



New York State Board of Elections Annual Report 2017



40 North Pearl Street
Albany, New York 12207
518-474-6220 800-367-8683
Public Information Office: 518-474-1953
TDD/TTY: 711
www.elections.ny.gov

Peter S. Kosinski
Co-Chair

Gregory P. Peterson
Commissioner

Todd D. Valentine
Co-Executive Director



State of New York
STATE BOARD OF ELECTIONS

40 NORTH PEARL STREET
ALBANY, N.Y. 12207-2109
Phone: 518/474-6220
www.elections.ny.gov

Douglas A. Kellner
Co-Chair

Andrew J. Spano
Commissioner

Robert A. Brehm
Co-Executive Director

To: The Honorable Andrew M. Cuomo, Governor
Members of the New York State Legislature

We are pleased to submit to you the New York State Board of Elections' 2017 Annual Report. This report provides a comprehensive review of Board programs and accomplishments during the calendar year 2017.

The Board's mission consists of the oversight of each county board of elections and the Board of Elections in the City of New York, as well as statewide compliance with the Help America Vote Act, the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act and the Military & Overseas Voter Empowerment Act. The Board, among other things, administers several critical programs, including the statewide voter registration list (NYSVoter), all agency-based registration, the voting system certification program and campaign finance disclosure filings for state-level and local candidates. In addition to ensuring fair and broad ballot access for hundreds of candidates from throughout the State, the Board is committed to the active oversight and compliance with campaign financial disclosure filing requirements.

2017 saw two special elections and three elections to fill vacancies in the 30th Senate District and the 9th Assembly District on May 23rd and in the 26th Senate District and the 27th and 71st Assembly Districts on November 7th. At the General Election, there were 28 vacancies in 10 of the state's 13 Judicial Districts for State Supreme Court. There were also many local, county, town and municipal primaries and general elections well.

The electorate also considered three statewide ballot propositions. They resoundingly rejected Proposal 1, the once-every-twenty-years question of whether there shall be a constitutional convention, by a ratio of five to one. They approved a constitutional amendment that would allow a court to revoke the government pension of a public official convicted of certain felonies related to their official duties. Lastly the people narrowly approved the creation of a land bank in the Forest Preserve to address public health and safety concerns.

The issue of cyber security of national elections continued to be a major concern for all levels of government in 2017. The Department of Homeland Security revealed that as many as 21 states were targeted during the 2016 Presidential election cycle for potential malicious activity by possible foreign actors intent on causing mischief if not outright affecting the outcome of specific elections. The Board continues to do everything in its power to ensure the accuracy and integrity of New York State's elections.

Lastly, 2017 was the 100th anniversary of New York State extending the right of suffrage to women. New York was the largest state in the nation at that time to approve women's suffrage and had been at the center of the movement ever since the Seneca Falls Convention of 1848 which featured Lucretia Mott, Elizabeth Cady Stanton and Frederick Douglass. Just three years later in 1920, the 19th Amendment would make women's suffrage the law of the land.

The New York State Board of Elections has worked diligently to embrace each of the new programs it has implemented. We remain steadfast in our commitment to providing open, accessible and accurate elections.

Respectfully submitted,

Douglas A. Kellner
Co-Chair, Commissioner

Andrew J. Spano
Commissioner

Peter S. Kosinski
Co-Chair, Commissioner

Gregory P. Peterson
Commissioner



2017 Members of the State Board. L to R, Co-Executive Director Robert A. Brehm, Commissioner Andrew J. Spano, Commissioner and Co-Chair Douglas A. Kellner, Commissioner and Co-Chair Peter S. Kosinski, Commissioner Gregory P. Peterson, Co-Executive Director Todd D. Valentine.

Mission Statement

The New York State Board of Elections (NYSBOE) was established in the Executive Department, June 1, 1974 as a bipartisan agency vested with the responsibility for administration and enforcement of all laws relating to elections in New York State. The Board is also responsible for regulating campaign finance disclosures and limitations and a Fair Campaign Code intended to govern campaign practices. In conducting these wide-ranging responsibilities, the Board offers assistance to local election boards and investigates complaints of possible statutory violations. In addition to the regulatory and enforcement responsibilities, the Board is charged with the preservation of citizen confidence in the democratic process and enhancing voter participation in elections.



PERSONNEL DIRECTORY

Commissioners

Douglas A. Kellner
Co-Chair

Peter S. Kosinski
Co-Chair

Andrew J. Spano
Commissioner

Gregory P. Peterson
Commissioner

Robert A. Brehm
Co-Executive Director

Donna Mullahey
Secretary

Todd D. Valentine
Co-Executive Director

Maryellen Reda
Secretary

Office of the Counsel

Kimberly A. Galvin, *Co-Counsel*
Brian Quail, *Co-Counsel*

Election Operations & Services

Thomas E. Connolly, *Dir. of Election Operations*
Brendan Lovullo, *Dep. Dir. of Election Operations*

Public Information

John W. Conklin, *Dir. of Public Information*
Cheryl Couser, *Dep. Dir. of Pub Information*

Information Technology

William Cross, *Chief Information Officer*
William Ryan, *Information Security Officer*

Administrative Office

Thomas Jarose, *Administrative Officer*
Jennifer Blanch, *Administrative Assistant*

Compliance

Marie Woodward, *Compliance Specialist*
Robert Eckels, *Compliance Specialist*

Agency-Based Voter Registration

Gregory Fiozzo, *Coordinator of NVRA Operations*
Patrick Campion, *Coordinator of Special Projects*

Division of Election Law Enforcement

Risa S. Sugarman, *Chief Enforcement Counsel*

TABLE OF CONTENTS

COUNSEL’S OFFICE.....4

COMPLIANCE UNIT.....12

VOTER REGISTRATION UNIT.....15

ELECTION OPERATIONS UNIT.....21

INFORMATION TECHNOLOGY UNIT.....28

PUBLIC INFORMATION OFFICE.....32

AGENCY ADMINISTRATION.....36

Appendix

 NYSVoter Enrollment.....39

DIVISION OF ELECTION LAW ENFORCEMENT.....44



Women voting at 1920 Presidential Election in New York



Co-Counsels Kim Galvin and Brian Quail argue a presidential ballot access case in Supreme Court.

COUNSELS' OFFICE

The four attorneys in this unit are responsible for handling all legal matters impacting the State Board, including litigation in state and federal courts by or against the State Board of Elections. The unit also drafts regulations, formal and advisory opinions and an annual Election Law Update on developments in election case law and statutes. The attorneys work with all other State Board units to prepare the State Board's legislative agenda and draft legislation for the commissioners to present to the legislature. The Counsels' Office provides oversight and guidance on contracts, compiles responses to subpoenas and certain Freedom of Information Law requests and prepares and presents continuing legal education courses on campaign finance laws throughout the state. The Counsels' Office also responds to a large volume of legal questions from county boards, candidates, constituents, committees and the State Board's Public Information Office regarding all aspects of the Election Law.



Deputy Counsel William McCann argues a case in N.Y. Supreme Court

Litigation

Counsels' Office represented the Board in approximately 24 new non-petition judicial proceedings in 2017. As 2017 was not a state office filing year at the State Board, there were only a few ballot access cases involving local boards of elections in which the State Board was tangentially involved.

The Counsel's Office is the primary liaison between the Board and the Attorney General's Office which represents the board in many proceedings, and directly represents the Board in proceedings. Of all the cases involving the State Board, the most significant are described below.

Lauder v. Pellegrino (Appellate Division, Third Department). Petitioners, five qualified voters who reside within the 9th Assembly District, brought an action against several political committees, including New Yorkers for a Brighter Future("NYBF"), Teachers for Christine (TFC),

and Voice of Teachers for Education/Committee on Political Education of the New York State United Teachers (VOTE/COPE). Petitioners allege that NYBF, acting as a political action committee or an independent expenditure committee, made a prohibited \$200,000 contribution to TFC, an independent expenditure committee, while the two entities shared "common operational control". The trial court dismissed the petition in its entirety, holding that petitioners lacked authority to bring an action, opining that such proceedings are reserved for the Enforcement Division of the State Board of Elections. Both the petitioners and State Board of Elections appealed. The Third Department reversed, holding that a private party, not just the chief enforcement counsel, has standing to bring an action to compel compliance against a political committee for violations of the Election Law. Subsequently, the matter was resolved, and petitioners withdrew their petition.

Davis v. New York State Board of Elections (Supreme Court, Albany County). The NYS Constitution mandates that voters are asked, every twenty years, whether there should be a Constitutional Convention for purposes of revising and amending the Constitution. Petitioner sought an order requiring the State Board of Elections to mandate that county boards of elections place the Constitutional Convention question on the same side of the ballot as candidates running for elective office. Petitioner argued that placing the Constitutional Convention question on the opposite side of the ballot fails to effectively "submit" the question to the voters as required by the State Constitution. State Supreme Court Justice Richard J. McNally Jr. dismissed the petition, holding that the constitution "does not indicate where on the ballot (the referendum question) must appear" and "(t)o grant relief ... would require the court to read into (the constitution) requirements that simply do not exist."

Eason v. New York State Board of Elections and NYSDMV (U.S. District Court, NY Southern District 1:16-cv-0492). This action claims NYSBOE and DMV are in violation of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. This matter is schedule for trial in May 2018.

Brennan Center for Justice v. New York State Board of Elections (Appellate Division, Third Department). In this matter, petitioners, consisting of both a not-for-profit, non-partisan public policy and law institute and several former, current and potential candidates who are New York residents representing multiple party affiliations, commenced a hybrid CPLR Article 78 proceeding / declaratory judgment action to challenge the Commissioners' decision regarding the status of LLC's relating to contribution limits. The trial court upheld the Board's retention of the 1996 LLC opinion, owing to a tie vote, on various grounds. Petitioners simultaneously appealed this decision along with a prior decision from a similar LLC action decided in 2015. Oral arguments were heard in December. A decision on both matters was received on March 29, 2018, maintaining the status quo.

Silberberg et al. v. State Board of Elections (U.S. District Court, NY Southern District 1:16-cv-08336). Plaintiffs sought to enjoin the enforcement of Election Law § 17-130 which prohibits a person from showing to another a “ballot after it is prepared for voting[.]” After a two-day trial, in September the Court dismissed the Complaint, upholding the constitutionality of § 17-130. The Court found that the state’s interest in preventing vote buying and voter coercion was compelling, and that the law was narrowly tailored to meet this compelling interest.

Merced v. New York State Board of Elections (U.S. District Court, NY Eastern District 1:16-cv-03054). This action challenges section 6-140(10)(b) of the Election Law which requires witnesses of Independent Nominating Petitions to be duly qualified voters resident in the State. Discovery is complete in this matter. Both parties have moved for summary judgment, which is fully briefed. A decision has yet to be issued.

Parish v. Kosinski (U.S. District Court, NY Northern District 17-CV-344). Plaintiffs (two enrolled members of the Independence Party) challenged N.Y. Elec. Law §§6-204(1), 6-206(2) 15-108(3) and 15-108(4), which required that witnesses to party designating petitions and independent nominating petitions for village elections must be residents of the village for which the candidate is seeking office. Plaintiffs alleged these statutes infringe upon Plaintiffs’ First Amendment rights to free speech and freedom of association. Subsequently, the State enacted legislation removing the witness residency requirement from the statutory provisions at issue. The action was ultimately settled.

Sloan v. Shulkin (US Court of Appeals, 2nd Circuit 1:16-cv-01185). Plaintiff alleges the composition of the New York State Board of Elections violates the Equal Protection Clause “one person, one vote” principle. The U.S. Federal District Court, Southern District, dismissed the case primarily on 11th Amendment grounds and res judicata. The court also found that New York’s Election Law Article 16 proceedings afford adequate post deprivation remedies to satisfy due process and the New York State Board of Elections’ structure does not violate “one person, one vote” principles. Petitioner’s appealed and, in May, the Second Circuit upheld the lower court’s decision.

Merrell v. Sliwa (Supreme Court, Albany County). This case involved the quorum requirements of a newly organized party under the interim rules of the party. The Reform Party interim rules required attendance at the organizational meeting reach two-thirds of the committee. Petitioners assert this required attendance by two-thirds of the total committee membership which could have been elected (positions available), as opposed to two-thirds of those actually elected. The court dismissed on procedural grounds but opined that it would have found the committee

lawfully constituted because the interim rules did not require a minimum number of committee members actually be elected. Petitioner appealed, which was denied on technical grounds. The petitioner has filed a subsequent notice of appeal, which is still pending.

Common Cause/New York v. SBOE (U.S. District Court, NY Southern District 1:17-cv-06770-AJN). Plaintiff, Common Cause of New York, alleges that New York’s procedure of not including “inactive” voters in poll books constitutes an unlawful removal in violation of section 8 of the National Voter Registration Act (“NVRA”). Specifically, Common Cause alleges New York’s practice of not printing the names of “inactive” voters in poll books, in combination with alleged deficiencies in the voting process, constitutes an unlawful “de facto” removal of the “inactive” voter from the official voter registry in violation of section 8 of the NVRA. The State Board of Elections has filed a motion to dismiss for failure to state a cause of action and for lack of standing. The motion is fully briefed. The Court has yet to issue a decision.



Deputy Counsel Nick Cartagena makes a presentation at the 2017 ECA Summer Conference.

Regulations

The unit drafted, and the Board adopted, amended regulations:

1. Amendments to Part 6200.10 (Independent Expenditures). These amendments provided for implementation of new laws related to independent expenditure reporting. The Board adopted independent expenditure rules on May 2, 2016. Following further changes by the legislature, the Board made an emergency adoption of rules on September 15, 2016 and a further emergency adoption on December 8, 2016 amending the independent expenditure rules. On March 13, 2017, the Board permanently adopted the amendments to the independent expenditure rules.
2. Amendments to Part 6201.2 and 6201.3 (Fair Campaign Code). These amendments update the process for fair campaign code matters. In 2014, the State Board underwent a reconfiguration pursuant to Chapter 55 of Laws of 2014, which eliminated the “enforcement counsel” position and created a new “chief enforcement counsel.” Prior to these amendments, regulations had the former “enforcement counsel” position adjudicate fair campaign code proceedings. These amended regulations update the fair campaign code process by having a hearing officer adjudicate these matters. Further, these amended regulations incorporate the standard related to poll disclosure provided for by Board Opinion 1984-1 in the regulations.
3. Amendments to Part 6216 (HAVA Complaint Procedure). This regulation streamlines the HAVA complaint procedure and clarifies that Counsels’ Office at SBOE administers the procedure.
4. Amendments to Part 6200.7 (Designation of Treasurer Removal Committee). This regulation implements the process of treasurer removal provided for by part C of Chapter 286 of the Laws of 2016.

Board Opinions

The Office of Counsel is responsible for preparing responses to requests for formal opinions from the New York State Board of Elections (NYSBOE). These formal opinions serve to further clarify certain sections of New York Election Law. The Board issued one opinion for 2017.

Advisory Opinion # 1 of 2017 advised that Election Law §14-130 prohibits a trade association, which both operates a political action committee and retains a lobbying firm, from paying its lobbying retainer fees with funds from its political action committee.

You may obtain copies of individual opinions or a complete set of opinions by visiting the Board’s website (www.elections.ny.gov).



Executive Staff testified before New York State Assembly Standing Committee on Election Law, November 18, 2016.

Legislative Activities

Counsels’ Office, in consultation with the executive staff, regularly monitors all legislative action which could impact the Board and the election process in New York. Such activities include attending legislative committee meetings, responding to inquiries regarding legislation, and responding to requests for comments on legislation. Counsels’ Office is also responsible for drafting all legislative proposals of the Board. In addition to any New York State legislative initiatives, the office has worked extensively with other members of the staff in reviewing any federal legislative proposals that may affect elections in New York.

The following is a summary of legislation proposed by the Board enacted or passed by at least one house of the legislature in 2017:

1. Chapter 293, A.6907-A/S.443-A (SBOE 17-08) - The prior statute allowed for "half day" shifts for poll workers. This chapter allows local boards at their option to authorize shorter or longer "split" shifts.

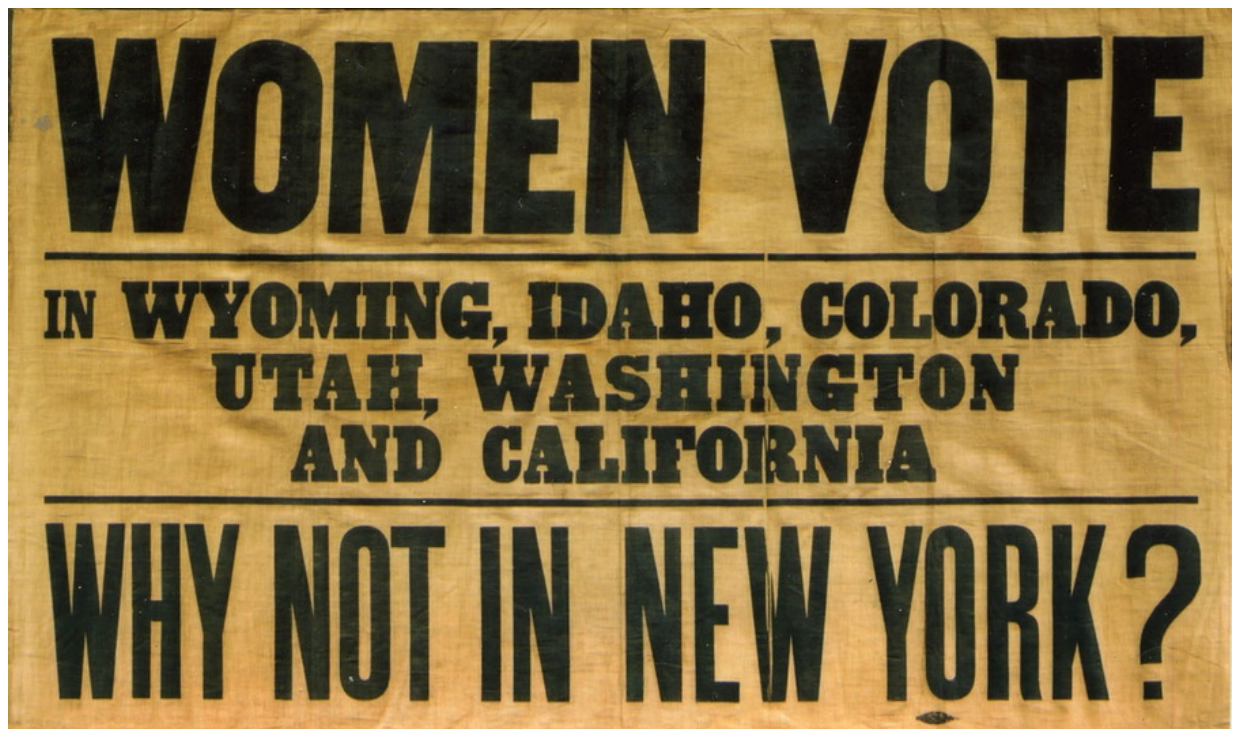
2. Chapter 307, A.5740-A/S.1567-A (SBOE 17-09) - Requires the State Board of Elections to publish the campaign website addresses of candidates for Governor, Lt. Governor, Attorney General, State Comptroller, member of the State Senate and member of the State Assembly.

3. Chapter 310, A.5588/S.2786 (SBOE 17-04) - Removes outdated postal language from the requirement regarding annual mail notifications that must be sent to voters.

4. Chapter 210, A.8029/S.5658 (SBOE 17-22) - Repeals Election Law § 2-126, related to the use of party funds in primaries, because the provision has been declared unconstitutional.

One proposal passed one house:

1. Passed Assembly. A.6732/S.5455 (SBOE 17-10) - Eliminates the one thousand dollar (\$1,000) filing threshold to require all candidates or their authorized committee to electronically file with the NYSBOE. It also removes language requiring local and County filers to file with County Boards of Elections.





Board of Commissioners meeting

COMPLIANCE UNIT

The Compliance Unit falls under the supervision of the Counsels’ Office. This Unit is comprised of three sub-units: Intake and Processing, Education Outreach and Training, and Audit & Review. These units are managed on a day-to-day basis by two Compliance Specialists.

