

WHEREAS, on May 28, 2021, the Local and State Government Law Section submitted an Executive Summary and a Memorandum with comments concerning the April 2021 Report and Recommendations of the Task Force on Free Expression in the Digital Age, The Crisis in Local Journalism (the “Report”); and

WHEREAS, Local and State Government Law Section members include in-house municipal attorneys, and public- and private-sector municipal counsel who routinely (many on a daily basis) deal with Freedom of Information Law (“FOIL”) requests and/or the Open Meetings Law (“OML”) on behalf local and state governments; some Section members also serve as Records Access Officers for local government agencies and others file FOIL requests with government agencies; and

WHEREAS, the report and its recommendations focus largely on the difficulties faced by journalists and do not adequately consider or reflect: 1) the practical realities of FOIL and OML administration; 2) the careful legislative balance between the administrators and beneficiaries of these laws; and 3) the insight and experience of those attorneys who are most closely associated with the administration of FOIL and OML in their day-to-day operations; and

WHEREAS, while it is appropriate and even admirable that the New York State Bar Association has a Task Force to address the “crisis in local journalism,” the Association equally has a responsibility to safeguard the protection of taxpayer funds and to avoid expensive, unilateral, unfunded burdens on our State and local governments, to the detriment of other critical mandates and priorities that are imposed upon them, especially given the already tremendous burden placed on government due to staggering COVID-19-related expenses and substantial actual and projected revenue losses; and

WHEREAS, it is the position of the Local and State Government Law Section that, despite previous comments having been submitted to the Task Force by the Section highlighting the numerous substantial concerns with the Task Force’s position, certain of the Task Force’s recommendations continue to be unrealistic and unduly burdensome upon government agencies and inconsistent with the concerns of our many Section members who encounter the OML and FOIL in their daily practice; and

WHEREAS, it would be inappropriate for the State Bar to advance the types of reforms set forth in the Task Force’s Report based on anecdotal claims of hinderance by existing FOIL and OML laws which are not in accord with the everyday experiences of government attorneys and FOIL officers, and without an analysis of the tremendous and unrealistic burden the recommendations would place on already taxed local and state governments, as well as the other concerns expressed in the Section’s Memorandum; and

WHEREAS, the FOIL and OML reforms recommended in the Task Force's Report are not material to the Task Force's mission to identify legal reforms which would assist local media to survive in the modern era; and

WHEREAS, the FOIL and OML reforms set forth in the Report do not recognize or strike the proper balance among the attorneys comprising the membership of the State Bar Association or among the public policies that underlie the laws at issue.

NOW, THEREFORE, BE IT RESOLVED, that the Report be amended to delete Recommendations III.C.1-4 concerning the Freedom of Information Law, and

BE IT FURTHER RESOLVED that the Report be amended to delete Recommendations IV.B.1-3 concerning the Open Meetings Law, and

BE IT FURTHER RESOLVED that the Report, as so amended, be received by the House and that the Task Force be thanked by the House for the completion of the Report.

MEMORANDUM

TO: NYSBA TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE
FROM: LOCAL AND STATE GOVERNMENT LAW SECTION
RE: APRIL 2021 REPORT & RECOMMENDATIONS OF THE TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE, THE CRISIS IN LOCAL JOURNALISM
DATE: May 28, 2021

Executive Summary

The members of the Local and State Government Law Section include the attorneys most likely to encounter FOIL and the OML in their daily practice, yet our section was not invited to participate in the study or creation of the Task Force's Report. Consequently, the proposals and recommendations set forth in the Report focus largely on difficulties faced by local journalists and do not adequately consider or reflect: 1) the practical realities of FOIL and OML administration; 2) the careful legislative balance between the administrators and beneficiaries of these laws; and 3) the insight and experience of those attorneys who are most closely associated with the administration of FOIL and OML in their day-to-day operations. **The Local and State Government Law Section requests that the Task Force consider and incorporate the comments provided herein in a revised report.**

