STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December, 1986

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1986 REPORT TO THE GOVERNOR AND THE LEGISLATURE

SECTION I - OVERVIEW

The Committee on Open Government, originally designated as the Committee on Public Access to Records, has existed for more than a decade, having been created by the enactment of the Freedom of Information Law in 1974. From its start, the Committee has been a proponent not only of open government, but of good government as well.

Over the years, the role of the Committee has expanded and it has tried to adapt to the changing needs of society.

In 1974, the Committee performed its duties in relation to the Freedom of Information Law. In 1977, the Committee was given advisory authority under the Open Meetings Law. Oversight of the Personal Privacy Protection Law was added to the Committee's duties in 1984. Although the three statutes are designed to accomplish different goals, each involves an intent to ensure that government is accountable and fair. Each represents an affirmation that government is the public's business and, in the Committee's view, each symbolizes our confidence in democratic institutions.

More than anything else, the Committee believes that "sunshine laws" should be based upon common sense. Stated differently, records maintained by government should be available and meetings of public bodies should be open, unless the disclosure of records or public discussion of an issue would "hurt" either a person or a governmental process in a significant way. The general rule should be one of openness, and the capacity to withhold records or exclude the public from meetings should be based upon potentially harmful or damaging effects of disclosure.

Both the Freedom of Information Law and the Open Meetings Law are, in great measure, based upon presumptions of openness. All records are available under the Freedom of Information Law, except to the extent that one or more of the grounds for denial listed in that statute may properly be asserted. Under the Open Meetings Law, meetings of public bodies are generally presumed to be open, unless a ground for entry into a closed or "executive" session can be cited.

The courts have in many instances confirmed that rights of access should be the rule rather than the exception, and that the exceptions should be narrowly construed to guarantee openness and the successful implementation of the principles inherent in open government laws. The Court of Appeals in particular has unmistakably confirmed both the scope and intent of the Freedom of Information Law, holding that the statute:

> "expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies...The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning 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' and with an effective tool for exposing waste, negligence and abuse on the part of government officers...
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted...Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access...Moreover, because FOIL has made full disclosure by public agencies a public right, the

> status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions" [Capital Newspapers v. Burns, 67 NY 2d 562, 565-567 (1986)].

Similar in thrust is the Legislative Declaration that appears in the first section of the Open Meetings Law (Public Officers Law, Section 100):

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

The Committee believes that the Freedom of Information Law has generally worked well due to the language of the Law itself, its judicial interpretation and the activist role taken by the Committee. While problems will likely always arise, often those problems are the result of individual attitudes, agencies' workloads, or difficulties in interpretation that require the making of subjective judgments and which cannot adequately be addressed by legislation.

With regard to the Open Meetings Law, many have questioned whether the Legislative Declaration quoted earlier continues to be meaningful in view of an amendment to the Law enacted in 1985. That change in the Law enables a majority of members of legislative bodies who are adherents of the same political party to discuss virtually all issues that come before them in private. Thereafter, its public response to an issue might involve only a rubber stamping of a consensus reached during a closed "political caucus". Further, since the caucuses are completely exempt from the Law, there is no requirement that notice be given or minutes be taken. Therefore, deliberations leading to decisions can be conducted in private in their entirety.

The Committee has received reports of closed caucuses held to discuss issues that could only be characterized as public business. Although the political caucus does not appear to have been used widely as a vehicle for excluding the public from what otherwise would be open meetings, closed caucuses have been held in municipalities from Suffolk County to Erie County. Perhaps most importantly, unlike the purposes for which executive sessions may be convened, which are based upon potentially damaging effects of public discussion, a political caucus can legally be closed for any reason, or no reason at all.

In the next section of the report, the Committee will offer several legislative proposals designed to strengthen and clarify the Freedom of Information and Open Meetings Laws. Above all, the proposals are intended to be fair, to solve persistent problems, and to enhance the purposes for which those statutes were enacted.

SECTION II - LEGISLATIVE PROPOSALS

A. OPEN MEETINGS LAW

1. Political Caucuses

Background

Since its enactment, the Open Meetings Law has always exempted political caucuses from its provisions. The question that arose involved whether a majority of the members of a public body representing a single political party could cite the exemption to hold a political caucus when discussing public business. The answer initially was provided in 1981 in a decision rendered by the Appellate Division, Fourth Department. In brief, the Court found that the exemption for political caucuses applied only to discussions of purely political party business, and that discussions of public business by a majority of members of a public body representing one political party fell outside the scope of the exemption and constituted a "meeting" subject to the Open Meetings Law.

