hand out information that they don't want in the public domain, it's not really a problem for them. They don't face any consequences for their recalcitrance in not complying with their statutory disclosure obligations. As one anecdotal example, a general counsel to one of the state agencies once said to me, way off the record, but in surprising candor, "If we have a record that one of your clients wants, and we know it's not exempt, you're not going to get it because we'll make you sue us. And we know in all likelihood that probably won't happen." Again, not a great way for a statutory disclosure regime to function.

Today in particular given the budgetary constraints that face newsrooms, and in particular smaller community newspapers, it's a very difficult thing to decide to commence litigation. It's expensive. And it is no exaggeration to say that often the cost of a full-blown FOIL litigation, especially if it goes beyond the trial court level to an appeal, is going to be more than the cost of a reporter's annual salary. So that that's a very difficult impediment.

Again, as an egregious example, one problem that seems to recur, in a litigation context, is you ask for documents, you get strung out, you don't get anything. You take your appeal administratively, you still don't have anything. You finally file the lawsuit, an article 78 petition. Once it's filed, a bunch of documents miraculously appear disclosed by the agency, now that you've brought the lawsuit. Well, not again an ideal situation for a news organization because they have had to undergo the burden and costs of litigation, that they should not have had to experience, in order to gain non-exempt documents in the first instance.

And one case, which I think illuminates, and Rex, you may unpleasantly remember. Back around 2002 or 2003 the Albany Times Union submitted a FOIL request for the pistol permit database from the New York State Police, and the request was submitted by a reporter, and the response came back from the state police saying, "We don't have these in the format you requesting." So at that point, Rex called me, I went on the state police database and there it proclaims, right on the page, we have a centralized statewide database of pistol permits.

So I send a letter in saying, "Hey, what gives? The position you're expressing in denying the reporter's FOIL request is contradicted by what you're saying in

black and white on your own website." Hemming, hawking, still wouldn't admit they had it. Their initial response was this, "We have them in paper format. For you to get it will cost," and this is the exact figure, "\$250,000. Before we start processing your request, you have to cut us a check for \$125,000." Now clearly no news organization has the budgetary resources to do something like that. And it was obviously a pretext. We filed the lawsuit, within two or three days, counsel to the state police calls me and says, "You can have the database, as long as you withdraw your lawsuit and don't go after attorney's fees." So we took the deal. But I think that example illustrates this problematic nature of the laws that I'm talking about.

So what's the answer? It seems to me that at least two reform initiatives should be seriously considered. The first one is to simplify the procedures for disclosure under 89(3)(a), to prevent this stringing along when an agency is hoping to alleviate the news value of a particular record. And I think there should be a firm date. It should be something that's workable. I think the five business days is simply not realistic, but let's come up with something that works for both parties. And if you don't have a response, or a denial, or an acceptance and a grant of the records by that date, then you get to take the administrative appeal. And to me that's not a big ask. I think that actually serves the interest of, it's fair. It doesn't disserve the interest of either side, the government agency or the requester.

Second to provide an incentive to the government. I think there should be reforms to, and revisions to, the fee shifting provision under FOIL. Because right now there is an ability if you are a prevailing party in FOIL litigation against a state or municipal government agency to recover attorney's fees, although it almost never happens because courts are reluctant to do that. I would suggest that, like some other states, for example, Rhode Island where we recently litigated a significant open records act case, if you prevail and obtain disclosure, you should be entitled to a mandatory fee shift. And maybe the way to make that a little more palatable is to include a fee cap, but I think there should be some consequence to state agencies who routinely play this game of stringing along requesters, forcing them to go into litigation, to obtain documents that should not have been withheld in the first instance. So if anybody has any questions after that you want to talk to me privately about, I'm happy to discuss it with you. So thank you.

David McCraw: And you're not subject to FOIL so we can't find out what's said privately. All right. All right. Kathryn to you.

K. Sheingold: All right. I'm Kathryn Sheingold. I'm the FOIL appeals officer at the Office of the Attorney General, and I need to preface that my comments are based on my observations and my experience, and may not be the policy of the office itself. I've been the FOIL appeals officer for six plus years there. As has been alluded to, I'm on the opposite side of the equation from many of the other panelists here. I'm the one who, after the first instance, after the records access officer

has made a determination and the requester is displeased with that determination, they have the right to file an administrative appeal. And then I review what's going on and make a second determination. And it's that second, that final agency determination that allows the request, or if he or she chooses to, to file an Article 78 proceeding to get a different-

PART 1 OF 5 ENDS [00:31:04]

K. Sheingold: ... Article 78 proceeding to get a different result if they choose. The Office of the Attorney General, just to give you an idea of my experience, receives about 3000 or 3500 FOIL requests a year. Of those 3000 or so, 40 to 50 get administratively appealed a year. So in my six years I've done about 280 administrative appeal determinations.

I have reviewed personally thousands of pages of records that are both internally created records and records that the office has because of investigations that it's pursued, for example. So, records that have been created by outside entities that are not, that for FOIL purposes are absolutely agency records. But are not considered agency records in the sense that we created them.

And I've instructed agency attorneys on their obligations under FOIL and advised agency attorneys who are engaged in litigation over the FOIL process. And although not all requesters who administratively appeal get everything they want, I have received thank you letters from requesters who have gotten, if not actually the complete records that they've requested, they've gotten something that they sought, even if they didn't exactly ask for it. Or at least have gotten an explanation of why the records are being withheld.

So in my work as the FOIL appeals officer, I try very hard to find that space between protecting the agency's valid interests and providing the requester with something that he or she is seeking. So that's the perspective that I hope to bring to any questions that any of you have for me.

I would say also 5 business days sometimes works, if it's something that we have in fact proactively posted. We can simply point you to it on our website. And the office has made a point of starting to post many of the records that are regularly requested. Real estate finance bureau filings, charity filings, those sorts of things are actively posted regularly.

There may not be... You say that the agencies don't have incentive to comply. I would say that my incentive to comply is that there's a law, there are rules, and I would like to follow the law and the rules. So there isn't necessarily something hanging over my head, but I would think that many agency FOIL officers are trying to do the right thing and walking that line between the agency's interests, valid interests and doing, disclosing what can be disclosed.

Mike Grygiel: Just so we're clear, Kathryn, I'm not saying anything to the contrary.

K. Sheingold: Okay. Okay.

David: And you've got pending requests there. No.

K. Sheingold: I don't think, I don't think so.

Mike Grygiel: If there's a request move to the head of the line.

K. Sheingold: I guess one other point I'd like to raise is that often my appeal determination involves explaining. So a requester has asked for something and gotten back a... We don't have any response of records or getting material back that is not what they expected. And they say it's useless material.

And often my explanation is, "You asked for this, this literally satisfied what your request was. But maybe you want to ask for X. Or, we can't give you this because it's a medical record and you haven't proven that you have the connection to the person that the records about. But here's a press release, a publicly available press release that you might not be familiar with that gives you some information about the situation."

So there may be things that we can do that are not literally what the requester was asking for but provides some information in a helpful way.

Speaker 1: [inaudible 00:35:34].

K. Sheingold: Yes, I do.

Speaker 1: Okay. Obviously, agencies have their own.

K. Sheingold: They do. They do. I do sometimes consult with them.

David: So anybody want to react to what you've heard up here at this point? I have a bunch of questions if we don't.

Kristen O'Neill: I mean I agree. I mean my experience, I agree with Catherine. I mean there's always a bad apple here or there, but my experience is that the front line, they're trying to do the right thing. They may be getting pressure from above. And that's always an issue. But just try to keep in mind that when you're dealing with a records access officer, for example, that person is, most of the time, really just trying to do their best to comply with the law and to comply with responding to your request.

I have had wonderful experiences with all the state and local records, access officers that I've dealt with. I very rarely get off the phone with government

employees and think, wow, that person was a real jerk. Now it just, they're really, most of the time just trying to do the right thing. And I know you think I'm saying this because I'm a government employee. But I mean it's my role.

My role is I'm supposed to be independent. I'm supposed to provide advice and guidance consistent with the law. And I try not to take sides from either a political or any other bias. I just try to provide advice. What do I think you're required to do under the statute? What do I think is the right thing to do, even if it's going slightly above what you're required to do under the statute because that might make everybody's life easier? I try to give practical advice, but 99 times out of 100 the government employees that I'm dealing with are happy to take any advice that's going to help them satisfy their customers, so to speak. And satisfy the requests so it's done.

David: Walk people through this, Kristin, because I think they may not be fully familiar with how the Committee on Open Government works. So one of Mike's clients has put in a FOIL request. He doesn't like the response he got from the FOIL officer. Is that the point where your office get called?

Kristen O'Neill: You can call our office at any point. You can call our office before you make a request. Some of Rex's reporters call. I just emailed with one of your reporters just today about something. You can just, if you want to just say, "I'm thinking I want information about this. Is this something that I might be able to get through the Freedom of Information Law?" And then I may be able to try to guide them about the types of records, because I want to remind them that the Freedom of Information laws about access to records. Because that's a confusing issue for a lot of members of the public. They think that the Freedom of Information, because the word information is there, is that they should be able to write a letter to their public officials asking questions. And that the public officials should be obligated to respond to their questions. That's not what the law requires.

There's no obligation to answer questions in response to a FOIL request. The Freedom of Information Law governs access to existing records. Records that exist at the moment the request is submitted. That means the government is not required to create new records in response to a FOIL request. It's not required to answer questions. Just access to existing records consistent with the statute.

So you can provide, you can call me before you make a FOIL request. You can call me after you've submitted a FOIL request and you haven't received a response, and you're wondering about time limits. You can call me after you've received the response and you want to know whether, in our opinion, that response is consistent with law. And I will try to provide you guidance from that point. I will give you guidance as to whether I think it's worth filing an administrative appeal, or whether the case law on a particular issue is so straight forward, or there's a statute that's specifically on point.

For example, someone makes a FOIL request for copies of autopsy records from Onondaga County. Those records are confidential by statute. So if they're denied and someone comes to me and says, "I can't believe it, they denied. I'm a family member." Or I shouldn't say a family member. "I'm the person's ex-boyfriend's half-sister. And I want a copy of the autopsy report." Get a court order then, because there's a specific statute that says you're not entitled to it through the Freedom of Information law.

Same is true that a lot of people are surprised by county operated 911 systems. Those transcripts and recordings of 911 calls through a county operated 911 system are also confidential by statute. Do not need to be disclosed in response to a FOIL request. So if someone comes to me and says, "I was denied access, do you think I should appeal?" I'm going to tell them, "You can do what you want but it's probably a waste of time."

David: So you raise an interesting point here that FOIL doesn't empower anybody to ask questions. It empowers them to ask for documents. I have been dealing with, of all things, a Freedom of Information request in India where there are Indian lawyers who are putting it in on our behalf. And it's questions like, "What's your policy about this kind of visa? Why do you deny..." And I said, "From an American perspective, well that's, can you do that?" And they said, "Well, of course you can." And I said, "Well, in the United States you can only ask for documents." And they said, "Well, the reason they're not a document is because they don't want to tell people what it is." So that's why you have to ask these questions.