1. The Report of the Task Force is a "solution in search of a problem," and the limited resources of NYSBA are better allocated to issues more relevant to the New York Bar as a whole, rather than **an issue that is ancillary to the practice of most of its members, and antagonistic to half of those that do encounter FOIL and OML in their daily practice.** (Pages 1, 2)
2. The practical realities of FOIL and OML administration are ignored in the Report. The rigid timelines for responding to a FOIL request are flawed and unrealistic. **The complexity, availability and clarity of a FOIL request are more determinative of the appropriate time for a response than page count.** (Pages 2-4)
3. Many local governments lack the human and technological resources necessary to comply with the proposed FOIL timelines. **A "one-size-fits-all" approach to FOIL is not feasible.** While the Report recognizes the additional cost to government for complying with its recommendations, it earmarks funds only to State agencies. (Pages 4-6)
4. The recommendations of the Task Force, in many respects, are counterintuitive and self-defeating, **and will result in more litigation and less access to records.** (Page 4)
5. The fee-shifting provisions in the **current law ensure transparency and adequately protect requesters** under FOIL and should continue post-COVID. The rigid timelines proposed in the Report could result in courts newly imposing fees upon taxpayers even without any direct change to the fee-shifting provisions. (Pages 4, 5, 6)

MEMORANDUM

TO: NYSBA TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE

FROM: LOCAL AND STATE GOVERNMENT LAW SECTION

RE: JANUARY 2021 REPORT & RECOMMENDATIONS OF THE TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE, THE CRISIS IN LOCAL JOURNALISM

DATE: MAY 28, 2021

The following is the position of the NYSBA Local and State Government Law Section concerning the April 2021 Report & Recommendations of the Task Force on Free Expression in the Digital Age, The Crisis in Local Journalism (“the Report”). The Report concerns a proposal to reform New York’s Freedom of Information Law (FOIL) and the Open Meetings Law (OML).

As a preliminary matter, the recommendations contained in the Report directly relate on a daily basis to the practice of law by our Section members. Local and State Government Law Section members are public and private sector attorneys engaged in dealing in any capacity with legal issues concerning local or state government. Our Section’s members are in-house municipal attorneys, and public and private sector counsel, who contend on a regular basis with FOIL and/or the Open Meetings Law. Some of our Section members also serve as Records Access Officers for local government agencies. Some Section members also file FOIL requests with government agencies.

As a result, we continue to believe that, had our Section been invited to participate in the Task Force study, the resulting recommendations would have considered, and reflected, not only the difficulties faced by local journalists, but also the practical realities of government agencies responding to the information requests made by journalists as well as those made by other citizens and entities. Indeed, upon first being notified in January 2021 of the revised report which was proposed to be made by the Task Force, representatives of our Section familiar with FOIL and the Open Meetings Law from varying perspectives met with Task Force representatives to seek common ground. Unfortunately, the report was soon thereafter issued without change.

We submitted written comments about that report on February 16, 2021. We did not hear further from the Task Force. Thereafter, the revised April 2021 report was issued, with some slight modifications purportedly in response to concerns raised by our Section. The revised report continues to woefully ignore the legitimate concerns of our Section.

At the outset, our Section recognizes that FOIL and the Open Meetings Law both serve important public policies by opening the processes and records of government where feasible. Municipalities throughout the State work in good faith every day, despite significant operational, staffing and budgetary constraints, to implement those policies. Current law also strikes a careful balance that seeks to recognize and reasonably accommodate those constraints. While that balance is always capable of refinement by the State Legislature, the Task Force Report essentially casts it aside. For the reasons set forth below, we have grave concerns about this aggressive approach.

During the last 10 years, municipalities have seen an increase in the volume and scope of FOIL requests, a substantial number of which do not relate to matters of broad public concern and only a relatively small number of which are made by the news media. The Committee on Open Government, in its 2020 Annual Report (at page 3) estimates that New York State entities now receive over 250,000 requests annually. The Task Force report fails to take this high volume into account in any manner, while focusing on recommendations apparently aimed at opening records without allowing adequate time to assure that the records do not contain non-public information. Many requests are from individuals; further, many are from non-local special interest groups, individuals or entities seeking to use this information for commercial, profit-making purposes, or attorneys seeking to supplement or circumvent pre-suit discovery. In addition, the demands on state and local government as a result of the pandemic have been enormous.

