



NEW YORK STATE
BAR ASSOCIATION

Report and Recommendations of the Task Force on Free Expression in the Digital Age

June 2021

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

The Crisis in Local Journalism

JUNE 2021

**Approved with amendment by the New York State Bar Association
House of Delegates on June 12, 2021.**

The report was approved by the Association’s House of Delegates on June 12, 2021, subject to an amendment which eliminated Recommendations III.C.1-4 concerning the Freedom of Information Law (“FOIL”) and Recommendations IV.B.1-3 concerning the Open Meetings Law (“OML”).

The eliminated recommendations are specific to the following “redlined” edits in the report: deleted references to the eliminated recommendations in the Table of Contents at page 3; deleted references to the eliminated recommendations in the Introduction and Executive Summary at pages 11 and 12; deleted the recommendations for FOIL reform at pages 22 through 25, with associated footnotes; and deleted the recommendations for proactive transparency efforts at pages 26 through 27, with associated footnotes. The redlined text in this report reflects the elimination of those recommendations.

CONTENTS

| | |
|--|-----------|
| MEMBERS OF THE TASK FORCE | 4 |
| ACKNOWLEDGEMENTS | 7 |
| INTRODUCTION | 9 |
| I. EXECUTIVE SUMMARY | 10 |
| II. BACKGROUND ON TRENDS IN LOCAL JOURNALISM | 12 |
| A. Data on the Decline | 12 |
| B. Why Newspapers Matter | 14 |
| C. Is There a Local News Crisis in the Media Capital of the World? | 15 |
| D. What’s the Bottom Line? | 16 |
| E. Insurance | 16 |
| III. FREEDOM OF INFORMATION LAW | 17 |
| A. FOIL’s Purposes and Operation | 17 |
| B. Overview of FOIL’s Deficiencies | 18 |
| 1. The Absence of Enforceable Timetables for Disclosure | 18 |
| 2. Weak Provisions for Attorneys’ Fees | 20 |
| 3. Withholding Entire Documents In Lieu of Redactions..... | 20 |
| IV. PRO-ACTIVE TRANSPARENCY EFFORTS | 21 |
| A. Background | 21 |
| V. NONPROFIT NEWS ORGANIZATIONS | 22 |
| A. The Growth of Nonprofit Journalism..... | 22 |
| B. The Challenges Facing Nonprofit News Organizations..... | 24 |
| C. Ways in Which the Bar Association Can Assist | 25 |
| VI. DISCOUNT AND PRO BONO LEGAL SERVICES | 26 |
| A. Background | 26 |
| B. Recommendation..... | 27 |
| VII. THE NEW LAWS | 28 |
| A. Libel and anti-SLAPP | 28 |
| B. Section 50- a..... | 29 |
| APPENDIX A: Resources | 29 |

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

**Cynthia S. Arato, Esq.
Co-Chair**

**David E. McCraw, Esq.
Co-Chair**

Hon. Rolando T. Acosta*

Mark H. Alcott, Esq.

Jennifer A. Borg, Esq.

Joseph M. Finnerty, Esq.

Hon. Victoria A. Graffeo

Michael J. Grygiel, Esq.

Caitlin J. Halligan, Esq.

Susan L. Harper, Esq.

Hon. Barbara Jaffe*

Joel L. Kurtzberg, Esq.

Jonathan Matthew Manes, Esq.

Patricia T. Northrop, Esq.

Lynn Beth Oberlander, Esq.

Hon. Karen K. Peters

Prof. LaVonda Nichelle Reed

Hon. Robert S. Smith

Kenneth G. Standard, Esq.

Nabiha Binte Syed, Esq.

Executive Committee Liaison

Margaret J. Finerty, Esq.

Non-Attorney Advisors

Errol Lewis

Judy Patrick

Rex Smith

In Memoriam

G. Robert Witmer, Jr., Esq.

NYSBA Staff

**Thomas J. Richards, Esq.
Staff Liaison**

**Susan DeSantis
Chief Communications Strategist**

**Eunice Bencke
Administrative Support**

**Alexander Dickson
Publications Copy and
Content Editor**

* Hon. Rolando T. Acosta abstained from voting on Section III of the Report; Hon. Barbara Jaffe abstained from voting on Sections III, IV, and V of the Report.

ACKNOWLEDGEMENTS

The Task Force on Free Expression in the Digital Age would like to thank Pat Northrop, Mike Grygiel, Jonathan Manes, Al-Amyr Sumar, and Susan DeSantis for their invaluable work in assisting Task Force co-chairs Cynthia S. Arato and David E. McCraw in drafting the report. The Task Force would also like to thank the guest speakers and panelists who participated at the Task Force’s panels, open meetings, and forums, including Prof. Penny Abernathy (“The Economics of News Organizations in the Digital World”); Prof. LaVonda N. Reed, Jeremy Boyer, Michael J. Grygiel, Roy Gutterman, Diane Kennedy, John Lammers, Kristin O’Neill, Kathryn Sheingold, and Paul Wolf (“FOIL and the Future of Local Journalism: Rethinking Access to Information in a Digital Age”); Hon. Rolando Acosta, Dean Gillian Lester, Paul Bass, Carroll Bogert, Jennifer Borg, David Bralow, Sharon Chan, Jennifer Preston, Dick Tofel, and John Wotowicz (“The Crisis in Local Journalism: Are Nonprofits the Answer?”); Margaret Sullivan, Joseph Finnerty, Sandra S. Baron, David Donovan, Rex Smith, and Megan Meier (“Rethinking Libel Law in a New Era of Journalism”); David Bralow, Katie Fallow, Mark Howard Jackson, and Katie Townsend (“Pro Bono and Low-Cost Legal Services for Small and Nonprofit New Organizations”); Lynn Beth Oberlander, Saul Shapiro, Ernest Hart, Hon. Paul McDonnell, Omar Mohammedi, Rachel Strom, and Al-Amyr Sumar (“From Body Cam Footage to Sealed Court Records: Rethinking Access Law in a Digital Age”); and Cam McDonald, Dan Clark, Kristin O’Neill, Ava Ayers, John Rager, Carey A. Merrill, Diane Kennedy, Rex Smith, Stephanie Delsignore, Camille S. Jobin-Davis, Erika Lorshbaugh, Justin Harrison, Lee Rowland, and Pauline (“Forum on Transparency”). The Task Force also thanks the staff and leadership of Syracuse University College of Law and Columbia Law School for graciously hosting Task Force programs.