But so let me, and this really kind of throw this open. Should the FOIL officers have more independence? Should you have more power? Should your office have more power? I mean in other words is the problem here a power dynamic where an agency, and I don't... You can tell me or not whether higher ups actually intrude on the process. But it often feels a FOIL officer doesn't feel as if he or she has much power. And of course your office, by statute, is not empowered to override the decision. Would we be better off with a system where there was empowerment, either of an independent authority like the Committee on Open Government or for the individual FOIL officers? And I open that up to anybody who wants to jump in on this.

Kristen O'Neill: I think, well part...

David: You're not power hungry. You don't seem to say, "Yes, I want that power."

Kristen O'Neill: And the reason why, well, first of all it's staffing, certainly. I don't think the administration would be, the current administration would be interested in giving the Committee on Open Government more authority than it already does. I'm not sure there's... Every year there's all sorts of legislation proposed. I don't know if Catherine is aware that there's legislation proposed giving the Attorney General's office a role. Instead of going to court, a step after filing an

administrative appeal, would be to submit basically a request for an opinion or a request to the Attorney General's office. I'm like, "Well how does that work if you're dealing with a state agency that the Attorney General's office is then going to have to represent in court?"

David: That's the Massachusetts system isn't it?

Mike Grygiel: It's the Rhode Island system.

David: The Rhode Island system.

Mike Grygiel: Yeah, where if you're denied you can then, you don't have to go to court and it's optional. But you can submit a denial for an independent opinion to the Rhode Island Attorney General's Office.

David: Right. Then to use the example, Mexico, they have an independent body that can overrule the agency determination, which is a system that nobody in the United States has adopted. But it goes to that question I have about, is this really a matter of power dynamics?

Mike Grygiel: It's an intriguing suggestion I think, and because I do encounter, get the sense often times in difficult politically sensitive FOIL requests, I think the front line officers, the people who are making the legal determination are looking to do the right thing. I think often times there is behind the scenes political pressure that is brought to bear from people who are higher up the food chain. And I think sometimes that can lead to unfortunate results.

Kristen O'Neill: The smaller the level of the government the easier it is.

Mike Grygiel: Absolutely. That is my experience. Municipal governments at the risk of a generalization, it is that. Local governments are much more responsive. Where you run into problems, at least in New York State FOIL, is at the state executive branch level. It's more politicized often times and they have more resources. The Attorney General can fight the fight.

K. Sheingold: I was going to say, I wonder if part of it, and again this is just coming from inside the agency there, it may be difficult to identify the full range of records. My office for example, does a vast number of different things. And so sometimes it can take a while to identify who the likely custodian of those records is. And if they're older records, to retrieve them. If we're involved in litigation, you may have dozens of boxes worth of records to have to go through. So not just, I would imagine that a local government office may have just fewer collected records that have to be identified and searched.

David: This idea of power has been intriguing to me since I first got into this business when I was the lawyer for the Daily News, which happened to come up in the period when we were going from the Giuliani administration to the Bloomberg

administration. And in some ways it was easier under the Giuliani administration because you would file in an agency. The agency would say, well it depends on whether the mayor's office allows it. There was a guy I could call at the mayor's office and he would tell me whether we were going to get the documents or we were wasting our time. And in some ways that was a very efficient system. You knew exactly where the power was.

Then Bloomberg came in and suddenly the agencies were scared because they didn't know what they were allowed to release. Because Bloomberg was essentially saying, we apply the law, do what you need to do. Roy, you raised the way the courts have been dealing with both FOIA and FOIL. Are we at a point where the law just doesn't work and we should be looking for alternatives?

Roy: I think the law works. It might be the exceptions that might not work.

David: Okay.

Roy: I think there's some, there's so much malleability with interpreting some of the exemptions that it really does give both the PIOs and the FOIL officers and the courts a little too much leeway. And some of these are reasonable. I mean I'm not here to say that there should be no exceptions or exemptions across the board. But when you look to something like the law enforcement exception, I mean that's pretty broad at both the federal and the state level.

And even now, I brought up the trade secrets exemption with all the interwoven dealings between private entities and government. That is just an open, it's an open question of how far you can go in clamping down on information by just saying, well, there is this tangential trade issue or competition issue, that it could really rope in a lot of information.

David: So Mike had raised two things of interest to me. One was delay and we'll start with that. And Kathy, from your perspective, is there any way to actually deal with delays? Is delay inevitable because of the way the requests come in?

K. Sheingold: My experience has been that, again, when you're dealing with a large agency with a centralized FOIL unit but records in custody throughout the agency, there likely is some delay inevitable just in finding the records before you even start the review.

The idea of a firm deadline is troublesome to me because as I said, I have had instances on an appeal, on an administrative appeal where I've reviewed thousands of records, pages of records. And having a firm deadline, knowing... As it is, I have 10 business days to render a determination. Knowing that the records, the first line review has a firm deadline to do that initial review is daunting when you get those kinds of requests that have a very large number of

responsive records. I think it just depends on the type of request that comes in and some agencies are going to get much larger responses.

Mike Grygiel: I mean it's a practical matter if there was a firm date for a response. Again, the way it works now, an agency can just hold you in limbo for a fair amount of time without you knowing whether you're going to get anything or whether you're going to be denied. But if we could get up front some sort of indication, and then you were on the phone with me and we're going back and forth on this. And you're saying your clients want this information, but it's 10,000 pages or documents we have to look through. I can't get that to you in 30 days. How about a phased production? There're still going to be issues we might fight about and redactions. I could live with that. Would I can't live with is just this indefinite extension hoping the requester's going to go away without providing any information or explanation whatsoever.

David: And Mike, under the current system or the law, you're supposed to get a 5 days' notice, which is either, here's the documents or here's the reasonable time period when you're going to get the documents.

Mike Grygiel: Right, right.

David: If it's going to extend beyond 20 business days.

Mike Grygiel: Well, once the determination is made and this is where there's the real plan [crosstalk 00:51:10]

Kristen O'Neill: See, this is where I'm so bothered by the courts on this and I'm with you on this. It doesn't make sense to me that an agency doesn't have to provide a date by which they will respond until after they've made a decision.

Mike Grygiel: Correct.

David: So they have to decide [crosstalk 00:51:28].

Kristen O'Neill: That's not the way we interpret the law. That's not the way the Committee on Open Government interprets the law. The way we interpret the law is if you are going to take more than 20 business days after your acknowledgement letter, you have to assess the size of the request. You have to assess... I mean sometimes it's, certainly you may not be able to do in the first 5 business days. But I think you can probably do it within the first 25 business days, which is the 5 plus the 20. And give yourself and assess the number of records and how much time you think it's going to take.

At that point, in our opinion, the law requires you to give a date certain that is reasonable under the circumstances. Regrettably, the courts don't agree with the Committee on Open Government on this. And they think that you don't

have to give that date certain until after you've decided whether you're going to disclose or not, which makes zero sense.

Mike Grygiel: It doesn't, but that is what the law says.

David: Right.

Mike Grygiel: And that's the text, is you-

Kristen O'Neill: I just think it's, unfortunately, in my opinion, it was poorly worded.

Mike Grygiel: No. That's the real disconnect. That is the real disconnect.

David: So just so everybody-

Kristen O'Neill: And we've recommended changes. If you look at our annual report from the past couple of years, we recommended technical changes to the law, which would require, which would clarify what we believe was the original intent of the statute.

David: So, just so people are clear of this, under the case I lost, which is the leading case on this.

Mike Grygiel: David is being very modest in all-

David: I really lost it.

Mike Grygiel: No, he is one of the country's foremost FOIL and FOIA, the federal litigators. And one of the most knowledgeable.

David: Thank you. But what came out of that was that the agencies are free to take as long as they want to decide whether they can make a response. And then once they make that determination then it's 20 days. We'd always understood the law to mean that they had to make the determination in that 20-day period, which has been the problem.

To put a finer point on what Mike was saying about the case I brought against the police department, the police department had traditionally at that point, this goes back several years, but no matter what you requested, you would get a response that says we need 120 days. That was the rule.

So I engaged them in a discussion of this saying that's really absurd. That if I asked for a single piece of paper, I get 128... You say you need 120 days. If I asked for hundreds of pages of documents, I get a thing that says 120, there'll be 120 days. And they said, fair point. And then we started getting a standard

letter that said 90, which was not really my point. It was an improvement I agree, but...

So I do think that there's some things about the law that desperately needs to be cleaned up. What about this idea of fees? I mean, do you think fees would actually change anything? That if it was easier to get fees. You don't get fees that often? Sometimes you do.

Mike Grygiel: Twice, I think over 30 years. And they were both egregious cases where the agency flagrantly didn't comply with their obligations and actually flouted instructions from a judge. So it just doesn't happen very often.

Kristen O'Neill: But now that would be mandatory in the past couple of years?

Mike Grygiel: I think so. But if you look at the way the current fee shifting provision is written, it gives a judge discretion if the requesting party substantially prevailed and the agency was untimely in the disclosure. But we know from the New York Times case that that doesn't really have much meaning because there's no deadlines.

David: Right.

Mike Grygiel: So you're almost never going to get a discretionary award and there's I think logical and valid and understandable reasons for that. It's a matter of public fisc, and courts are reluctant to tell a public agency you have to pay taxpayer dollars to a private organization or individual.

The real problems for me on the fee shift, I think it should be mandatory. I think there should probably be some sort of limit or cap and it should be compelled when an agency has unreasonably withheld requested records. And that too can be a matter of interpretation, but at least it's something.

Rhode Island, where we are currently litigating a case, has a mandatory fee shift. And it doesn't matter if the agency was reasonable, unreasonable, whatever the reason was, if the information is ordered disclosed by a court, the requester gets paid. And the case law in Rhode Island emphasizes that the reason for that is to effectuate the purposes underlying the statute of incentivizing parties to bring and make access requests for governmental information in order to promote accountability in the agencies that are intended to serve the people.

And that may be, I think the unusual jurisdiction, but it does have a lot to recommend it. Because I think agencies would think twice. Another suggestion that I cannot take credit for. It's creative. It came from David's colleague at the New York Times, Dana Green, is maybe, Kristin, your office should publish an annual list of agencies at both the state level, the municipal level, county level, putting out their timeliness and ranking them. And whether or not they have

complied, sort of, let's call it a FOIL letter. If nothing else, that would be a good news story every year.

David: And then the feds do a version of that, right?

Mike Grygiel: Yeah, they do.

David: Yeah. Yeah. Catherine, I was struck by your remarks, and Kristin echoed some of this, about your attempt to try to work with the requesters. And you obviously are one of the people that are really conscientious in doing the appeals, which as Mike will say are not necessarily 100% through the agencies. But should there be a more formal mechanism for that? On the federal side there's an Ombudsman's office where at least in theory you can go and there is an independent party that tries to bring people together. Your office may do some of this informally or not. But do you think that that would help cut through some of the tension?