Specifically, it was determined that:

> "[A]n expansive definition of a political caucus, as urged by respondents, would defeat the purpose of the Open Meetings Law that public business be performed in an open and public manner (Public Officers Law, section 95), for such a definition could apply to exempt regular meetings of the Council from the statute. To assure that the purpose of the statute is realized, the exemption for political caucuses should be narrowly, not expansively, construed. The entire exemption is for 'deliberations of political committees, conferences and caucuses" (Public Officers Law, section 103, subd 2), indicating that it was meant to prevent the statute from extending to the private matters of a political party, as opposed to matters which are public business yet discussed by political party members. To allow the majority party members of a public body to exclude minor-

> ity members, and thereafter conduct public business in closed sessions under the guise of a political caucus, would be violative of the statute" [Sciolino v. Ryan, 81 AD 2d 475, 479 (1981)].

Several later decisions interpreted the Law in the same manner as Sciolino.

Notwithstanding the uniformity of the judicial decisions, in the legislation containing the 1985 amendment concerning political caucuses, it was stated that the courts misinterpreted the intent of the Legislature when it originally passed the law in 1976. The Law as amended states that:

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

Impact of the 1985 Amendment

As a result of the 1985 amendment, the members of a political party who serve on a legislative body can meet in private to discuss not only political party business, but matters of public business as well. In the Committee's view, the amendment simply makes it too easy for a public body (or a majority of its members) to exclude the public from its most significant deliberations. Further, it is difficult, if not impossible, to know when closed caucuses occur, for they are "exempt" from the Law. The procedural requirements otherwise applicable to meetings (i.e., notice, motions prior to entry into executive sessions, taking of minutes) are completely absent if and when political caucuses are conducted.

Although the amendment pertains to the Senate, the Assembly and local legislative bodies, the impact of the amendment upon local legislative bodies is significant, for it is possible that the deliberative process, from beginning to end, can be legally closed, except for a final public vote that merely ratifies decisions effectively made behind closed doors. Moreover, many local legislative bodies are dominated by one political party. Dozens consist solely of members representing one political party.

If indeed the 1985 amendment represents an effort to clarify the original intent of the Law, the Committee believes that such an intent is inconsistent with the legislative declaration set forth at the beginning the Law. Since the Open Meetings Law became effective in 1977, many public bodies have learned to live with both the letter and the spirit of the Law; many have learned that the Open Meetings Law is beneficial; scores have even acted to reject their authority to conduct closed political caucuses. Undoubtedly, government often deals with difficult problems. Often there is no clearly correct course of action to be taken. By deliberating in public and enabling the public to know that the tasks of government are difficult and complex, the public better appreciates the job that government must perform.

Although the amendment has clouded the Law, we believe that the Appellate Division, Second Department, in a decision later unanimously affirmed by the Court of Appeals was correct in its view that the Open Meetings Law was:

> "intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-

> making process that the Legislature intended to affect by the enactment of this statute" [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, 415, affirmed 45 NY 2d 947 (1978)].

Last Year's Proposal

In an effort to deal with the amendment concerning political caucuses, the Committee recommended a series of proposals to the Governor and the State Legislature. Although the Governor recommended legislation based upon the Committee's proposals, no legislative action was taken. The Committee sought to redefine the phrase "political caucus", require a public vote before a political caucus could be held, and it attempted to draw a line of demarcation between discussions of purely public business, and those issues of public business involving considerations of political party position or party strategy. Moreover, the proposal excluded the State Legislature.

Although so-called "good government groups" viewed the proposal as a step in the right direction, others offered criticism due perhaps to its complexity and because of the distinction in its treatment of the State Legislature and legislative bodies at the local government level.

1986-87 Proposal

The Committee recommends that the Open Meetings Law be amended to reflect the principles upon which the Law is founded, a presumption of openness, irrespective of the party affiliation of members of legislative bodies, and a simple and direct statement of policy applicable to all legislative bodies. The goal of the recommendation is to preclude legislative bodies dominated by a single political party from discussing public business in private by means of a political caucus.

The current provision pertaining to political caucuses, section 108(2), should be amended by adding the following language:

> "The foregoing shall not apply to a meeting of at least two-thirds of the voting membership of any legislative body held to discuss public business."

Under the proposal, political party business would remain exempt from the law; at the same time, public business discussed by a substantial majority of a legislative body would be subject to the Open Meetings Law.

The Committee believes that the proposal is fair, for it would merely require what is obvious. If two-thirds of the membership of a public body convenes to discuss public business, the Open Meetings law should apply, notwithstanding the political party affiliation of those in attendance, for that significant a majority of a public body has the power to carry out the duties of the body. Two-thirds, in the Committee's view, represents a reasonable line of demarcation, for in some cases, an affirmative vote of two-thirds of a public body is needed to take particular kinds of action (i.e., overriding a veto, adopting bond resolutions, etc.). Most importantly, when two-thirds of the membership of a public body discusses public business, the members, for all intents and purposes, represent the body itself and can exercise authority on behalf of the body.