Introduction

EDITOR’S NOTE: The Task Force submitted an earlier version of this report to the House of Delegates at its June 2020 meeting. After delegates voted to amend a section dealing with New York’s anti-SLAPP law and had certain questions about other sections, that version of the report was tabled by the House. Since that time, New York has enacted two new laws relevant to the report—one concerning anti-SLAPP and the other concerning the Freedom of Information Law. This revised report thus narrows the topics for consideration by the House of Delegates. The report was approved by the Association’s House of Delegates on June 12, 2021, subject to an amendment which eliminated certain recommendations concerning the Freedom of Information Law (“FOIL”) and the Open Meetings Law (“OML”).

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

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

Nonetheless, the Task Force recognized that the law and the organized bar have a role to play in alleviating the crisis. Local journalism remains the heartbeat of civic engagement in New York’s towns and cities. Local news organizations not only inform communities on the issues and events that have the most immediate impact on citizens’ lives, but they also play a vital role in holding governments accountable. In examining the current state of local journalism in New York, the Task Force recognized that financially weakened news organizations are susceptible to threats of libel suits and other claims that often silence important reporting. News organizations also encounter roadblocks and frustrations in trying to get at government information, obstacles that seem baked into the Freedom of Information Law (“FOIL”) and the FOIL request system, or arise from the law’s implementation by agencies, its interpretation by the courts, or a lack of resources for the government’s FOIL officers. Few struggling organizations have the resources to challenge in court improper denials of access or delays. Important as well is the body of law that dictates, independent of FOIL, what information should be available proactively to journalists and citizens. Technology

empowers easy access to governmental data, but there needs to be a legal framework in place to ensure that information is available, up to date, and distributed as widely as possible. Increasingly, nonprofit news organizations are being formed to fill the gap left by the decline of traditional media, and their development should be encouraged as a public good. In addition, these nonprofits, along with for-profit local news entities, would benefit from legal assistance to facilitate their formation and continued operation.

Over the course of its work, the Task Force convened forums and meetings on the reform of New York's libel laws; the reform of FOIL and access to court records and proceedings; the status of government transparency outside of FOIL and ways to encourage and increase the release of government records and data to the public; the rise of nonprofit news organizations; and initiatives designed to bring pro bono and low-cost legal services to news organizations. The Task Force met with Professor Penelope Abernathy of the University of North Carolina, a leading scholar in the field, to learn directly about her research on the decline of local journalism. The Task Force also heard from a range of journalists, media lawyers, nonprofit publishers, and public interest groups.

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

I. Executive Summary

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

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

FOIL reform: New York’s Freedom of Information Law, enacted in 1974, has long been a valuable tool for journalists to use in their coverage of local and state governments. It was written with a presumption that governmental records should be public unless one of the statute’s enumerated exceptions applies, and that citizens would enjoy the benefits of a widely open government. The reality has become much different. The Task Force repeatedly heard from journalists and others about the flaws and failures of FOIL. Among the key problems: extended delays in getting agency responses, a lack of resources in both staffing and technology for FOIL units in their respective agencies, aggressive deployment of the exemptions to deny access at many agencies or local governmental bodies, and a weak statutory provision for shifting legal fees from the requester to the agency when the requester is forced to go to court to get documents. Because of the financial restraints most news organizations now work under, challenging FOIL denials through an Article 78 proceeding is increasingly rare. In its initial report, the Task Force also called for reform of Section 50-a of the Civil Rights Law, which exempted from FOIL and cloaked in secrecy much police misconduct and police disciplinary processes. The law had become a major obstacle for news organizations providing oversight to the activities of local police agencies. The Task Force’s initial report called for its elimination and advocated for the position that the release of the personnel records of the police should be governed by the statutory scheme set forth in FOIL. In June 2020, the State Legislature passed a bill, which was then signed by the governor, largely incorporating the changes being proposed by the task force.

Proactive transparency: New York has shown a commitment to make governmental data more readily available online. That is an important development for news organizations with limited resources and for citizens, because it frees journalists and citizens from the regimen of FOIL requests or visiting government offices to get information. The Task Force believes those efforts at proactive transparency can be enhanced. Journalists and public interest groups have expressed concerns that truly valuable information is not being included in the data portals and that many local governments have been notoriously slow to adopt transparency initiatives or lack the technology to facilitate access to information. Disclosure initiatives should not be judged simply by the volume of data made public but by the value of the information being made available.