The Intake and Processing sub-unit is primarily responsible for registrations and terminations of committees, receiving and processing campaign financial disclosure reports, and for operating the call center, where inquiries about the Election Law and filing mandates are handled. At the end of 2017, there were 16,462 active filers with the Board. A total of 25,230 itemized financial disclosure statements were received by the Board in 2017. All filings are available for public viewing on the Board’s website.

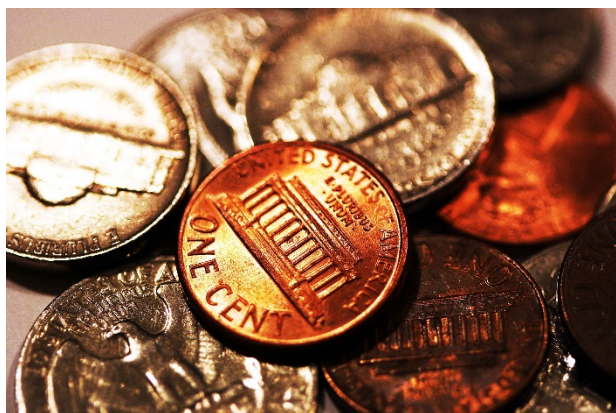
The number of active filers with the Board continues to increase, as is indicated below:

| | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| State Filers | 2,549 | 2,212 | 2,695 | 2,244 | 2,365 | 3,017 | 2,996 | 2,860 |
| County Filers | 8,458 | 10,198 | 9,990 | 11,817 | 13,534 | 13,270 | 13,347 | 13,602 |
| TOTAL | 11,007 | 12,319 | 12,595 | 14,061 | 15,899 | 16,287 | 16,343 | 16,462 |

Filers include both committees, and candidates without a committee who are making their own filings. In 2017, **3,462** new committees registered with the Board. With each new registration, the Compliance Unit sent a confirmation to the treasurer, providing the committee identification number -- a personal identification number that acts as an electronic signature when making filings - and other information relating to filing requirements and obligations. There were **3,273** committee/candidate terminations processed in 2017.

Other duties of this sub-unit which they accomplished in 2017 include:

- Creation and publication of the campaign financial disclosure filing calendar.
- Calculation of the contribution limits as set forth in Election Law Article 14.
- Providing the public, as well as all filers with the State Board or County Boards of Elections, with information regarding campaign finance
- Staff also assisted people who visited our public view area.



The Education Outreach and Training sub-unit is staffed by three employees. The primary activities of the sub-unit are the preparation and dissemination of information and training materials relative to the financial disclosure mandates of Article 14 of New York Election Law. In 2017, this sub-unit completed the annual revision of the Campaign Finance Handbook and created the annual Filer Update for distribution to all filers.

Overall in 2017, staff conducted 31 seminars and 9 webinars throughout the State to provide information as to the requirements of campaign financial disclosure and applicable Election Law provisions. Current training topics include: the traditional campaign finance seminars focused on registration, Compliance-specialized trainings, Continuing Legal Education (CLE) credits for attorneys, Continuing Professional Educational (CPE) credits for accountants, and “Winding Down the Campaign” training for post-election filers requesting resignation or termination. In addition, two specialized seminars for political clubs were conducted in Manhattan and Nassau County. A total of 872 people attended our seminars and 67 attendees participated in our webinar offerings. Staff continues to offer a “train-the-trainer” program for county boards of elections so that the staffs at the boards can better assist filers.

The Audit & Review sub-unit tracks the most common deficiencies in filed financial reports and revises and updates its training materials to address the most common errors treasurers make.

The compliance review process, in and of itself, is educational for treasurers and their candidates. The “Frequently Asked Questions” section of the Board’s “Campaign Finance” Webpage is updated to include additional instructions for common questions and modifications have been made to our training seminars and webinars to reflect compliance issues. It is hoped that these ongoing efforts will enable a greater number of treasurers to file correctly in the first instance.

In 2017, 24,984 itemized reports were reviewed. Of the 24,984 reviewed in 2017, 1,857 were deficient, 18,736 were compliant and 4,391 had training issues.

Referrals

In 2017, the Compliance Unit referred non-filer and deficient filer items to Enforcement for review and action. This consisted of 3,984 referrals for non-filing. Of these, 2,880, approximately 75%, continue to owe reports that have yet to be filed.

For deficient filings in 2017, a total of 597 referrals of candidates/committees for failure to come into compliance after being served with a deficiency notice were made. For filings due between 2014 and 2017, 2,210¹ filings were referred to Enforcement as deficient. Of that number, 329 reports were amended to successfully address deficiencies, one filing has been deleted and 1,066 deficiencies remained unresolved.

The Board of Elections provides a civil enforcement administrative hearing process through which violations of the Election Law deemed not criminal may be addressed, followed by civil proceeding in court. The Board currently has three hearing officers to manage these proceedings. In 2017, six matters were referred by Enforcement to a hearing officer.

Additionally, at the request of Enforcement Counsel the Board approved four subpoena requests and made one criminal referral to a prosecutorial agency.

1. Approximately 814 of the referred reports were eventually reclassified as training.



Voter Registration Unit

Agency-Based Voter Registration

Since 1995, the New York State Board of Elections has been assisting and guiding participating state agencies in understanding and executing their voter registration responsibilities mandated by the National Voter Registration Act of 1993 (NVRA) and its corresponding state laws. The intent of the program is to offer individuals the opportunity to register to vote, when they apply for or renew a driver's license, or when they apply for services at any of the approximately 785 offices that participate in the program.

Agencies designated to provide voter registration include the Department of Motor Vehicles, as well as public assistance, disability, and other state-designated agencies. Designated as state agencies which provide public assistance are the Office of Temporary and Disability Assistance and the Department of Health. Designated as state agencies that provide programs primarily engaged in providing services to people with disabilities are the Department of Labor, Office for the Aging, Division of Veterans' Affairs, Office of Mental Health, Office of Vocational and Educational Services for Individuals with Disabilities, Commission on Quality of Care and Advocacy for Persons with Disabilities, Office for People With Developmental Disabilities, Commission for the Blind and Visually Handicapped, Office of Alcoholism and Substance Abuse Services, State University of New York Disability Offices, City University of New York Disability Offices, and certain offices which

administer programs established or funded by such agencies. Additional state agencies designated as voter registration sites are the Department of State and the Division of Workers' Compensation.



Registration Statistics

During 2017, there were 403,928 voter registration applications or transactions received by county boards of elections which resulted from the efforts of state agencies. The Department of Motor Vehicles yielded the highest volume of registration applications among the various agencies mandated by the NVRA, accounting for 88.9% (359,487) of the total number of voter registration applications or transactions in the state. The remaining agencies participating in the program accounted for 10.8% (44,441).

Sources of Voter Registration

| | |
|----------------------------|---------|
| Motor Vehicles | 359,487 |
| Public Assistance Agencies | 37,959 |
| Disability Agencies | 5,238 |
| State Designated Agencies | 702 |
| By Mail | 542 |
| Total | 403,928 |

Agency-Based Voter Registration Statistics

| <u>Year</u> | <u>New Registrations</u> | <u>Address Changes</u> | <u>Enrollment Changes</u> | <u>Name Changes</u> |
|-------------|--------------------------|------------------------|---------------------------|---------------------|
| 2012 | 201,401 | 87,057 | 33,479 | 11,089 |
| 2013 | 135,773 | 56,912 | 19,312 | 8,618 |
| 2014 | 127,726 | 56,966 | 17,126 | 8,126 |
| 2015 | 132,230 | 63,883 | 20,596 | 8,653 |
| 2016 | 246,762 | 99,701 | 50,214 | 12,511 |
| 2017 | 144,730 | 88,644 | 36,200 | 11,502 |

Training

The State Board of Elections is responsible for the development of training materials and presentation of training programs on the requirements and implementation of the agency-based voter registration program. Regional agency-based voter registration training offerings were presented to the participating NVRA sites in New York State. State Board staff continues to provide updated training and reference materials as well as on-going telephone guidance and support to agency program liaisons, site personnel in all offices offering agency-based voter registration, as well as to county boards of election.

Agency Oversight

The success of the agency-based registration program relies on cooperation among the participating state agencies, county boards of elections, and the New York State Board of Elections. Due to the numerous and unique differences in clientele and services provided by each of the agencies, the administrative policies at each agency's participating offices and programs are conducted at the discretion of each individual state agency, under the guidance, input, approval and support of the State Board of Elections. Also, staff responds to all inquiries, and acts to assist agency program coordinators, site personnel, and county board staff in resolving administrative and procedural issues to ensure effective and efficient operation of the agency-based registration program in New York State.

In addition, statistical reports containing data on voter registration activity for all agency-based sites are mailed to agency commissioners and program coordinators each month. Review of these reports enables program coordinators to monitor voter registration activity and program compliance, as well as identify inconsistencies at each participating office. This information also assists the State Board of Elections in evaluating the workload placed on county boards of elections offices by NVRA program requirements.

Distribution of NVRA Program Supplies

Supplies for the agency-based registration program are shipped weekly by NVRA staff as

requested by participating sites. Constant tracking of supply orders and shipping dates is made possible by a supply order and inventory system specifically developed for monitoring distribution of NVRA program materials. The system also provides staff with current inventory balances to ensure that supplies, including forms in multiple languages as required by the Voting Rights Act, are reordered as needed. The State Board also distributed voter registration forms to institutions of the State University of New York. The New York State Board of Elections processed 527 individual supply shipments to participating NVRA sites during 2017.

In addition, the State Board of Elections provides large print copies of the NYS voter registration form as well as a poster-sized version of the agency-based voter registration form are provided to agencies and programs participating in the NVRA program that serve people with disabilities upon request.

Voter Registration Cancellations

When New York State residents relocate to another state or when out-of-state residents move into New York State and subsequently register to vote, a notice of registration cancellation is returned either to a county board of elections or the New York State Board of Elections so that voter registration rolls may be updated. In 2017, staff at the State Board of Elections processed 28,609 New York State and 12,453 out-of-state registration cancellations and forwarded them to the appropriate county board of elections or state election official.

DMV Address Change Requests

The New York State Board of Elections assists the Department of Motor Vehicles with the distribution of customer address change requests resulting from licensing or driver I.D. transactions by counting, sorting and forwarding them monthly to county boards of elections. Also received from the Department of Motor Vehicles and processed by state board staff, are the DMV internet change of address request forms which have been downloaded by customers, completed, and forwarded to DMV. The state board distributed 20,605 address change requests received from the Department of Motor Vehicles to county boards during 2017.

County HAVA Funds Program

The Help America Vote Act (HAVA) has provided funds to the State of New York for poll worker training, voter education, and poll site accessibility. Since June 2006, the State Board has been overseeing the grant application process, as well as the disbursement of federal and state funds, to further the HAVA and State program objectives. The Poll Site Access Improvement Program provides funds to county boards of elections to assist them in ensuring that all New York polling places are accessible and provide the same opportunity for all voters to participate in the election process. The Voter Education and Poll Worker Training Program provides funds to county boards of elections to implement programs to educate poll workers and the general public on the proper use of new voting systems.

Poll Site Access Program

The New York State Board of Elections has received funding from State appropriations and from the Department of Health and Human Services to establish, expand, and improve access to and participation by individuals with a full range of disabilities in the elections process. The polling place access improvement funds will assist county boards in undertaking minor temporary improvement or renovation projects, and the purchase of proper signage, materials, and low-tech devices to help assist persons with disabilities on election days and to assure voter privacy and independence. The funds may be used to make polling places, including parking, the path of travel, door hardware, entrances, exits, and voting areas of each polling facility, accessible to individuals with the full range of disabilities (e.g. impairments involving vision, hearing, mobility, dexterity, emotional, or intellectual) through the use of varied accessibility tools (e.g. ramps, handrails, and signage).

Poll Worker Training and Voter Education Program

The New York State Board of Elections has received HAVA funds to be dispersed and used by county boards for the specific and limited purpose of advancing Voter Education and Poll Worker Training. County Boards have implemented programs to educate individuals on the proper use of new voting systems, including ballot marking devices. These efforts are intended to help bolster public confidence in the election process by providing information to election administrators on methods for keeping the process secure while ensuring that every eligible voter can cast a vote and have that vote counted. Training and education must extend to all voters, including those with a full range of disabilities, as well as those with language barriers.



NYSVoter County Reviews

In 2007, the State Board of Elections implemented “NYSVoter” (pronounced nice voter), the statewide voter registration database to comply with the Help America Vote Act (HAVA) and subsequent amendments to New York Election Law. NYSVoter was built by integrating a centralized database system with the county voter registration/election management systems (VR/EMS), giving the State Board administrative control over the centralized database and the responsibility for auditing the system to assure that the local election officials are conducting the business of voter registration in a compliant manner. State Board personnel visit the county boards to perform periodic reviews of their NYSVoter procedures, and in 2017, 21 counties were reviewed and found to be in substantial or better compliance with state regulations.





ELECTION OPERATIONS UNIT

The major responsibilities of the Election Operations Unit of the New York State Board of Elections include the oversight and support of New York State’s 62 county Boards of Elections, the facilitation of ballot access efforts by candidates for a variety of public offices and party positions, and oversight and technical assistance of the statewide deployment of voting systems. The Election Operations Unit actively engages in ongoing daily communications with county Boards of Elections and the general public on a multitude of topics.

Candidate Ballot Access

In the summer of 2017, state-level ballot access activity focused on petition filing for the election of delegates and alternate delegates to Judicial District Conventions. Delegates nominate candidates for the office of Justice of the Supreme Court from 13 Judicial Districts in the State at fall conventions.



Ballot access activity for the Judicial Delegates and Alternates described above, included data entry, and the creation and dissemination of corresponding acknowledgements, consisted of the following:

- 70 petitions (comprising 449 candidates) for Judicial Delegate/Alternates

Some filings related to the party position candidacies previously described are made at local level, as some of the districts in which those persons run are wholly contained within county boundaries. In these cases, information concerning candidate filings which are made at the county level must be shared with NYSBOE. These local certifications are forwarded to the Board and become part of the statewide certifications to party committees and others who have need of or interest in this information.

Ballot access filings are not validated by NYSBOE. They are presumptively valid when filed, however the validity of a filing may be challenged by persons choosing to do so. Challenges require the filing of an initial objection within three days of the filing, followed by specific objections within six days. If specific objections are filed – the itemization of objections – staff reviews each specific itemized objection, notes their findings, and submits a summary of findings report to a hearing officer for review.

Determinations are then made by the Commissioners of the State Board of Elections, and a notice of those determinations is made to the objector as well as the candidate. In 2017, objections to petitions and corresponding specifications received, posted, and researched, were as follows:

- 3 objections filed
- 2 sets of specifications filed

Vacancies existed in 23 of the State's 13 Judicial Districts. Delegates and Alternate Delegates were notified by their respective political parties to attend conventions, which were convened on various dates beginning on September 19 and running through September 25. From each of the 9 Judicial Districts that had vacancies, a total of 24 nominations were received, posted, and acknowledged, representing the nomination of 40 candidates for office of Justice of the Supreme Court.

In 2017, Governor Andrew Cuomo called for special elections to be held on May 23, 2017 at which vacancies for the 30th Senate District and the 9th Assembly District were filled. Those special elections were held because:

- 30th Senate District – resignation of Senator Bill Perkins – 2/28/17
- 9th Assembly District – resignation of Assemblyman Joseph S. Saladino – 1/30/17

In addition, three seats became vacant prior to September 19, 2017 and pursuant to Public Officers Law 42 these were filled at the general election on November 7, 2017:

- 26th Senate District – resignation of Senator Daniel Squadron – 8/11/17
- 27th Assembly District – death of Michael A. Simanowitz – 9/2/17
- 71st Assembly District – resignation of Herman D. Farrell, Jr. – 9/5/17

The 2017 general election ballot had three ballot proposals:

1. Proposal Number One, A Question

Constitutional Convention

Shall there be a convention to revise the Constitution and amend the same?

2. Proposal Number Two, An Amendment

Allowing the complete or partial forfeiture of a public officer's pension if he or she is convicted of a certain type of felony

The proposed amendment to section 7 of Article 5 of the State Constitution would allow a court to reduce or revoke the public pension of a public officer who is convicted of a felony that has a direct and actual relationship to the performance of the public officer's existing duties. Shall the proposed amendment be approved?

3. Proposal Number Three, An Amendment

Authorizing the Use of Forest Preserve Land for Specified Purposes

The proposed amendment will create a land account with up to 250 acres of forest preserve land eligible for use by towns, villages, and counties that have no viable alternative to using forest preserve land to address specific public health and safety concerns; as a substitute for the land removed from the forest preserve, another 250 acres of land, will be added to the

forest preserve, subject to legislative approval. The proposed amendment also will allow bicycle trails and certain public utility lines to be located within the width of specified highways that cross the forest preserve while minimizing removal of trees and vegetation. Shall the proposed amendment be approved?

Post-election activities include the collection, recording, and validating of all election results corresponding to the offices noted above. Certificates are prepared for signature by the Commissioners of the State Board of Elections in their capacity as the State Board of Canvassers. In addition, the Unit fielded a multitude of post-election questions on both Primary and General Election issues.

Staff scanned and indexed petitions and all related certificates, streamlining and decreasing response time for public access requests, enabling the State Board of Elections to positively impact the turn-around time needed to respond to requestors.



Public Election Services

In 2017 the Unit responded to inquiries from the public for data and/or information from the public and the distribution of related documentation. Additionally, a sizeable amount of associated information was distributed, including copies of the 2017 *New York State Election Law*, general information such as election results (current and previous), political calendars, candidate lists, the State Board of Elections' *Running for Office* booklet, as well as other data and information relating to elections and the election process. Further, the Election Operations Unit manages the State Board of Elections' toll-free voter registration application request number (1-800-FOR-VOTE), and

fulfills requests submitted via the agency website. In 2017, 2,388 requests for registration forms were processed by the Unit, resulting in the mailing of a total of 3,983 forms.

Statewide County Boards of Elections Operational Support

In addition to election assistance, support to county Boards of Elections in the area of daily operations remains a key focus of the Unit.

County Boards of Elections are provided with oversight and support in innumerable ways, including phone calls, conference calls, e-mails, customized workshops and site visits tailored to individual counties, informative conference presentations, participation in and appearances at Election Commissioners Association regional meetings, topical memorandums, and the provision of extensive procedural documents and forms for implementation at the local level. As new regulations emerge or previous topics become heightened areas of interest, the Unit strives to communicate timely and appropriate guidance to county Boards of Elections personnel.

The State Board of Elections also provides National Change of Address (NCOA) information to all of New York State's county Boards of Elections. NCOA services are a required component of New York State's statutory voter registration list maintenance procedures, and help to ensure that voter addresses are synchronized with information on file with the U.S. Postal Service. This process is further enhanced as data is processed via the statewide database. In 2017, data concerning over 718,676 such changes were provided to county Boards of Elections for their use in updating registration records, voter notifications, and other routine maintenance tasks to reflect voter's change of address information.

Cybersecurity of Elections

The Election Operations Unit continues to work collaboratively with other units within the agency toward improving the cybersecurity of the election infrastructure at both the state and county levels. On January 6, 2017, U.S. Secretary of Homeland Security Jeh Johnson designated Elections as Critical Infrastructure. As a result, Unit staff has worked to determine what this designation means for election administration in New York and what resources it may make available for the State and County Boards of Elections. This work has included staff involvement in conversations and activities with various state, federal and relevant partners, such as the US Department of Homeland Security, the Center for Internet Security, the Governor's Cybersecurity Advisory Board and others.

The Unit has participated in the agency's efforts in developing a plan for improving the cybersecurity posture at both the state and local levels, enhancing incident response planning and coordinating local, state and federal resources and communication. As the issue of cybersecurity of elections infrastructure will undoubtedly be an ongoing one, the Unit continues to educate and position itself to best serve the county Boards of Elections on the topics of cybersecurity and incident response.