K. Sheingold: That's very interesting. I don't know. I don't know. I think of it as part of my background as a reference librarian, and I just like knowing the answer and helping people find something. So I hadn't thought of it as an ombudsman sort of role.

David: Well, because it is that idea that it's almost like mediation where you bring the two parties together. And I know that there are some FOIL requesters you probably don't want to see face to face if they're persistent in their requests, as some are. But it is a good question about whether that is one of the ways you might be able to move things along or at least come to some sort of agreement on it.

So before we turn to the people here today who may have questions, I wanted to come back to this idea of proactive. And Kristin, while you endorsed it you didn't seem to think that it was necessarily practical in every situation. What kind of things might it be practical for? So this is release without request.

Roy: Right. I think what it comes down to is the smaller the unit of government, the more workload one individual person has. And it's hard sometimes to set aside time to do things that are not absolutely necessary. And I'm just wondering, and I don't know what the answer is, I'm wondering if, as part of the task force, if we can come up with ideas for making that easier, making proactive disclosure easier. Whether that is...

I know local governments have their websites. For example, I'll talk to one town clerk who says, "Oh yeah, that's easy. I'll just, I'll post that on my own website right now." And that's great. On the other hand, sometimes you have town or village clerks who have no idea how to access their website. They have to say, "Oh, well, I've got to wait till next week when the tech guy comes in." And then I can put in a request to ask them to put that on their website. And it just slows

the whole process down. So if there's some sort of educational program to make all local officials more tech savvy so that they know how to get the information out to the public without the requests being made.

Also, as we move forward, I think it would be nice to see less paper. I mean, obviously that's true. We have significantly less paper than we did 40 some years ago when the law was written. But when someone makes a request for records instead of having to make photocopies of them or pulling them out of storage. And putting them aside for somebody to come in and inspect, or to have to scan them and put them on an electronic storage device. They already exist in electronic form. So that will make everyone's lives easier. So even if a FOIL request is made, it will take significantly less time if those records already exist in electronic form.

So if we can try to encourage those types of steps at the local government level, I think that would be a big help. I just worry, I mean, I always worry about, this is like the softie in me, but I worry about making, the idea of unfunded mandates on local governments.

David: Yeah, asking them to do things [crosstalk 01:02:03].

Kristen O'Neill: Asking them...

PART 2 OF 5 ENDS [01:02:04]

Kristen O'Neill: Local governments.

David: Yeah, asking them to do things-

Kristen O'Neill: Asking them to do things that they don't have the budget for, and they don't have the time for. Sometimes you've got village town clerks of some teeny tiny little town and their clerk works two days a week.

David: Right.

Kristen O'Neill: Three hours a day, and that's... so to ask-

David: [crosstalk 01:02:19]

Kristen O'Neill: That's your FOIL off sir.

David: Among everything else, yeah.

Kristen O'Neill: Among... exactly. So-

David: Yeah. So before I turn it to questions... we've talked a little bit about that difficult request, difficult requesters, if there was one piece of advice you could give, I'll ask each of you. If there's one piece of advice you should... you would give to requesters to enhance their chances of success, what would it be?

K. Sheingold: Be polite.

David: Oh no, not the be polite.

K. Sheingold: Yeah. Yes. Honestly.

David: Okay.

K. Sheingold: I... difficult requesters who have frequent and extensive requests are easier to deal with than the ones who you provide something with and they're rude back.

David: Okay. Good thing to remember.

Speaker 2: I think in... whenever possible, be as concise and just specific as you can be in identifying the records that are the subject of the request.

Kristen O'Neill: Both wonderful suggestions. Be... always remember that you're dealing with a real person on the other side and be willing to be flexible on both sides. I think this is important for both sides, but the requester should keep in mind that if they're making a particularly large request, that they're not the only person making a FOIL request, and so while it might seem perfectly reasonable to you that the request should be turned around in the first five business days, or the first 20 business days. You also have to keep in mind that you are one of dozens, or hundreds, or thousands of peoples... people making FOIL requests to government agencies. So just always keep in mind that you're... that you are dealing with real people on the other side.

David: [inaudible 01:04:07] sense of what requesters could do better?

Roy Gutterman: I would say understand both the system and what you're looking for, and that would speak to the population. I think we're talking about two separate populations-

David: Yeah.

Roy Gutterman: The professional media, professional who knows exactly... in most cases, what they're looking for and then the citizen requester who may have a really precise understanding, but also might have just this general understanding that there might be something there that they want. So the two populations have to know what they're looking for.

David: Good thought, so questions, somebody want to... Lynn, please.

Lynn: So... [inaudible 01:04:54] really, really interesting. I am a [inaudible 01:04:54] I'd have to say, but what the panel has reminded me is that the... by the way, I'm Lynn Overland, I'm a media lawyer of longstanding working with journalists and I have what the panel's reminded me is that I only see the FOIA requests that have been denied, and there is certainly a large number of a FOIA request... FOIA and FOIL requests that go through and that the information is handed over by local or state or federal folks immediately, easily and for that FOIL is a great thing. Because it allows the clerk to say, "Hey, this is a public record. I'm going to give it to you."

And if they want to, if the clerk wants to provide this information and many of them do as Katherine and Kristen have said, they really want to be helpful. They feel like it is a public record. Many of them are former journalists themselves who have subsequently worked, and if they... so they're looking for a reason to provide it and that's great, and it really does serve that purpose. So I wouldn't get rid of it for just that reason, but when I see the requests, they've been denied. And I'm trying... I'm wracking my brains now to... and often we appeal, we don't often go to court for all the reasons that we've discussed, but we often appeal in all the places I've worked.

I can't actually even remember the time an appeal was granted. Now, I may just be having flawed memory here, but I have... but the administrative appeal process, and this is not just... it's not about FOIL particularly, it's about FOIA, FOIL cross states, federal sovereign, this is not an attack on the AGs pellet process. But I can't remember the last time an appeal, any of them has actually been granted. So I do think that the system is quite problematic and broken, and of course the cost elements are... hiring counsel and I'm a big believer in private lawyers, but it's still out of control.

My question... actually given that... question is really, one of the things I've often wondered about is not when the journalists are asking for material, but when you are actually dealing with commercial interests that are asking for public records, because I don't ever... I don't often think of about them, but I think that they're actually kind of a big force in some of these FOIL and FOIA issues, and I'm curious as to what the panel thinks about that.

David: Do you get inquiries from corporations? Do you get requests from corporations and are they a significant player, and on the state side?

Kristen O'Neill: You probably deal with the corporations more, where I probably deal more with the people who are frustrated with corporations. I'm not sure. I... I'll use the example of there's an entity called Smart Procure, and they blanket the state with requests for vendor information, and they take that information and they put it up online. And it's fine, it's all public information, but depending on the size of the government unit, sometimes it's a really easy thing to do, because it's

all computerized and data, and you ask for this information, I punch a few buttons on my computer, boom, done. And then you've got a really teeny, tiny government entity that doesn't... that everything's on paper.

If Smart Procure doesn't want it on paper, and then they want you to scan it and from my perspective, I think they're still entitled to the information. It's still perfectly valid for you to have information or request, but what I see is I can definitely tell that the government, the town clerks, village clerks, whatever it may be are less sympathetic when a request is coming from a corporation than they are when it's coming from one of their residents.

David: Are you seeing corporate?

K. Sheingold: Some. Some, I don't know what percentage it would be, and a lot of it is sort of advocacy groups rather than-

David: Okay.

K. Sheingold: Big corporations. Yeah.

David: Johnathon?

Johnathon: Yeah. Thank you very much for this panel. I thought it was really interesting to hear different perspectives on this. I'm a professor at the North State Buffalo School of Law and I do a bunch of FOIL work rep... sometimes representing people trying to get disclosure of records. I just want to make a couple quick points. So I couldn't agree more that the deadline... that the absence of meaningful data in the statute is a big problem. I'll give you one example. A colleague of mine needed to get a police report from a state police arrest. It was sort of a high-profile incident. Requested the report, was told it was going to take six months to get a copy of the report. Appealed, because the six-month seemed unreasonable and then got a decision on appeal saying, "Okay fine, four months." For a single police report.

Speaker 2: Six months. Four months. 120 days. 90 days. [crosstalk 01:09:56]

Johnathon: And at that point, the option is to sue, but if you sue, you're not going to get it any faster because it's going to take you awhile to get [inaudible 01:10:03] etc. So that seems to me like an abuse of the rules. I'm very cognizant of the problems involved in records that are requested, ask for thousands of pages, but it seems to me that there is a way to draft the statutes such that if the number of records are less than say a thousand, anticipate a response. There's a hard deadline, and if it's anticipated to be larger than that, maybe it's a different scheme, but the system right now is sort of open to manipulation.

So some kind of deadline seems reasonable. I guess a couple other issues that sort of weren't on the table yet, that I'd love to get your thoughts about. I guess

on the question of proactive disclosure, what about the idea of having agencies sort of be required to self-identify the sorts of records they often get asked for? To maybe issue a report or some kind of public disclosure. Every... to analyze what records are frequently requested and then to require them to make those proactively disclosed. So at the federal level now, if an agency gets a... if an agency gets a request three times for a certain record, they have to publish it online.

And I wonder if some version of that might be sensible in New York State so that agencies are required to think proactively about what they should proactively disclose.

Kristen O'Neill: Is there an executive order right now on that? Or is it-

K. Sheingold: Oh, I don't know. I don't know.

Kristen O'Neill: I'll have to think about that. My recollection is there might have been... I mean this... it's only going to apply to state agencies, but I do think the governor put out an executive order encouraging proactive disclosure. Of course it's... that's basically all it is, is encouraging-

David: Yeah. That is about a 20-year-old city directive to that effect within [inaudible 01:11:46] put together a list of [crosstalk 01:11:47] available without request. The list, the last time I checked had not been-

Kristen O'Neill: Updated?

David: Yeah, in a long time. But a good thought.

Kristen O'Neill: Yeah.

Johnathon: And I can just... I don't mean to hog the mic, but just one more thought I had was... so the law is quite good in a sense that agencies have to justify their decisions to withhold records on appeal and in court if necessary. But right now, there isn't sort of a similar requirement to justify whether the search for records was adequate, so there's a case from the Court of Appeals, which basically says that if an agency certifies that there are no such records, that's the end of the story. You don't get any explanation with respect to how the agency conducted the search.

And in most cases, there's no reason to suspect that faith, or to suspect that there was any wrongdoing, but it strikes me that it's very easy for someone in the agency to certify that no records were found, even if there wasn't a meaningful search conducted. So I wonder if there could be... some mechanism to document and to require justification for the adequacy of search.

David: Okay. Other thoughts [inaudible 01:12:58] wants to raise here, over here Tom. And then kind of work your way across.

Speaker 3: Just a... can anything be done about the routine use of FOIL to actually discourage routine... revelation of information? We have a lot of... experience of local officials saying, "Fine, if you want this document." Which is presumptively open documents that are routinely produced. File it and we'll give it to you in five days or something. There's no way around, therefore, getting a delay for something that is quite... just intrinsically presumptively open. Is there anything that can be done about that?