We believe it would be inappropriate for the State Bar to advance the types of reforms set forth in the Task Force Report given this backdrop, as well as the other concerns expressed herein. We submit that approving such reforms would not strike the proper balance among the attorneys comprising the membership of the State Bar Association or among the public policies that underlie the laws at issue. Adoption of this Report would, quite frankly, disenfranchise many members of our Section, a result that NYSBA and our Section can ill afford.

Task Force Recommendation III.C.1 – Amendment to FOIL

The Task Force's April 2021 proposal establishes a stringent time frame within which agencies must respond to FOIL requests. In general, the time frame is twenty business days, which may be extended to forty business days upon certification of the agency if there are more than 100 pages of records or if there are "exceptional circumstances that go beyond predictable agency workload." While this is an improvement over the Task Force's prior recommendation, it continues to be unrealistic and unduly burdensome upon government agencies.

Taken as a whole, the proposed scheme ignores the practical realities faced by a governmental agency responding to a FOIL request. The amount of labor and time (and associated expense) it takes to answer a FOIL request is not a function solely of the volume of pages that need to be produced. Documents may be far shorter than 100 pages but take significant amounts of time to locate, especially when they are archived, non-digitalized or require substantial redaction, or the holder of the record is unavailable. In many municipalities, outside IT firms must first identify, locate and retrieve the records potentially responsive to a FOIL request and then they must be reviewed by the municipality's records access officer, further making these time frames unrealistic. The Report also does not take into account that many FOIL requests are vague or overbroad, so that it is difficult at best to ascertain what record(s) are being sought.

The difficulty is not just with the volume of records that are requested, as records may be only a few pages, but also with the reality that each may be in a different location and may require days of searching to locate. It is also impossible for an agency to certify ahead of time that a request will result in more than 100 pages of records as the agency must first search its files to determine how many records are actually responsive.

The Task Force's proposed hard deadline of 40 business days for any FOIL response does not further clarify what constitutes a "reasonably described" request under Public Officers Law Section 89(3)(a), an area that is particularly problematic. A letter styled as a single FOIL request should not be able to seek multiple types of records from different categories or request lists of different items. Further, requests involving a search of emails or electronic records should be required to specify particular recipients or senders by name or at least by title, and provide search words and a time frame.

The Report's assumption that every request, no matter how broad, complex or arcane, can be answered within forty business days, is also deeply flawed, and simply does not reflect the content of these requests or the resources available to local governments. Smaller local governments often have just a few full-time employees, who must multi-task to accomplish all the essential functions of government and may also need to search through more paper records, while larger governments have a high volume of requests in proportion to the number of employees available to respond to them as well as a high volume of records that require review. Indeed, the Committee on Open Government has formally recognized in its existing regulations that the amount of time that is reasonable for answering a FOIL request is not amenable to a "one size fits all" approach, but is rather a function of multiple factors including not only the volume of the request, but also "the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors." 22 N.Y.C.R.R. Section 1401.5(d). Far from being limited to "exceptional circumstances," these are the typical considerations that are faced by local governments

on a daily basis in responding to requests. Indeed, it is especially ironic that this report is brought to the State Bar for approval during the COVID crisis, which has placed strain on the ability to staff and respond to these requests and arguably constitutes a continuing “exceptional circumstance” that calls the proposed stringent time frames into question.

The practical result, then, if the Task Force’s recommendation is adopted, will be more unnecessary litigation, benefiting private attorneys, all at taxpayer expense. Ironically, the result may also be less access to records than would have been available under current law. Records Access Officers who are appropriately concerned about disclosing material that should not be disclosed or that even contains material that is protected by law will not have the time to engage in a full review that would be able to address such concerns and may instead feel compelled to deny requests, leading to costly litigation that could be avoided under the more practical approach permitted by current law.