Legislative Support

Although last year's proposal received little legislative support, the Committee is hopeful that its recommendation will be viewed favorably in 1987. Of possible significance are the results of a survey recently conducted by Common Cause. A questionnaire raising several questions was mailed to candidates for the Senate and the Assembly. One of the questions was:

> "Would you vote to amend the Open Meetings Law to ensure that governing bodies at the city, county, town and village level do not use the 'political caucus' exemption to avoid their obligation to discuss and decide issues in open session."

Among 138 Assembly incumbents who sought reelection, 58 responded to at least one question in the survey. Of the 58, 38 responded "yes" to the question on the Open Meetings Law, 9 responded "no", and 11 did not answer that question. Among 56 Senate incumbents who sought reelection, 23 responded at least in part to the survey. Of the 23, 14 answered "yes" to the question on the Open Meetings Law, 6 answered "no", and 3 did not answer the question.

While the number of State Legislators who responded represented less than a majority of either house, a substantial majority of incumbents who answered the question concerning the Open Meetings Law apparently believe that the Law should be amended to ensure openness. We are hopeful that the results of the survey are indicative of general legislative support for strengthening the Open Meetings Law.

2. Enforceability of the Open Meetings Law

Previous reports of the Committee recommended two amendments to the Open Meetings Law regarding its enforcement. Although the proposals resulted in legislation introduced at the request of the Governor, the legislation was not approved.

Currently, section 107 of the Law permits a court to invalidate action taken behind closed doors in violation of the Law. It was recommended that a court be given discretion to invalidate action taken when any aspect of a meeting is closed in violation of the Law. The other recommendation involved the authority of a court, in its discretion, to fine members of public bodies individually up to $100 where it is found that a flagrant violation or a pattern of violations occurred.

Based upon a 1984 study prepared by the Hubert H. Humphrey Institute of Public Affairs at the University of Minnesota, the sanctions recommended by the Committee last year are neither unique nor unusually stringent in comparison to provisions enacted in other states.

The study describes sanctions that may be imposed by the states as follows:

> "Four kinds of sanctions are used in various combinations by the states should their sunshine laws be violated. In some cases the level of imposition of sanctions increases with repeated violations, and may be levied either against individuals (in which case showing that a particular individual resisted violating the sunshine law might protect him or her from sanctions taken against other members of a covered group) or against the body or agency as a whole. All citizens of a state have standing in almost every case; in many places, the attorney general's office is also free to bring action. Action must be brought within a specified time period, generally under 120 days, and some states require intent to violate the law be shown as well as proof of the actual act.
>
> 1. Voiding the action. Declaring an action taken in contravention of the sunshine law null and void is the measure most commonly used. In some states, an illegal action can be

made legal simply by retaking the vote in public. In most, the entire process must begin again. However, voiding actions is not always accomplished simply, and the difficulty of imposing this sanction often requires weighing a challenge to an action altogether. Many states permit the court to decide if an action should be nullified. A few states will nullify any but financial decisions made in contravention of the law.

2. Equitable relief. Equitable relief remedies, often including a writ of mandamus, or injunctions, or both are used by four-fifths of the states.

3. Civil penalties. About a quarter of the states impose civil fines, often nominal, upon groups that sidestep open meeting requirements. In some states, a public official may be removed from office for repeated violations.

4. Criminal Penalties. About two-fifths of the states can take criminal action against offenders, with sentences that include fines or jail sentences or both, often increasing in weight with repeated offenses."

In New York, invalidation is discretionary, and "good cause" to void action must be shown. Moreover, as indicated earlier, judicial decisions indicate that action taken by a public body may not be subject to invalidation when the Law is violated during a series of closed meetings held for the purpose of discussion only, but when "action" is taken later at an open meeting [see Woll v. Erie County, 83 AD 2d 792 and Dombroske v. West Genesee Central School District, 462 NYS 2d 146 (1983)].

Therefore, if a public body deliberates toward final action behind closed doors in violation of the Law, and later takes "action" during an open meeting, there may be nothing to invalidate. Stated differently, to avoid the most significant penalty that may be imposed by the Law, a public body might deliberate in private in violation of the Law but escape the penalty by taking action in public.

In two neighboring states, New Jersey and Connecticut, sanctions are more stringent than in New York. Under the New Jersey statute, "if the court shall find that the action was taken at a meeting which does not conform with the provisions of this act, the court shall declare such action null and void". In addition, "Any person who knowingly violates any of the foregoing sections of this act shall be fined $100.00 for the first offense and not less than $100.00 nor more than $500.00 for any subsequent offense". In Connecticut, an independent commission, the only agency of its kind in the nation, has discretionary authority to invalidate action and impose fines of up to $1,000.

Based upon case law, there are relatively few instances in which action has been invalidated. Nevertheless, it is recognized that invalidation could lead to unreasonable results. For example, a decision rendered by a zoning board might be invalidated after a private party has begun construction; a budget might be invalidated after it has been in effect for six months. While no court has apparently upset those types of actions, it is possible that, under existing law, or under last year's proposal, invalidation could occur.