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

Expansion of legal services: Outside of the national press, the journalism industry is populated today with startup news entities and traditional news outlets that have experienced significant financial troubles over the past decade. Both of those groups play a vital role in local democracy and the ability

of citizens to have access to independent and comprehensive coverage of local government and politics. While journalism does not fall in any traditional category of need for the provision of legal services, the Task Force believes that providing legal assistance to news organization contributes to the public good. The Task Force recommends that the Bar Association create a legal referral network devoted to journalism clients and encourage practitioners to provide pro bono or discounted services to such clients. The needs of news organizations, especially nonprofit startups, extend beyond the usual areas of media law like libel and FOIA and encompass areas like employment, incorporation, and taxes. A NYSBA-sponsored referral service would not only assist in getting needed legal services to journalists and news organizations but stand as a distinguishing symbol of the Bar Association's commitment to a free press.¹

II. Background on Trends in Local Journalism

Local journalism has been in a state of crisis for the past 15 years, fueled by intense disruption and financial distress caused by the ascendancy of search engines and digital platforms that deliver news and entertainment in various forms. During this time, local news outlets have faced crushing competition from these platforms for both readers' attention and advertising revenue. While New York's local newspapers remain an important vehicle for advertising and publication of legal notices, the financial strain has caused local news organizations to shut their doors at alarming rates, leaving many U.S. communities without a daily news outlet, and creating so-called "news deserts."²

This trend has consequences for our nation, since local journalists are at the frontline of communities, investigating and delivering the news that matters most to residents, and which leads to greater civic engagement and community bonds.³

A. Data on the Decline

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

- The nation has lost 2,300 newspapers since 2008, leaving only 1,700 dailies and 5,000 weeklies in existence.
- More than one in five newspapers has closed over the past 15 years. That has left half of the 3,143 counties in the country with only one newspaper.⁴

1 The Task Force's initial report also focused on libel reform in the form of amendments to the State's anti-SLAPP laws, with the goal of reducing the "chilling effect" that threatened or actual, but meritless libel litigation can have on news organizations that wish to cover difficult but necessary stories. In November of 2020, while this revised report was being prepared for submission to the House of Delegates, Governor Cuomo signed into law amendments to the anti-SLAPP law that incorporated the main changes the Task Force had endorsed for inclusion in this report.

2 Penny Muse Abernathy, "The Expanding News Desert," School of Media and Journalism, Center for Innovations and Sustainability in Local Media, UNC, 2018 at 16.

3 "Putting a Price Tag on Local News," Knight Foundation, <https://knightfoundation.org/wp-content/uploads/2019/11/Putting-a-Price-Tag-on-Local-News-final-updated.pdf>, at 1, n. 6.

4 *Id.* at 8.

- Almost 200 of the 3,143 counties in the country have no newspaper at all, affecting 3.2 million people.⁵
- Many of the surviving newspapers are ghosts of their former selves with staffs so “dramatically pared back that the remaining journalists can’t adequately cover their communities.”⁶ It is estimated that staff has been cut in half at as many as 1,500 of the newspapers.⁷
- During a tumultuous decade and a half that saw a precipitous drop in print advertising, the largest 25 companies took control of newspapers at an astonishing pace. By 2018, these companies owned nearly one-third of all papers, up from 20 percent in 2004. When it comes to dailies, the numbers are even more striking—two out of three of all daily newspapers, accounting for 812 publications, are owned by the top 25 firms.⁸
- Chain ownership has led to publications managed by out-of-town editors with less knowledge of local issues or connection to residents’ concerns.
- Newspapers have retreated from outlying circulation areas that are less desirable to advertisers, helping expand news deserts across wide swaths of the nation.
- Cities with rival newspapers were once the norm, but now there are fewer than a dozen cities with competing publications.
- The nation has lost more newspaper jobs than coal-mining jobs.⁹

⁵ Abernathy, *supra* n. 2, at 24.

⁶ *Id.* (the analysis focuses on local newspapers and does not include The New York Times, Wall Street Journal, and USA Today or shopping circulars, magazines, or specialty publications.)

⁷ *Id.* at 14.

⁸ *Id.* at 31.

⁹ *Id.* at 27; *see also* American Society of News Editors, 2008 and 2015 Newsroom Diversity Survey Census, 2008, 2015, <https://www.asne.org/diversity-survey-2008>, <https://www.asne.org/diversity-survey-2015>; Bob Papper, “TV News Employment Surpasses Newspapers,” Radio Television Digital News Association/Hofstra University Newsroom Survey, April 16, 2018; Bureau of Labor Statistics, Employment Statistics Survey, 2018.

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

- There were only 303 newspapers (54 dailies and 249 weeklies) still publishing in the state in 2019 compared to 501 (62 dailies and 439 weeklies) in 2004, a 40 percent decrease.¹⁰
- New York has one county without a newspaper and 13 with just one newspaper, and most of those 13 are weeklies that don't cover all of the applicable counties.¹¹
- As of 2018, the top 25 newspaper chains owned 61 of New York's newspapers, which amounts to one in five.¹²
- In 2004, New York newspaper publishers distributed 9.3 million copies. By 2019, that was slashed to 3.4 million, a decrease of 63%.¹³
- New York lost 190 weekly newspapers between 2004 and 2019.¹⁴ Thus, one of the most populous states (with 20 million residents) was also one of the states that saw the most weeklies go out of business.

B. Why Newspapers Matter

Research dating back to the 1970s shows that strong newspapers foster a sense of geographic identity and nurture social cohesion and grassroots political activism.¹⁵ They do this by covering local developments over which communities can bond; informing citizens;¹⁶ demanding accountability from local leaders;¹⁷ and promoting fiscal responsibility and governmental efficiency.¹⁸ When local newspapers shrink, fewer candidates run for local office and voter turnout suffers.¹⁹ Even newspaper advertising performs an essential function: it helps a community's economy to grow by connecting businesses with consumers.²⁰

A 2011 report by the Federal Communications Commission found that local newspapers are the best medium to provide the public service journalism that (1) shines a light on the major issues confronting communities and (2) gives residents the information they need to solve their problems.²¹ These

10 Abernathy, *supra* n. 2, at <https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9>.

11 *Id.* at <https://www.usnewsdeserts.com/states/new-york/#1536357227273-1fd2118-6dc6>.