These inflexible deadlines are at odds with both the letter and spirit of Public Officers Law § 87(2). That subdivision authorizes an agency to deny access to records for specific reasons that are of concern to municipalities, including that they are exempted from disclosure by state or federal statute, are law enforcement-related records the disclosure of which could harm investigations, judicial proceedings, rights of the accused, or protection of confidential sources, or are records that if disclosed could impair present or imminent collective bargaining negotiations. These are public interests important enough that the Legislature evidently intended that agencies consider them along with the rights of those seeking disclosure pursuant to FOIL. In many cases it will not be feasible for an agency to meaningfully analyze whether a request implicates an exemption or exception within 20 business days or even the proposed alternative 40-day time period.

Task Force Recommendation III.C.2 – FOIL Fee Shifting Provision

The Task Force recommends that NYSBA:

continue to study how the fee-shifting provisions have been applied by the courts, other state’s experiences with fee shifting, whether the judicial decisions have been consistent with the legislative intent of the provisions, and whether the Bar Association should recommend amendments to the provisions so that they appropriately incentivize agencies and local governments to implement FOIL’s policy of broad disclosure and penalize those governmental bodies that are not living up to their transparency obligations under the law:

(Report at 24). In so doing, it continues to ignore the concerns previously expressed by our Section in regard to this proposal.

The position of our Section continues to be that the fee-shifting provisions in the current law are adequate to protect requestors and ensure transparency, and that therefore there is no need for the Bar Association to continue to expend resources and energy on this issue at this time, or to revisit the issue after the effects of the pandemic have subsided. The Task Force's proposed revisions are inconsistent with long-standing Bar Association policy in opposition to mandatory fee-shifting provisions.

Currently, the FOIL provision for the award of attorney's fees and costs provides:

The court in such a proceeding: (i) *may* assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case ... in which such person has *substantially prevailed*, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall 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* and the court finds that the agency had no reasonable basis for denying access.

Public Officers Law Section 89(4)(c) (emphasis added).

In applying Section 89(4)(c), courts have not refrained from exercising their discretion to assess attorney's fees and costs in appropriate cases where the agency's failure solely involved not responding to FOIL requests in a timely manner.¹

It should also be noted that although the Report states (as described further below) that it is not recommending changes to the provisions governing award of attorney's fees and costs, it would in fact alter the effect and cost of these provisions. The provision quoted above generally requires that courts assess fees and costs where the agency "had no reasonable basis for denying access." The imposition of inflexible deadlines for responding to FOIL requests would invite courts to award fees under this mandatory provision by opining that an agency did not have a reasonable basis for violating a statutory mandate when it did not (or even could not practically) respond to a voluminous or complex request within the strict timeframe.

For these reasons, the Section continues to recommend against any further action by the New York State Bar Association seeking changes in the fee-shifting provisions of the

¹ *E.g., 101CO, LLC v. N.Y.S. Dept. of Environmental Conservation*, 2020 NY Slip Op 07969 (3d Dep't, 12/24/20) (agency provided the requested records after the requestor filed an Article 78 proceeding, but was nonetheless ordered to pay attorney's fees and litigation costs incurred at every stage of the litigation, i.e., in the initial proceeding in Supreme Court, in an appeal to the Appellate Division from Supreme Court's denial of parts of the application for fees, and on remittal after the Appellate Division's decision.)

FOIL law, and cautions that even the current proposals in the Report could impose substantial new litigation expenses, including fees and costs, upon local governments and their taxpayers.

Task Force Recommendation III.C.3 – Explicitly Authorize Redaction of Documents

The Task Force “recommends that FOIL be amended to make clear that agencies have an obligation to segregate disclosable information from exempt information and release the material in redacted form when such segregation is practicable.” (Report at 24). In so doing, the Task Force continues to ignore the concerns previously expressed by our Section in regard to this recommendation.