K. Sheingold: So you're saying things that don't even need the five days to disclose?

Speaker 3: Right. Something that is-

Kristen O'Neill: Like meeting minutes.

David: Police report.

Speaker 3: Exactly.

David: [inaudible 01:14:01]

Speaker 3: Stuff that is just routinely held in a file drawer literally... and times sitting right there, fine, file a FOIL. It's meant to discourage reporting.

K. Sheingold: Well I don't know about affix to the law on that, but I know that my practice, one of my other hats is rendering opinions on behalf of the office in a couple different capacities, and if someone files a FOIL request for one of those, it comes directly to me and we turn it around, and we call the requester and say, "If you want an opinion in the future, a copy of an existing opinion, just call us and we'll send it." So I think it maybe agency dependent.

Speaker 3: Right, and that's my point. There's nothing that can be done about... in effect harassment by public officials.

K. Sheingold: That's unfortunate. Sorry.

David: [crosstalk 01:14:55] I'm not... it's something to think about for the task-

Speaker 3: One day they're giving us police reports [inaudible 01:15:02] and then next day when the mayor gets arrested, "Oh, you're going to have to FOIL-"

David: Right. Right

Speaker 2: Yes.

Speaker 3: [inaudible 01:15:07]

Kristen O'Neill: I always tell people, "You need to be consistent."

Speaker 3: Yeah.

David: Go ahead, that's fine and then we'll go over here. You first, go ahead. Step up and then we'll go to the...

Speaker 4: Thank you. One thing that... kind of to piggyback off of the proactive producing records, I think it's... forgive me, I can't remember the exact citation, but I think it's eight... in section 87. It mentions the subject matter list that agencies are supposed to produce and update them annually. Is there any enforcement that you know of with that? And I think Katherine, you talked about a lot of the problems is actually identifying what the requester wants and if we have it, and where to locate it. I think that such a list might help requesters kind of identify what exactly they are looking for, because a lot of it is kind of translating what they want, and they may put the... they may put their request in a form of a question, but I also think that municipalities have a duty to kind of translate that.

What are the taxes on this property? I mean, a records access officer could translate that. "Oh, that's this record." So I think that there's-

Kristen O'Neill: And most [inaudible 01:16:15] they mostly do.

Speaker 4: Yeah, but how is that subject matter list kind of enforced/existing?

Kristen O'Neill: The only enforcement is really would be through a court proceeding, like if some agency did not have a subject matter list, and you would want to basically sue the agency to require them to do so, but to be honest, most of them. At the local level, what they do is they adopt the records retention and disposition schedule put out by the New York State archives. So villages, towns, cities they're required to comply with the ME1, and counties have the CO2. So all the different levels of government state agencies have record retentions, although, most state agencies also create their own subject matter list.

So it's not... I would say it's pretty common that most government agencies do have these subject matter lists. They probably just not as detailed as you're hoping. I do encourage... for example, I encourage reporters. If they're thinking to themselves, "I want some type of information, but I don't know what info... what records are out there that have that." I tell them, "Look at the record retention schedule for the agency." It... or the subject matter list for the agency, and then you can kind of figure out, "Well what kind of records do they maintain?" But they're not going to be that specific.

For example, I get letters from inmates all the time complaining because the agency did not provide them with their subject matter list. They think that agencies required to maintain a subject matter list about them. So there's a lot of confusion about what this... but basically, it's supposed to say contracts, litigation records, purchase orders, invoices. That's what it's supposed to say. It's not going to go into a lot of detail. When someone [inaudible 01:18:14] to the attorney general's office and says, "I want all records relating to charity A, B, and C." Going to your subject matter list is useless. That's not helpful at all.

Katherine probably... or not Katherine, but your records access officer has to go to a number of different places. Maybe the finance people. The charity's bureau, different areas within the agency and track down all those records. And the records access officer knows where they are. It just takes time for people to gather...

David: What you're talking about is can be more detailed and can...

Speaker 4: Yeah, and I should preface, I formally was a records access officer, so that's kind of the ones that I'm thinking of through it. I felt that more than half of my job was kind of educating the requester about what records we have. How they can get it and trying to help them kind of translate their request. So I was just thinking if that was published, I guess more it could help the public become informed of what they actually could ask for.

Speaker 2: In section 87 3C, which I think is what you're referring to-

Speaker 4: Yes.

Speaker 2: Is actually mandates the maintenance of a reasonably detailed current list and further, if a state agency has a website, it has to be... the list has to be posted on the state agency's website and linked to the Committee on Open Government's website. So I would imagine that probably that's in compliance on the part of most agencies.

David: What a great suggestion that would actually benefit both sides.

Speaker 2: Yeah.

David: Why don't we take the last question over here [inaudible 01:19:49] and then we'll take a break.

Speaker 5: Hi, I'm Andrew Donovan. I'm a reporter at News Channel 9, the local ABC station here and thank you all for taking your time out to talk to us. I just made a few notes and I think there's some questions hidden in here, but I can relate to the request about the police record, because something even more simple that I had a hard time getting and it wasn't even that the... it was Onondaga County, I did a story about they want to build a beach on Onondaga Lake, and for those

who don't know, it was historically one of the dirtiest lakes in the entire world. They've spent millions to clean it up. They want to build a beach.

I was talking to the environmental director for the county and he was showing me a PowerPoint as I was interviewing him. I said, "Oh, I'd love that PowerPoint for some of the visuals and we could include it in the story." We have to file... FOIL the PowerPoint. It's literally right in front of me. I'm seeing it. I could have rolled on the thing with a camera, but I didn't, just because I was expecting it to be an easy request. I FOIL'd it and two weeks later I got it, but the story ran the day I was with him, but I'm wondering if there's a way to incentivize or help governments and agencies maybe do a better job at record keeping themselves, and I think this goes to the digitizing. The using less paper, because if their record keeping is better to begin with, it's easier to share those records.

That's kind of a common theme, whether they keep a list or an index of those records. Publish frequently requested records. Syracuse Police for example, their software is so old that if I want to ask for certain crimes committed in a certain neighborhood, they don't have a database to go find that. They'd have to pull records from every arrest or crime reported for every day, and then narrow it down with their own work, the neighborhood that I'm asking about. That's just crazy, but yeah, software do that could be expensive, so I understand that. I guess I have a question in some of this, and maybe it's more just wanting to pick your brain-

David: Well it's good to hear this. So yeah, go ahead.

Speaker 5: About... what's that?

David: It's good to hear it.

Speaker 5: Oh yeah, no and maybe picking your brain about that and... as a journalist too, I understand the time constraints of not a PowerPoint that I should have got... that I should've gotten an hour later. But for example, if I FOIL the governor's office for every email from a certain time using certain words, and that one I've gotten continual, "We need more time." And I get that, that's a seven-month worth of email requests if those emails still exist. So I get that, but that... I don't know, maybe you think there should be a better database of internal emails for FOILING. I don't know, I'm just kind of spewing now.

David: Yeah.

K. Sheingold: I think that with the technological advances, it's sometimes hard to remember that not every record that we keep in our agency is keyword searchable, and that's something that I frequently have to explain. Yes, you have a very precise request and we know exactly what it is you're looking for, but it will take us time to get our hands on it, because again, we can't just type in that word and pull up every record that the agency has with that word.

David: Well thank you all for participating. Thank you all for joining the discussion with us. We're going to take a 15-minute break. We'll start again at 4:10. We'll have journalists here talking about their experiences and people from the public advocacy community talking about their experiences, but really appreciate everybody coming forward here and helping us wrap our heads around FOIL. Thank you.

K. Sheingold: Thank you for [inaudible 01:23:15]

Kristen O'Neill: Thank you.

David: Thank you all and we're going to start the second part and let me distinguish a little bit between panel number one, which we had some exceptional discussion of the law and panel number two. We tried to bring in people who either because of their role in advocating for public access, or their work as journalists that they have the on the ground experience of dealing with FOIL, but we also want to talk about some of the related subjects around transparency, open courts and open meetings, both of which have separate bodies of law designed to encourage transparency and sometimes failing to live up to that.

The... so we'll broaden that. We're also looking and I've encouraged this panel to talk about their own experiences, or the experience of their organizations with these issues, so that we get more of that feeling of here's how it actually works, and here's when it works and when it works not so well. So with that, let me introduce the panel that we have here today. Next to me is Diane Kennedy, President of the New York News Publisher Association, which represents how many of the...

Diane Kennedy: 50-ish.

David: 50-ish. 50 is okay. All right. 50-ish of the news organizations around the state from very large ones like the New York Times to very small ones. You have one with-

Diane Kennedy: Yeah, the Highlands Current.

David: How many?

Diane Kennedy: Which is a... well, there an online, startup online not for profit news organization.

David: Okay, and Jeremy Boyer is here. Jeremy is the Executive Editor of the Auburn Citizen. John Lammers is Senior Director of Content for Advance Media New York, most of you will know the company more for it's very visible products Syracuse Post Standard, Syracuse.com. And then Paul Wolf is President of the Niagara Coalition for Open Government advocating for transparency in the Buffalo area. So with that, I'll ask each of you to reflect on either what your

experience has been with openness FOIL, open meetings, courts, whatever it might be of either you or your organization. So why don't we start down there Jeremy?

Jeremy Boyer:

All right, well thank you and thank you for inviting to this program, and more importantly thank you for investing the time and resources into exploring the current challenges that journalists are facing regarding access to public information. I'm the editor of a small newsroom that takes seriously the job of digging deep to bring important information about state and local activity to light, but we're also a newsroom like most, if not all others these days with an extremely tight budget.

So we've had occasions to wrestle with the decision of whether to spend significant funds on attorneys to pursue the recovery of information that we are highly confident we should be able to get. There's no question in my mind that some government entities are aware of our financial limitations and therefore, deny FOIL requests and FOIL appeals on the assumption that we won't take them to court. That's a huge problem, and it's one that we need open government advocates to address.

I write with interest last week actually about the efforts made by the Niagara Gazette to secure information via FOIL on who was using luxury suites that Western Regional Off-Track Betting was leasing at Buffalo Bills and Sabres games. I think Mike may have handled that effort, or your firm?

Mike:

[inaudible 01:27:06] talk about that.

Jeremy Boyer:

Yeah. So basically, the paper was denied based on a legally flawed argument that such information was an invasion of privacy. The paper got a clear advisory opinion from the State Committee on Open Government in support of disclosure, but OP... OTB continued to deny and finally, the paper engaged legal counsel, which drafted a letter stating their intention to take the matter to court and suddenly at that point, the OTB decided to release the documents. They didn't even file, from my understanding, right? Didn't they get to the point of filing?

I read that account shaking my head, because we've gone through that same exercise twice since I've been at the Citizen. Being denied information that we were confident should be public. Getting the Committee on Open Governments on biased opinion and support. Still being denied the information and then suddenly getting the documents after we expended funds to hire an attorney and send a demand letter.