12 *Id.* at <https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9>.

13 *Id.* at <https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9>.

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

15 *Id.* at 5.

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

17 Why Local News Matters, and What We Can Do to Save It, https://www.nysba.org/Journal/2019/Dec/Why_Local_News_Matters_and_What_We_Can_Do_to_Save_It/, at 9.

18 *Id.* at 11.

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

20 Abernathy, *supra* n. 2, at 5.

21 *Id.* at 8; see also Steven Waldman, "The Information Needs of Communities: The changing media landscape in a

impacts disproportionately affect our nation’s most vulnerable citizens, as studies have shown that residents of news deserts are poorer, older and less educated than the average American citizen,²² and that residents of low-income areas have less access to traditional publications or digital startups.²³

The loss of newspapers in one state can affect residents in neighboring states. Officials at the Centers for Disease Control and Prevention, for instance, say that it’s harder to track the spread of disease without thriving newspapers. That’s because news stories traditionally served as an early warning system for the agency, and social media has not done as well in providing that service. Without help from newspapers in identifying and publicizing public health risks, there could be more outbreaks and epidemics.²⁴ One Stanford University economist recently documented how investigative journalism saved lives and averted environmental disasters.²⁵

The decline in local news is accompanied by a decline in readership, and print readers are disappearing at an even faster rate than print newspapers. Over the past 15 years, weekday circulation of dailies and weeklies declined from 122 million to 73 million, or 40%,²⁶ and the pace of the decline is accelerating.²⁷ If circulation continues to drop at the same rate, one-half of the surviving newspapers will fold by 2021, according to Nicco Mele, director of the Shorenstein Center for Media, Politics and Public Policy at Harvard University.²⁸

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

New York City is the media capital of the world, yet even in this city many communities lack sufficient local news coverage.²⁹ Here’s why:

- The *New York Daily News* (winner of 15 Pulitzer Prizes) was sold in 2017 to the news conglomerate Tribune Publishing (then named “Tronc”), the country’s fourth-largest newspaper chain. Tronc paid \$1 and assumed the newspaper’s liabilities. It cut the newsroom staff, which had already gone through many rounds of layoffs, leaving 50 journalists to cover the five boroughs.³⁰ By the time of its purchase, the publication’s circulation already had declined to 200,000 from a high of two million in the mid-

broadband age,” Federal Communications Commission, July 2011, https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

22 Waldman, *supra* n. 21, at 16.

23 Waldman, *supra* n. 21, at 17.

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

25 James T. Hamilton, *Democracy’s Detectives, The Economics of Investigative Journalism* (2016).

26 Abernathy, *supra* n. 2, at 10.

27 *Id.* at 14.

28 *Id.* at 14; *see also* Judith Miller, “News Deserts: No News Is Bad News,” Urban Policy, 2018, Manhattan Institute, October 2, 2018, <https://www.manhattan-institute.org/html/urban-policy-2018-news-deserts-no-news-bad-news-11510.html>.

29 Sara Rafsky, *Media Mecca or News Desert? Covering Local News in New York City*, CJR, Jan. 21, 2020, at 1, https://www.cjr.org/tow_center_reports/local-news-deserts.php.

30 Abernathy, *supra* n. 2, at 27.

twentieth century.³¹

- The *Wall Street Journal* eliminated its “Greater New York” section and the reporters who worked for the section were reassigned or laid off.
- The *New York Times* stopped publishing its standalone Metro Section in 2008 and cut the scope of its metro coverage substantially since then. The *Daily Beast* quantified what that meant: The *Times* published 153 metro stories in the last week of January in 2001; 102 in 2009; and just 48 in 2017.³²
- More than half of the staff at *AM New York* was laid off in October of 2019 after the newspaper was purchased by Schneps Media.³³ In December of 2019, Schneps also bought New York City’s other free daily, *Metro New York*.
- The Tow study, *Media Mecca or News Desert? Covering Local News in New York City*, found that criminal justice, civil courts, and healthcare were going unreported. Several news outlets said environmental and climate change coverage was also lacking. There is comparatively less coverage of Staten Island than the other boroughs. Government meetings go largely unreported.³⁴
- Hardly any of the news outlets in the Tow study said they had much time for investigative stories.³⁵

D. What’s the Bottom Line?

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

E. Insurance

The ability of news organizations to withstand unwarranted litigation often depends on the adequacy of insurance coverage. For smaller news organizations facing difficult economic times, the price of policies needed to address the full scope of risk can itself be prohibitive. Lawyers who regularly represent news organizations repeatedly raised this concern to the Task Force.

31 Jaclyn Peiser, *Daily News Newsroom Cut in Half by Tronc as Top Editor Is Ousted*, The New York Times, July 23, 2018, <https://www.nytimes.com/2018/07/23/business/media/tronc-daily-news-layoffs.html>.

32 Paul Moses, *The New York Times Turns Its Sights Away from New York City*, The Daily Beast, Jan. 21, 2020, <https://www.thedailybeast.com/the-new-york-times-turns-its-sights-away-from-new-york-city>.

33 Marc Tracy, *A New Owner, and Layoffs, for amNewYork*, The New York Times, Oct. 11, 2019.

34 *Id.*

35 *Id.*

Many general liability policies exclude coverage for media liability. Specific media liability policies are typically expensive. Even when such coverage exists, coverage disputes can limit or eviscerate the value of such coverage.