The Task Force’s proposal on redaction does not respond to a widespread problem. The First Department decision in *Judicial Watch v. City of New York*, 178 A.D.3d 540 (1st Dep’t 2019), which the Task Force cites for the proposition that records can now be withheld in their entirety if only partially exempt from disclosure, does not reflect the FOIL practices of many municipalities and it does not apply throughout the State. It was also decided in the particular context of a law enforcement exemption with a specialized interpretation. Many municipalities generally seek to use redaction, except where state or federal privacy statutes, such as the former Civil Rights Law Section 50-a, the current Civil Rights Law Section 50-b or HIPAA, are implicated. This approach is consistent with *Gould v. NYPD*, 89 N.Y.2d 267 (1996). The Court of Appeals decision in *Matter of New York Civil Liberties Union v. New York City Police Department*, 32 N.Y.3d 556, 94 N.Y.S.3d 185 (2018), which the Task Force cites, was tied to the particular context of the now repealed Section 50-a and other privacy statutes. In general, the language of the statute itself (POL section 87(2)), contemplates that agencies will disclose records or parts of records.

Task Force Recommendation III.C.4 – Provide Necessary Resources to FOIL Offices

The “Task Force urges the Legislature to show a real commitment to openness by earmarking funds specifically to finance expanded FOIL operations at the state agencies that are the leading recipients of FOIL requests.” (Report at 25). This recommendation too ignores the concerns previously expressed by our Section. The Report does not provide for earmarking of funds to the multitude of other non-State agency public entities, including municipalities, that would be in dire need of substantial additional funding were the Task Force’s proposals to be adopted. Further, any earmarked funds for this purpose will have to come from somewhere and, given the current state and local budget difficulties, it is unlikely that funds could actually be diverted to this cause in the near future. If the Task Force wants the State to mandate a level of funding for FOIL offices and FOIL compliance by state and local government entities, then the State also should provide grants or other monetary assistance to local governments and non-State agencies,

while also appropriating sufficient funds to State agencies, for purpose of such compliance during this time when absent the temporary federal pandemic aid, local governments would be financially stretched to the brink.

Task Force Recommendation IV.B.1 – Identify Necessary Information for Disclosure

The Task Force's recommendations in this area are also unchanged from its prior recommendations, despite the concerns previously expressed by our Section. The Local and State Government Law Section recognizes the value of working with media and community groups to identify those records that are most responsive to community needs, and local governments have worked, within their limited resources, to enhance online access to many of these records. However, these efforts are voluntary, and reflect what can actually be accomplished. The adoption of this Report will not by itself change the difficult fiscal and operational environment in which these laudable voluntary efforts take place. By contrast, additional unfunded mandates threaten to inundate municipalities, preventing them from accomplishing their primary missions of protecting and enhancing the safety and welfare of their citizenry.

Task Force Recommendation IV.B.2 – Improve Disclosure at the Local Level

This recommendation too continues to ignore the basic reality faced by many small municipal entities; they simply do not have the resources to create and maintain the type of IT infrastructure needed to comply with this proposal. When there are limited resources, they should be utilized for the purposes determined by the community, which is best situated to make the difficult resource allocation decisions that are required. The needs of journalists, while legitimate, cannot supersede those difficult decisions. In addition, in some localities there is not yet access to broadband service.

Task Force Recommendation IV.B.3 – Fix the Open Meetings Law

The mandatory advance document disclosure proposed by the Report continues to be not workable, just as it was in the prior version of the Report. There are times where documents and contracts are exchanged up until the time of the meeting of the legislative body and it is neither practicable nor realistic for them to be shared in advance. It is similarly impractical to expect all local government bodies (many of which are in small municipalities, or are bodies which lack legal counsel) to prepare in advance resolutions regarding matters as to which the body has not yet had discussion or come to consensus.

Conclusion

While it is appropriate and even admirable that the New York State Bar Association has a Task Force to address the “crisis in local journalism,” the Association equally has a responsibility to safeguard the protection of taxpayer funds and to avoid expensive, unilateral, unfunded burdens on our State and local governments, to the detriment of other critical mandates and priorities that are imposed upon them. This is especially so given the already tremendous burden placed on government due to staggering COVID-19-related expenses and substantial actual and projected revenue losses.