Now I know there's a provisional law that was recently made stronger to allow plaintiffs and FOIL lawsuits to cover attorney costs and that's certainly good thing, but I think there's potential for unintended consequence and that's governments sticking with the approach to preemptively deny legitimate

requests, daring us to spend money on lawyers, but when we do, getting us the information before court action occurs. We get the information, yes, but we have no vehicle to recover the funds we shouldn't have had to spend. And those funds are consequential.

In our case, just getting to the point of retaining counsel to put together a demand letter can cost equivalent of a half years reporter salary. Sometimes we have to make that choice to spend those funds because the story isn't too... is too important for the public for us to walk away from it. I'm afraid though that unless we come up with some better solutions to make government more accountable for bad faith FOIL denials, that this problem will only get worse and the fundamental First Amendment mission of the free press will be in serious jeopardy. Thanks.

David: Thank you Jeremy. Let me make sure I understand something. They asserted it was private who was in the suites?

Jeremy Boyer: Mike can probably fill you in better, but yeah basically. We spent taxpayer money to have luxury suites at these games. We bring people in to these games. You can't know who's there.

David: Okay.

Jeremy Boyer: Fair assessment?

Mike: And other perquisites that OTB was using taxpayer money on. Their refusal to comply with the Niagara Gazette's FOIL request [inaudible 01:29:26] we are not a [inaudible 01:29:29]

David: Right. Okay.

Mike: [inaudible 01:29:31]

Speaker 6: That was my [inaudible 01:29:33] I tried to shut that down as quick as possible.

David: I once had the State Park Department tell me there was a privacy interest in the tee times of various people playing golf at a public golf course in Long Island. Most of them were fraudulent claiming a disability to get free fees. Well free exemption, but... and I did ask the FOIL... I ask the general counsel whether they had vanity boards between the holes so that you could golf in private without seeing who was teeing up next to you, but anyway. Diane what are your members concerned about?

Diane Kennedy: Well they're concerned about the ability to fund litigation. I should mention first that we do have a free legal hotline for our members that is ably and generously staffed by Mr. [Griegel 01:30:25] and so our members who have concerns about

any issue can contact Mike and unfortunately, sometimes it gets to litigation, but then Mike's very good at scaring the documents out of agencies. I thought that I would talk for a minute or two about how the legislative process works, since we keep talking about changing the law and you'll all be depressed and then I'll try to cheer you up after that.

As President of the News Publishers Association. I am the person who monitors the state legislature and the state government, mostly playing defense to try to prevent FOIL from being scaled back, which is an annual effort. But occasionally working with lots of other organizations to try to move the ball forward, and to improve FOIL. So I'm a registered lobbyist. The way the process works, everything that you learned in school is lovely, but this is New York and it's different.

So we have a two-year legislative session, and during that session... during the two-year legislative session, the legislature introduces approximately 20,000 individual bills. About 2% of those will get signed into law. Some of them have been around for decades. Some of them are just nuisance bills that someone put in to make someone happy, but the way the process works is the legislature convenes in January of... after they've been elected in November. Very soon after adjournment within a... or a couple of weeks of being convened in January, the governor puts in his budget.

The governor of the state of New York has more power over the budget than probably any other governor in the United States. The... due to the way our constitution is written in a number of court decisions that have come out. So you think of a budget as being lines of numbers, and there is that, those are appropriations bills, but there are also bills called Article 7 bills pursuant to Article 7 of the constitution that change laws. They do have to be connected to the budget in some way, however tenuous but they're grouped by subject matter. They are hundreds of pages long, and sometimes there are areas of the budget that make major changes to the law with the change to one word, or one sentence.

A favorite tactic that I see is that rather than amend public officers law to change the accessibility of some access to information, access to documents, they will put in a...

PART 3 OF 5 ENDS [01:33:04]

Diane Kennedy: ... information, access to documents, they will put it in a clause saying notwithstanding any section of law to the contrary, these documents are now hereby shielded from FOIL or they will simply reference section 87 of Public Officer's Law and say these records or this agency is exempt from FOIL. And it happens with regards to all kinds of information and there's something in the budget every single year. Last year it was booking information. So if a person is arrested for any crime whatsoever under that proposal, their name, address,

age, charges and mugshot would have been withheld from public disclosure or would have been considered an unwarranted invasion of personal privacy. In the end, we were able to get that scaled back to just booking shots, mugshots and it was a little more permissive. Law enforcement agencies could release mug shots if they determined that there was a public safety reason and then that's up to the police department.

But in the past, they've tried to shield information about complaints to department of motor vehicles, about rat ride hailing services. There's always something about FOIL in the state budget from what I see. Sometimes it's in one of the necessary budget documents and sometimes it's in a standalone bill called the Good Government and Ethics Bill that never passes, as you can imagine. But what happens is you have to go through these thousands of pages of legislation to try to find the little chestnut that's hidden in there, then 30 days later the governor can amend all of those bills, and then everybody we'll negotiate bills and then about 12 hours before the budget really passes, everybody's... The legislative leaders and the governor are pretty much in a room together. They negotiate the final budget and it begins to pass usually before it has been printed or released publicly. We call this the big ugly.

And so after it's passed, everybody gets to find out what was in it. So you really need to try to take out the bad provisions before they get to that point. And sometimes you don't. The mugshot issue was amended as the bill was being passed in a separate connected bill in a big ugly. That was fun. So while all of that is going on, the legislature's in session, legislators are introducing bills, they're running bills through committee, so this is kind of your chance if you want to change FOIL law, you start talking to legislators and making the case for a change in the law. What we're doing at that point is assessing any changes to the law that would be harmful to the ability of journalists to report the news. I will contact somebody like Jeremy or Rex or his, the editorial page editor, Jay Jochnowitz, at the Times Union and other editorial page editors and show them the bill language.

I have to make the case for an editorial just like everybody else does. Analyze the bill, tell them why it's harmful to their, it's harmful to their newspaper, show them background information and then, you know, hopefully they editorialize. In the meantime, we do work with a lot of other organizations. We work with the New York Civil Liberties Union. We work with Reinvent Albany. I will contact the Committee on Open Government and alert them to any legislation so that they can share it with their committee. The committee is a committee. They have people who meet, who are not government. Some of them are government employees, some of them are not. So they can get information out there about that legislation. And I also communicate with the Committee on Media Law of the State Bar Association of which my friend David is a member.

So that's how the process works. The budget gets passed sometime in early April though everybody goes home and get some rest for a little while. They

come back, and then the rest of the legislative session proceeds until usually the end of June. This year it'll be ending at the end of May because of primaries. So then you continue to try to get legislation passed. Some of the legislation I've been working on to improve FOIL has been around for 28 years or 30 years. The attorney's fees provision we were working on since the early 1990s, and I wasn't thrilled with what finally came out, but it did move the ball forward. I thought it should be stronger, but you got what you can get.

David McCraw: It sounds like you've been doing since the 1890s.

Diane Kennedy: It does. It does. It does sometimes. And what you run into is the governor and the legislature don't always get along very well. The governor feels very strongly that the legislature should be brought under the same section of FOIL that applies to executive agencies. He likes to say the legislature is exempt from FOIL. This is not true. They ... It's not true. Okay. The section that applies to the legislature is a list of the types of documents the legislature has to release. All the rest of FOIL is you have to release everything except a list of the types of information you don't have to release.

And the court system does not fall under FOIL at all. And it all relates to a separation of the different branches of government. In other states where legislation was passed during the legislature under the executive section of FOIL, the courts have thrown it out. So if you want to amend FOIL to improve access to legislative documents, the only fix you really need is to add some things to the list of documents they need to disclose.

Emails are really one of the only things the legislature does not have to disclose. But when you're trying to amend FOIL, you get involved in that back and forth between the legislature and the governor. So that's a little hard to negotiate. But it does happen. There are actually two bills that passed the legislature this year that that incrementally improved FOIL and they will go to the governor sometime for signature, probably like Thanksgiving weekend when he thinks you're not paying attention. So that is the process and it takes a lot of work. It takes a lot of allies and it takes quite a lot of time and help to make those changes. So that's basically what we do.

David McCraw: Scary, but thank you for [crosstalk 01:39:23]

Diane Kennedy: Sorry. Sorry.

John: Well, I would just say that I think the state FOI law is fundamentally broken. The daily life of a journalist in New York is to operate many times as if there is no freedom of information. What has mostly developed is an honor system in which authorities provide records or don't, really, based on their understanding of their public responsibility or their concern for being shamed on the front page of the post standard or the Albany Times Union or the Auburn Citizen. It's getting worse. And it's every day. So I would ask the Bar Association to take...

You know, I am so pleased that they're on this topic and I would ask them to be bold because it's broken and that means fundamentally shifting the power. Mike and David have both referred to that in their excellent session.

The power belongs to the executive. And that's got to change because it can't be, well, we can just sue them, because that's not a weapon. That's an occasional thing we pull out once in a while. We got three shots in the gun. That's all we can use. And so the power has to change. That's in fee shifting so that an agency feels the pain when they either refuse to get educated in the law or refuse to comply with the law. And it's all the time. If you stay long enough, you might get to hear my little speech that I will refer to as to the Department of Health rant. And so you might want to record that. But it's comical and it's just contempt for the public. And so tinkering around the edges won't work. The Bar Association should argue for something bold penalties, real deadlines, third parties with power. But think big, because it's a big problem.

David McCraw: Can I quit there?

John: For now. We're going to get that [crosstalk 01:42:26]

Paul Wolf: Thank you. My name is Paul Wolf. I'm an attorney from Buffalo New York area. I worked for 17 years in government where I served as Chief of Staff for the Buffalo Common Council. I was an attorney for the Buffalo Housing Authority, attorney for the Department of Social Services. So I have seen it from kind of both perspectives. And I currently serve as President of a nonprofit organization called the Buffalo Niagara Coalition for Open Government. After I left government and went into private practice, every other week there seemed to be an article about something like the OTB issue or there's always open government issues going on. And I had my own independent struggles of trying to file FOILs and I read articles about different people and I thought maybe we should try to form an organization of getting citizens to work together.

So that's what we've done. We have citizens from Erie County and Niagara County, and we've dealt with FOIL, but I want to take us in a different direction and talk about the Open Meetings law, which I think really needs to have some focus and some changes made to it. New York state's Open Meetings law is very weak. I like Vermont, I believe, has a better model and I encourage you to take a look at Vermont's Open Meetings law. Massachusetts has components of it as far as far as enforcement goes, that I think should be taken a look at. So I just want to point out five problems that I've encountered with the Open Meetings law and encourage you to take a look at that.

One is, believe it or not, the Open Meetings law in New York state does not mandate that the public has a right to be heard at a public meeting. Vermont does. Now most municipalities will put on their agenda a spot to hear from citizens, but they don't legally have to and not all of them do. Especially public authorities or even the Buffalo Common Council, the Erie County legislature,

you cannot speak to the full Buffalo Council, the full county legislature, they don't allow it. They don't have to. They will let you speak at a committee meeting, but even that is sometimes denied. I sent an email once to an Erie County legislator was holding a hearing saying I'd like to speak at the meeting on behalf of our organization. I didn't get a response. I showed up to the meeting anyways, I approached the chairman and said, geez, I'd like to speak, and he said, no, you're not on the agenda. You're not going to speak.