An additional clause can be added to the proposal to avoid unreasonable consequences. A court might be given the authority to invalidate, "unless the invalidation of action would result in undue hardship to any person or governmental entity", or "unless the result of invalidation would be unreasonable".

In a situation in which a violation is found, but in which invalidation is unreasonable, there may be no sanction, other than a judicial statement that a violation of law has occurred. The problem that would, therefore, remain is that there would be little in the way of a deterrent to further violations.

Therefore, the Committee proposes that the language concerning the imposition of a fine serve as an alternative to invalidation when invalidation would be unreasonable. It is emphasized that the language of the proposal indicates that the imposition of a fine would be clearly discretionary and a fine could be imposed only when the court determines that a member of a public body "knowingly or intentionally" violated the law.

1986-87 Proposal

The following language would serve to solve problems concerning invalidation that would lead to unreasonable consequences, while providing something of a deterrent to willful violation of the Law. Specifically, the Committee proposes that section 107(1) of the Public Officers Law be amended as follows:

"Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion upon good cause shown, to declare any action or part thereof [taken in violation of this article] void in whole or in part when any portion of a meeting required to be open was closed in violation of this article, unless the court determines that invalidation of action would result in undue hardship to any person or governmental entity. Where the court finds that invalidation of action is inappropriate or irrelevant, and/or that the public body or any of its members engaged in a pattern of violations or a flagrant disregard of this article, it may, in its discretion, impose a fine of up to one hundred dollars payable by each member who knowingly or intentionally engaged in such violation, notwithstanding any provision of law to the contrary regarding indemnification of such member."

3. Recording, Broadcasting or Photographing Meetings

The ability to disseminate information obtained at open meetings is basic to the concept of open government. The broad availability and use of recording equipment, cable television, and particularly public access TV, can enhance the public's right to know. The Open Meetings Law should be amended to assure that advances in technology may be used to realize the intent of the Law.

A 1985 Appellate Division decision confirms the Committee's view that the unobtrusive use of tape recorders cannot be prohibited, notwithstanding restrictions established by public bodies. Citing its agreement with an opinion of the Committee and the Attorney General, as well as other judicial decisions, the Court found that a school board "offered no justifiable basis for prohibiting the use of unobtrusive, hand held tape recording devices at its public meetings" (Mitchell v.

Board of Education of Garden City Union Free School District, 113 AD 2d 924). The Court added that "While Education Law section 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operation, this authority is not unbridled." As such, the Court annulled the board's rule prohibiting the use of tape recorders at its meetings.

With regard to televising and broadcasting, the capacity to do so in the Senate and Assembly has been governed by statute (Civil Rights Law, Section 52) for more than 30 years. There is no general statute, however, that governs the use of broadcast equipment at meetings of public bodies.

The following recommendation, which was approved by the Assembly in February of 1985, is intended to give effect to the intent of the Open Meetings Law by permitting recording, televising and broadcasting at open meetings of public bodies in a non-disruptive manner. Specifically, a new subdivision (c) would be added to section 103 of the Law, stating that:

> "(1) At any meeting of a public body that is open to the public, the deliberations may be recorded or broadcast.
>
> (2) A photographer or broadcaster and its personnel, or a person recording the proceedings, shall be required to handle the photographing or broadcast recording as inconspicuously as possible and in such manner as not to disturb the proceedings of the public body. As used herein the term 'broadcasting' shall include the transmission of visual and audible signals by cable.
>
> (3) A public body may adopt rules governing the non-disruptive and reasonable use of recording, photographing or broadcasting equipment, but in the absence of the adoption of such rules and regulations by the public body prior to the meeting, such recording, photography or the use of such radio and television equipment shall be permitted as provided in subparagraphs (1) and (2)."

The Committee believes that advances in technology and the widespread use of cable and public access television should be recognized to enhance the public's capacity to hear and observe the deliberations of public bodies.

4. Records Discussed at Meetings

Many members of the public have brought to the attention of the Committee a frustrating situation that relates to discussions at meetings and access to records. Often a public body will review and discuss a particular record at an open meeting, but the record may not be available or distributed to people attending the meeting. For instance, a board in reviewing its expenditures might refer to an item appearing on "page 3, line 6". While that information is referenced at a meeting, the public may be unaware of the contents of the record that is the subject of the discussion. Therefore, although the meeting is open, the public is unable to know what the discussion specifically concerns.

In addition, it is possible that a record may be denied under the Freedom of Information Law, but that discussion of the record must be conducted during an open meeting. For instance, if a school superintendent writes a memorandum suggesting changes in the curriculum, the memorandum may be considered advisory. Therefore, it could be withheld under the Freedom of Information Law [section 87(2)(g)]. Nevertheless, when the school board initiates a discussion of proposed changes in curriculum, there would be no basis for entry into an executive session.