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

III. Freedom of Information Law

A. FOIL’s Purposes and Operation

The purpose of FOIL is to promote the public’s right to be informed about the processes of executive branch decision-making by affording access to government records.³⁶ The statute was enacted by the Legislature because access to governmental information “should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.”³⁷ In signing FOIL into law in 1974, then Governor Wilson stressed the importance of open government to a free society and the need for FOIL to engender public understanding and participation.³⁸ Accordingly, the Court of Appeals has consistently held “that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.”³⁹ The burden of proof rests upon the government agency claiming the exemption to establish that the requested material is exempt from disclosure.⁴⁰

The press—including community newspapers—has routinely relied on FOIL as a means of obtaining information from and reporting on the activities of a wide array of executive agencies at the State, county, and municipal levels of government. For example, FOIL requests have resulted in public access to booking logs and arrest reports from local police departments and the New York State Police; criminal prosecution records from County District Attorneys’ offices; public school board planning and personnel decisions; the dispensation of State tax benefits in connection with economic zone revitalization initiatives; Health Department investigation and oversight records, including restaurant inspection violation reports; real estate development applications and zoning approvals; and license and permit applications and permissions, for example.⁴¹

36 *Capital Newspapers, Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565 (1986); *Town of Waterford v. N.Y.S. Dep’t of Env’tl Conserv.*, 18 N.Y.3d 652, 656–67 (2012) (FOIL is premised “on the overriding policy consideration that the public is vested with an inherent right to know” government operations)

37 Legislative Declaration, Public Officers Law § 84.

38 Governor’s Memorandum 1974 N.Y. Laws, Chs. 578, 579, 580, 1974 Legis. Ann., at 392, cited in *Russo v. Nassau Community College*, 81 N.Y.2d 690, 697 (1993); see also *Capital Newspapers*, 67 N.Y.2d at 565–66 (FOIL ensures public oversight of the “day-to-day functioning of state and local government [,] thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities”).

39 *Newsday, Inc. v. Sise*, 71 N.Y.2d 156, 150 (1987), cert. denied, 486 U.S. 1056 (1988).

40 Pub. Off. Law § 89(4)(b); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 697–98 (1993).

41 See, e.g., *N.Y. Civ. Lib. Union v. City of Schenectady*, 2 N.Y.3d 657 (2004) (incident reports prepared by city police

B. Overview of FOIL's Deficiencies

New York State's community newspapers and the public they serve have a direct and vital interest in an effective and reliable Freedom of Information Law. In the course of the Task Force's public hearings, however, journalists and press lawyers complained about the ineffectiveness of FOIL. They pointed to undue delay and the aggressive use of exemptions by many agencies.⁴² At the same time, a lack of resources devoted by governmental bodies to FOIL offices and necessary technology to manage the information flow has compounded the problems, making it harder for requesters to get timely and considered responses even when FOIL officers are serious about disclosure. Requesters also contend with the reality that court decisions have broadened the authority of agencies to deny access to documents in a variety of circumstances.

The Task Force focused on two deficiencies in FOIL: (1) requesters' inability to get timely responses to FOIL requests and (2) the difficulty that requesters face in recovering attorneys' fees when prevailing in a FOIL action. In addition, certain court decisions have abetted the lack of disclosure. FOIL has long been understood to require agencies to redact documents and produce them to requesters once properly withheld information is removed. That was seen as the preferred, and in fact required, alternative to withholding an entire document. Court decisions have now cast doubt on the use of redaction to enable the partial release of documents. The Task Force also devoted significant time and discussion to Section 50-a of the Civil Rights Law, which shielded the personnel records of law enforcement officers, and was pleased when the Legislature revoked the statute and amended FOIL's provisions to ensure greater access to law enforcement disciplinary records. Those changes largely tracked the recommendations in the Task Force's original report.

1. The Absence of Enforceable Timetables for Disclosure

FOIL's provisions governing the timing of agency disclosures permit delays that can severely diminish if not extinguish altogether the topical news value of requested information. The procedures

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

⁴² Indeed, professional journalists in this State have described government agencies' all-too- frequent noncompliance and delay tactics in objecting to FOIL's ineffectiveness as a means of obtaining the release of non-exempt information. *See, e.g.*, Mark C. Mahoney, *Uphill Battle for Transparency in Government Continues*, The Daily Gazette, Mar. 15, 2019, <https://perma.cc/KFP6-SENH> (stating that government officials regularly decide not to follow FOIL and noting that "[a]lmost every day, journalists and citizens encounter public officials who routinely deny access to records without trying to comply with the law, who refuse to follow established deadlines for notification and compliance. Citizens routinely have to fight for basic public documents."); Jerry Moore, *Partly Cloudy on Sunshine Week*, Watertown Daily Times, Mar. 13, 2019, <https://perma.cc/KFP6-SENH> (stating that because "New York has an incredibly dysfunctional system when it comes to enforcing the state's FOIL . . . there's little incentive for government authorities in New York to adhere to FOIL").

governing an agency's response to a FOIL request are set forth in § 89(3)(a) of the statute. Under Pub. Off. Law § 89(3)(a), an agency must respond within five business days of receipt of a written request. That response must grant the request, deny the request in writing, or—in a particularly troublesome alternative—provide a statement of the *approximate* date by which the request will be granted or denied, which must be “reasonable under the circumstances.”⁴³ *Id.* This provision means that agencies never confront a firm deadline to make a determination in response to the request. If and when the agency decides to grant the request (in whole or in part), it must do so within 20 days or, if there are reasonable circumstances preventing the agency from complying with that deadline, inform the requester in writing of the reason the deadline cannot be met and provide a date certain “within a reasonable period” when access will be granted.⁴⁴ *Id.*

As a practical matter, the interplay of the above provisions has licensed some government agencies to respond to pending FOIL requests—whether discrete or voluminous—by periodically issuing standard form letters acknowledging receipt of the FOIL request and setting rolling deadlines for a response. Whether those delays are caused by a lack of resources at an agency or a willful and improper attempt by an agency to keep sensitive information out of the public domain, the effect for news organizations is the same: the public is denied timely access to potentially newsworthy information.⁴⁵