The SHOEBOX Program

As New York's HAVA fund distribution program does not provide for the direct release of federal funds to counties, in the overall scope of compliance with HAVA, a separate program was created to enable the reimbursement of county funds that were expended in the name of either implementing HAVA, or furthering the goals and objectives of HAVA. For the purchase of products and services related to the overall HAVA project which were not part of the vendor contracts themselves, this program was created and came to be known as the SHOEBOX Program.

County Boards of Elections may make application, after the purchase of such products and services with county funds, for reimbursement of either some or all of those costs, provided that the purchases were reasonable, allowable, and allocable. Substantial evidence must be included with each application, and prior to the award of any reimbursement, all applications are reviewed for the products' and/or services' compliance with the EAC's guidelines and formal opinions for allowable expenses. Reimbursement will be made for 100% of the allowable costs submitted not to exceed the unspent balance of funds allocated to each county.

To receive reimbursement, county Boards of Elections must have contracts in place, and complete and submit an application packet to the Election Operations Unit. In 2017, twenty counties submitted 49 vouchers for SHOEBOX fund reimbursement, amounting in total to \$2,747,099.

Voting System Certification and Support Activities

The rapid pace and high volume of activity relative to supporting and guiding county Boards of Elections in the use of optical scanning devices continued into 2017. Due to the complexity and technical nature of these systems, the provision of ongoing support is essential throughout the year. Key initiatives and services included, but were not limited to, the following:

- Help Desk technical support was provided before, during, and after each Primary and the General Election, with dedicated staff assigned to assist county Boards of Elections personnel in building ballots, running test decks, conducting 3% post-election audits, defining ballot layout, and related tasks.
- Election Operations staff continued refining all policies and procedures. Feedback from county Boards of Elections, as well as input received from security vendor NYSTEC, support the goal of sculpting all the policies and procedures.
- Staff continues to collect and review ballots generated by county Boards of Elections in order to assess the potential for improved usability for voters. Areas of focus were font size, layout, placement of instructions, and overall ballot design.
- Election Operations staff continue to visit county Boards of Elections to conduct voting machine audits and election monitoring activities. Election monitoring includes gathering and reviewing procedures and processes at the local level to ensure that county boards are

creating and executing test desks as prescribed by NYSBOE; look for aberrations in the functioning of voting equipment; and, review operational procedures used by county boards, to ensure consistent delivery of all Boards of Elections services.

- Staff continues to monitor the usage of the asset management system.
- The Unit continues to conduct on-site and in-house training sessions related to the use of certified voting systems to county personnel as refresher training.
- Staff completed certification testing of Engineering Change Controls (ECO's) submitted by Clear Ballot, Dominion and ES&S related to end-of-life issues.
- Staff completed the certification testing of a new Dominion Statement of Votes Cast report which now breaks out town, city and ward subtotals.
- Staff continued working with the Information Technology Unit to provide support of the statewide election night reporting database. This effort included continued training of county Boards of Elections staff, along with assisting boards before and on election night in the reporting of their results.

Additional Unit Activities

In addition to ongoing operational and technical support to county Boards of Elections, public election services, ballot access assistance, and voting system certification and technical support, Election Operations personnel assist other Units in the agency through active participation in workgroups and projects, support of other Agency missions affected by staffing shortages, and contributing to the various priorities identified by the Agency.



Commissioner Spano makes a point during a board meeting



CIO Bill Cross testifies before the State Assembly Standing Committee on Election Law.

INFORMATION TECHNOLOGY UNIT

All program units in the Agency rely heavily on technology to perform the Board’s collective mission. The Information Technology Unit (ITU) is tasked with providing the most efficient and cost-effective technology solutions to enable program unit staff to perform their responsibilities.

The IT Unit is responsible for all aspects of technology within the Agency including acquisitions, infrastructure management, applications development, systems support, cybersecurity, and end-user support. IT management is also responsible for developing an IT budget and working with various internal and external units to obtain necessary approvals and process procurements in accordance with Agency and NYS requirements.

IT Unit staff, including the Information Security Officer (ISO), work closely with counties, vendors and other state and federal entities to monitor, maintain, and improve the security of state election systems and their data.

The Chief Information Officer (CIO) participates in strategic planning for the Agency and provides recommendations regarding emerging technologies and best-fit solutions to support business functions. Additionally, the CIO is the primary liaison for the Board of Elections to the NYS Office of Information Technology Services.

Computing Environment and Infrastructure

The New York State Board of Elections operates a complex network environment, connecting BOE offices with its primary and backup datacenters, as well as secure connections to local county systems. The IT Unit is responsible for the design, installation, maintenance and security of this network infrastructure, providing a stable and secure platform for BOE applications. The Board also maintains an Internet-accessible network, hosting the Agency's website and public applications such as Voter Lookup and Election Night Reporting.



With the heightened attention on election security, BOE has undertaken significant efforts to improve our cybersecurity posture and bolster the security of key election systems and infrastructure. These actions include adding additional layers of protection for public-facing systems and tightening existing security between BOE and the counties. Various technologies have been utilized to implement multiple layers of firewalls, intrusion detection and prevention systems (IDS/IPS), malware protection and system log monitoring. BOE has also engaged multiple third parties, including the federal Department of Homeland Security (DHS), to scan, monitor and assess Agency networks for emerging security threats.

We have partnered with several state and federal entities to exchange up-to-date cybersecurity information and disseminate this information to county BOE's. We have also worked with the counties to help increase end-to-end security of all election systems.

IT Unit staff develops, maintains and supports several major applications and systems, described below, which are used at the State Board of Elections, and ensures that all design and coding are performed with attention to best industry standards and practices. All new applications

are designed to meet accessibility standards and utilize responsive design to ensure a consistent user experience across multiple device types including desktop computers, tablets, and mobile phones.

Financial Disclosure Administration System (FIDAS).

The Financial Disclosure Administration System is a relational database, network-based system used by auditing and enforcement staff for the management of the financial disclosure reports for committees and candidates for statewide and local office. The Information Technology Unit develops and maintains the databases and applications associated with the administration of campaign finances. The Agency's Electronic Filing Software, which is used by candidates and political committees for filing their reports, was developed by and is maintained by the Agency's IT staff. In 2017, IT continued the reengineering of FIDAS as part of the CAPAS/FIDAS Redesign Project.

IT is responsible for receiving and processing electronic filings from over 17,000 filers and loading them into FIDAS. There were eight major filing periods in 2017. A small, but efficient Help Desk staff performs this work, in addition to delivering telephone support to the financial report filers, county Boards of Elections and Agency staff.

National Change of Address (NCOA) Processing

NCOA processing was coordinated by the State Board as required by the National Voter Registration Act. A file with all the names and addresses is produced and forwarded electronically to an NCOA vendor for matching against the U.S. Post Office's Change-of-Address database. The file resulting from the processing is retrieved electronically by the State Board where it is parsed and redistributed to the individual counties of origin. The NCOA processing for 2017 included nearly 12 million voter records from sixty-two counties. Centralizing this NCOA processing through the State Board, as opposed to the processing by individual counties, provides the counties with a substantial cost savings due to the economy of scale that the State Board leverages.

Election Operation Support

The Information Technology Unit provides support to the Election Operations Unit in the form of the Candidate Petition Administration System (CAPAS), which is used to administer the candidate petition process as well as create correspondence, ballots and reports pertaining to elections. In 2017, IT continued the reengineering of CAPAS as part of the CAPAS/FIDAS Redesign Project.

Agency-based Voter Registration / Public Information

The Information Technology Unit supports the database applications used by the Voter Registration Unit to manage the registration sites and transactions. There is also a supplies

inventory system created and maintained by the Agency's IT staff.

The Public Information Officer has oversight of the content on the Agency's website. The Agency has adopted a policy of making as much information as possible available electronically thus cutting the cost of printing and reproduction through the Freedom of Information Law process. The Information Technology staff works closely with the Public Information Office to oversee the technology, design and application development associated with the Agency's website, and is responsible for ensuring that the website meets all State branding and accessibility guidelines.

NYSVoter Statewide Voter Registration Database

As part of the Federal Help America Vote Act (HAVA), legislation that was passed in 2002, as well as New York State Election Law changes, the State Board of Elections created a statewide voter registration database. The database, known as NYSVoter, was developed and implemented in 2007. Since then the system has become mature and stable.

During 2017, the IT Unit has continued the NYSVoter Refresh Project to ensure that the complex network of servers and connections to county systems is secure, fault tolerant, and supportable on up-to-date hardware and software.

The Information Technology Unit worked with the Federal Voting Assistance Program to implement the Military & Overseas Voter Empowerment Act (MOVE) to assist military and civilian voters who live overseas to vote absentee ballots. The MOVE system was integrated with NYSVoter and the county voter registration systems for the 2012 election and continues to operate for the benefit of MOVE voters.



Recruitment meeting of the National Women's Suffrage Association sometime after 1869.



The CIO Bill Cross and Co-Executive Directors Todd Valentine and Robert Brehm testify before the Assembly Standing Committee on Election Law.

PUBLIC INFORMATION OFFICE

Media and Public Relations

The Public Information Officer serves as the board's spokesperson and is responsible for handling all press inquiries. In 2017, the Public Information Office received over 3,800 requests from reporters, interested parties and the general public seeking information on election results, voter registration and enrollment data, campaign finance filings, enforcement matters, N.Y. Election Law, implementation of the Help America Vote Act, the National Voter Registration Act, absentee voting, the Military & Overseas Voter Empowerment Act, voting machines, cybersecurity and Board policies. The Public Information Officer also produced press releases and advisories throughout the year which provided information on these topics to the state and national press corps and the public. This information was also made available via the Internet primarily through the Board's website (www.elections.ny.gov), but also our Twitter account (@NYSBOE) and YouTube channel (www.youtube.com/user/NYSBOE) along with a wide range of election-related data of interest to New York State voters all over the world.

Election Night Results Reporting

Pursuant to legislation passed in 2013, the Board now provides unofficial Election results as part of an Election Night Reporting System. In 2017, we reported results for two special elections that took place on May 23, 2017 for the 30th Senate District and the 9th Assembly District. We also reported on results on three elections to fill vacancies in the 26th State Senate District and the 27th

and 71st Assembly districts held on the day of the General Election, November 7, 2017. There were also 28 vacancies in 10 of the state's 13 Judicial Districts for State Supreme Court.

The electorate also considered three statewide ballot propositions. They resoundingly rejected Proposal 1, the once-every-twenty-years question of whether there shall be a constitutional convention, by a ratio of five to one. They approved a constitutional amendment that would allow a court to revoke the government pension of a public official convicted of certain felonies related to their official duties. Lastly the people narrowly approved the creation of a land bank in the Forest Preserve to address public health and safety concerns.

Freedom of Information Law

The Public Information Officer also serves as the Board's Records Access Officer. He is responsible for processing all FOIL requests (excluding petition copies) received by the Agency. In 2017, 937 requests were received by the Records Access Officer. This number represents an 11.8% increase from 2016. Most requests were for data and records from NYSBOE's statewide database of registered voters (NYSVoter). Of the requests received, 818 were fulfilled, 53 were denied in accordance with the provisions of Section 87 of the Public Officers Law, and in 66 instances no records were found.



SBOE Staff met with a delegation of elected and party officials from Israel in September 2016.

Registration Hotlines

The Board's automated hotline (1-800-FOR-VOTE) and the Board's webpage on-line voter registration form (www.elections.ny.gov) provide a dependable, efficient and convenient way in which citizens may request voter registration application forms. The hotline remains a positive

component of the board's outreach program and the webpage continues to capture a larger share of the program.

Legal Notices

Pursuant to Section 4-116 of the Election Law the State Board is required to publish, once in the week preceding any election at which proposed Constitutional Amendments or other propositions or questions are to be submitted to the voters of the state, an abstract prepared by the Attorney General explaining the amendment or question. The amendment, abstract and question are published in at least one general circulation newspaper in every county of the state and comply with the language requirements of the Voting Rights Act. There were three ballot proposals on the 2017 General Election ballot concerning, 1) Shall there be a Constitutional Convention; 2) Shall a public officer forfeit fully or partially his or her pension if convicted of certain defined felonies; and 3) Shall Forest Preserve lands be used for specifically defined public health and safety purposes. These proposals were translated into Spanish, Chinese, Korean and Bengali. The cost of publishing the three proposals in advance of the 2017 General Elections was \$67,108.25.

Website (www.elections.ny.gov)

Lastly, the Public Information Office works in close concert with the Information Technology Unit to operate and maintain the Agency's website. Our website is an integral part of the Board's effort to provide information for the public. The homepage received 3,258,593 total visits during 2017. The voter lookup page received 1,615,306 visits for the year. Our top five pages include the homepage; the Campaign Finance search engine, 274,490 pageviews; the Campaign Finance View Reports page, 218,272 views; the Voting Information page, 175,564 pageviews; and the Campaign Finance homepage, 161,320 pageviews. The Election Night Reporting page, where election results are reported, had 106,212 pageviews.

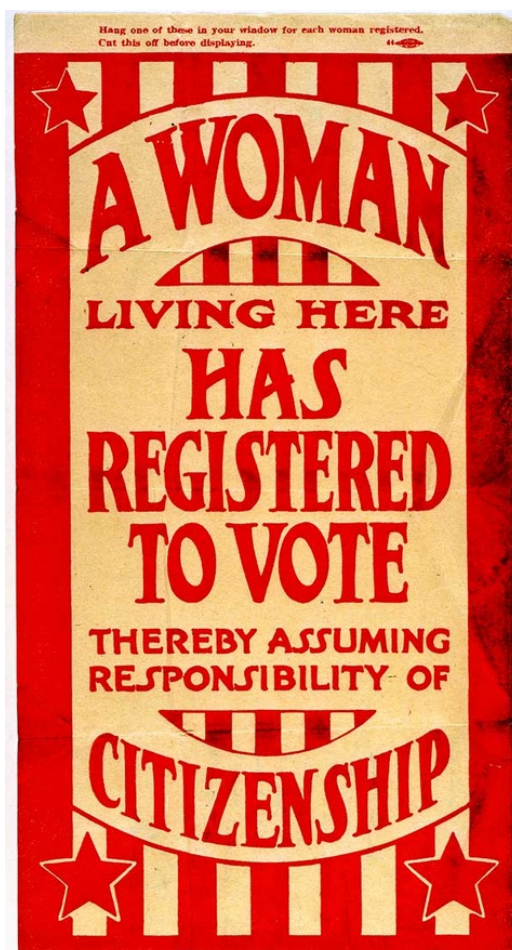
Cybersecurity

During the 2016 General Election a unique issue emerged when it was revealed by the Federal Bureau of Investigation that Illinois' and Arizona's voter databases had allegedly been hacked into by foreign actors. The Public Information Office quickly received dozens of inquiries from international, national and local media asking about the possibility of cyberattacks, hacking and the integrity of our voting machines, voter registration database and Election Night Reporting System.

Coordinating with our County Board of Elections colleagues and the Information Technology Unit, the Public Information Office was able to tamp down some of the more extreme concerns expressed by the national and statewide media and explain the strengths of the New York's decentralized voting system. While no system is immune from hacking, the wisdom of voting machines that are not networked to the Internet or each other became profoundly clear in the wake of the cyberattack allegations.

Cybersecurity of national elections continued to be a major issue for all levels of government in 2017 as the Department of Homeland Security revealed that as many as 21 states were targeted during the 2016 Presidential election cycle for potential malicious activity by possible foreign actors intent on causing mischief if not outright affecting the outcome of specific elections. While New York was not one of the targeted states, we acted as if we had been.

The Board put together a plan to address what it believed to be the most important areas to address first and in the longer term. That plan was submitted to the Executive and received substantial support. Throughout this process, BOE has worked with several state and federal partners to exchange up-to-date information and disseminate this information to local BOE's. The Board continues to pursue long- and short-term strategies to improve the security of our procedures and to do everything in its power to ensure the accuracy and integrity of New York State's elections.





AGENCY ADMINISTRATION

The Board's Administrative Office consists of two staff members. The duties of this unit include all personnel administration, purchasing, banking, mail and warehouse operations and all general agency administrative tasks relating to day-to-day operations. The Board has a “Host Agency” agreement with the Office of General Services for activities related to budgeting, contracts, purchasing, voucher payments and transactional Human Resource functions.

Fiscal Operations

The State Board of Elections received fiscal year 2017-18 appropriations of \$8,559,000 in the General Fund, \$0 in Federal Funds and \$3 million in Special Revenue Funds.

The State Board of Elections was granted the following re-appropriations for 2017-18:

- \$1,100,000 by the laws of 2016, for the purchase of software and/or development of technology related to compliance and enforcement.
- \$4,600,000 by the laws of 2011, for the implementation of federal election requirements including HAVA of 2002 and the MOVE Act of 2009.
- \$3,500,000 by the laws of 2010, in federal HAVA funds related to the implementation of the Military and Overseas Voter Empowerment (MOVE) Act of 2009.
- \$1,500,000 by the laws of 2009, for HAVA related expenditures.
- \$1,000,000 by the laws of 2005, for services and expenses (prior to April 1, 2005) related to the Help America Vote Act of 2002.
- \$1,000,000 by the laws of 2005, for services and expenses (on or after April 1, 2005) related to the Help America Vote Act of 2002.
- \$1,000,000 by the laws of 2009, for expenses related to satisfying the matching funds requirements of Section 253 (b) (5) of the Help America Vote Act of 2002.
- \$3,000,000 by the laws of 2016, for Voting Machine Examinations related expenditures.
- \$3,000,000 by the laws of 2014, for Voting Machine Examinations related expenditures.
- \$1,900,000 by the laws of 2006 amended in 2008, for the general fund local assistance services and expenses related to the alteration of poll sites to provide accessibility for disabled voters.

- \$1,000,000 by the laws of 2012, for services and expenses in the federal Health and Human Services account, including prior year liabilities, related to Poll Site Accessibility improvements.
- \$900,000 by the laws of 2011, for services and expenses in the federal Health and Human Services account, including prior year liabilities, related to Poll Site Accessibility improvements.
- \$500,000 by the laws of 2010, for services and expenses in the federal Health and Human Services account, including prior year liabilities, related to Poll Site Accessibility improvements.
- \$500,000 by the laws of 2009, for services and expenses related to the implementation of the Help America Vote Act of 2002, including the purchase of new voting machines and disability accessible ballot marking devices for use by the local boards of elections.
- \$1,500,000 by the laws of 2009 amended in 2011, for services and expenses related to the implementation of the Help America Vote Act of 2002, including the purchase of new voting machines and disability accessible ballot marking devices for use by the local boards of elections.
- \$9,300,000 by the laws of 2008 amended in 2011, for services and expenses related to the implementation of the Help America Vote Act of 2002, including the purchase of new voting machines and disability accessible ballot marking devices for use by the local boards of elections.
- \$2,900,000 by the laws of 2005, for services and expenses incurred for the poll worker training and voter education efforts.
- \$10,000,000 by the laws of 2005 amended in 2006, for services and expenses related to the purchase of new voting machines and voting systems.

Personnel Administration

The agency was authorized at a staffing level of 80 full time positions for the 2017/18 Fiscal Year.

Chapter 165 of the Laws of 2017, which implemented the 2016-2021 Agreement between the State of New York and CSEA, provided for a salary increase of two percent (2.00%) for fiscal years 2016-2017 and 2017-2018.

Chapter 8 of the Laws of 2017, which implemented the 2016-2019 Agreement between the State of New York and PEF, provided for a salary increase of two percent (2.00%) for fiscal year 2017 and provided for an April 2016 retroactive salary increase of two percent (2.00%).

Chapter 8 of the Laws of 2017 provided for a retroactive salary increase of two percent (2.00%) for fiscal year 2016-2017 and provided for a salary increase of two percent (2.00%) for fiscal year 2017-2018.

Chapter 55 of the Laws of 2015 and Chapter 8 of the Laws of 2017 provided for a salary increase of two percent (2.00%) for 2017.