To enhance the public's right to observe the decision-making process, it is recommended that, with certain exceptions, a record that is the subject of a discussion at an open meeting should be available to the public at the time of the meeting.

Exceptions would arise concerning discussions that might have been precipitated by individuals whose privacy might be infringed if records including their identities are disclosed. If a member of the public submits a complaint about a particular issue or problem, it has been advised in similar situations under the Freedom of Information Law that the identity of a complainant may be deleted from the record on the ground that disclosure would result in "an unwarranted invasion of personal privacy". There may also be situations in which records reviewed by a public body are confidential by statute. If a school board seeks to discuss its policy concerning student discipline, it may, for purposes of background, review records pertaining to particular students that are confidential under federal law [see Family

Educational Rights and Privacy Act, 20 USC section 1232g]. The ensuing proposal would balance an expectation of personal privacy with the public's right to be informed of the deliberative process of government. Therefore, it would not make all records reviewed by public bodies at open meeting automatically accessible; it would, however, give effect to considerations of personal privacy as well as matters made confidential by statute.

The Committee recommends that a new subdivision be added to section 103 of the Open Meetings Law as follows:

> "A record that is the subject of a discussion conducted by a public body at an open meeting shall be available to the public, prior to or at the beginning of the meeting during which such record is discussed, except that such record may be withheld to the extent that disclosure would constitute an unwarranted invasion of personal privacy or when the record is specifically exempted from disclosure by state or federal statute as described in subdivision two of section eighty-seven of this article."

B. FREEDOM OF INFORMATION LAW

1. Attorney's Fees

For several years, the Committee recommended legislation similar to the federal Freedom of Information Act that would enable a court to award attorney fees to a member of the public who successfully challenged a denial of access to records by an agency. Legislation on the subject was passed by both houses in 1980 and 1981, but was vetoed. In 1982, however, similar legislation was approved that permits a court to award attorney fees under specified conditions.

In the interest of fairness, the Committee believes that a court should be given broader discretionary authority to award attorney fees when government withholds records.

Section 89(4)(c) of the Freedom of Information Law, which pertains to proceedings initiated under the Freedom of Information Law, currently states that:

> "[T]he court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

In the Committee's view, the conditions that must be met are unnecessarily restrictive, particularly in view of judicial interpretations of the Freedom of Information Law.

First, as indicated earlier, the committee has long advised and the courts have confirmed the principle that accessible records should be made equally available to any person, without regard to status or interest. Whether a record sought is of "clearly significant interest to the general public" or perhaps to a single individual is of no relevance with respect to rights of access. In short, since the Freedom of Information Law grants access to all records, except those listed as deniable, the only question raised by an agency in receipt of a request involves the extent, if any, to which the records sought fall within one or more of the grounds for denial. Therefore, the Committee recommends that section 89(4)(c) of the Law, which requires that a court determine that a record was "of clearly significant interest to the general public" be removed.

Second, in William J. Kline and Son, Inc. v. Fallows, [478 NYS 2d 524 (1984)], a different type of problem arose which, in the opinion of the Committee, led to an unreasonable result. The petitioner requested and was denied access to records. Following an appeal, the denial was upheld. Under those circumstances, an applicant may either consider the matter to be ended or seek judicial relief by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Judicial proceedings are often costly and time consuming. It is likely that many do not initiate suits, due in great measure to the cost of bringing an action.

In Kline, a suit was initiated, but the agency disclosed the records sought before the court heard arguments. Since the controversy was considered moot, the court found that the applicant did not "substantially prevail." Therefore, the court held that attorney fees could not be awarded. The Committee believes that it is unfair to preclude an award of attorney fees under such circumstances in view of the expenditures of time and money incurred by a petitioner who might otherwise substantially prevail.

Consequently, the Committee recommends that the following language replace the existing provision:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person where the court finds that:
>
> i. such person has substantially prevailed and the agency lacked a reasonable basis in law for withholding the record; or
>
> ii. the record is substantially disclosed following the initiation of such proceeding but prior to a judicial determination."

It is emphasized that the proposal would continue to provide a court with discretion to award attorney fees, rather than a requirement that attorney fees be awarded. Further, it is intended to enable to treat both government and the public fairly. If a person substantially prevails in a judicial proceeding, attorney fees would not be awarded where the agency's denial was based upon good faith and a reasonable interpretation of the Law. Concurrently, the recommendation would enable a court to award attorney fees where the records should have been made available and the applicant had no choice but to initiate a judicial proceeding to assert rights granted by the Law.

SECTION III - PERSONAL PRIVACY PROTECTION LAW

The Personal Privacy Protection Law has been in effect for two years. In its effort to ensure proper implementation of the Law, the Committee prepared model regulations for use by state agencies. In addition, model guidelines concerning the Law have been distributed. For the use of the public and government, "You Should Know", a non-technical guide to the Law, has been widely disseminated.