Unreasonable delays in disclosure effectively amount to denials of public access and contravene FOIL's premise that “the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.”⁴⁶

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Courts have repeatedly recognized that temporal guarantees are indispensable to effective news reporting. As the Supreme Court reasoned in *Bridges v. California*, 314 U.S. 252, 269 (1941), a ban on reporting news “just at the time [the] audience would be most receptive” would equate to “a deliberate statutory scheme of censorship.” *See also United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972) (“timeliness of publication is the hallmark of ‘news,’ and the difference between ‘news’ and ‘history’ is merely a matter of hours”); *Grove Fresh Distributors, Inc. vs. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”) *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) (“The peculiar value of news is in the spreading of it while it is fresh.”).

⁴⁶ *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (citing *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (internal quotation marks omitted). When former Governor George Pataki signed the current version of Pub. Off. Law § 89(3)(a) into law in 2005, he noted that avoiding delays in obtaining responsive documents would “ultimately [] result in a more open and accountable government. In addition, the new provision ensuring that records are timely disclosed after an agency determines to grant a FOIL request will prevent unjustified delays in turning over material that FOIL requires to be disclosed to the public.” Mem. filed with Assembly Bill No. 6714, at 3, Bill Jacket, 2005 N.Y. Laws, ch. 22. In practice, and as discussed above in the text, the 2005 amendment has resulted in exactly the opposite by facilitating agency delays in making records available to the public under FOIL.

2. Weak Provisions for Attorneys' Fees

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

The statute's weak provisions for awarding fees to requesters when they prevail in FOIL litigation contribute to that reality. Requesters have no assurance of a fee recovery in even the most meritorious cases, making it financially perilous for requesters to initiate even plainly meritorious litigation. The Legislature recognized when adopting FOIL's current attorneys' fees provision in 1982, that a fee-shifting provision was needed to combat a "sue us" attitude within those governmental agencies that did not want to release records.⁴⁷

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

3. Withholding Entire Documents In Lieu of Redactions

Recent judicial decisions have suggested that agencies can withhold all parts of an otherwise public document if any part of the document contains exempt information, even though standard practice under FOIL has been, when practicable, to redact the exempt material and release the remainder of the document. Accordingly, there is now significant doubt about the longstanding and fundamental principle that agencies should only refuse to disclose particular information that squarely falls within an exemption enacted by statute. In a 2018 decision, the Court of Appeals was asked to decide whether police personnel records, which are generally exempt from disclosure under Section 50-a of the Civil Rights Law, could be released once information identifying the officers was redacted.⁴⁸ The Court determined that a police agency was not required to use redaction to disclose police personnel records.

The Appellate Division, First Department, has taken the reasoning of the Court of Appeals a significant step further, holding that the use of redaction to allow for the disclosure of otherwise public documents is required in only one circumstance: "Redactions to records sought under FOIL are available only under the personal privacy exemption."⁴⁹ Under this decision, agencies can now

⁴⁷ See *N.Y. State Defenders Ass'n v. N.Y. State Police*, 87 A.D.3d 193, 195 n.2 (3d Dep't 2011) (quoting Assembly Mem. in Support, at 4, Bill Jacket, 1982 N.Y. Laws, ch. 73); see also S. Budget Report on Bills, at 11–12, Bill Jacket, 1982 N.Y. Laws, ch. 73.

⁴⁸ See *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556 (2018).

⁴⁹ *Judicial Watch, Inc. v. City of New York*, No. 160286/17 (1st Dep't Dec. 17, 2019).

withhold documents if the documents contain any information exempt from disclosure under a different FOIL exemption.

Advocates for requesters believe those decisions not only undermine public access but are at odds with the statutory language of FOIL’s § 87(2), which states, “Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access records *or portions thereof* that” fall within a statutory exemption (emphasis added). In addition, they point to *Gould v. N.Y.C. Police Dept.*, where the Court said, “If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material.”⁵⁰ If redaction is in fact no longer part of New York law, it puts the state at odds with the standard practice used under the federal Freedom of Information Act and under the open records law of multiple states.⁵¹ As Judge Rivera said in her dissent in *New York Civil Liberties Union*, the majority’s opinion could mean that “redaction is unavailable even where it may be the sole method to effectuate the statutory goal of promoting government transparency to hold the governors accountable to the governed.”⁵² (internal quotation marks omitted).

IV. Proactive Transparency Efforts

A. Background

Proactive disclosures practices—that is, an agency’s disclosure of information without waiting for a FOIL request—is an important ingredient in helping assure that necessary government information is available to journalists and to citizens.⁵³ In 2013, Governor Cuomo issued Executive Order 95, “Using Technology to Promote Transparency, Improve Government Performance and Enhance Citizen Engagement.” The principal focus of the executive order was the creation of an open data website, which would allow New York citizens to access governmental data without the need for a FOIL request. Through the New York State Office of Information Technology and Services (“ITS”), the state launched OpenNY. The City of New York has undertaken a similar effort, launching NYC

50 89 N.Y.2d 267, 275 (1996)

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

52 32 N.Y.3d at 573 (internal quotation marks omitted).

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

Open Data. The State Comptroller provides similar open data through Open Book New York. Agencies have been working to identify information that can be made available through these open sources.

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

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

V. Nonprofit News Organizations

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

A. The Growth of Nonprofit Journalism

There are now more than 200 nonprofit news organizations throughout the country, employing over 2,200 journalists and generating revenue of over \$350 million.⁵⁴ These nonprofit organizations have worked to fill critical gaps in news coverage and have made significant impact.