Revenue Calendar Year 2016

| | |
|------------------------------|-------------|
| Judgments | \$72,049.49 |
| Photocopies | \$263.75 |
| Voting Machine Certification | \$0.00 |

Appendix
NYSVoter Enrollment by County, Party Affiliation and Status
Voters Registered as of November 1, 2017

| REGION | COUNTY | STATUS | DEM | REP | CON | GRE | WOR | IND | WEP | REF | OTH | BLANK | TOTAL |
|-------------|-------------|----------|---------|---------|--------|-------|-------|--------|-----|-----|-----|---------|---------|
| Outside NYC | Albany | Active | 90,209 | 35,072 | 2,928 | 549 | 558 | 9,311 | 66 | 54 | 161 | 40,501 | 179,409 |
| Outside NYC | Albany | Inactive | 9,907 | 2,800 | 253 | 82 | 99 | 1,030 | 12 | 0 | 60 | 4,781 | 19,024 |
| Outside NYC | Albany | Total | 100,116 | 37,872 | 3,181 | 631 | 657 | 10,341 | 78 | 54 | 221 | 45,282 | 198,433 |
| Outside NYC | Allegany | Active | 5,794 | 12,426 | 431 | 85 | 127 | 1,247 | 6 | 4 | 18 | 4,731 | 24,869 |
| Outside NYC | Allegany | Inactive | 350 | 435 | 19 | 8 | 13 | 80 | 0 | 0 | 1 | 344 | 1,250 |
| Outside NYC | Allegany | Total | 6,144 | 12,861 | 450 | 93 | 140 | 1,327 | 6 | 4 | 19 | 5,075 | 26,119 |
| Outside NYC | Broome | Active | 42,038 | 41,092 | 1,510 | 338 | 565 | 5,843 | 37 | 26 | 88 | 21,704 | 113,241 |
| Outside NYC | Broome | Inactive | 4,620 | 2,807 | 123 | 61 | 86 | 690 | 14 | 4 | 20 | 3,150 | 11,575 |
| Outside NYC | Broome | Total | 46,658 | 43,899 | 1,633 | 399 | 651 | 6,533 | 51 | 30 | 108 | 24,854 | 124,816 |
| Outside NYC | Cattaraugus | Active | 14,102 | 17,543 | 1,079 | 127 | 262 | 2,254 | 18 | 10 | 11 | 9,013 | 44,419 |
| Outside NYC | Cattaraugus | Inactive | 1,062 | 1,054 | 84 | 18 | 27 | 200 | 1 | 0 | 2 | 948 | 3,396 |
| Outside NYC | Cattaraugus | Total | 15,164 | 18,597 | 1,163 | 145 | 289 | 2,454 | 19 | 10 | 13 | 9,961 | 47,815 |
| Outside NYC | Cayuga | Active | 14,632 | 16,573 | 1,209 | 158 | 221 | 2,405 | 7 | 2 | 23 | 9,727 | 44,957 |
| Outside NYC | Cayuga | Inactive | 1,464 | 1,387 | 92 | 19 | 47 | 314 | 0 | 0 | 2 | 1,316 | 4,641 |
| Outside NYC | Cayuga | Total | 16,096 | 17,960 | 1,301 | 177 | 268 | 2,719 | 7 | 2 | 25 | 11,043 | 49,598 |
| Outside NYC | Chautauqua | Active | 25,268 | 25,573 | 1,873 | 179 | 429 | 4,605 | 26 | 28 | 89 | 17,880 | 75,950 |
| Outside NYC | Chautauqua | Inactive | 2,188 | 1,558 | 156 | 23 | 53 | 459 | 3 | 3 | 18 | 2,064 | 6,525 |
| Outside NYC | Chautauqua | Total | 27,456 | 27,131 | 2,029 | 202 | 482 | 5,064 | 29 | 31 | 107 | 19,944 | 82,475 |
| Outside NYC | Chemung | Active | 15,174 | 20,115 | 785 | 116 | 266 | 3,035 | 8 | 11 | 15 | 10,199 | 49,724 |
| Outside NYC | Chemung | Inactive | 1,290 | 1,301 | 59 | 14 | 32 | 320 | 0 | 1 | 1 | 1,157 | 4,175 |
| Outside NYC | Chemung | Total | 16,464 | 21,416 | 844 | 130 | 298 | 3,355 | 8 | 12 | 16 | 11,356 | 53,899 |
| Outside NYC | Chenango | Active | 6,989 | 12,257 | 487 | 132 | 172 | 1,659 | 5 | 1 | 17 | 6,204 | 27,923 |
| Outside NYC | Chenango | Inactive | 604 | 751 | 35 | 12 | 23 | 149 | 4 | 1 | 2 | 738 | 2,319 |
| Outside NYC | Chenango | Total | 7,593 | 13,008 | 522 | 144 | 195 | 1,808 | 9 | 2 | 19 | 6,942 | 30,242 |
| Outside NYC | Clinton | Active | 16,981 | 14,171 | 471 | 106 | 247 | 3,261 | 7 | 6 | 0 | 10,465 | 45,715 |
| Outside NYC | Clinton | Inactive | 1,336 | 892 | 46 | 14 | 28 | 295 | 2 | 3 | 0 | 1,164 | 3,780 |
| Outside NYC | Clinton | Total | 18,317 | 15,063 | 517 | 120 | 275 | 3,556 | 9 | 9 | 0 | 11,629 | 49,495 |
| Outside NYC | Columbia | Active | 14,582 | 12,066 | 1,088 | 204 | 210 | 2,749 | 17 | 4 | 24 | 11,107 | 42,051 |
| Outside NYC | Columbia | Inactive | 709 | 460 | 33 | 6 | 17 | 178 | 0 | 0 | 2 | 596 | 2,001 |
| Outside NYC | Columbia | Total | 15,291 | 12,526 | 1,121 | 210 | 227 | 2,927 | 17 | 4 | 26 | 11,703 | 44,052 |
| Outside NYC | Cortland | Active | 9,019 | 10,015 | 447 | 105 | 135 | 1,565 | 9 | 4 | 4 | 6,769 | 28,072 |
| Outside NYC | Cortland | Inactive | 641 | 573 | 35 | 11 | 18 | 128 | 0 | 0 | 1 | 728 | 2,135 |
| Outside NYC | Cortland | Total | 9,660 | 10,588 | 482 | 116 | 153 | 1,693 | 9 | 4 | 5 | 7,497 | 30,207 |
| Outside NYC | Delaware | Active | 7,240 | 11,671 | 483 | 110 | 105 | 1,554 | 8 | 1 | 21 | 5,276 | 26,469 |
| Outside NYC | Delaware | Inactive | 628 | 658 | 35 | 7 | 17 | 160 | 0 | 1 | 3 | 634 | 2,143 |
| Outside NYC | Delaware | Total | 7,868 | 12,329 | 518 | 117 | 122 | 1,714 | 8 | 2 | 24 | 5,910 | 28,612 |
| Outside NYC | Dutchess | Active | 61,595 | 52,076 | 3,525 | 496 | 727 | 10,130 | 62 | 44 | 171 | 47,409 | 176,235 |
| Outside NYC | Dutchess | Inactive | 5,697 | 3,637 | 233 | 88 | 88 | 901 | 3 | 1 | 15 | 4,188 | 14,851 |
| Outside NYC | Dutchess | Total | 67,292 | 55,713 | 3,758 | 584 | 815 | 11,031 | 65 | 45 | 186 | 51,597 | 191,086 |
| Outside NYC | Erie | Active | 286,029 | 152,409 | 13,145 | 1,670 | 2,879 | 28,210 | 147 | 84 | 607 | 107,214 | 592,394 |
| Outside NYC | Erie | Inactive | 15,523 | 6,500 | 457 | 132 | 204 | 1,609 | 8 | 2 | 50 | 7,402 | 31,887 |

| | | | | | | | | | | | | | |
|-------------|------------|----------|---------|---------|--------|-------|-------|--------|-----|-----|-----|---------|-----------|
| Outside NYC | Erie | Total | 301,552 | 158,909 | 13,602 | 1,802 | 3,083 | 29,819 | 155 | 86 | 657 | 114,616 | 624,281 |
| Outside NYC | Essex | Active | 6,552 | 10,577 | 200 | 83 | 54 | 1,741 | 3 | 1 | 11 | 4,393 | 23,615 |
| Outside NYC | Essex | Inactive | 984 | 1,248 | 34 | 20 | 24 | 341 | 1 | 0 | 6 | 905 | 3,563 |
| Outside NYC | Essex | Total | 7,536 | 11,825 | 234 | 103 | 78 | 2,082 | 4 | 1 | 17 | 5,298 | 27,178 |
| Outside NYC | Franklin | Active | 9,689 | 8,463 | 323 | 75 | 96 | 1,641 | 1 | 3 | 1 | 4,600 | 24,892 |
| Outside NYC | Franklin | Inactive | 656 | 535 | 25 | 11 | 14 | 156 | 0 | 0 | 3 | 592 | 1,992 |
| Outside NYC | Franklin | Total | 10,345 | 8,998 | 348 | 86 | 110 | 1,797 | 1 | 3 | 4 | 5,192 | 26,884 |
| Outside NYC | Fulton | Active | 7,530 | 15,475 | 528 | 77 | 160 | 1,694 | 9 | 2 | 27 | 5,806 | 31,308 |
| Outside NYC | Fulton | Inactive | 745 | 1,026 | 37 | 14 | 27 | 174 | 2 | 1 | 2 | 780 | 2,808 |
| Outside NYC | Fulton | Total | 8,275 | 16,501 | 565 | 91 | 187 | 1,868 | 11 | 3 | 29 | 6,586 | 34,116 |
| Outside NYC | Genesee | Active | 9,082 | 15,948 | 936 | 109 | 192 | 1,912 | 8 | 3 | 87 | 8,392 | 36,669 |
| Outside NYC | Genesee | Inactive | 325 | 474 | 31 | 4 | 11 | 62 | 1 | 0 | 3 | 338 | 1,249 |
| Outside NYC | Genesee | Total | 9,407 | 16,422 | 967 | 113 | 203 | 1,974 | 9 | 3 | 90 | 8,730 | 37,918 |
| Outside NYC | Greene | Active | 7,184 | 11,646 | 796 | 136 | 125 | 1,874 | 4 | 1 | 2 | 7,408 | 29,176 |
| Outside NYC | Greene | Inactive | 737 | 895 | 67 | 37 | 19 | 230 | 1 | 0 | 0 | 875 | 2,861 |
| Outside NYC | Greene | Total | 7,921 | 12,541 | 863 | 173 | 144 | 2,104 | 5 | 1 | 2 | 8,283 | 32,037 |
| Outside NYC | Hamilton | Active | 882 | 2,459 | 62 | 9 | 8 | 233 | 0 | 0 | 3 | 559 | 4,215 |
| Outside NYC | Hamilton | Inactive | 83 | 176 | 13 | 1 | 0 | 30 | 0 | 0 | 0 | 63 | 366 |
| Outside NYC | Hamilton | Total | 965 | 2,635 | 75 | 10 | 8 | 263 | 0 | 0 | 3 | 622 | 4,581 |
| Outside NYC | Herkimer | Active | 9,983 | 18,120 | 675 | 116 | 126 | 2,487 | 9 | 30 | 7 | 6,632 | 38,185 |
| Outside NYC | Herkimer | Inactive | 976 | 1,275 | 65 | 11 | 27 | 273 | 0 | 2 | 3 | 826 | 3,458 |
| Outside NYC | Herkimer | Total | 10,959 | 19,395 | 740 | 127 | 153 | 2,760 | 9 | 32 | 10 | 7,458 | 41,643 |
| Outside NYC | Jefferson | Active | 15,586 | 23,401 | 854 | 153 | 205 | 3,109 | 12 | 12 | 29 | 12,254 | 55,615 |
| Outside NYC | Jefferson | Inactive | 1,769 | 1,894 | 94 | 17 | 36 | 411 | 0 | 0 | 6 | 2,234 | 6,461 |
| Outside NYC | Jefferson | Total | 17,355 | 25,295 | 948 | 170 | 241 | 3,520 | 12 | 12 | 35 | 14,488 | 62,076 |
| Outside NYC | Lewis | Active | 4,070 | 8,456 | 265 | 30 | 45 | 829 | 1 | 0 | 3 | 2,779 | 16,478 |
| Outside NYC | Lewis | Inactive | 449 | 714 | 29 | 6 | 7 | 105 | 0 | 0 | 0 | 400 | 1,710 |
| Outside NYC | Lewis | Total | 4,519 | 9,170 | 294 | 36 | 52 | 934 | 1 | 0 | 3 | 3,179 | 18,188 |
| Outside NYC | Livingston | Active | 10,303 | 16,802 | 882 | 152 | 138 | 1,849 | 6 | 5 | 73 | 8,472 | 38,682 |
| Outside NYC | Livingston | Inactive | 834 | 748 | 51 | 18 | 24 | 161 | 3 | 0 | 6 | 760 | 2,605 |
| Outside NYC | Livingston | Total | 11,137 | 17,550 | 933 | 170 | 162 | 2,010 | 9 | 5 | 79 | 9,232 | 41,287 |
| Outside NYC | Madison | Active | 11,302 | 16,039 | 883 | 125 | 226 | 2,640 | 6 | 5 | 62 | 9,481 | 40,769 |
| Outside NYC | Madison | Inactive | 819 | 746 | 39 | 12 | 18 | 173 | 0 | 0 | 5 | 815 | 2,627 |
| Outside NYC | Madison | Total | 12,121 | 16,785 | 922 | 137 | 244 | 2,813 | 6 | 5 | 67 | 10,296 | 43,396 |
| Outside NYC | Monroe | Active | 185,145 | 129,297 | 7,840 | 1,271 | 1,495 | 20,441 | 132 | 43 | 625 | 108,755 | 455,044 |
| Outside NYC | Monroe | Inactive | 12,035 | 6,305 | 374 | 127 | 115 | 1,358 | 7 | 0 | 60 | 6,985 | 27,366 |
| Outside NYC | Monroe | Total | 197,180 | 135,602 | 8,214 | 1,398 | 1,610 | 21,799 | 139 | 43 | 685 | 115,740 | 482,410 |
| Outside NYC | Montgomery | Active | 8,987 | 9,397 | 650 | 61 | 113 | 1,500 | 8 | 8 | 20 | 6,170 | 26,914 |
| Outside NYC | Montgomery | Inactive | 695 | 581 | 65 | 5 | 15 | 144 | 2 | 0 | 2 | 737 | 2,246 |
| Outside NYC | Montgomery | Total | 9,682 | 9,978 | 715 | 66 | 128 | 1,644 | 10 | 8 | 22 | 6,907 | 29,160 |
| Outside NYC | Nassau | Active | 386,674 | 327,964 | 10,211 | 1,724 | 2,303 | 35,675 | 224 | 205 | 392 | 232,846 | 998,218 |
| Outside NYC | Nassau | Inactive | 11,185 | 8,244 | 262 | 60 | 56 | 1,063 | 2 | 1 | 11 | 6,496 | 27,380 |
| Outside NYC | Nassau | Total | 397,859 | 336,208 | 10,473 | 1,784 | 2,359 | 36,738 | 226 | 206 | 403 | 239,342 | 1,025,598 |
| Outside NYC | Niagara | Active | 51,260 | 43,662 | 3,066 | 447 | 1,170 | 6,673 | 38 | 43 | 77 | 23,773 | 130,209 |
| Outside NYC | Niagara | Inactive | 3,512 | 2,355 | 146 | 43 | 102 | 441 | 9 | 1 | 6 | 2,220 | 8,835 |
| Outside NYC | Niagara | Total | 54,772 | 46,017 | 3,212 | 490 | 1,272 | 7,114 | 47 | 44 | 83 | 25,993 | 139,044 |

| | | | | | | | | | | | | | |
|-------------|-------------|----------|---------|--------|-------|-------|-------|--------|----|-----|-----|--------|---------|
| Outside NYC | Oneida | Active | 42,716 | 47,970 | 2,000 | 294 | 454 | 7,391 | 36 | 21 | 137 | 24,052 | 125,071 |
| Outside NYC | Oneida | Inactive | 3,505 | 2,754 | 134 | 30 | 69 | 671 | 3 | 1 | 12 | 2,307 | 9,486 |
| Outside NYC | Oneida | Total | 46,221 | 50,724 | 2,134 | 324 | 523 | 8,062 | 39 | 22 | 149 | 26,359 | 134,557 |
| Outside NYC | Onondaga | Active | 106,856 | 83,475 | 4,699 | 1,007 | 1,202 | 14,540 | 85 | 47 | 346 | 72,781 | 285,038 |
| Outside NYC | Onondaga | Inactive | 8,743 | 4,448 | 306 | 115 | 161 | 1,257 | 7 | 2 | 31 | 6,385 | 21,455 |
| Outside NYC | Onondaga | Total | 115,599 | 87,923 | 5,005 | 1,122 | 1,363 | 15,797 | 92 | 49 | 377 | 79,166 | 306,493 |
| Outside NYC | Ontario | Active | 20,699 | 27,155 | 1,375 | 240 | 219 | 3,990 | 14 | 18 | 33 | 16,973 | 70,716 |
| Outside NYC | Ontario | Inactive | 604 | 651 | 48 | 10 | 11 | 135 | 3 | 0 | 3 | 652 | 2,117 |
| Outside NYC | Ontario | Total | 21,303 | 27,806 | 1,423 | 250 | 230 | 4,125 | 17 | 18 | 36 | 17,625 | 72,833 |
| Outside NYC | Orange | Active | 79,293 | 70,067 | 4,185 | 632 | 1,071 | 11,469 | 69 | 44 | 181 | 49,576 | 216,587 |
| Outside NYC | Orange | Inactive | 5,712 | 4,420 | 278 | 61 | 109 | 948 | 6 | 1 | 18 | 3,984 | 15,537 |
| Outside NYC | Orange | Total | 85,005 | 74,487 | 4,463 | 693 | 1,180 | 12,417 | 75 | 45 | 199 | 53,560 | 232,124 |
| Outside NYC | Orleans | Active | 5,299 | 10,650 | 522 | 66 | 134 | 1,094 | 6 | 2 | 39 | 4,938 | 22,750 |
| Outside NYC | Orleans | Inactive | 380 | 559 | 42 | 8 | 21 | 83 | 0 | 0 | 3 | 440 | 1,536 |
| Outside NYC | Orleans | Total | 5,679 | 11,209 | 564 | 74 | 155 | 1,177 | 6 | 2 | 42 | 5,378 | 24,286 |
| Outside NYC | Oswego | Active | 16,869 | 31,362 | 1,641 | 157 | 330 | 3,699 | 13 | 6 | 45 | 14,500 | 68,622 |
| Outside NYC | Oswego | Inactive | 2,430 | 2,974 | 177 | 26 | 76 | 602 | 1 | 0 | 10 | 2,462 | 8,758 |
| Outside NYC | Oswego | Total | 19,299 | 34,336 | 1,818 | 183 | 406 | 4,301 | 14 | 6 | 55 | 16,962 | 77,380 |
| Outside NYC | Otsego | Active | 10,557 | 12,997 | 527 | 148 | 135 | 2,088 | 9 | 4 | 39 | 7,140 | 33,644 |
| Outside NYC | Otsego | Inactive | 888 | 759 | 36 | 12 | 15 | 205 | 1 | 0 | 4 | 716 | 2,636 |
| Outside NYC | Otsego | Total | 11,445 | 13,756 | 563 | 160 | 150 | 2,293 | 10 | 4 | 43 | 7,856 | 36,280 |
| Outside NYC | Putnam | Active | 18,563 | 22,066 | 1,848 | 159 | 200 | 3,734 | 16 | 16 | 48 | 16,007 | 62,657 |
| Outside NYC | Putnam | Inactive | 1,336 | 1,443 | 119 | 11 | 13 | 278 | 0 | 0 | 4 | 1,265 | 4,469 |
| Outside NYC | Putnam | Total | 19,899 | 23,509 | 1,967 | 170 | 213 | 4,012 | 16 | 16 | 52 | 17,272 | 67,126 |
| Outside NYC | Rensselaer | Active | 29,582 | 24,379 | 4,172 | 445 | 1,032 | 7,621 | 34 | 37 | 35 | 28,983 | 96,320 |
| Outside NYC | Rensselaer | Inactive | 3,062 | 1,692 | 296 | 44 | 152 | 765 | 2 | 0 | 6 | 2,800 | 8,819 |
| Outside NYC | Rensselaer | Total | 32,644 | 26,071 | 4,468 | 489 | 1,184 | 8,386 | 36 | 37 | 41 | 31,783 | 105,139 |
| Outside NYC | Rockland | Active | 88,761 | 44,792 | 4,228 | 342 | 866 | 7,837 | 44 | 144 | 5 | 43,597 | 190,616 |
| Outside NYC | Rockland | Inactive | 6,187 | 2,980 | 225 | 45 | 66 | 645 | 4 | 1 | 0 | 3,468 | 13,621 |
| Outside NYC | Rockland | Total | 94,948 | 47,772 | 4,453 | 387 | 932 | 8,482 | 48 | 145 | 5 | 47,065 | 204,237 |
| Outside NYC | Saratoga | Active | 40,536 | 59,988 | 2,342 | 401 | 402 | 9,027 | 23 | 10 | 47 | 37,262 | 150,038 |
| Outside NYC | Saratoga | Inactive | 3,385 | 3,884 | 210 | 52 | 55 | 826 | 4 | 1 | 8 | 3,451 | 11,876 |
| Outside NYC | Saratoga | Total | 43,921 | 63,872 | 2,552 | 453 | 457 | 9,853 | 27 | 11 | 55 | 40,713 | 161,914 |
| Outside NYC | Schenectady | Active | 36,075 | 23,488 | 3,163 | 309 | 623 | 5,429 | 46 | 12 | 68 | 23,049 | 92,262 |
| Outside NYC | Schenectady | Inactive | 2,612 | 1,299 | 138 | 34 | 65 | 417 | 3 | 0 | 10 | 1,840 | 6,418 |
| Outside NYC | Schenectady | Total | 38,687 | 24,787 | 3,301 | 343 | 688 | 5,846 | 49 | 12 | 78 | 24,889 | 98,680 |
| Outside NYC | Schoharie | Active | 4,710 | 7,194 | 515 | 61 | 82 | 1,152 | 8 | 17 | 26 | 4,186 | 17,951 |
| Outside NYC | Schoharie | Inactive | 658 | 787 | 61 | 12 | 19 | 229 | 1 | 0 | 3 | 733 | 2,503 |
| Outside NYC | Schoharie | Total | 5,368 | 7,981 | 576 | 73 | 101 | 1,381 | 9 | 17 | 29 | 4,919 | 20,454 |
| Outside NYC | Schuyler | Active | 3,242 | 4,669 | 251 | 62 | 70 | 693 | 1 | 0 | 0 | 2,547 | 11,535 |
| Outside NYC | Schuyler | Inactive | 258 | 326 | 12 | 6 | 12 | 88 | 1 | 0 | 0 | 280 | 983 |
| Outside NYC | Schuyler | Total | 3,500 | 4,995 | 263 | 68 | 82 | 781 | 2 | 0 | 0 | 2,827 | 12,518 |
| Outside NYC | Seneca | Active | 5,887 | 7,433 | 406 | 64 | 109 | 970 | 4 | 1 | 1 | 4,042 | 18,917 |
| Outside NYC | Seneca | Inactive | 423 | 413 | 39 | 5 | 11 | 118 | 0 | 0 | 0 | 432 | 1,441 |
| Outside NYC | Seneca | Total | 6,310 | 7,846 | 445 | 69 | 120 | 1,088 | 4 | 1 | 1 | 4,474 | 20,358 |
| Outside NYC | St.Lawrence | Active | 21,373 | 19,829 | 902 | 167 | 254 | 3,206 | 8 | 2 | 63 | 11,878 | 57,682 |
| Outside NYC | St.Lawrence | Inactive | 2,224 | 1,703 | 67 | 38 | 51 | 425 | 0 | 0 | 7 | 1,919 | 6,434 |