The Law requires that state agencies report to the Committee with respect to the number of requests made under the Personal Privacy Protection Law and the agencies' determinations. For purposes of reporting, many agency officials asked whether their report should refer to all requests by individuals for records pertaining to them, or only to those requests that specifically refer to the Personal Privacy Protection Law. It was advised that only the formal requests be reported. According to the agencies' reports, 1,390 requests were granted, 38 were denied in full, 16 were denied in part; in four of the requests, the agency did not maintain the records sought. As such, a number of individuals have utilized the Law to review information pertaining to themselves.

The figures may be somewhat misleading in gauging the impact of the Law. For example, people have often asked how many requests are made under the Freedom of Information Law. Our response has always been that it is difficult, if not impossible to know, for records are sometimes made routinely available in response to an informal, oral request. The Committee believes that many records have become readily available due to the existence of access laws and agencies' familiarity with those laws gained over a period of years. In short, it is our view that records in general, as well as records accessible only to the individuals to whom they pertain under the Personal Privacy Protection Law, are often made available without resort to a formal request.

It is noted that more than half of the oral inquiries directed to the Committee regarding the Personal Privacy Protection Law were made by state agency officials seeking to comply with the Law. Furthermore, in many agencies, particular individuals have been designated to deal with both the Freedom of Information and Personal Privacy Protection Laws. Those individuals and the staff of the Committee have developed good working relationships. The result is a network of "access professionals" having expertise with respect to both statutes, who can serve the public well.

The provisions of the Personal Privacy Protection Law and the services of the Committee have also been used in related areas that lead to public benefit and greater government efficiency. For instance, for the Governor's project on forms simplification and paperwork reduction, the Law can often be cited as a basis for collecting less personal information, when it is found that certain items are not necessary or relevant to the work of the agency. The result may be shorter forms, less paperwork and a lesser burden imposed upon both government and the public.

The Committee, as required by the Law, has completed a directory of systems of records. Under the Law, each state agency is required to report the nature of each system of records that it maintains from which personal information may be retrieved. The directory, which consists of more than 1,000 pages, identifies 1,946 systems of records maintained by state agencies.

SECTION IV - RECOGNITION OF THE COMMITTEE

The Committee on Open Government is an agency unique among the fifty states. Due to its unusual functions, its work has been widely recognized not only in New York, but also nationally and internationally.

On many occasions, the staff of the Committee has shared its experience with representatives of other states, as well as government officials and members of the news media from Canada, England, and several entities of Japanese government. Their areas of interest have involved the role of the Committee and particular aspects of the laws within the Committee's jurisdiction, such as personal privacy, the impact of the law on municipal government, and trade secrets.

In 1986, the Committee and its staff were recognized in several forums in which its function in New York was found to be of value nationally. Its executive director lectured on the subject of administrative law at the National Judicial College in Reno, Nevada. He also served as the only representative of state government at a symposium conducted for private sector employers on the topic of "Privacy vs. Profit".

The Committee, by means of its experience and expertise, will seek to continue its activist role, serve the public and government impartially and work to make the laws operate most effectively.

SECTION V - SERVICES RENDERED BY THE COMMITTEE

Since 1974, the Committee and its staff have attempted to assist any person who might have questions regarding the Freedom of Information Law, and later, in conjunction with the Open Meetings and Personal Privacy Protection Laws. The assistance has been carried out in a variety of ways. Advice is given orally in response to telephone inquiries. Advice is given by means of written advisory opinions to those who write to the Committee. Those two functions, providing advice orally and in writing, represent the major aspects of the day to day duties of the staff of the Committee.

Efforts have also been made on an ongoing basis to reach those having an interest in the laws by means of seminars, workshops, television and radio broadcasts and other events during which the staff seeks to educate interested persons. Public presentations have been given at the request of government groups, representatives of news media, bar associations, public interest groups and on campus.

Most recently, videotapes of training sessions were produced concerning the Freedom of Information and Open Meetings Laws. It is hoped that videocassettes can be used throughout the state to disseminate information before local government and news media groups, and on local public access television.

A third method of disseminating information has involved the publication of informational materials. For instance, a fifteen page brochure entitled "Your Right to Know" has been extremely popular, and the Committee has distributed approximately 300,000 copies of that brochure in its current and prior versions.

In 1975, while serving as Secretary of State, Governor Cuomo suggested the preparation of a pocket card on the Freedom of Information Law. A pocket guide that summarizes both the Freedom of Information and Open Meetings Laws has also been prepared and thousands of copies have been disseminated. In addition, thousands of copies of a new publication regarding the Personal Privacy Protection Law "You Should Know", have been distributed.

The Committee's written advisory opinions are disseminated to various regional law libraries in order that interested persons may review and copy the opinions. Further, the New York Consolidated Laws Service in its case notes following the provisions of the Freedom of Information and Open Meetings Laws cites advisory opinions of the Committee.