So the law does not mandate that the public be heard at a public meeting. I think it should. You're only allowed to speak typically for three minutes at a time. It's really not that burdensome. There's usually not that many people, depending on if there's a hot issue going on. And then what some will do is, okay, you can speak regarding an agenda item at the beginning of the meeting, but a non-agenda item, you have to wait to the end of the meeting. So in Niagara County we would frequently try to bring up open government issues. They're not going to put it on the meeting agenda. So you have to wait and it's kind of just to stick it to you to punish you. You'd have to wait two or three hours to get your three minutes to speak. And I said, well, why can't I speak at the beginning of the meeting where other people are speaking? You got three speakers, you can't fit me in. You wait till the end of the meeting.

And actually what they do is they adjourn their meeting. People are literally walking out of the room as I'm trying to speak, and they don't document it in the meeting minutes. So it's like it never occurred. And that's how they do at Niagara County.

So that's one issue. The second issue is not mandating that meeting agendas and documents have to be posted online again. And we're at a digital age now. Everybody is accessing information with their phones and computers and government is behind the times. The law was changed in 2012 to say as best as you can, if you have a website, you should post meeting agendas and documents online. But it's not mandated. Vermont mandates it. So, we've had issues. We've done reports where we rate local government websites. Are they posting things online and we try to, it was mentioned, kind of a ranking grading system and it's kind of been somewhat effective. It embarrasses them. Some really strived to get a better score for next year. Others just could care less what we say or think.

But you should be able to see, as a reporter or as a citizen, the same documents that the city council has, the town board has when they're discussing or voting on an item. Many places will just post a one-page agenda and it will just list the topics, but it won't contain all the documents. The town of Amherst where I live, fortunately they will sometimes scan and post 700 pages of their meeting. They scan whatever the board members have. They scan it, they post it. I don't think it's really that hard to do in today's day and age, but the law does not mandate it in New York, and I think it should. You're not mandated to post meeting

minutes in New York, Vermont. You have to post them within five days. There was some controversy about that when they made that change recently.

In New York, you have to have many meeting minutes available within two weeks. So if someone asks for them, they have to give them to you, but they're not required to post them. For years, the Niagara County legislature never posted meeting minutes until we did one of our reports and suddenly now they at least post their meeting minutes. But can you imagine not being able to find out what happened at a county legislature meeting? How people voted? The law does not mandate posting. Many places do, but some places don't, and many are months behind in posting. In New York, you're not mandated to live stream your meetings and post the videos online. Again, analyze as best you can, you know, funding available, you should do it. Today's day and age, I think that should be mandated. The New York State legislature just passed a couple months ago mandating industrial development agencies to live stream and post their meeting videos online. But you know, city councils, County legislators, town boards are not mandated to do so and 99% of them have websites.

There's a citizens group in Lewiston, New York. They actually spent \$200 on a camera and a tripod and they video tape their town board meetings and they post it online because the town board refused to do it. And for 200 bucks, it's actually not a bad video. You know, it's not the greatest quality, but you can see and hear what's going on. And a real problem I have with the law, which is the same thing with FOIL, is weak enforcement. The New York State Attorney General in New York has no enforcement powers over FOIL, open meetings law. The only enforcement mechanism is that you as a citizen have to go hire an attorney and spend thousands of dollars and government officials know it in Vermont, Massachusetts, you can file a complaint with the Attorney General and they will investigate it and they have great information on their websites about how to go about filing a complaint.

In Vermont and Massachusetts, they have the authority to find government officials who violate the law. In Vermont, you can be charged with the misdemeanor if you knowingly and willingly violate the law. We don't have any of that in New York. Your only recourse is you go hire an attorney, and it's not working. They know it's not.... They're not going to be taken the court. They know it's not being enforced. Either we have to give enforcement powers in New York State Committee and open government, the Attorney General, someone needs to have... Or the fee shifting. There has to be a legitimate fee shifting so that private attorneys will take these cases on and hold government officials accountable. And as it was said earlier, I think most government officials are cooperative and wanting to do the right thing, but I got to tell ya, I can't... The amount of hostility that we've been met with, the amount of arrogance that we've been met with, has really been quite shocking.

I will frequently go to meetings to talk about this and they start off very defensive. They're very thin skin, they're very defensive. We always try to be

polite and professional and say, look, we're not here to attack. I always try to start out by saying something positive. You're, you know, you have difficult jobs. We're just here to make suggestions and they're not very open to the suggestions, quite honestly. There is a power dynamic. Many of the elected officials I encounter are full of themselves, arrogant, thin-skinned. Not all of them, but man, a good many of them. And it makes it difficult.

David McCraw: Let me... Jeremy, you work in one of those places where a lot of local governments, smaller governments. Do you accept that diagnosis of the difficulty of getting information? You know these people more personally than many people would in a larger place.

Jeremy Boyer: There's a huge variation. I mean it really depends on who you're dealing with. Websites is a great example. I'd like to see you do that in our county because I think it would be eye opening for our residents to just see the level... I mean we have a couple that are just like... I have, you know, there's a town clerk in the town of Brutus that she's sending me the minutes the day after every meeting and I don't even really care to have them, but I'm glad she does because that's proactive disclosure that like we've been talking about. Others barely even have a phone number that that can be answered to ask for information. So we really see a variety of it.

One thing that, and I kind of remember... I jotted this down when we were talking earlier. When it comes to the local level, I know the law has, you know, everyone has a records access officer and they have a appeals officer. When it comes to local government, all those people are, for the most part, title only. We send in a FOIL, it goes to their attorney, it goes to the city attorney, it goes to the county attorney or you know, the town attorney, they'll tell them what to do.

John: And those handled the appeal.

Jeremy Boyer: Yeah. And exactly. And then when you appeal that, it goes back to the same attorney that told them not to appeal it. So it's ridiculous exercise that, you know, we talk about delays that adds to the delay.

And I also, you know, I don't... As lawyers, you understand better than me who... At what point, whose interests are you serving when you're the city attorney making a decision on what should be disclosed? Are following law of... Are you following FOIL or are you protecting a client who might be exposed to some other legal jeopardy? So that's a reality of what happens on the ground to local level. I can't speak to the state because that's such a massive agency. I think there's a different process there. We have our own challenges there with just unreasonable delay. But I think on a local level there are some great examples and we should probably try to highlight the good ones as best we can, but we definitely need some more uniformity.

David McCraw: Great. Diane, is there an appetite for a reform of these laws in the legislature today?

Diane Kennedy: Yeah. Oh, I think so.

David McCraw: Okay.

Diane Kennedy: You know it's a significant battle so I think you can work on two tracks. One is to get a broad coalition of people to call for reform. You know, the newspapers throughout the state, dailies and weeklies and small not-for-profits all singing from the same songbook. And while you're doing that, you need to find a way to fund litigation. Cornell Law School has a first amendment center that is staffing up to help with FOIL litigation. University of Buffalo. I think that we should increase funding for Committee on Open Government so that when there is a good faith disagreement that the local newspaper or the citizen has sufficient access to an impartial legal counsel to tell them what they should be doing. And then if they won't agree we need to find ways to fund litigation. A lot of our newspapers just really can't afford litigation. We might even start some sort of a litigation fund.

That's something that Bar Association could do, is set up a mechanism to fund litigation and have a panel of attorneys and editors and publishers perhaps to assess FOIL litigation and decide which cases are important to fund. And then smaller newspapers might be able to engage in litigation. But really, the only mechanism for overseeing what happens at the local government level is a newspaper. So they're the ones that are, if they have enough staff, showing up at the town board meetings that are asking for the minutes of the zoning board. That are calling the mayor to ask what's going on. That are asking the police department for information. And that's getting increasingly rare, especially in rural areas and small towns. So we need for people to be encouraged, not just to subscribe to a newspaper, but tell any retailers you shop at to place advertising.

I mean that sounds like I'm a shill, but, which I am, but most the revenue that comes into a newspaper that pays for reporters and editors comes from advertising still. So we need that. And reach out to groups like the Buffalo Niagara Coalition to get them to be very vocal, and I think you are, in support of FOIL legislation. If legislators hear from people back home, we want you to fix this, they will get motivated to fix it. But you still get back into that... Then the governor lobs the ball back in saying, okay, then you need to change the whole law so that the legislature falls under FOIL, which is kind of a red herring.

David McCraw: Yeah. And one of the things that we're planning to do is a session on a pro bono or low-cost legal services for news organizations. And you mentioned the clinics, the Knight Foundation is now pushing out through the reporters committee. We think that is something that's sort of in our wheelhouse as a Bar Association. Can we make those kinds of services available through those various

mechanisms? So there can be that sort of legal push that that's often needed. I'm not going to ask you for the Department of Health rant yet, but before-

John: I'll stay after for that.

David McCraw: We'll get there. But before we began, you talked about a separate line of access issues, which comes from the court.

John: Yeah, I've... Yes. Covering me, Mike, on this. So this is important to me and it should be important to us. It's not under FOI law, but I'm wary of an increasing volume of cases being sealed by the courts that keep important matters and that are in the public interest away from the public. And I'm going to give you a couple of quick ones of ours. And Mike is helping on this first one. A community college was being sued by a basketball coach that it fired. The coach had a federal civil rights claim. The two parties settled and made as a condition of the settlement that it would be kept confidential. The judge endorsed that. Thus, putting everyone under the fear of contempt for releasing what is basically, in all other cases, public information. And we've been fighting for a year... And more than a year and a half thanks to Mike, to get that judge to change her mind.

And we just recently had a state court case that was comparable. A woman was picked up by the sheriff's department and booked into the jail where she had a terrible experience detoxing and she died. And the watchdog for the state, the Commission of Correction came in and found that she was not properly cared for. She was detoxing, they didn't evaluate the situation, treat her properly. The family of the woman sued. They agreed to a settlement, and both those parties would like that to be private. And so the judge sealed it. Public cops, somebody in a public jail, and opinion from a public watchdog, insurance money probably. But really, you know, public funds, public matter, we should care whether people are dying in the jail or not. And it's all sealed. You have a judge in both cases looking to move calendar, and who's looking out for the public? Who in that room is looking after the public?

The two parties would like that to be private. Of course they would. But it's not about them. Who's looking out for the public? And so I would say... I mean, I don't... I trust you guys on a remedy for this. But there's got to be a remedy. There's got to be a way where we don't have to go to court on behalf of the public. And there has to be a way where if a judge is contemplating sealing such a thing, there should be a disclosure. And that's the 1078 form, and there's a big list of them down at the courthouse. You're going to go look at them. But there has to be something affirmative. You can't sneak one past us.