| | | | | | | | | | | | | | |
|-----------------------|-------------|----------|-----------|-----------|---------|--------|--------|---------|-------|-------|-------|-----------|-----------|
| Outside NYC | St.Lawrence | Total | 23,597 | 21,532 | 969 | 205 | 305 | 3,631 | 8 | 2 | 70 | 13,797 | 64,116 |
| Outside NYC | Steuben | Active | 14,004 | 28,157 | 944 | 155 | 251 | 2,975 | 16 | 3 | 71 | 10,203 | 56,779 |
| Outside NYC | Steuben | Inactive | 1,193 | 1,676 | 79 | 24 | 26 | 331 | 1 | 0 | 5 | 1,293 | 4,628 |
| Outside NYC | Steuben | Total | 15,197 | 29,833 | 1,023 | 179 | 277 | 3,306 | 17 | 3 | 76 | 11,496 | 61,407 |
| Outside NYC | Suffolk | Active | 319,900 | 310,873 | 20,938 | 1,958 | 4,097 | 42,869 | 246 | 127 | 728 | 254,202 | 955,938 |
| Outside NYC | Suffolk | Inactive | 21,035 | 15,887 | 1,117 | 162 | 288 | 2,749 | 12 | 8 | 53 | 16,130 | 57,441 |
| Outside NYC | Suffolk | Total | 340,935 | 326,760 | 22,055 | 2,120 | 4,385 | 45,618 | 258 | 135 | 781 | 270,332 | 1,013,379 |
| Outside NYC | Sullivan | Active | 17,237 | 13,018 | 1,015 | 148 | 225 | 2,366 | 15 | 4 | 37 | 11,392 | 45,457 |
| Outside NYC | Sullivan | Inactive | 2,079 | 1,093 | 89 | 25 | 42 | 275 | 0 | 1 | 4 | 1,329 | 4,937 |
| Outside NYC | Sullivan | Total | 19,316 | 14,111 | 1,104 | 173 | 267 | 2,641 | 15 | 5 | 41 | 12,721 | 50,394 |
| Outside NYC | Tioga | Active | 7,914 | 13,577 | 429 | 90 | 106 | 1,647 | 2 | 0 | 47 | 6,249 | 30,061 |
| Outside NYC | Tioga | Inactive | 637 | 877 | 32 | 10 | 14 | 162 | 1 | 0 | 0 | 697 | 2,430 |
| Outside NYC | Tioga | Total | 8,551 | 14,454 | 461 | 100 | 120 | 1,809 | 3 | 0 | 47 | 6,946 | 32,491 |
| Outside NYC | Tompkins | Active | 28,003 | 11,533 | 405 | 453 | 223 | 2,238 | 18 | 3 | 72 | 11,436 | 54,384 |
| Outside NYC | Tompkins | Inactive | 2,890 | 981 | 20 | 64 | 28 | 228 | 1 | 0 | 12 | 1,625 | 5,849 |
| Outside NYC | Tompkins | Total | 30,893 | 12,514 | 425 | 517 | 251 | 2,466 | 19 | 3 | 84 | 13,061 | 60,233 |
| Outside NYC | Ulster | Active | 43,311 | 28,454 | 2,528 | 682 | 593 | 5,935 | 42 | 12 | 98 | 33,815 | 115,470 |
| Outside NYC | Ulster | Inactive | 2,594 | 1,376 | 140 | 44 | 49 | 379 | 3 | 0 | 13 | 2,353 | 6,951 |
| Outside NYC | Ulster | Total | 45,905 | 29,830 | 2,668 | 726 | 642 | 6,314 | 45 | 12 | 111 | 36,168 | 122,421 |
| Outside NYC | Warren | Active | 10,520 | 18,653 | 630 | 215 | 125 | 2,561 | 12 | 29 | 32 | 8,448 | 41,225 |
| Outside NYC | Warren | Inactive | 907 | 1,177 | 46 | 22 | 12 | 270 | 1 | 2 | 1 | 925 | 3,363 |
| Outside NYC | Warren | Total | 11,427 | 19,830 | 676 | 237 | 137 | 2,831 | 13 | 31 | 33 | 9,373 | 44,588 |
| Outside NYC | Washington | Active | 8,777 | 14,533 | 634 | 138 | 183 | 2,179 | 3 | 5 | 2 | 7,542 | 33,996 |
| Outside NYC | Washington | Inactive | 672 | 848 | 53 | 11 | 21 | 212 | 1 | 0 | 0 | 756 | 2,574 |
| Outside NYC | Washington | Total | 9,449 | 15,381 | 687 | 149 | 204 | 2,391 | 4 | 5 | 2 | 8,298 | 36,570 |
| Outside NYC | Wayne | Active | 13,277 | 22,309 | 1,478 | 150 | 266 | 2,900 | 7 | 7 | 90 | 13,999 | 54,483 |
| Outside NYC | Wayne | Inactive | 902 | 1,037 | 78 | 14 | 30 | 211 | 0 | 0 | 13 | 1,086 | 3,371 |
| Outside NYC | Wayne | Total | 14,179 | 23,346 | 1,556 | 164 | 296 | 3,111 | 7 | 7 | 103 | 15,085 | 57,854 |
| Outside NYC | Westchester | Active | 282,783 | 131,324 | 7,819 | 969 | 1,388 | 21,938 | 147 | 97 | 191 | 137,155 | 583,811 |
| Outside NYC | Westchester | Inactive | 19,593 | 8,794 | 479 | 95 | 130 | 1,554 | 2 | 0 | 17 | 10,328 | 40,992 |
| Outside NYC | Westchester | Total | 302,376 | 140,118 | 8,298 | 1,064 | 1,518 | 23,492 | 149 | 97 | 208 | 147,483 | 624,803 |
| Outside NYC | Wyoming | Active | 5,223 | 10,899 | 530 | 33 | 94 | 1,158 | 0 | 1 | 22 | 5,037 | 22,997 |
| Outside NYC | Wyoming | Inactive | 447 | 633 | 50 | 3 | 16 | 125 | 0 | 0 | 1 | 533 | 1,808 |
| Outside NYC | Wyoming | Total | 5,670 | 11,532 | 580 | 36 | 110 | 1,283 | 0 | 1 | 23 | 5,570 | 24,805 |
| Outside NYC | Yates | Active | 3,225 | 6,477 | 235 | 53 | 57 | 687 | 13 | 19 | 12 | 2,679 | 13,457 |
| Outside NYC | Yates | Inactive | 211 | 321 | 19 | 4 | 6 | 48 | 1 | 1 | 3 | 280 | 894 |
| Outside NYC | Yates | Total | 3,436 | 6,798 | 254 | 57 | 63 | 735 | 14 | 20 | 15 | 2,959 | 14,351 |
| Outside NYC Grand Tot | | Active | 2,619,073 | 2,198,086 | 127,993 | 18,541 | 28,150 | 335,519 | 1,821 | 1,328 | 5,183 | 1,614,187 | 6,949,881 |
| Outside NYC Grand Tot | | Inactive | 177,390 | 117,821 | 7,382 | 1,868 | 2,815 | 25,871 | 134 | 39 | 531 | 124,705 | 458,556 |
| Outside NYC Grand Tot | | Total | 2,796,463 | 2,315,907 | 135,375 | 20,409 | 30,965 | 361,390 | 1,955 | 1,367 | 5,714 | 1,738,892 | 7,408,437 |
| Within NYC | Bronx | Active | 558,204 | 41,666 | 2,901 | 800 | 2,696 | 13,485 | 380 | 48 | 83 | 98,039 | 718,302 |
| Within NYC | Bronx | Inactive | 64,327 | 5,780 | 423 | 88 | 484 | 1,997 | 19 | 0 | 22 | 13,940 | 87,080 |
| Within NYC | Bronx | Total | 622,531 | 47,446 | 3,324 | 888 | 3,180 | 15,482 | 399 | 48 | 105 | 111,979 | 805,382 |
| Within NYC | Kings | Active | 1,023,594 | 125,384 | 4,342 | 2,914 | 4,869 | 28,677 | 512 | 59 | 383 | 243,357 | 1,434,091 |
| Within NYC | Kings | Inactive | 86,805 | 10,410 | 443 | 372 | 649 | 3,410 | 8 | 1 | 55 | 24,595 | 126,748 |
| Within NYC | Kings | Total | 1,110,399 | 135,794 | 4,785 | 3,286 | 5,518 | 32,087 | 520 | 60 | 438 | 267,952 | 1,560,839 |

| | | | | | | | | | | | | | |
|------------------|----------|----------|-----------|-----------|---------|--------|--------|---------|-------|-------|-------|-----------|------------|
| Within NYC | New York | Active | 693,487 | 93,582 | 1,676 | 1,965 | 1,823 | 26,939 | 303 | 62 | 469 | 180,708 | 1,001,014 |
| Within NYC | New York | Inactive | 90,620 | 18,791 | 304 | 341 | 326 | 5,978 | 9 | 1 | 114 | 32,873 | 149,357 |
| Within NYC | New York | Total | 784,107 | 112,373 | 1,980 | 2,306 | 2,149 | 32,917 | 312 | 63 | 583 | 213,581 | 1,150,371 |
| Within NYC | Queens | Active | 753,198 | 129,161 | 5,142 | 1,827 | 3,290 | 27,196 | 489 | 60 | 280 | 233,619 | 1,154,262 |
| Within NYC | Queens | Inactive | 47,129 | 8,520 | 403 | 142 | 294 | 2,209 | 9 | 1 | 36 | 16,017 | 74,760 |
| Within NYC | Queens | Total | 800,327 | 137,681 | 5,545 | 1,969 | 3,584 | 29,405 | 498 | 61 | 316 | 249,636 | 1,229,022 |
| Within NYC | Richmond | Active | 127,548 | 86,821 | 4,318 | 406 | 1,083 | 9,626 | 98 | 29 | 104 | 59,111 | 289,144 |
| Within NYC | Richmond | Inactive | 8,957 | 4,884 | 267 | 37 | 106 | 735 | 0 | 0 | 7 | 4,091 | 19,084 |
| Within NYC | Richmond | Total | 136,505 | 91,705 | 4,585 | 443 | 1,189 | 10,361 | 98 | 29 | 111 | 63,202 | 308,228 |
| Within NYC Total | | Active | 3,156,031 | 476,614 | 18,379 | 7,912 | 13,761 | 105,923 | 1,782 | 258 | 1,319 | 814,834 | 4,596,813 |
| Within NYC Total | | Inactive | 297,838 | 48,385 | 1,840 | 980 | 1,859 | 14,329 | 45 | 3 | 234 | 91,516 | 457,029 |
| Within NYC Total | | Total | 3,453,869 | 524,999 | 20,219 | 8,892 | 15,620 | 120,252 | 1,827 | 261 | 1,553 | 906,350 | 5,053,842 |
| Statewide Total | | Active | 5,775,104 | 2,674,700 | 146,372 | 26,453 | 41,911 | 441,442 | 3,603 | 1,586 | 6,502 | 2,429,021 | 11,546,694 |
| Statewide Total | | Inactive | 475,228 | 166,206 | 9,222 | 2,848 | 4,674 | 40,200 | 179 | 42 | 765 | 216,221 | 915,585 |
| Statewide Total | | Total | 6,250,332 | 2,840,906 | 155,594 | 29,301 | 46,585 | 481,642 | 3,782 | 1,628 | 7,267 | 2,645,242 | 12,462,279 |

The Division of Election Law Enforcement

(Submitted by Enforcement Counsel pursuant to N.Y. Election Law § 3-104(7))

On March 31, 2014, Governor Andrew Cuomo signed into law the Public Trust Act, thereby amending the New York State Election Law by creating an independent enforcement division, known as the division of election law enforcement (the “Division”), within the New York State Board of Elections (“SBOE”). Pursuant to the amended Election Law, the Governor chose Risa S. Sugarman as chief enforcement counsel to head the Division. Both the Assembly and Senate confirmed the choice, and Chief Enforcement Counsel Sugarman took office on September 1, 2014.

The Election Law, as amended, confers upon the chief enforcement counsel the power and duty to conduct all investigations necessary to enforce provisions of the Election Law and other statutes governing campaigns, elections and related procedures. The chief enforcement counsel has sole authority within the SBOE to investigate alleged violations of such statutes. The chief enforcement counsel oversees the entire Division with an operating budget of \$1,450,000 and oversees all staff activities.

Division Structure and Staffing

The Division, headed by the chief enforcement counsel, created a structure for independent enforcement activities. The chief enforcement counsel hired an investigative team of experienced attorneys, support staff, investigators and auditors. In total, the staff of the Division, headed by the chief enforcement counsel, includes five additional attorneys, an investigator, three investigative auditors and one support staff. Division attorneys are experienced in investigation and litigation as well as both the prosecution and defense of criminal and civil matters. Investigative and audit staff have extensive investigatory backgrounds in law enforcement and

have been members of state and local police departments and state investigative agencies. A member of the audit staff, with internal audit experience, is designated as the internal controls officer and is responsible for providing the Division with financial, records, and performance auditing.

Further, the Division conducts staff training activities and implements technology advances with investigative tools and data analytics systems.

Division Activities

The Division receives complaints about a variety of issues affecting elections and campaign finance in New York State and also generates investigations on its own initiative. Generally speaking, when the Division receives a complaint, the chief enforcement counsel reviews the complaint to determine whether it will be assigned to an attorney, an investigator, an auditor, or an investigative team. A letter is sent to the complainant (if identified) acknowledging receipt of the complaint, and an initial review of the complaint is undertaken. The nature of the complaint determines the nature and extent of the investigation. If necessary, the Division may request additional information from the complainant or other sources.

If the chief enforcement counsel determines that the allegations, if true, would not constitute a violation of the Election Law or that the allegations are not supported by credible evidence, a letter is issued to the complainant dismissing the complaint and notice is given to the SBOE.

The chief enforcement counsel must determine whether to proceed civilly or criminally on complaints that are supported by credible evidence. Division staff, working as a team, investigate the allegations and gather evidence necessary to make a determination as to the proper disposition of the case. In some instances, the chief enforcement counsel may request authorization from the

SBOE to administer oaths and affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any documents or other evidence relevant or material to the investigation. Based on the evidence obtained, the chief enforcement counsel makes a determination whether the Division should close the matter, proceed with civil enforcement action, or seek criminal prosecution.

Decisions to proceed with civil enforcement actions are guided by the evidence and the law. The election law gives the chief enforcement counsel discretion whether to initiate civil enforcement matters before a hearing officer upon her own initiative or based upon the referral from the SBOE compliance unit. All referrals from the compliance unit are reviewed to determine whether they meet the statutory requirements for the filing of a hearing officer proceeding. The chief enforcement counsel must be able to allege in a written report that substantial reason exists to believe that a violation of the election law exists. In addition, to avoid dismissal of the proceeding, the Division must prove that the violation is not de minimis, that the subject of the complaint did not make a good faith effort to correct the violation, and any previous violations by the subject of the complaint.

Complaints from the Public

Complaints are received and reviewed by the Division continuously. Complaints are received by email, regular mail, and telephone and are self-generated. The Division maintains an email address – enforcement@elections.ny.gov – to enable citizens to file complaints easily. Members of the public have utilized the Division’s email address for the purpose of contacting not only the Division but also the SBOE. Emails that ask questions dealing with SBOE functions, such as counsel, operations, registration, and elections calendars, are referred to SBOE Executive Directors for disposition. Remaining complaints are addressed by the Division.

All complaints received by the Division are confidential. The identities of complainants and the existence of particular investigations are held in the strictest confidence by the Division. Complaints received by the Division are sometimes unique but more often fall into familiar and repeating categories. A few of the categories include -

- *Failure to File:* Complaints typically received within days of filing deadlines which point to the failures of particular candidates or committees to file required financial disclosure reports in a timely manner. Although some of these complaints expose serial non-filers whose continual nonfeasance may require further legal action by the Division, most complaints point out isolated incidents of a particular candidate or committee missing a filing deadline. Typically, these issues resolve themselves when the candidate or committee files the required report shortly thereafter.
- *Campaigning or Election Day conduct:* Complaints received by the Division about elections include allegations that candidates have used false or misleading information on their campaign materials, electioneered at polling places on Election Day, or improperly expended committee or candidate campaign monies. These complaints are assigned to Division staff for investigation.