⁵⁴ INN Index, <https://inn.org/innindex/>; Gerry Smith, *Local News in America Is Dying. Charity Might Save It*, Bloomberg, Apr. 25, 2019, <https://www.bloomberg.com/news/articles/2019-04-25/silicon-valley-is-killing-local-news->

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

Nationally, a number of exciting initiatives have emerged to support local journalism, including (1) the American Journalism Project (<http://www.theajp.org/>), a venture philanthropy fund that invests in nonprofit local news startups and provides them with business and technical expertise; (2) the ProPublica Local Reporting Network (<https://www.propublica.org/local-reporting-network/>), an arm of the nationally known investigative reporting nonprofit ProPublica, brings its investigative resources to local reporting entities to help cover one topic in-depth; (3) Report for America (<https://www.reportforamerica.org/>), which places reporters in existing newsrooms in need, and funds half of their salaries, in order to foster reporting as public service; (4) NewsMatch (<https://www.newsmatch.org/>), a national matching-gift campaign launched by the Knight Foundation to grow fundraising capacity in nonprofit newsrooms and promote giving to journalism among U.S. donors (available to members of the Institute for Nonprofit News); and (5) Philadelphia's Solutions Journalism project, which brought together 15 news organizations to report for one year on a single topic of prisoner re-entry into society and is premised on the idea of collaboration and creating local news ecosystems.⁵⁵

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

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

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

[can-charity-bring-it-back](#).

⁵⁵ See Philadelphia's Reentry Project, <https://thereentryproject.org>.

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

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

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

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

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

B. The Challenges Facing Nonprofit News Organizations

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

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

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

for-Profit Corporation Law and the federal tax code.

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

4. Perceived First Amendment barriers to government assistance. Both journalists and the public at large may believe that governments must stay out of local journalism because governments cannot support journalistic efforts consistent with the First Amendment. There certainly are constitutional barriers to what government can do to help solve the crisis in local journalism, but we have seen both in the U.S. (with some public support for public broadcasting) and abroad (with organizations like the BBC) that government support can be undertaken without compromising journalistic independence. In addition, it is possible to consider non-content-based legislative initiatives, like tax relief, that do not raise the same concerns about independence.

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

C. Ways in Which the Bar Association Can Assist

Rather than make unique recommendations in respect to nonprofits, the Task Force instead underscores that the recommendations identified throughout this report in regard to libel reform, amendment of FOIL, insurance, and pro bono initiatives, will enhance the burgeoning work of nonprofits. In addition, we believe NYSBA has a role to play in initiating an important public conversation about the viability of public funding of nonprofit news organizations (and, more broadly, news organizations however they are organized as incorporated entities). The issues are complicated, and for that reason the Task Force recommends that NYSBA launch a longer-term study of the feasibility of legislative support for local news, including whether New York State could replicate New Jersey's Civic Information Consortium in some shape or form or provide unique tax incentives for subscribers to news outlets or to owners who donate community business assets and seed philanthropic trusts to meet local needs. There are a variety of proposals for governmental support that are actively being discussed.⁵⁶ NYSBA, as the preeminent association of lawyers in the state, is uniquely situated to help New York explore the possibility of public support because of its expertise in the areas of law that would be implicated and the association's broader concern for civic engagement, checks and balances on government, and the imperative of honest government.

⁵⁶ See Nicholas Lemann, *Can Journalism Be Saved?*, N.Y. Review of Books, Feb. 27, 2020.

VI. Discount and Pro Bono Legal Services

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

A. Background

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

However, it is not just high-profile or urgent matters that require legal support. While today’s news outlets tend to be less profitable than the media powerhouses of the past, they still have basic enterprise needs—contracts, tax, HR issues—that require legal support.⁵⁷ Thus, support is needed not just from the Bar’s media lawyers but from those with expertise in contracts, labor and employment, and other business areas.

Various models exist for providing free or low-cost legal services, and for connecting those in need of such services with those who provide them in various areas of the law. There are also similar efforts aimed at journalists. (*See Appendix A.*) The Student Press Law Center provides legal support for campus-based journalists. The Reporters Committee for Freedom of the Press (RCFP) recently launched the Local Legal Initiative, a foundation-funded initiative to embed legal resources in states most in need of them. However, this effort will only support five states initially, and New York is not among them. Moreover, there is only so much a single attorney can do to help an entire state’s worth of news outlets. In addition, law school clinics provide free legal services on a pro bono basis, in a variety of fields. In the last few years, a number of new clinics have launched with a focus on First Amendment free speech issues, some with funding from the Stanton Foundation; these include, in New York State, one at Cornell Law School⁵⁸ and the Civil Liberties & Transparency Clinic at University of Buffalo School of Law. The Yale Law School houses the Media Freedom Information and Access Clinic. Such clinics typically function as a small private law firm. The advantage is that they are generally free to those who qualify and are selected as clients. However, clinics may be limited by geography and bar admissions in terms of representing individuals or organizations in court, and they are further limited by the constraints of a student-driven resource whose primary

⁵⁷ *The Legal Needs of Emerging Online Media: The Online Media Legal Network After 500 Referrals*, Digital Media Law Project of the Berkman Center for Internet & Society at Harvard University (April 2014) at 15. “When the OMLN was launched [in 2009], the DMLP expected a majority of its work would involve urgent responses to legal threats. The DMLP was surprised to see how few matters required urgent referral, and how many matters were instead from clients proactively considering their legal needs.” And “. . . there remains much that has not changed in the nature and needs of journalism as it flourishes online. Rather, what has changed is journalists’ monetary ability to obtain counsel for the sorts of issues that these ventures have always faced.” *Id.* at 14.