Now here's the case of the jail is so damn funny. A reporter who's tremendous got it when it was a proposed settlement. So it's still public. We put it on the site in a story and the judge still sealed it. You can just look it up on syracuse.com and he still sealed it. And so I think increasingly this is going to be a problem,

also for FOI, as governments outsource their work. We've got a company that manages the amphitheater. We've got a company that is collecting parking tickets. We've got a company that's doing the medical care at the jail. We've got a company that's running the nursing, the county poor house, and all these guys are private... And they think they're private. And they're not. They're not private under law. Right? I think.

Speaker 7: It's an interesting question. You're going to get resistance, I think certainly [inaudible 02:02:35] as to whether that development somehow allows additional public information to be insulated from disclosure. [inaudible 02:03:01] I think that's wrong, and I think we'll see increasing court challenges [inaudible 00:30:08]

John: And just quickly on this, I would ask everybody to Google a Reuters project from the summer on this topic where they did a deep data project to show how judges were routinely sealing records on important cases, particularly in New York opioid scandal. And for years and years and years, great evidence was being put in front of a judge about this pill pushing and both parties would agree to seal it. And so nobody, like in the tobacco industry years before that, nobody could build on previously known information and the public was not served by the actions of those judges. And so, also, I would just say if there's anything that the Office of Court Administration can do or anybody else can do, the school can do to teach lawyers, and eventually judges, about their responsibility, it would be a welcome thing.

Diane Kennedy: There's actually a piece of legislation on that sponsored by assembly-

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John: You're welcome thing.

Diane Kennedy: There's actually a piece of legislation on that sponsored by Assemblywoman Helene Weinstein.

David McCraw: On what piece?

Diane Kennedy: Sealing of court records.

David McCraw: Okay. Yeah.

Diane Kennedy: That are of interest to the public.

David McCraw: Right, but we should separate the two strands here that that John has raised, because they're both important. One is the sealing of court records and standards for that. It's appropriate to talk about that in Syracuse, where the Lugosch case arose from and the building of the mall and is the leading case. On

the civil side and in federal courts, for papers having to be public, so that's an important issue. And we're going to deal with that more in the New York session in January. But the second thing you put your finger on, and John and I had been talking about this beforehand, is this problem of outsourcing government roles to private entities. And it is a serious problem.

It's been around for a long time. When you were in Central Park in New York. That is, will they look to you like a public space. The ground is public. The cops are public. But it is run by the Central Park Conservancy that is absolutely adamant that it is not a government agency. And that if you FOIL them, they will tell you that, and they will point out a decision from many, many years ago.

They'll usually give you the documents so you don't sue them to change the law on this, but it is quite extraordinary how much is of outsourcing. Whether it's for universities athletic programs, industrial or economic development agencies and the like. Let me ask one further question here of Paul, and then bring others into the conversation, if I might. The Buffalo Niagara Coalition, done great work on transparency. You think the public cares? I mean, is the public with you on this or are we all just cranks? Some professional cranks, some volunteer cranks?

Paul Wolf:

That's a good question. It's sometimes I think it's the chicken or egg thing, where I have government officials say, "no one comes to our meetings, because no one cares." But then on the other hand, you're not posting your meeting agendas and your meeting minutes so the people know what's going on. And I've had elected officials say to me, "you know what Paul? All this open government stuff, do you know how many times people bring up open government when I go door to door? Zero. Nobody brings it up, Paul."

So, I think there are people that care. Is it a majority of people? I think depending on, like any issue, when it hits home to them. With something they want to know about, they care. And I think it's critically important, in a democratic society, that access to information is one of the things that separates us from other countries. And while this may seem at a small scale on a small level, it's hugely important.

So I think people do care. We have monthly meetings of our organization, and we have a dedicated group of people that show up every month. And we've had some success, I think in large part, because of the support from the news media. When you can't sue, I think that a great way of bringing about change is embarrassing people, which the news articles do. Government officials don't want to find out that according to our group, their website got a failing grade, or we did a report where we took a look at executive sessions. You can, under the law, meet in private as a public body, but in some very limited circumstances. And you have to make your motion correctly and inform the public as to why you're going into executive session. And we did, our report was front page of the Buffalo news that 97% of the time they got it wrong.

Incredible. 97%. And I was trying to be overly generous in finding. I never expected it to be 97%, but you can't go in executive session and say, "to discuss a personnel matter," which is what they typically do. You have to be a little more specific. Is it to discuss hirings? You don't have to name the person, but is it hiring somebody, firing somebody, disciplining someone? You can't say, "go in executive session to discuss litigation," which they typically do. You have to name the lawsuit that you're going to talk about. So, 97% wrong the first year we did it. The second year we got up to 75% wrong. So I guess that was a huge improvement from the front-page news article, but still, a long ways to go.

David McCraw: And let me underscore the point before we take your questions, or get your comments, it doesn't have to be a question. Let me underscore the point that Diane was making about how important it is for local news organizations to be vital to this process. That there's a lot of things we can do to empower citizens. There's a lot of things that good government organizations can do. But at some point we really depend on those news organizations. And if they're spending their money litigating, then they're not spending money reporting. And that's really a bad place for us to be.

Someone pointed out to me the other day that when there was the shootings in Midland, Texas, thankfully there is still a local newspaper there, so people know about it. But there are a lot of cities around the country, especially in the West and the in the middle West, where if something like that happen, there is no local journalism going on, and it essentially goes unreported until somebody puts it on Twitter and somebody finds it, and a news organization to go cover it. And it's really not the way the system should work. So, people want to raise any concerns or pushback on anything that's been said here? Fill in any context for us?

Speaker 8: One additional point-

David McCraw: Sure.

Speaker 8: To Johns anecdote, and that is 58, of course, further locks up the information about law enforcement, because you might... through no other way [inaudible 02:10:18]

Diane Kennedy: Section 58 of the civil rights law makes disciplinary records of police officers, correction officers, and firefighters completely shielded from public disclosure. Just explanatory notes.

David McCraw: Right? And it-

Diane Kennedy: For the people who don't deal with this every single day.

David McCraw: Right. And it sweeps broadly where... When first passed, the court of appeals looked at it as being about personnel records. You got promoted, you got fired,

whatever. That was not great, but at least it was kept within that boundary. But soon it became the disciplinary records of people, and then it became the investigations that were done. And it really, in a time of when people are talking about the need for police accountability, after the Garner case and the other cases we saw from around the country, really is detrimental to our ability to find out what happened. And more importantly, how the agency responded. Did they give somebody a pass, or did they discipline?

John: Yeah.

David McCraw: Yeah. Lynn,

Lynn: This may just be a suggestion for the January or February session, but along these issues we're talking about sealing of court records, which is a huge issue. Maybe it's time to look at a legislative response, again, to cameras in the court.

David McCraw: No, yeah.

Lynn: Maybe we should just call it live streaming as opposed to cameras in the court. But, of course, that's a huge issue in New York state.

David McCraw: And do you want to remind people of what the history of that has been in New York?

Lynn: So the history, as I recall, and David, you can correct me. Is that it is that we had a period of about 20 years where we had an experiment that allowed cameras in the court, which many of us looking around grew up during that experiment. And then the experiment, by statutes, sort of expired, and there was a number of core challenges, but it was found that the, I think, actually even under the constitution state constitution, that there wasn't a right to having... There was I, and maybe even a negative right, you had no right to have a camera in the courtroom. And so that's been the status I think for really probably about 20 years now, that we haven't had the ability to have cameras.

And it's not only that, of course, you have court courtroom artists who are theoretically working for the public, but who are selling their work, and claiming copyright in their work. And so it's a kind of further privatizing of public information. Because it's not like you can have a picture, because there are no cameras aloud.

Diane Kennedy: No, you can have still cameras.

David McCraw: Well-

Diane Kennedy: Still cameras are allowed.

Paul Wolf: With discussion.

David McCraw: If they're not taking testimony.

Diane Kennedy: Right.

Lynn: Right. Right. And if they're- [crosstalk 02:13:12]

Jeremy Boyer: Our judges just don't let it, right, don't let it happen in our county. [crosstalk 02:13:13]

Diane Kennedy: There's still cameras.

David McCraw: Okay.

Cynthia Arato: I have a question, but I also, I am the subject of a courtroom drawing. And I will say that the courtroom art artists charged my firm a thousand dollars for it, and then said, "if you don't like anything about it, I have a studio and I'll change it." So she sent it and I said, "I won that argument, but you drew me looking really alarmed, like I'm losing." And she said, "Oh, you just look like you're arguing strenuously." So... There was no change made to that drawing that I had. So anyways, my question is really, I think Diane is in your wheelhouse, which is what is the history of legislative changes to FOIL? And what are the levers that are in play, and what has worked in terms of working to amend? And what has not been successful?

Diane Kennedy: Every couple of years there's an incremental change usually, and it does make FOIL work better. The battle to get attorney's fees, we waged two battles, and one changed the law to, may, get attorney's fees, and that was, that was a pretty intense battle. And then a couple of years ago it was strengthened to say shall, but only under certain circumstances. The levers to get that changed are to get a lot of light focused on the issue. Really newspaper editorials and newspaper coverages. Newspaper coverage is key. Open government groups, NIPER, all of those organizations that we work with. That's really what's important. And for the legislators to hear from their local good government groups, their local newspapers, that something means to change.

Cynthia Arato: And I'm just curious, is the opposition mostly from smaller communities and towns petitioning their legislators? Or is it the executive branch kind of saying we don't want-

Diane Kennedy: Well, it depends on the legislation. Local government groups will speak up to their local legislators if they feel that a bill is going to be onerous to them. That was part of the issue with the attorney's fees, and that's part of the issue with deadlines, is that small local governments will say, "Gee, we have a town clerk who comes in once a week, and if there's a local real estate developer who asks

us for every GIS coordinate in the whole town going back 35 years, we're just not going to be able to comply with that."

And the issue that came up with the attorney's fees bill was in the context of a deadline, because I wanted the attorney's fees to be awarded automatically if the agency ignores the deadlines for response. And the local governments said, "what if our one town clerk has an accident and misses the deadline by a week, and there is nobody else to respond?" And those are the arguments on the other side. But yeah, the eternal tension between the governor and the legislature is like sand in the wheels all the time. If you try to move the ball forward to the legislature, the governor invariably says, "well, why don't they put themselves under the executive section of FOIL? They don't even fall under FOIL." And then we have to have that same old discussion over and over.

David McCraw: Yeah. I mean, one of the things I should say about litigating, and Mike jump in here if he has a point of view on this, is that the ease with which we can file a federal FOIA case is so different from how hard it is to file a New York FOIL case. As I was sitting here, my associate back in the office was suing the state department. It takes her about two hours to pull the documents together, write the complaint, sits at her desk, files it with the federal court, pays for our filing fee online. We now have a case against the state department on under FOIA. We also have FOIL cases that we're pursuing, but because it's done under article 78, requires that you write a memo of law, that you provide affidavits, and a variety of other procedural steps. And even though that was designed to expedite the litigation, it actually is a bit of a burden to get the thing commenced from the very beginning.