Division Investigations

- *Improper use of Political Party Committees to Evade Contribution Limits –*

The Election Law affords unique benefits to political party committees that are not available to independent bodies or other legislative or special interest groups. Among those benefits are the exemption of certain contributions, including those expended as so-called “housekeeping,” or non-candidate, expenditures, from limits imposed by Article 14 of the Election Law. When such exemptions are improperly claimed by non-

party committees or by party committees for other than non-candidate expenditures, such committees may evade the contribution limits and disclosure requirements imposed by the Legislature to prevent corruption. The Division is seeking to ensure that the unique benefits the Legislature chose to extend only to political parties are properly utilized: (a) only by committees that are truly committees of political parties; and (b) only for the intended purpose of making non-candidate expenditures.

In furtherance of this effort, the Chief Enforcement Counsel commenced enforcement proceedings in 2017 against the New York State Committee of the Independence Party (the “Independence Party”), the Independent Democratic Conference (the “IDC”), and principals of those groups, after the Independence Party purported to create a party committee controlled by members of the IDC and utilized solely for their benefit. The IDC used the newly created purported party committee to expend in excess of \$500,000 for a single 2016 Senate candidate and large amounts for others – amounts that exceeded candidate contribution limits – and claimed party exemptions for those expenditures. In addition, the IDC created a housekeeping account and claimed exemptions from all Article 14 limits for that account. The Chief Enforcement Council sought a declaration in Supreme Court that the newly created committee and its housekeeping committee were not validly created party committees, and thus not entitled to the exemptions claimed, and an injunction prohibiting the committees from raising or expending money until they were properly registered with the Board. The Court held oral argument on October 20, 2017 on a motion to dismiss the proceeding, and a decision has not yet been issued.

The Division is continuing its vigilance of potential evasion of contribution limits

and disclosure requirements established by the Legislature to prevent political corruption and is committed to ensuring transparency by party committees and enforcement of such limits.

- *Improper Use of Housekeeping Committees to Evade Contribution Limits -*

The Election Law affords unique benefits to political party committees, including the ability to maintain Housekeeping Committees - contributions to which are exempted from the contribution receipt limitations of Article 14 of the Election Law, as long as the expenditures of the Housekeeping Committees are not being made “for the express purpose of promoting the candidacy of specific candidates.” See Election Law section 14-124(3). When such exemptions are improperly claimed, such housekeeping committees may evade the contribution limits and disclosure requirements imposed by the Legislature to prevent corruption.

The New York State Senate Republican Campaign Committee is registered with the State Board of Elections (“SBOE”) as a Type 6 Party State Committee. The New York State Senate Republican Campaign Housekeeping Committee (the “Housekeeping Committee”) is registered with the SBOE as a Type 6H Party State Housekeeping Committee. In early 2017, the Chief Enforcement Counsel commenced a (then)confidential investigation to determine whether the Housekeeping Committee had violated various provisions of Article 14 of the NYS Election Law. A review of the Housekeeping Committee’s financial disclosure reports revealed that, for the periods covered by its 2015 January Periodic and 2017 January Periodic financial disclosure reports, it reported expending substantial amounts of money for purported “issue advocacy” and “polling.” The periods covered by these reports include,

respectively, the general election dates in 2014 and 2016 thus raising the issue of whether these expenditures were unlawful expenditures made for the express purpose of promoting the candidacy of specific candidates in these elections. The Housekeeping Committee's growing and substantial expenditures for Facebook advertising during the period covered by its 2015 January Periodic and continuing through the period covered by its 2017 January Periodic financial disclosure report similarly raise the issue of whether these expenditures were unlawful expenditures for the express purpose of promoting the candidacy of specific candidates in the 2016 elections.

To the extent that the contributions to and expenditures by the Housekeeping Committee do not qualify for the exception in Election Law § 14-124(3), the contribution and receipt limitations of Election Law § 14-114 are applicable, thus implicating potential contributions in excess of receipt limitations to both the New York State Senate Republican Campaign Committee and to candidates.

On March 23, 2017, the Chief Enforcement Counsel served subpoenas duces tecum on the above-referenced committees demanding documents relative to the investigation. On or about May 26, 2017, the Committees filed a petition in Albany County Supreme Court, requesting that the Court quash the subpoenas and grant a protective order. The Committees challenged the Chief Enforcement Counsel's statutory authority to issue subpoenas, as well as the propriety of the subpoenas themselves.² On June 13, 2017, the Chief Enforcement Counsel moved to dismiss the Committees' petition, and to compel compliance with the subpoenas. Oral argument was held on July 6, 2017, and on August 21, 2017 Albany County Supreme Court (Hon.

² The Committees' decision to litigate this matter resulted in details of the previously confidential investigation described above becoming public.

Roger D. McDonough) issued a decision granting the Chief Enforcement Counsel's motion to dismiss the Committees' petition, and to compel compliance with the subpoenas. The Committees timely took and perfected an appeal of the trial court decision to the Appellate Division, Third Department. The appeal will be heard by the Third Department in 2018.

The Division is continuing its vigilance of potential evasion of contribution limits and disclosure requirements established by the Legislature to prevent political corruption and is committed to ensuring transparency by party committees and enforcement of such limits.

Inspector General Investigation

On April 22, 2016, the chief enforcement counsel was informed that a confidential Division document previously presented to the SBOE at an Executive Session was disclosed to the news media. New York State Inspector General Catherine Leahy Scott conducted an investigation and issued a report dated May 2016 entitled "Investigation of the Dissemination of New York State Board of Election Enforcement Division Documents." The Inspector General's report concluded that the SBOE Director of Public Information disseminated confidential documents to the press.

The Inspector General's report recommended that the SBOE adopt appropriate rules, regulations, policies, and procedures establishing which Division materials are privileged and confidential and how such materials should be handled to ensure the integrity of the Board of Elections' operations and enforcement matters. SBOE counsel submitted to the SBOE a "Proposed Policy Related to Enforcement Matters." The Division submitted a response to the SBOE proposed policy as well as a memorandum of law. The memorandum of law detailed the structure of the Division, its relation to the Board, and the ethical obligations of attorneys, their employees, and

prosecutorial and investigative agencies as they relate to Division documents. In addition, the memorandum of law discussed the applicability of the Open Meetings Law and Freedom of Information Law as it relates to Division documents. Further, the Division proposed amendments to 9 NYCRR Parts 6202 (Examination and Copying of Records) and 6203 (Investigations) to create enforceable confidentiality rules for the SBOE. The Division's response and memorandum of law is attached to and made a part of this annual report as Exhibit "A". Over the objections of the Chief Enforcement Counsel the SBOE adopted a formal policy on March 13, 2017 allowing for the disclosure of Division documents provided to the Board.

Division Statistics

Between January 1 and December 31, 2017, the Division received 463 email questions and/or complaints.³ The Division conducted the initial review process described above which allowed referral of 69 of the questions and/or complaints to the SBOE for matters under its jurisdiction. Some of the complaints were resolved as filers voluntarily completed missing filings, as noted above. The Division conducted a review of the referrals from the compliance unit as required by the statute. Referrals described as records were reduced to the number of actual committees reviewed and evaluated based upon the number of violations, the prior history of violations and the good faith effort to correct the violations.

The Division formally opened 52 cases for investigation. After SBOE action, the chief enforcement counsel received authorization in four (4) cases to exercise the authority to issue subpoenas. Further, after SBOE action, the chief enforcement counsel referred one (1) investigation for continued investigation and possible prosecution. The Division filed six (6) matters before hearing officers pursuant to Election Law section 3-104(5)(a). Division

³ Some correspondents contacted the Division multiple times about the same issue. Inquiries about the same issue were counted as one (1) email for the purpose of this report.

investigations and litigation resulted in collection of penalties totaling \$4,250.00 in 2017. The Division also collected \$67,295.56 in judgments obtained by the former Enforcement Unit.

The Division encourages the public to continue to report violations of the Election Law. All allegations are treated as serious matters.

EXHIBIT “A”

**DIVISION OF ELECTION LAW ENFORCEMENT
STATE BOARD OF ELECTIONS**

**40 NORTH PEARL STREET, SUITE 5
ALBANY, N.Y. 12207-2729
Phone: 518.486.7858**

Risa S. Sugarman
Chief Enforcement Counsel

July 28, 2016

Mr. Douglas A. Kellner
Kellner Herlihy Getty & Friedman, LLP
470 Park Ave. South – 7th floor North
New York, NY 10016

Mr. Andrew J. Spano
210 Trump Park
Shrub Oak, NY 10588

Mr. Gregory P. Peterson Esq.
Berkman, Henoch, Peterson, Peddy & Fenchel, PC
100 Garden City Plaza Suite 300
Garden City, NY 11530

Mr. Peter Kosinski
70 Marsdale Court
Selkirk, NY 12158

Re.: Proposed Policy Related to Enforcement Matters

Dear Commissioners:

At a meeting of the Board of Commissioners on July 12, 2016, the staff of the Board of Elections presented a “Proposed Policy Related to Enforcement Matter” for discussion. This proposal was presented as a response to the report of Inspector General Catherine Leahy Scott issued May 2016 – “Investigation of the Dissemination of New York State Board of Election Enforcement Division Documents.”

A copy of that proposal was provided to me on Sunday, July 10, 2016 at 10:15 p.m. via email by Republican Chief Counsel Kim Galvin. Before any detailed discussion on the proposal began, I requested that the matter be tabled until my staff and I had sufficient time to process the contents of the proposal and conduct a thorough legal analysis in regards to the proposal’s scope and consistency with the law that created my independent Division, as well as my position within the

Board of Elections. The Board granted my request and today I present to you the analysis conducted, my conclusions, and my recommendations.

The first document is a Memorandum of Law which details: the structure of the Division and its relation to the board; the ethical obligations of attorneys, as well as prosecutorial and investigative agencies as it relates to Division documents; the law of Privilege as it relates to Division documents; and the law of Open Meetings and Freedom of Information Law as it relates to Division documents. The second document is a point by point response to your proposal.

Our analysis leads to the third set of documents, which are proposed amendments of Parts 6202 and 6203 of the Rule and Regulations of the agency. It is my position that regulations are required to ensure that the materials received by the Division and reports prepared pursuant to my statutory obligation under Election Law Article 3 are maintained solely under the control of the chief enforcement counsel.

Inspector General Leahy-Scott concluded "...that disclosure of Enforcement Division materials while investigations are pending not only has the potential to impede or obstruct investigations, but potentially undermines principles of fundamental fairness in investigations and prosecutions." The response presented supports the conclusions of the Inspector General and offers a solution to assure the integrity of the Division investigations and documents, the identity of witnesses and targets, and the ethical responsibilities of the Board of Elections.

If you have questions, please do not hesitate to contact me. Until that time I remain,

Very truly yours,

Risa Sue Sugarman

Risa S. Sugarman
Chief Enforcement Counsel

Via Email and Regular Mail

Cc.: Robert Brehm – via Email
Todd Valentine – via Email
Hon. Catherine Leahy Scott - via Email and Regular Mail

Enclosures

MEMORANDUM OF LAW

Background

On June 1, 1974, the NYS Board of Elections (“SBOE”) was established. The SBOE is a bipartisan state agency headed by four commissioners – evenly divided between Democrats and Republicans. Election Law § 3-102 provides the SBOE with several “powers and **duties**” (**emphasis added**) including, but not limited to the following:

- Conducting any investigation necessary to carry out the provisions of the Election Law;
- Conducting private or public hearings;
- Subpoenaing witnesses, books, records, documents or other evidence it may deem relevant; and,
- Performing such other acts as may be necessary to carry out the purposes of the Election Law.

The SBOE’s mission statement reads:

“The State Board of Elections was established in the Executive Department June 1, 1974 as a bipartisan agency **vested with the responsibility for administration and enforcement of all laws relating to elections in New York State**. The Board is also responsible for regulating disclosure and limitations of a Fair Campaign Code intended to govern campaign practices. In conducting these wide-ranging responsibilities **the board is charged with the preservation of citizen confidence** in the democratic process and enhancement in voter participation in elections⁴” (**emphasis added**).

In July of 2013, the Moreland Commission on Public Corruption (“Moreland Commission”) was appointed by the Governor to probe systemic corruption in state government, political campaigns, and elections in New York State.

On December 2, 2013, after an investigation, the Moreland Commission issued a preliminary report⁵, in which it found (amongst other things) that “[the SBOE] does not have the resources, it does not have the required degree of independence from those it must police; and its

⁴ <http://www.elections.ny.gov/AboutSBOE.html>

⁵ The Commission to Investigate Public Corruption – “Preliminary Report” – December 2, 2013 (http://publiccorruption.moreland.ny.gov/sites/default/files/moreland_report_final.pdf)

makeup of two members from each political party inevitably results in either logrolling or frequent deadlocks.” Consequently, “[t]he Board has failed to satisfy its statutory mandate” (**emphasis added**).

As a result of these findings, the Moreland Commission recommended “creating a structurally **independent** enforcement agency... [which] would be **independent** of the current Board of Elections... [,] would be **structured to promote political independence**, and professionalism, and would be a much stronger Election Law watchdog” (**emphasis added**). “All election law enforcement would benefit from a non-partisan, structurally independent, professional enforcer whose sole purpose is safeguarding the integrity of our elections and our political system.”

In direct response to the Moreland Commission’s preliminary report, an independent enforcement unit was created to restore the public’s trust in New York’s electoral system. On March 31, 2014, Governor Cuomo and NYS legislative leaders announced the passage of the 2014-15 budget⁶. On the topic of “Restoring Public Trust” the press release stated:

“Independent Enforcement Unit at Board of Elections: The State Board of Elections ineffective structure, consisting of four commissioners who are evenly appointed by each major party, leads to gridlock and rarely produces any serious investigations of election law violations. The Budget legislation creates a new, independent enforcement division headed by a chief enforcement counsel, who is appointed outside of the Board to a 5-year term, vested with authority to investigate violations of the Election Law.”

In June of 2014, Election Law § 3-100 was amended to include subparagraph (3-a) – which created the office of Chief Enforcement Counsel. Further, Election Law § 3-104 was enacted, creating the Division of Election Law Enforcement – headed by the Chief Enforcement Counsel, within the SBOE. Additionally, Election Law § 3-102 [3] was amended to provide that while SBOE retained the power and duty to conduct any investigation necessary to carry out the

⁶ “Governor Cuomo and Legislative Leaders Announce Passage of 2014-15 Budget” (<https://www.governor.ny.gov/news/governor-cuomo-and-legislative-leaders-announce-passage-2014-15-budget>)

provisions of the election law, that duty was **specifically and exclusively delegated to the Chief Enforcement Counsel**. The Division of Election Law Enforcement is located in the same building, and on the same floor as the SBOE; however, in order to maintain its autonomy and independence, the Division of Election Law Enforcement’s office is physically separated from the rest of the SBOE.

Despite the fact that the Chief Enforcement Counsel, leading an independent investigatory unit, has **sole authority** within the SBOE to investigate alleged violations of the Election Law, in order to advance ongoing investigations, at times it becomes necessary for the Chief Enforcement Counsel to request that the SBOE take action – i.e., to subpoena certain documents or testimony⁷ or to refer a case for criminal prosecution⁸. In these instances, pursuant to the Election Law, the Chief Enforcement Counsel must furnish the SBOE with investigation-related materials substantiating such request(s). These investigation-related materials typically include a legal memorandum, labeled “privileged and confidential,” which comprehensively describes the findings and conclusions of the Chief Enforcement Counsel in regards to her initial investigation. Such matters are discussed, and voted on, in private executive sessions, pursuant to Public Officers Law § 105 [1].

In May of 2016, pursuant to its investigation, the NYS Inspector General’s Office (“IG”) released a report⁹ in which it found that the Republican Public Information Officer of the SBOE,

7 “The [Chief Enforcement Counsel] may at any time ask that the board authorize him or her to exercise the powers which the board is otherwise authorized to exercise pursuant to subdivisions five and six of section 3-102 of [the Election Law].” Election Law § 3-104 [3].

8 If the [Chief Enforcement Counsel] determines that reasonable cause exists to believe a violation warranting criminal prosecution has taken place, the [Chief Enforcement Counsel] shall present such findings to the board. ... Should the board fail to vote to either accept or reject the findings... or should the board accept the findings of the [Chief Enforcement Counsel] that there is reasonable cause to believe that a violation warranting criminal prosecution has taken place, the [Chief Enforcement Counsel] shall... refer such matter to the attorney general or [appropriate] district attorney...” Election Law § 3-104 [5] [b].

9 State of New York Office of the Inspector General – “Investigation of the Dissemination of New York State Board of Elections Enforcement Division Documents” – May 2016

John Conklin, disseminated law enforcement investigation-related documents, consisting of a letter and memorandum written by the Chief Enforcement Counsel and addressed to the commissioners of the SBOE. The IG found that despite the fact that these law enforcement investigation-related materials were labeled “privileged and confidential,” Conklin disseminated the letter and memorandum to a journalist (who subsequently published said documents in the *New York Daily News*), as well as the deputy director of communications for the New York State Senate Republicans.

The IG’s report noted that the SBOE currently maintains an Employee Handbook that includes the following confidentiality policy: “**All information which you read, see or hear is confidential** and should not be disclosed to others, except as part of your work assignment. **Employees should not disclose confidential information** acquired in the course of their duties nor use such information to further their personal interest (**emphasis added**).” Along the same vein, the IG’s report noted that Public Officers Law § 74(3)(c), also known as New York State’s Code of Ethics, states that “no officer or employee of a state agency... should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.” Accordingly, the IG forwarded the matter regarding the SBOE’s employee’s actions to the Joint Commission on Public Ethics.

Most importantly, the IG’s report notes that “[p]ublic dissemination of the materials required for the board to approve the Enforcement Division’s actions could compromise the division’s investigations and undermine outside prosecutors’ ability to build successful cases” (**emphasis added**). In conclusion, the IG recommended “that the SBOE adopt **appropriate** rules, regulations, policies, and procedures establishing which Enforcement Division materials are

<https://ig.ny.gov/sites/default/files/pdfs/BOEREREPORT5.31.16.pdf>

privileged and confidential, and how such materials should be handled to ensure the integrity of the Board of Elections' operations and enforcement matters" (**emphasis added**).

Pursuant to the IG's recommendation, the SBOE has submitted a "Proposed Policy Related to Enforcement Matters." This proposed policy is not appropriate as it undermines the statutorily-created independent nature of the Chief Enforcement Counsel and also raises serious concerns that the Chief Enforcement Counsel's investigation-related information will not be kept appropriately confidential. Following are some of the reasons sensitive materials prepared for law enforcement purposes must be kept confidential and under the control of the Chief Enforcement Counsel.

Unfair Pretrial Publicity Violates Due Process Guarantees of the U.S. Constitution

In a series of cases before the United States Supreme Court in the 1950s and 1960s, the Court addressed the growing problem of the prejudicial effects of government actors utilizing the press to influence the outcomes of criminal trials. In perhaps the most notorious of these cases, *Sheppard v Maxwell*, 384 US 333 [1966], the Court described the atmosphere in which the case was investigated and tried:

'Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life.'

(*id.* at 356 [citation omitted]). So spoke the U. S. Supreme Court in the *habeas corpus* case of Ohio prisoner Dr. Sam Sheppard, who was convicted of murdering his wife. The question for the federal court was whether the inherently prejudicial publicity that occurred during the investigation and trial of the case deprived defendant of a fair trial consistent with due process.

In the end, the Court reversed the conviction. Sheppard was later acquitted at a new trial, but by then his life was ruined. This case was at that time the latest in a series of convictions reversed by the Supreme Court due to pretrial publicity, including *Marshall v United States*, 360 U.S. 310 (1959) (jurors exposed ‘through news accounts’ to information that was not admitted at trial), *Rideau v Louisiana*, 373 U.S. 723 (1963) (television exposed community to confession), and *Estes v Texas*, 381 U.S. 532 (1965) (defendant need not show actual prejudice if procedure employed involves such probability of prejudice “that it is deemed inherently lacking in due process”).