To provide meaningful access to written advisory opinions, the Committee also prepares indices to the opinions under both statutes. The index to opinions rendered under the Freedom of Information Law (Appendix 1) identifies nearly 4,400 written opinions by means of approximately 450 key phrases; the index to advisory opinions rendered under the Open Meetings Law (Appendix 3) refers to more than a thousand opinions identified by approximately 200 key phrases.

The remaining mechanism for disseminating information regarding the two laws involves the preparation of summaries of judicial decisions. The summaries of opinions rendered by the courts under the Freedom of Information Law are included as Appendix 2; the summaries of judicial opinions rendered under the Open Meetings Law are attached as Appendix 4.

A. Statistical Summary

Since 1980, the staff, at the direction of the Committee, has kept logs regarding telephone inquiries. In an effort to identify the users of the Committee's services, the logs characterize callers as members of the public, state agency officials, local government officials, state legislators, commercial interests, and members of the news media. A similar breakdown is developed with respect to requests for written advisory opinions.

From November 13, 1985 through November 14, 1986, the staff of the Committee prepared 564 written advisory opinions. With respect to telephone inquiries, the number for the same period was 6,462. The figure regarding oral inquiries made by telephone is almost exactly the same as last year, when the Committee received its highest total of telephone inquiries (6,475). The number of written advisory opinions prepared by staff is somewhat higher than 1985 (523).

Statistics - Freedom of Information Law

Under the Freedom of Information Law, 428 opinions were prepared. Among the opinions, the total by group is as follows:

Members of the Public	357	(83%)
State Agency Officials	10	(2.5%)
Local Government Officials	36	(8%)
State Legislators	1	(.5%)
Commercial Interests	8	(2%)
Members of the News Media	16	(4%)

With regard to advice given by telephone, the total for the period is 3,995. The profile among those callers is as follows:

Members of the Public	1,161	(29%)
State Agency Officials	842	(21%)
Local Government Officials	880	(22%)
State Legislators	139	(3%)
Commercial Interests	60	(2%)
Members of the News Media	913	(23%)

Under the Open Meetings Law, figures have been slightly increasing since 1980. During that year, the Committee received slightly more than 1,500 telephone inquiries regarding the Open Meetings Law. In 1981 and 1982, the Committee received just above 1,600 inquiries on the subject. In 1986, the Committee received 1,999 telephone inquiries regarding the Open Meetings Law.

In terms of written advisory opinions rendered under the Open Meetings Law, in 1980, 1981 and 1982, approximately 130 opinions were written. In the covered period, 116 written advisory opinions were prepared. Therefore, the number of written advisory opinions rendered under the Open Meetings Law has slightly decreased; the number of opinions rendered in response to oral inquiries has slightly increased.

Statistics - Open Meetings Law

The categories of those who wrote to the Committee and sought written advisory opinions under the Open Meetings Law is as follows:

Members of the Public	66	(57%)
State Agency Officials	4	(3%)
Local Government Officials	31	(27%)
Members of the News Media	11	(10%)
Commercial Interests	4	(3%)

With regard to those who contacted the Committee by telephone to raise questions under the Open Meetings Law, the callers may be identified as follows:

Members of the Public	510	(25.5%)
State Agency Officials	189	(9%)
Local Government Officials	480	(24%)
State Legislators	92	(5%)
Commercial Interests	1	(.5%)
Members of the News Media	727	(36%)

Statistics - Personal Privacy Protection Law

Advisory services were also rendered in connection with the Personal Privacy Protection Law. Seventeen written advisory opinions were prepared at the request of members of the public. In addition, 3 "advisory letters" were written in response to questions raised by state agency officials. With respect to oral inquiries made concerning the Personal Privacy Protection law, the following breakdown has emerged:

Members of the Public	120	(26%)
State Agency Officials	254	(54%)
Local Government Officials	46	(10%)
State Legislators	27	(5.5%)
Commercial Interests	3	(.5%)
Members of the News Media	18	(4%)

Combined Figures Regarding the Three Laws

Viewing the statistics shown above regarding the three statutes within the Committee's jurisdiction, the 564 written advisory opinions prepared from November 13, 1985 through November 14, 1986, were drafted by group as follows:

Members of the Public	440	(78%)
State Agency Officials	17	(3%)
Local Government Officials	67	(12%)

State Legislators	1	(.5%)
Commercial Interests	12	(2.5%)
Members of the News Media	27	(5%)

Among the 6,462 telephone inquiries, the following breakdown has emerged:

Members of the Public	1,791	(28%)
State Agency Officials	1,285	(20%)
Local Government Officials	1,406	(22%)
State Legislators	258	(4%)
Commercial Interests	64	(.1%)
Members of the News Media	1,658	(26%)

As noted in previous reports, many more inquiries are made regarding the Freedom of Information Law than the Open Meetings Law. From the Committee's perspective, the reason is clear. In short, state and local government maintain thousands of different types of records. Those records may be the subjects of rights of access under the Freedom of Information law and numerous other provisions of law.