And I've often thought that if in fact the legislature wanted it to be expedited, there was better ways to do it than through the article 78 proceeding. Did, Johnny, can you talk about suing authorities as public entities? Because you're at the fourth department. Yeah, please.

Johnathon: Sure. So, I guess, I mean, that and maybe one other thing. So, I run a clinic at the University of Buffalo that engages in transplants litigation. We've had sort of long running litigation against the local Sheriff's office for incident reports, local, about attempted suicides in the jail that were mischaracterized as inmate disturbances or... What was the term they used? Manipulative gestures. And so we sued for these records that we didn't get any response for a long time.

Then we filed an appeal, got no response. Then we sued. And the process in court is, as you say, it's a lot of work to work up one of these cases. Even a relatively straightforward case where we've got nothing. And then, the judge, judge is supposed to, in the law it says, that they're supposed to treat these in an expeditious fashion due to priority.

David McCraw: Right.

Johnathon: But in our case that meant, I think we had four hearings, we would argue a point and he'd have us back later, and read some more briefing, have us back again. So it's taken a whole year. We've got a good ruling and now we're waiting for [inaudible 00:15:28].

David McCraw: But a really important topic because so much of government is being outsourced to private entities who claim that they're not subject to FOIL around the country. We see this for particular with all of the big time athletic departments: Florida, Georgia, elsewhere. And you can't really get at the money. Huge, huge piles of money flowing through that, looking every bit like its government funding or funding for government purposes. It's being treated as if it's not.

And, as Jonathan suggesting there, there is a lot of work to do a FOIL case. We have a current FOIL case against the mayor of New York, because he received a private warning letter from the conflict of interest board, and our position is there is no such thing in the conflict of interest law. Nowhere does it say that one of the options they have is to file private letters. And one would think that one who wanted to be president would have nothing to hide in his private ruling. But apparently one does not agree with me. And we have been going around and around in that we've got the suit filed, and the city is dragging its feet, but it is a lot of work to go for a case that should be really simple. It's this one document. There's no search involved. We know it exists. They acknowledge it exists. But getting to it can be a bit ordeal. Anybody else want to jump in here before we conclude for the day? Yes, please. Up there.

Diane Kennedy: [inaudible 02:21:09]

David McCraw: Sure. Of course. Yeah.

Diane Kennedy: Before we wrap. Very quickly.

David McCraw: Yeah.

Diane Kennedy: Hopefully we wrap this...

Speaker 9: Hi, so just to clarify on the cameras in the court issue. Here in Syracuse, we have had video news coverage in our courts, but it is up to the judge's discretion. Nothing testimonial.

David McCraw: Okay.

Speaker 9: And so what that usually leaves our television stations with is first appearances, sentencing, pretrial motions, that kind of thing. But they are able to get video of the defendant in a courtroom for some type of proceeding, if not the actual trial where there's testimony.

David McCraw: Okay. Panel members, last words before we...

John: I just want to kind of make a point. In August, we were very interested in the buses that deliver people to the state fair. That involves two government entities, a bus authority and the New York State Department of Ag and Markets. One of our terrific reporters, [inaudible 02:22:18] both of them. The bus people gave us the contracts in five days. New York state still hasn't, from August requests, two PDFs in an email. What are we going to do to incentivize what the first one did, and to disincentivize, is that a word? What the second one did? Because otherwise you're on your own. It's the same law governing both parties. What are we going to do?

David McCraw: Other closing.

Jeremy Boyer: I mean, I had a similar FOIL story. We had a... Rapist who was out on parole and cut his bracelet off, in Skaneateles, over the Summer. Massive manhunt for this guy. Docs is in charge, or parole is in charge. They don't say anything to the public for 17 hours. Finally, it ended fine because no one got hurt, but it could have been a big deal. A week later, he's in for his parole violation hearing. They close it. They don't let anyone hear it. We get word that the decision was he's going to go back to prison for the parole violation, but we can't tell you for how long he's going to go back. You'll have to wait for the administrative law judge ruling. The judge ruled in the courtroom, but he has to put something in writing too.

A week later we can see that he's been transferred to prison. I call the docs press office. They tell me to file a FOIL. That's August 14th, for what I'm guessing is probably a three or four page, at the most, ruling. So docs gives me the five-day response, tells me it'll be 20 days. 20 days hit in September. I've emailed them back four times now with no response. I'm probably not going to hire Mike for this one, because it's just-

David McCraw: Right.

Jeremy Boyer: We already know he's in prison, but it's just they can do it because they can. And that's, when John said be bold, I really echo that, because it's just tinkering around the edges is not going to stop. They know we have limited financial resources, and we just really need more bold action to really honest dealings in this area.

John: I look, Washington and-

Speaker 10: [inaudible 02:24:53] looking for access to the ALJ ruling.

John: Yeah.

Speaker 10: Okay. Well, you may not have to go through FOIL through that, you may have a first amendment right to have access to that I'm thinking.

David McCraw: Yeah.

Speaker 10: Because that clearly that is a function that very closely approximates a traditional judicial adjudication, and there is New York state case laws, it's been around for quite a while. It says the constitutional right of access, not just statutory disclosure on a FOIL, extends to determinations that are very similar to judicial functions, and that includes administrative proceeding. So, you may have that argument at your disposal.

Jeremy Boyer: Yeah.

John: I think that's a Syracuse case.

Speaker 10: But that's the thing is-

John: I think it's a Syracuse case.

Speaker 10: Honestly, the answer should have been the day the hearing happened.

David McCraw: Right.

Speaker 10: It's a simple answer. How long is he going to be in prison for? And we have to jump through all these hoops. And that's what's frustrating. I think I know where your department of health story is, and if it's the guy that tweets out the occasional...

John: But it's a-

Speaker 10: I've seen, I seen Glenn Coin. It's, I forgot what it, acid rain or something, and it's just, we'll let you know in a year if we have your documents, and then we'll let you know in a year if we have your documents.

John: There has to be penalties, and I think you might've referred to that earlier, the idea of Washington and New Mexico are two good States to look at, where there are penalties if you don't hit your deadlines. It has to be some greater power that is conferred on the public and taken away from the government.

David McCraw: Paul and Diane, you have any last remarks here?

Paul Wolf: Just two quick things. We know we talked about how it'd be great to give local governments more help in managing their records. And I read that Rochester, when they updated their whole FOIL processing system, they got \$300,000 from New York State Local Government Records Management Improvement Fund. I

don't know what that is, but maybe there's some way to utilize that more often. I guess they used it to help digitize records and just revamp how they process FOIL. I don't want to just constantly hit local governments. They need help with this. Maybe there's some way to utilize that grant program more for FOIL type stuff.

And secondly, I just can't say enough about the New York state committee and open government. I would email them frequently. They always quickly respond. Their opinions are a great resource. Their website's a great resource. I'd love to have them have enforcement powers, but I really appreciate all the work they do.

Speaker 10: What's your staffing right now? You?

Diane Kennedy: You. The staff is here.

John: The staff has arrived here.

Speaker 10: Are you getting are-

Speaker 11: [inaudible 02:27:36].

Speaker 10: You getting any indications of what's...

Paul Wolf: They haven't filled the position still, right? The executive director.

Speaker 12: No, the posting was put out at the end of August. Originally, the applications were due September 3rd, and then they bumped it to September 17th. That's...

Jeremy Boyer: That's all you know?

Paul Wolf: It's the governor's call. Correct? He makes the decision.

Speaker 12: It's a governor's office appointment. I mean, full disclosure, my names, and I put, I'm sure that's not a surprise to anyone, but it's a governor's office appointment. They can pick anyone they want. So we'll see. I know nothing.

Jeremy Boyer: Is there any indication of, regardless of they make this appointment, are they going to backfill if they promote you, are they going to backfill your position? Because I think it's staffing of your office could really help things too.

Speaker 12: I wouldn't count on it. And it won't be anytime soon. If I'm lucky enough to get the executive director position, I will not be surprised if I continue to be on my own for a while.

Jeremy Boyer: So you're New York state bar association colleagues ought to...

David McCraw: Step up for that one.

Jeremy Boyer: Step up for that one.

John: Yeah.

Speaker 12: It's just, yeah, I mean, certainly, I mean, people contact us all the time, "Oh, we wish you had enforcement authority." And I said, "I don't want enforcement authority unless you're going to give me another five or six attorneys minimum." I think about we have thousands of units of local governments. And just the numbers of phone calls I get, or letters, or emails asking me to investigate a complaint, and I have to tell them that I don't have investigatory authority. I don't have enforcement authority. I can answer your questions, I can give you guidance, I can help you try to solve your problems on your own. I can teach a man to fish. But I just, at this point, as I said, I... if someone else is appointed executive director, I will get to keep my job. So, then we'll have two. If I'm appointed as executive director, I would not be surprised if I'm on my own for a while.

Jeremy Boyer: Yeah.

David McCraw: Diane, last word for you?

Diane Kennedy: Civic education. Try to do everything that we can to instill interest in young people, in civic responsibilities. The school system is starting to get very interested in teaching civic education. The bar association, for a very long time, has had a law youth and citizenship program, which is terrific. And at our association, we've worked with them closely for years. We have a newspaper and education news literacy project. And I have someone who goes out to the schools to teach school kids, and college kids, about how to assess information presented in the news media. And when we do that, we sometimes use materials from the bar association from the Newseum in Washington, and we will contact the local newspaper to have an editor or reporter come with our news literacy educator. And what she does is she has the kids role play being a journalist, and covering a story, and finding out who's telling them the truth, how do they source information.

But that's very important. If you can give a newspaper as a gift to a young person in your life and get them to understand that access to public information belongs to them, and they need to safeguard it. It's very easy for these things to be taken away if we're not careful. So I think we all have a role in instilling that sense of responsibility and ownership in young people. And one more, and David will not do this for himself, but if you want to read a wonderful book about adventures in FOIL litigation and working for a newspaper, David published a book called "Truth in Our Times". It's a great read, and he does write about some of his adventures in FOIL litigation, as assistant general

counsel, assistant or deputy general counsel. Whatever you... for the New York times.

David McCraw: Well, I was about to say-. Thank you.

Diane Kennedy: It's a great read. I know he will not plug his own books, so I want to plug it for him.

David McCraw: Well, I was going to say until you did that, I was going to say, what a great note to end on. But now I say what a completely great, no [inaudible 02:32:18]. I want to thank a few people for the session today. Tom Richards has been here. Been the principal organizer for [inaudible 02:32:30] really state bar. And really been great throughout. I should thank Jonathan Manis from the Buffalo law school and Mike Grygiel, who worked with me and Cynthia in putting together the panels for this, and that was so important. And of course thank LaVonda, and Syracuse for hosting it. Really appreciate it. As I said, we want to bring in voices from around the state, and we've certainly heard from people here and come away with a lot of good ideas about how we think about this as an element in making sure that local journalism stays vital in the state. So thank you to the panel. Please join us for the reception afterwards, if you can stay around. So, thank you.

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