The *Sheppard* case involved massive preindictment and pretrial publicity as a result of disclosures by law enforcement personnel and other government officials from the time of the murder, throughout the investigation, and during the trial. The Court pointed out that “‘legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper’” (*id.* [quoting *Bridges v State of California*, 314 U.S. 252, 271 (1941)]), and no one should be “‘punished for a crime without ‘a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power’” (*id.* [quoting *Chambers v State of Florida*, 309 U.S. 227, 236-37 (1940)]). Instead, the Court said, the “‘undeviating rule” of the Court had been expressed as follows: “‘The theory of our system is that the conclusions to be reaching in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print’” (*Sheppard*, 384 U.S. at 351, [quoting Justice Holmes in *Patterson v State of Colorado*, 205 U.S. 454, 462 (1907)]). “Freedom of discussion . . . must not be allowed to divert the trial from the ‘very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures’” (*id.* at 350-51 [quoting *Cox v. State of Louisiana*, 379 U.S. 559 (1965) (Black,

J., dissenting)]). “Among these ‘legal procedures’ is the requirement that the jury’s verdict be based on evidence received in open court, not from outside sources” (*id.* At 351).

In the *Sheppard* case, the Court not only criticized the conduct of the trial, but also decried the release of leads, information, evidence, and gossip to the press by police officers, witnesses, counsel for the prosecution, and counsel for the defense, noting that much of the information disclosed was inaccurate and inadmissible as evidence. The Court found that effective control of these sources of information might have “prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity” (*id.* at 361). Specifically, the Court criticized such prejudicial extrajudicial statements as those concerning the merits of the case, identities of witnesses or their probable testimony, statements made by the accused or refusal to make such statements, and any belief in guilt or innocence. The Court also noted that the American Bar Association’s Canons of Professional Ethics could prohibit such statements, and appropriate government officials could promulgate regulations such as those promulgated by the U.S. Department of Justice (*see* 28 C.F.R. § 50.2) and the City of New York with respect to dissemination of information about a case by their employees.

Noting the increasing prevalence of cases involving unfair and prejudicial news comment on pending trials, the Court held that “due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused” (*Sheppard*, 384 U.S. at 362). The Court also called for strong measures to control the release of information about a case prior to trial.

[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must

take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but it is highly censurable and worthy of disciplinary measures.

(*Id.* at 363; *see also Application of Dow Jones & Co.*, 842 F2d 603 [2d Cir.], *cert denied sub nom Dow Jones & Co. v Simon*, 488 US 946 [1988], citing *Nebraska Press Assn. v Stuart*, 427 U.S. 539, 555 [1976] [relying on reversals for failure to afford a fair trial can exact high costs on society and the accused, including justice delayed, impossible retrials, and injustice unredressed]).

Extrajudicial Pretrial Disclosure of Investigative Information in a Pending Criminal Case Violates State and Federal Ethics Rules

Courts have long recognized the dual roles of a prosecutor in a criminal case as advocate and public officer (*see Berger v United States*, 295 U.S. 78 [1935] [prosecutor’s responsibility in criminal case “is not that [the government] shall win a case, but that justice be done”]; *People v Savvides*, 1 NY2d 554 [1956] [District Attorney is public officer charged with responsibility to seek justice, not merely to convict]). In *People v Santorelli*, 95 NY2d 412, 420-421 (2000), the Court of Appeals explained, “Prosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities – constitutional, statutory, ethical, personal – to safeguard the integrity of criminal proceedings and fairness in the criminal process.” These responsibilities are not limited to trial proceedings. “It goes without saying that this duty also rests upon the prosecutor during pretrial proceedings It is a serious matter for any individual to be charged with a crime whether the charge be true or false and it is as important that he be fairly and justly accused . . . as that he be fairly and impartially tried” (*People v Pelchat*, 62 NY2d 97, 105 [1984] [citations omitted]).

In fulfilling the responsibilities of a public officer, a prosecutor must speak carefully. “Language which might be permitted to counsel in summing up in a civil action cannot with propriety be used by a public prosecutor, who is a quasi judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice” (*People v Castelo*, 24 AD2d 827 [4th Dept. 1965] [citation omitted]. “[A] prosecutor must be mindful not only of his duty to the People, but also of his duty to the defendant in insuring an untrammelled fair trial” (*People v Nunez*, 74 AD2d 805, 806 [1st Dept. 1980]). When overzealous “improper comment[s]” result in “overstepping the bounds” of fairness, “it raises the spectre of lack of good faith and serves to undermine justice” (*id.*).

After the *Sheppard* case, the American Bar Association responded by making substantial changes to the Canons of Professional Ethics, and subsequently enacted the Model Rules of Professional Conduct, which contain rules governing extrajudicial statements by lawyers and others involved in pending matters. The Courts of the State of New York and Federal Courts in New York have each adopted versions of the Model Rules that govern extrajudicial statements by lawyers and others involved in a pending matter (including an investigation).

Rule 3.6 of the New York State Rules of Professional Conduct (22 NYCRR Part 1200) provides that:

- (a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:
 - (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, *unless* there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal matter:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

...

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(New York Rule of Professional Conduct 3.6). The purpose of the rule is to prevent an attorney associated with the criminal case "from making statements or disseminating matter which would

have a likelihood of interfering with the fair administration of justice” (*Matter of Markfield v Assn. of Bar of City of N.Y.*, 49 AD2d 516 [1st Dept.], *appeal dismissed* 37 NY2d 794 [1975]). Rule 3.8 imposes additional responsibilities on prosecutors and other government lawyers consistent with their duties as public officers to be impartial and to seek justice (*see* New York Rule of Professional Conduct 3.8 and Commentary). These Rules apply to lawyers involved in the investigatory stages of a matter as well as those involved in prosecution (*see* Rule 3.8 Commentary). Moreover, Rules 5.1 and 5.3 impose on lawyers the responsibility for conduct of other lawyers and nonlawyers, which may include investigators, law enforcement personnel, employees, and other persons associated with the lawyer (or government office) under certain circumstances (*see* Rules 5.1 and 5.3 and Rule 3.8 Commentary).

Similarly, Federal Court rules impose significant restrictions on extrajudicial statements. For example, Local Rule 23.1 of the Southern and Eastern Districts of New York provides the following:

(a) It is the duty of the lawyer or law firm, and of non-lawyer personnel employed by a lawyer’s office or subject to a lawyer’s supervision, private investigators acting under the supervision of a criminal defense lawyer, and government agents and police officers, not to release or authorize the release of non-public information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which they are associated, if there is a substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(b) With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation (including government lawyers and lawyers for targets, subjects, and witnesses in the investigation) shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers or otherwise to aid in the investigation, if there is a substantial

likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the administration of justice.

(c) During a jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication if there is a substantial likelihood that such dissemination will interfere with a fair trial; except that the lawyer or the law firm may quote from or refer without comment to public records of the Court in the case.

(d) Statements concerning the following subject matters presumptively involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice within the meaning of this rule:

(1) The prior criminal record (including arrests, indictments or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation and family status; and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in the accused's apprehension or to warn the public of any dangers the accused may present;

(2) The existence or contents of any confession, admission or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Information the lawyer or law firm knows is likely to be inadmissible at trial and would if disclosed create a substantial likelihood of prejudicing an impartial trial; and

(7) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

(e) Statements concerning the following subject matters presumptively do not involve a substantial likelihood that their public dissemination will interfere with a

fair trial or otherwise prejudice the due administration of justice within the meaning of this rule:

(1) An announcement, at the time of arrest, of the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit and use of weapons), the identity of the investigating and arresting officer or agency and the length of investigation;

(2) An announcement, at the time of seizure, stating whether any items of physical evidence were seized and, if so, a description of the items seized (but not including any confession, admission or statement);

(3) The nature, substance or text of the charge, including a brief description of the offense charged;

(4) Quoting or referring without comment to public records of the Court in the case;

(5) An announcement of the scheduling or result of any stage in the judicial process, or an announcement that a matter is no longer under investigation;

(6) A request for assistance in obtaining evidence; and

(7) An announcement, without further comment, that the accused denies the charges, and a brief description of the nature of the defense.

(f) Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against said lawyer.

(g) All Court supporting personnel, including, among others, marshals, deputy marshals, Court Clerks, bailiffs and Court reporters and employees or sub-contractors retained by the Court-appointed official reporters, are prohibited from disclosing to any person, without authorization by the Court, information relating to a pending grand jury proceeding or criminal case that is not part of the public records of the Court. The divulgence by such Court supporting personnel of information concerning grand jury proceedings, in camera arguments and hearings held in chambers or otherwise outside the presence of the public is also forbidden.

(h) The Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses and any

other matters which the Court may deem appropriate for inclusion in such order. In determining whether to impose such a special order, the Court shall consider whether such an order will be necessary to ensure an impartial jury and must find that other, less extreme available remedies, singly or collectively, are not feasible or would not effectively mitigate the pretrial publicity and bring about a fair trial. Among the alternative remedies to be considered are: change of venue, postponing the trial, a searching voir dire, emphatic jury instructions, and sequestration of jurors.

(i) Any lawyer who violates the terms of this rule may be disciplined pursuant to Local Civil Rule 1.5.

The Department of Justice has also promulgated a statement of policy regulation governing release of information relating to criminal and civil proceedings (*see* 28 CFR § 50.2). Subsection

(b) provides the following:

(b) Guidelines to criminal actions.

(1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(i) Observations about a defendant's character.

(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

(7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.

(8) This statement of policy is not intended to restrict the release of information concerning a defendant who is a fugitive from justice.

(9) Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

These laws, regulations, and policies reflect the determination and **broad consensus** that extrajudicial disclosure of matters concerning pending criminal investigations and trials is **unfair and inconsistent with the orderly administration of justice**. They represent restrictions on speech of government and private lawyers and their associates who have been involved in criminal investigations or actions for the purpose of preserving a suspect's constitutional right to a fair trial. As noted above, these court rules apply not only to prosecutors, but also to lawyers and their associates in law enforcement agencies, state agencies such as the SBOE, any other lawyer who had a role in or was associated with the matter, and **nonlawyers** associated with such lawyers.

Release of Confidential Internal Communications is Harmful to the Administration of Justice and Inconsistent With the Board's Duty to Enforce Election Laws

Although the Chief Enforcement Counsel has sole authority within the SBOE to investigate alleged violations of the Election Law and other statutes relating to campaigns, elections, and related procedures, the SBOE itself is charged with effectuating the execution and enforcement of those statutes (*see* Election Law 3-104 [1] [b]). Thus, it is the responsibility of the SBOE to delegate its powers and duties, as set forth in Election Law §§ 3-102 [5] and [6], to the Chief Enforcement Counsel to assist in those investigations upon request of the Chief Enforcement Counsel. It is also the duty of the SBOE to review the Chief Enforcement Counsel's findings and determinations that violations warranting criminal prosecution have occurred.

The Chief Enforcement Counsel necessarily must communicate with the Board concerning applications for delegation of powers in connection with investigations and investigative findings and determinations that violations warranting criminal prosecution have occurred (*see* May 2016 Report of the State of New York Office of the Inspector General entitled “*Investigation of the Dissemination of New York State Board of Election (sic) Enforcement Division Documents*” [Enforcement Division cannot take major investigative steps, such as subpoenaing witnesses or referring matter for criminal prosecution, without providing information and materials to commissioners], hereinafter “May 2016 IG Report”, at p. 9). The Chief Enforcement Counsel’s communications are confidential internal communications, clearly marked “Privileged and Confidential,” and made only to public officers within the SBOE. These confidential communications contain investigative findings and opinions of counsel designed to assist the Board in its review and determinations. Because these communications are made confidentially, and are designated as such, the writers are able to include privileged and confidential information therein that otherwise could not be included.

Such confidential internal communications are privileged and should be protected from disclosure by the SBOE, consistent with existing laws. Disclosure of such information, and disclosure of the investigation itself not only violates the constitutional and privacy rights of the subjects of the investigation and potential witnesses but also compromises the criminal investigation (*id.* [“Public dissemination of the materials required for the board to approve the Enforcement Division’s actions could compromise the division’s investigations and undermine outside prosecutors’ ability to build successful cases”). The Chief Enforcement Counsel keeps investigations confidential so that the integrity of the investigation is maintained and any future grand jury investigation can be conducted effectively by the prosecutor. There are good law

enforcement and public policy reasons to keep such investigative information confidential, such as preventing the tailoring of behavior to evade detection by law enforcement, evidence or witness tampering, fleeing the jurisdiction, or disclosure of private or sensitive information obtained by subpoena, search warrant, or other investigative technique. In addition, the communications reveal law enforcement methods that, if disclosed, would allow persons to tailor their conduct to violate the laws while remaining undetected. Disclosure of such information interferes with law enforcement investigations and is inconsistent with the Board's duty and responsibility to effectively enforce the law.

To protect the integrity and fundamental fairness of investigations and prosecutions, confidential communications and other materials prepared for law enforcement purposes in a pending criminal investigation should not be disclosed except in the orderly administration of justice pursuant to Criminal Procedure Law ("CPL") article 240. There is no "general constitutional right to discovery in criminal cases . . ." (*Matter of Miller v Schwartz*, 72 NY2d 869, *rearg. denied* 72 NY2d 953 [1988] [citations omitted]). Unlike broad discovery provisions in civil litigation, discovery in criminal cases is strictly limited to that permitted by statute. CPL article 240 is the statute that governs such discovery (*see Matter of Pittari v Pirro*, 258 AD2d 202 [2d Dept.], *lv. denied* 94 NY2d 755 [1999]; *Matter of Brown v Grosso*, 285 AD2d 642, 644 [2d Dept.], *lv. denied* 97 NY2d 605 [2001]). Attempts to circumvent article 240 likely will be unsuccessful (*see id.* [trial court's subpoena power cannot be used to circumvent the limited right to discovery under article 240, and additional discovery beyond that authorized by article 240 may not be granted on due process grounds]). Adherence to these principles will serve the dual purposes of protecting the investigations and protecting personal rights (*see* May 2016 IG Report at p. 1 ["disclosure of Enforcement Division materials while investigations are pending not only has the

potential to impede or obstruct investigations, but potentially undermines principles of fundamental fairness in investigations and prosecutions”]).

Release of Confidential Internal Communications May Constitute Violations of Law and Rules of Professional Responsibility

Unauthorized disclosure of investigative materials may constitute crimes or other violations of federal or state law. Because they are clearly designated as privileged and confidential, the Chief Enforcement Counsel may include in such communications privileged information such as social welfare information, tax information, criminal history information, court system information, sensitive materials created for law enforcement use, grand jury information, or other information that is protected by federal or state laws such as constitutional provisions, the Public Officers Law, Penal Law, Tax Law, Bank Secrecy Act, Right to Financial Privacy Act, Privacy Act of 1974, Fair Credit Reporting Act, Gramm-Leach-Bliley Act or other such laws enacted to protect privacy. Such materials carry with them their own privacy protections and impose civil and criminal penalties for unauthorized disclosure. Unauthorized disclosure of such confidential communications also may constitute crimes such as official misconduct, hindering prosecution, or other violations of law.

Attorney Rules of Professional Conduct also impose on lawyers the duty not to reveal confidential communications, as defined in the rule, or use confidential information to the disadvantage of a client or for the advantage of a lawyer or third person (*see* Rule 1.6 and commentary). A lawyer must exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing confidential information as defined in the rule (*id.*). Rule 1.11 further defines “confidential government information” and imposes further restrictions on current and former government officers and employees’ use of that information. Confidential communications prepared by the office of the

Chief Enforcement Counsel are subject to the attorney-client privilege and the attorney work product privilege and should not be released.

Confidential Communications and Materials Prepared for Law Enforcement Purposes in a Criminal Investigation are Privileged and Exempt From Disclosure

A public interest privilege attaches to official information in the hands of governmental agencies in certain contexts (*Cirale v. 80 Pine St. Corp.*, 35 NY2d 113, 117 [1974]). “Such a privilege attaches to confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged” (*id.* [internal quotation marks and citations omitted]). The public interest privilege is applicable when “the public interest might otherwise be harmed if extremely sensitive material were to lose this special shield of confidentiality” (*Matter of World Trade Ctr. Bombing Litig.*, 93 NY2d 1 [1999]).

The Court of Appeals has recognized a public interest privilege in confidential investigative reports whose release could trigger reprisals against witnesses or impair future ability to conduct sensitive investigations involving matters of public concern (*see Brady v. Ottaway Newspapers, Inc.*, 63 NY2d 1031, 1032 [1984] [the interest of a litigant in obtaining information must sometimes “give way to the public interest in enabling the government effectively to conduct sensitive investigations involving matters of demonstrably important public concern”). Courts have also held that the public interest privilege applies to investigations and security analyses where release might reveal confidential law enforcement information obtained under a pledge of confidentiality (*see Matter of World Trade Ctr. Bombing Litig.*, 93 NY2d at 10) and the identities and statements of witnesses in a criminal investigation even after the investigation is closed (*Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874 [1st Dept. 2011], *affd.* 20 NY3d 1028, *rearg. denied* 21 NY3d 974 [2013] [FOIL request]; *Matter of Rodriguez v Johnson*, 66 AD3d

536 [1st Dept. 2009] [FOIL request]; *Espady v City of New York*, 40 AD3d 475 [1st Dept. 2007] [anonymity of informants]; *Matter of Kassebaum v Morgenthau*, 270 AD2d 71 [1st Dept.], *lv. denied* 95 NY2d 756 [2000] [FOIL request]; *Matter of Huston v Turkel*, 236 AD2d 283 [1st Dept.], *lv. denied* 90 NY2d 809 [1997]). The privilege also applies to other intra-agency communications describing investigations (*see Martin A. v Gross*, 194 AD2d 195 [1st Dept. 1993] [internal report investigating death of child]; *Lowrance v State of New York*, 185 AD2d 268, 269 [2d Dept. 1992] [Inspector General's investigative files regarding corrections incident]; *Matter of Klein v Lake George Park Commn.*, 261 AD2d 774 [3d Dept. 1999] [Commission investigative files regarding complaint that was later dismissed]).

In *One Beekman Place v City of New York*, the Court recognized the long-held view that the public interest in encouraging candid discussion and representation of views among government employees is protected by the public interest privilege inhering in confidential communications within the agency just as such intra-agency communications are exempt from disclosure under the Freedom of Information Law (169 AD2d 492 [1st Dept. 1991]). The public interest privilege has long been held to apply to investigative files of the Department of Investigation (*see Matter of Langert v Tenney*, 5 AD2d 586 [1st Dept. 1958], *appeal dismissed* 5 NY2d 875 [1959]; *City of New York v BusTop Shelters*, 104 Misc2d 702 [Sup. Ct. N.Y. County 1980] [also finding such documents to be exempt from disclosure under the FOIL exemption protecting documents compiled for law enforcement purposes which if disclosed would interfere with pending investigations or proceedings]).

**FOIL and Other Applicable Laws Demonstrate the Chief Enforcement Counsel's
Investigation-Related Information is Confidential**

The applicable law supports the position that the Chief Enforcement Counsel's investigation-related information is confidential. In order for the SBOE to fulfill its statutorily-

mandated duty of conducting effective investigations in a manner which preserves citizen confidence in the electoral system, it is essential that the SBOE keep the Chief Enforcement Counsel's investigation-related information confidential.

Article 6 of the New York Public Officers Law (§§ 84-90), also known as the Freedom of Information Law ("FOIL") was enacted "to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (*Matter of Alderson v New York State Coll. Of Agric. & Life Sciences at Cornell Univ.*, 4 NY3d 225, 230 [2005]). "But while the Legislature established a general policy of disclosure by enacting [FOIL], it nevertheless recognized **a legitimate need** on the part of the government **to keep some matters confidential (emphasis added)**" (*Matter of Fink v Lefkowitz*, 47 NY2d at 571).

NY Pub. Off. Law § 87 [2] provides:

Each agency shall, in accordance with its published rules make available for public inspection and copying of all records, except that agency may deny access to records or portions thereof that:

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) if disclosed would constitute an unwarranted invasion of personal privacy . . .
.;
...
- (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
- (e) are compiled for law enforcement purposes and which, if disclosed, would:
 - i. interfere with law enforcement investigations or judicial proceedings;
 - ii. deprive a person of a right to a fair trial or impartial adjudication;
 - iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- (f) if disclosed could endanger the life or safety of any person;
- (g) are inter-agency or intra-agency materials which are not:
 - i. statistical or factual tabulation or data;
 - ii. instructions to staff that affect the public;
 - iii. final agency policy or determinations
 - iv. external audits, including but not limited to audits performed by the comptroller and the federal government; ...