Under the Open Meetings Law, due to the structure of the Law and its application, the breadth of the variety of the questions raised is not as significant as those that might arise under the Freedom of Information Law. Further, particularly with respect to state government, many state agencies fall outside the scope of the Open Meetings Law, for they are headed by executives rather than public bodies.

The statistics also point out that the pattern described in earlier reports continues. For instance, approximately three-fourths of the written advisory opinions were prepared at the request of members of the public. In some instances, it may be less intimidating and less costly to write to request an opinion from a government agency than to make a long distance telephone call. Conversely, the proportion of telephone inquiries made by representatives of local government, state agencies and state legislators is higher than the percentage of government representatives who seek written advisory opinions. As indicated by the statistics, nearly half of the telephone inquiries directed to the Committee were made by representatives of government.

Another pattern, which concerns the use of the Committee's services by the news media, also continues. While the number of oral inquiries made under the Freedom of Information Law by the news media represents approximately one quarter of the total number, calls by the news media regarding the Open Meetings Law represent nearly forty percent of the total.

As stated in last year's report on the Open Meetings Law, often there is not as great a necessity for receiving a quick response under the Freedom of Information Law as there may be when a question arises under the Open Meetings Law. If a request for records is denied, the records generally continue to exist, and an appeal may be taken. Stated differently, even though records may be withheld today under the Freedom of Information Law, they may be available in the future. In the case of the Open Meetings Law, however, there is often a need for immediate response. If a meeting is closed, the deliberations of the public body may never become known. For that reason, the Committee believes its services rendered under the Open Meetings Law are used more often by representatiaves of the news media than any other group. Moreover, it is the Committee's view that its advisory function under the Open Meetings Law may be particularly valuable, for an opinion rendered quickly may effectively prevent a violation of the law and ensure the capacity of the public to attend and listen to deliberations of a public body.

B. Presentations

As indicated earlier, an important aspect of the Committee's work involves efforts to educate by means of seminars, workshops and various public presentations.

From January 1, 1986 to the date of this report, the staff has given some fifty-seven presentations, which are identified below by interest group in chronological order.

Addresses were given in 1986 before the following groups associated with government:

- Schoharie Valley Clerks Association, Cobleskill
- NYS Personnel Council, Albany
- Association of Towns, New York City
- National Judicial College, Reno, Nevada
- NYS Association of Counties, Albany
- Franklin County School Boards Association, Saranac Lake

- Orange County Association of Villages, Goshen
- Division of Budget, Orientation Session
- Fort Drum Area Council of Governments, Watertown
- NYS County Treasurers and Financial Officers Association, Alexandria Bay
- NYS Association of County Directors of Real Property Tax Services, Callicoon
- NY Conference of Mayors, Stevensville
- Professional Firefighters Association, Montour Falls
- Northern Oneida County Council of Governments, Floyd
- Association of Fire Districts, Kiamesha Lake
- Community School District 11, Bronx
- Local Government Seminar on News Media Relations, Oswego
- New York City Community Development Agency

In addition, as a unit of the Department of State, the staff of the Committee made presentations at a series of Local Government Seminars conducted by the Department. Presentations were made before hundreds of municipal officials at seminars held in:

- Stone Ridge
- White Plains
- Farmingdale
- Syracuse
- Utica
- Troy

Addresses were given before the following groups associated with the news media:

- Upper Hudson Valley Press Club, Glens Falls
- Legislative Gazette, Albany
- Rochester Times-Union

- Women in Communications (New York City Chapter), New York City

- Saratogian

- Middletown Times Herald Record

- Amsterdam Recorder

Public interest groups before whom presentations were given include:

- NYPIRG, Albany

- Public Employees Federation, Albany

- Public Employees Federation, Colonie

- League of Women Voters, Rochester

- League of Women Voters, Albany

- Progress, Inc., Hostos Community College, Bronx

Lectures held for students on campus include those given at:

- College of St. Rose, Albany

- Syracuse University, Student Chapter, Sigma Delta Chi

- Russell Sage College, Troy

- SUNY, Albany

- Albany Law School

- Touro College of Law, Huntington

- Graduate School of Library & Information Services, SUNY/Albany

- Graduate School of Library & Information Services, SUNY/Albany

- SUNY College at Morrisville

Other presentations included:

- Nassau County Bar Association, Mineola

- Schenectady B'nai B'rith
- Capital News Conference (TV Talk Program), Schenectady
- Purchasing Management Association, Albany
- Syracuse Talk Program, Channel 3
- Public Forum, sponsored by City of Auburn
- Public Forum, sponsored by City of Corning
- WWCN Radio Talk Show, Albany
- Symposium, sponsored by Alexander & Alexander, New York City
- Association of Law Libraries of Upstate New York, Lake Placid
- Public Forum, Colonie Public Library