⁵⁸ Clinics have been established across the country, including at Vanderbilt, Duke, and Arizona State.

purpose is pedagogical (i.e., they are not fully resourced year-round and are limited by student schedules).

A common theme with law school clinics and other projects such as the RCFP's Local Legal Initiative is their reliance on one or a few major funders. Like a poorly diversified stock portfolio, this can translate to risk and uncertainty for a project's long-term sustainability, as they are vulnerable to shifts in funders' priorities and resources, and funding is not guaranteed in perpetuity. As a result, those dependent on such gifts would be well advised to devote at least some time to fundraising to ensure their longevity.

B. Recommendation

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

- The Institute for Nonprofit News, formerly known as the Investigative News Network ("INN"), has partnered with the nonprofit Media Law Resource Center ("MLRC") to create a "Legal Connect" project that helps connect nonprofit news organizations that are members of INN with affordable counsel. INN membership is available to nonprofit news organizations.
- From 2009 to 2017, the now-defunct Online Media Legal Network provided a nationwide referral network to connect independent online journalists and journalism organizations with affordable legal services. The OMLN model is instructive. The referrals themselves were free; participating lawyers and firms were encouraged but not required to offer services pro bono. The network made over 500 referrals for over 260 clients. While the model was successful, it was forced to shut down when its funding was not renewed; however, the online portal still exists and could be reactivated if a new entity were willing to take it on.

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

The Task Force also recommends that NYSBA develop programs and initiatives to provide pro bono legal representation to local news organizations defending against SLAPP suits or seeking access to information. The Bar Association can sponsor programs specifically designed to educate practitioners outside of New York City on basics of media law. It can also encourage the recognition of assistance to organizations as important pro bono work, especially within New York's innovative

Pro Bono Scholars Program for third-year law students. Such programs would allow the Bar Association to form alliances with existing press-freedom groups that provide support to news organizations.

VII. The New Laws

A. Libel and anti-SLAPP

In its initial report the Task Force paid special attention to libel law in considering the impact of law on local journalism. In particular, as local news organizations faced new and daunting economic challenges, the threat or reality of libel suits took on new significance. In simplest terms, the Task Force sought to study how the fear of legal liability can lead publishers to avoid controversial topics or decline to investigate issues that may offend powerful interests in the community.

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

The Task Force, in its initial report, expressed concern that New York’s anti-SLAPP laws (Civ. Rights Law §§ 70-a, 76-a and C.P.L.R. 3211[g], 3212[h]) covered vindictive lawsuits seeking to stifle speech in a just single very narrow area: government petitioning activities. The laws did not cover lawsuits seeking to stifle speech on other matters of general public importance. The Task Force also found that laws did not provide clear timetables for early resolution of SLAPP suits or for mandatory attorneys’ fees (or any other mandatory compensatory award) to a defendant that wins dismissal of the SLAPP suit.

The Task Force recommended, in its initial report, that New York amend the anti-SLAPP laws to address these areas.⁵⁹ At its June 2020 meeting, the House of Delegates voted to amend the Task Force’s initial report by eliminating proposals for fee-shifting and for a mandatory stay of discovery. It then tabled the entire report because there were additional questions and time was short. In the weeks after the House meeting, the Legislature proceeded to pass an amendment to the anti-SLAPP laws. Governor Cuomo signed the bill into law in November 2020. Among other things, the new law expands the reach of New York’s anti-SLAPP rules to all matters of public concern and

⁵⁹ The Task Force was not unanimous in all of these recommendations. One Task Force member dissented from the recommendations regarding mandatory attorneys’ fees, the discovery stay, and the right to an interlocutory appeal and his dissent was included in the initial report.

imposes mandatory fee-shifting. The Task Force applauds the Legislature and the governor for their decisive action on this important piece of legislation and believe that the law will provide needed protection to news organizations across the state.

B. Section 50- a

The Task Force heard of widespread concerns with Section 50-a of the Civil Rights Law, which had come to broadly impede local reporting on matters relating to police and law enforcement. Section 50-a provided that personnel records of law enforcement officials were confidential and therefore not subject to disclosure under FOIL. In practice, the exemption was being used to withhold most documents that would reveal a police officer's disciplinary record and how the officer's police force dealt with the matter.⁶⁰ As applied in that broad manner, the law impeded meaningful community-based reporting on police activities and is out of step with laws in other large and diverse states that permit broad access to police disciplinary records.⁶¹

In its initial report, the Task Force proposed that § 50-a be reformed so that it could no longer be invoked as an exemption to FOIL. The Task Force believed that access to law enforcement personnel records should instead be governed by FOIL's traditional exemptions dealing with privacy and sensitive law enforcement matters. After the House of Delegates voted to table the initial report in early June, the Legislature voted to repeal § 50-a and amend FOIL to set out new rules governing access to law enforcement personnel records. The new provisions largely address the concerns that were central to the Task Force's proposal about § 50-a. The new provisions are designed to significantly broaden access by the public and by journalists to law enforcement disciplinary records. While the courts' interpretation of the provisions will ultimately determine how effective the new law is in enhancing transparency, the Task Force applauds the Legislature and the governor for making this important change in the law.

Appendix A

Resources

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

Pro Bono Legal Services

⁶⁰ See Report on Legislation, Civil Rights Committee and Committee on Criminal Courts, New York City Bar Association, May 2018, <https://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf>; 2018 Report to the Governor and Legislature, Committee on Open Government, December 2018, <https://www.dos.ny.gov/coog/pdfs/2018%20Annual%20Report.pdf>.

⁶¹ See, e.g., *Kalven v. City of Chicago*, 7 N.E.3d 741 (Ill. App. Ct. 2014).

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

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

Referral Networks

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

Grant-Making Foundations

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

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