In regards to the first of the FOIL exemptions, “[s]o long as there is clear legislative intent to establish and preserve confidentiality of records, a State statute need not expressly state that it is intended to establish a FOIL exemption” (*Matter of Wm. J. Kline & Sons v County of Hamilton*, 235 AD2d 44, 45 [3d Dept. 1997]; see also *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 567 [1986] [a state statute need not expressly state it is intended to establish a FOIL exemption as long as there is a showing of clear legislative intent to establish and preserve confidentiality]; *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 81 [1984] [“While an express statement... is not necessary to establish an exemption from FOIL under a State statute, what is required is clear legislative intent to establish and preserve confidentiality”]).

The legislature’s intent in creating an independent enforcement unit should not be overlooked or understated. The Division of Election Law Enforcement, as well as its duties and responsibilities, were created in response to the findings of a public corruption probe – namely, that the SBOE, due to its structural organization as well as its bipartisan makeup, had failed to carry out its lawfully prescribed duties, including its duty to conduct investigations of possible violations of the Election Law.

The legislative intent in creating an **independent** investigatory unit which conducts confidential investigations comports with the IG's conclusions – that “[p]ublic dissemination of the materials required for the board to approve the Enforcement Division's actions could compromise the division's investigations and undermine outside prosecutors' ability to build successful cases.” The legislative intent in keeping the Chief Enforcement Counsel's investigation-related information confidential, could not be any clearer.

The same legislative intent is evident throughout FOIL, including § 87 [2] [e], in which the legislature specifically exempted the mandatory disclosure of records compiled for law enforcement proceedings, and which if released, would:

- interfere with law enforcement investigations or judicial proceedings;
- deprive a person of a right to a fair trial or impartial adjudication;
- identify a confidential source or disclose confidential information about an investigation; or
- reveal criminal investigative techniques or procedures, except routine technique and procedures....

This exemption codifies what was commonly known as the “law enforcement privilege” (*see Matter of Dept. of Investigation of the City of New York v Myerson*, 856 F2d 481, 484-485 [2d Cir. 1988]). The purpose of the “law enforcement privilege,” which is incorporated into FOIL, “is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference in an investigation” (*id.* at 484).

It is important to note that once the SBOE finds that there is “**reasonable cause to believe**¹⁰” that a criminal violation has taken place and thereafter refers a matter for criminal

¹⁰ “‘Reasonable cause to believe that a person has committed an offense’ exists when evidence or information which **appears reliable** discloses facts or circumstances which are collectively of such weight and persuasiveness as

prosecution, **the government's investigation has not concluded** – rather, it has just begun for the prosecutor. After the referral for criminal prosecution has been made, the matter is handled by a prosecutorial agency, which will likely wish to secure additional evidence in order to build its case. Witnesses, including suspects, may need to be interviewed. Search warrants may need to be executed. Wiretaps may need to be ordered. Various other investigatory techniques may need to be employed.

The law enforcement exemption recognizes a “legitimate need on the part of government to keep some matters confidential” (*Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571 [1979]). In *Fink*, the Court found the purpose of this exemption to be “obvious,” stating that “[e]ffective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information” (*id.* [purpose of FOIL not to “enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution”]). Disclosure of investigative techniques or procedures would likely allow violators to evade detection by “tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel” those techniques or procedures were considered nonroutine and should not be disclosed (*id.* at 572). A “detailed step-by-step depiction of the investigatory process should be exempted from disclosure” as nonroutine (*Spencer v New York State Police*, 187 AD2d 919 [3d Dept. 1992] [citing *Matter of Fink v Lefkowitz, supra*]).

It goes without saying that once the subject of an investigation knows he or she is under investigation, this knowledge will likely alter the subject's behavior. “A criminal prosecution is a ‘particular kind of enforcement proceeding’ where ‘disclosure of particular kinds of investigatory

to convince a person of ordinary intelligence, judgment and experience that it is **reasonably likely** that such offense was committed and that such person committed it (**emphasis added**).” Criminal Procedure Law § 70.10 [2].

records while a case is pending would generally interfere with enforcement proceedings” (*Matter of Leshner v Hynes*, 19 NY3d at 67 [prosecutor’s denial of FOIL request was sufficient where he alleged disclosure would interfere with law enforcement proceedings because the sought after records were replete with information about the crimes committed and therefore release posed an obvious risk of prematurely tipping the prosecutor’s hand], [quoting *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 US 214, 236 [1978], citing *Matter of Pittari v Pirro*, 258 AD2d 202]; *Legal Aid Soc. v New York City Police Dept.*, 274 A.D.2d 207 [1st Dept.], *appeal dismissed* 95 NY2d 956 [2000]). The result should be no different where an investigation is taking place, but charges have yet to be filed. Dissemination of investigation-related material is akin to “furnish[ing] the safecracker with the combination to the safe” (*see Matter of Fink v Lefkowitz*, 47 NY2d at 573; *Matter of DeLuca v New York City Police Dept.*, 261 AD2d 140 [1st Dept. 1999] [holding that information, which, if released, “might” interfere with an investigation is exempted from FOIL disclosure]).

In addition to tipping off the target of an investigation, the disclosure of investigation-related information can have a chilling effect on witnesses’ willingness to come forward and/or testify freely. The statements of witnesses who have not testified in open court “are confidential... and are not disclosable under FOIL” (*Matter of Friedman v Rice*, 134 AD3d 826, 829 [2nd Dept. 2015]). A defendant’s guilty plea does “not remove this ‘cloak of confidentiality’ from the statements of the nontestifying witness” (*id.*). The FOIL exemption holding that such records are inherently confidential is sound, as it encourages private citizens to furnish “controversial information” to law enforcement officials (*Hawkins v Kurlander*, 98 AD2d 14, 16 [4th Dept. 1983], *appeal withdrawn* 62 NY2d 804 [1984] [precluding disclosure of sought after materials because of the “chilling effect” it would have on future investigations]; *see also Matter of Exoneration*

Initiative v New York City Police Dept., 114 AD3d 436, 439 [1st Dept. 2014] [recognizing the “chilling effect” that release of certain witness information would have on future law enforcement investigations]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 [1st Dept. 1999], *appeal dismissed* 94 N.Y.2d 791 [1999] [same]).

The damage to law enforcement’s intelligence-gathering efforts would be impaired even if the disclosed documents were heavily redacted, as the documents will still contain “strands of information” that can be used to decipher sources, methods, and capabilities (*see Matter of the City of New York*, 607 F3d 923, 944 [2d Cir. 2010]). Disclosure of virtually any information concerning an open or discontinued investigation may interfere with a pending or contemplated investigation, or lead to the revelation of the identity of confidential sources, thereby compromising their safety or, when used with other information, result in the identification of complainants and reveal non-routine or confidential investigative methods. Further, New York courts have held that statements of witnesses are not disclosable under FOIL even after the criminal case concluded (*see, e.g., Matter of Friedman v Rice*, 134 AD3d 826 [2d Dept. 2015], *lv. granted* 27 NY3d 903 [2016]; *Matter of Johnson v Hynes*, 264 AD2d 777 [2d Dept. 1999]; *Matter of Esposito v Rice*, 67 AD3d 797 [2d Dept.], *lv. denied* 14 NY2d 871 [2009]).

It is important to note that in order to formally charge an individual with a criminal offense, the prosecutor must present sufficient evidence to a grand jury. The legislature, in enacting Criminal Procedure Law § 190.25, required an oath of secrecy of every person appearing before a grand jury. This “time-honored” grand jury secrecy principle - mandating the confidentiality of information produced before a grand jury, was created for the following purposes: “(1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and

tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely” (*People v Di Napoli*, 27 NY2d 229, 235 [1970]). Any dissemination of the Chief Enforcement Counsel’s investigation-related information critically undermines the legislative intent of the grand jury secrecy principle, as well as the legislative intent of several of the FOIL exemptions.

This recurring legislative intent of preserving the confidentiality of investigation-related information is also found in Article 7 of the Public Officers Law (§§ 100-111), also known as the Open Meetings Law. The Open Meetings Law, has a purpose which is “parallel” to that of FOIL, in that it “insures that public business is performed in an open and public manner so that citizens of this State are able to observe the performance of their public officials by attending and listening to the deliberations and decisions that go into the making of public policy” (*Matter of Wm. J. Kline & Sons v County of Hamilton*, 235 AD2d 44, 45 [3d Dept. 1997]).

That being said, similar to FOIL, the Open Meeting Law is not without exceptions (*id.* at 46).

Public Officer Law § 105 [1] states:

Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject to be considered, a public body may conduct an executive session for the below enumerated purposes only ... :

...

(b) any matter which may disclose the identity of a law enforcement agent or informer;

(c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

...

Thus, in enacting the Open Meetings Law, it is clear that the legislative intent was to establish and preserve the confidentiality of records of executive sessions (*Matter of Wm. J. Kline & Sons v County of Hamilton*, 235 AD2d at 46 [3rd Dept. 1997]). “It makes little sense to permit the governmental bodies to meet in private under clearly defined circumstances only to subsequently allow the minutes of those private meetings to be publicly accessed under FOIL” (*id.*).

In regards to Public Officers Law § 87 [2] [f] [the FOIL exemption regarding records or portions thereof that if disclosed could endanger the life or safety of any person] in order for records to be exempted from disclosure, an agency is “not required to prove that a danger to a person’s life or safety **will occur** if the information is made public” (**emphasis added**) (*Matter of Stronza v Hoke*, 148 AD2d 900, 900-901 [3rd Dept. 1989], *lv. denied* 74 N.Y.2d 611 [1989]). Instead, “there need only be a **possibility** that such information would endanger the lives or safety of individuals” (**emphasis added**) (*id.*; *see also Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 278 [1996] [disclosure of information regarding nontestifying witness created possibility that the witness’s life or safety could be endangered]; *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d at 439 [same]; *Matter of Bellamy v New York City Police Dept.*, 87 AD3d at 875 [agency need only demonstrate a possibility of endangerment, in order to invoke the public safety exemption, protecting disclosure of names of persons who spoke with police during investigation, but who never became testifying witnesses; disclosure of a name could lead to discovery of other information about where the person worked or lived]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348-349 [1st Dept. 1999] [release of certain information, by its very nature, could endanger lives or safety of individuals]). Nor does the agency need to provide a detailed description of the contents of such documents, because

disclosing the underlying facts contained in the subject records would “effectively subvert the purpose of [the exemption]” (*Matter of Nalo v Sullivan*, 125 AD2d 311, 312 [2nd Dept. 1986], *lv. denied* 69 NY2d 612 [1987]; *see also Cirale v 80 Pine Street Corp.*, 35 NY2d at 119).

It is important to note, “[t]his rule of confidentiality [regarding a confidential source] protects not only complaining witnesses, but also accused individuals who, for instance, are never formally charged with a crime or are found innocent of charged crimes” (*Matter of Friedman v Rice*, 134 AD3d 826, 829 [2nd Dept. 2015]). New York courts have recognized that citizens, whether the target of investigation or not, have a right to privacy. By way of illustration, the Court of Appeals has held that the 911 calls of people who perished in the September 11, 2001 attacks on the World Trade Center are protected from disclosure under FOIL because publication of such intimate moments of a person’s life constitutes an unwarranted invasion of personal privacy that the grieving family, or the caller if he or she survived, “might reasonably be deeply offended at the idea that these words could be heard on television or read in the New York Times” (*Matter of New York Times Co. v City of N. Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). Given the fact that the law provides the prosecutor with great leeway in choosing what cases he or she chooses to present to a grand jury, there will inevitably be instances in which Chief Enforcement Counsel investigations referred for prosecution will not be presented to a grand jury. In those instances, it would be inappropriate to publicly disseminate investigation-related information which will besmirch an individual’s reputation and cause him or her great embarrassment and possible pecuniary loss.

It is important to remember that in order to secure a conviction at trial, the prosecutor need overcome the defendant’s presumption of innocence and unanimously convince twelve jurors of

the defendant's guilt "beyond a reasonable doubt"¹¹ – a far more demanding burden of proof than that which was necessary to refer the matter for prosecution in the first place. Without question, in order to secure a criminal conviction the government's burden of proof should be very high; however, the prosecutor's job should not be made more difficult because the SBOE has compromised the investigation by releasing information which, **for various reasons**, the legislature (and courts) has justifiably sought to keep confidential.

Once the preliminary findings of the Division's investigation are publicly disseminated, witnesses may choose not to cooperate with investigators, evidence may be destroyed, and individuals may take measures to hide their illicit activities from the investigation. The effects of dissemination of investigation-related material will critically hinder the prosecutor's ability to collect evidence and build a solid case. By obstructing an investigation, and therefore impeding upon the prosecutor's ability to do his or her job – to seek justice – the SBOE clearly acts in a manner which runs contrary to its stated objective – to conduct investigations in a manner which preserves citizen confidence in the democratic process.

Conclusion

For the reasons stated above, it is essential that documents of the SBOE Chief Enforcement Counsel and her staff that are prepared for the purpose of law enforcement be protected from improper and untimely disclosure. Disclosure of such information violates individual due process and privacy rights, compromises investigations in derogation of the Board's duty to enforce the law, and reinforces the conclusion that the Board's interest in permitting such disclosures is purely partisan.

¹¹ "Proof of guilt beyond a reasonable doubt is proof that **leaves you so firmly convinced** of the defendant's guilt that you have **no reasonable doubt** of the existence of any element of the crime or of the defendant's identity as the person who committed the crime (**emphasis added**)." CJI2d[NY] – Proof Beyond a Reasonable Doubt.

The Chief Enforcement Counsel, as a non-partisan, independent, professional enforcer who routinely receives and safeguards confidential information and utilizes it for law enforcement purposes, is familiar with the requirements of law enforcement and the duty to safeguard the right to due process. As such, she is uniquely qualified to control the timing and appropriateness of release of any such materials. Thus, materials designated as “privileged and confidential” by the Chief Enforcement Counsel, based on her knowledge of the information contained therein and applicable laws and rules, must be kept confidential. Moreover, SBOE policy should reflect its commitment to enforcement of applicable laws and prohibit any dissemination of such materials or the information contained therein without consent of the Chief Enforcement Counsel.

RESPONSE TO THE PROPOSED POLICY RELATED TO ENFORCEMENT MATTERS –

Risa Sugarman, Chief Enforcement Counsel, Division of Election Law Enforcement

This process was initiated because of the leak of a confidential Division document presented to the board at an Executive Session, the subsequent Inspector General's investigation and the determination that the dissemination of the document was made by the Republican Public Information Officer to a member of the press and the deputy director of communications for the New York State Senate Republicans.

The Division of Election Law Enforcement has the sole authority to conduct all investigations necessary to enforce the provisions of the New York State Election Law, and the Chief Enforcement Counsel has sole authority to investigate all complaints alleging violations of Article 14 of the Election Law, as well as other statutes governing campaigns, elections and related proceedings. All complaints alleging violations shall be forwarded to the Division.¹² The Chief Enforcement Counsel serves in office for a fixed term of five years and may only be removed by the Governor for substantial neglect of duty, gross misconduct in office or the inability to discharge the powers or duties of office. Appointed by the Governor, the Chief Enforcement Counsel must be confirmed by each house of the legislature separately by a majority vote of the members elected to each house of the legislature. The Chief Enforcement Counsel has sole authority over personnel decisions within the Division.¹³ The clear statutory intent of the legislature was to create an independent Division within the Board of Elections. The board, in an attempt to undermine the clear statutory intent, has submitted a proposal that vests within the board sweeping control over Division documents with vague language and no statutory support. This proposal presents a clear danger to the integrity of the Division's past and future work.

The proposal also displays a fundamental lack of understanding of the ethical obligations of investigatory agencies conducting criminal investigations, as well as the course of investigations as they proceed through the criminal justice system. Complaints received and investigated by the Division are only the first step in the prosecutorial process. As an investigatory unit, the Division begins an investigation that is continued by either the Attorney General or appropriate District Attorney. Premature release of information will have the potential to obstruct investigations and negatively affect the fundamental fairness of the process. Under the board's proposal potential complainants who contemplate bringing information to the Division but are concerned that their identity be kept confidential will not be assured that their identities will remain protected. Those who are the subject of inquiries will be faced with the possibility of unwarranted accusations because of premature release of Division documents. Fairness to complainants and subjects of inquiries requires that investigations remain confidential until the entire process is complete.

¹² Election Law §3-102 (3) and §3-104 (1) (b)

¹³ Election Law §3-100 (3-a)

The proposal purports to give the board sweeping authority to take action concerning Division documents, but does not require that such action be taken at a formal meeting of the board. Any action of the board in reference to Division documents would raise serious issues of fundamental fairness to investigations and prosecution, yet the proposal omits a requirement that any vote of the board be taken at a meeting of the board where there is a statutorily-required quorum. Further, the proposal, in several sections, calls for a “majority vote of the commissioners” to take action. This is contrary to Election Law §3-100(4) which requires the affirmative vote of three commissioners for any official action of the state board of elections.

The only course of action to protect the integrity of the investigations conducted by the Division is to maintain the confidentiality of all Division documents. In addition, the Chief Enforcement Counsel must be the one to decide if and when documents are released. In order to accomplish the goal of ensuring the integrity of the Division’s investigations, records, and reports - formal Regulations are required. Additionally, the board should develop and implement policies to enforce those regulations, including specific penalties for violations. Further, it must be clear that the Regulations and any enforcing policy be applicable to the Commissioners and entire staff at the Board of Elections.

The legal arguments as to the objections to the overall proposal have been set out in the separate Memorandum. Below, I highlight specific objections to the proposal as it is submitted. These objections in no way suggest that this proposal can be edited to satisfy my objection to the board’s attempt to usurp the Division’s authority. The control of Division documents must be vested in the Chief Enforcement Counsel. Any policy to the contrary undermines the independence and integrity of the process.

PROPOSED POLICY RELATED TO ENFORCEMENT MATTERS

“Legislation established a new, independent enforcement division headed by a chief enforcement counsel, who is appointed outside of the Board to a 5-year term, vested with authority to investigate violations of the Election Law outside of the Board.”¹⁴

The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe.¹⁵

“.....disclosure of Enforcement Division materials while investigations are pending not only has the potential to impede or obstruct investigations, but potentially undermines principles of fundamental fairness in investigations and prosecutions.”¹⁶

¹⁴ Governor Cuomo and Legislative Leaders Announce Passage of 2014-15 Budget March 31, 2014

¹⁵ *In the Matter of Fink v Louis Lefkowitz, as Attorney General*, (47N.Y.2d 567, 573 [1979])

¹⁶ Report of the Inspector General Catherine Leahy Scott – May 2016

I. **Enforcement Documents**

Any document related to an Enforcement matter provided to the Board that claims to be confidential shall identify the statutory or other legal basis for such confidentiality or applicable Freedom of Information Law exemption; provided, however, the failure to so mark a document shall not be deemed a waiver of any applicable privilege or confidentiality.

For purposes of this policy, "Enforcement Documents" shall include documents from the Chief Enforcement Counsel to the Board requesting authorization to exercise the powers conferred by Election Law 3-102 [5], [6] or recommending a criminal referral, but shall not include documents or reports attached to such requests that are otherwise independently and publically available.

The clear legislative intent in creating the Division was to allow for the independent investigation of complaints alleging violations of the Election Law. The board seeks to impose its will on the Division, in a manner which runs contrary to the clear statutory intent. The proposal is vague and provides no definitions or criteria for any action contemplated under its provisions. By doing so, the board attempts to improperly take control of the Divisions' responsibilities. It is solely within the purview of the Chief Enforcement Counsel, not the board, to determine Division policy and if and when information is subject to release.

Please refer to the Memorandum on Independence of the Division, Public Interest Privilege, Open Meetings Law and FOIL.

II. **Complaints**

Complaints alleging violations of the Election Law received by the New York State Board of Elections shall be treated as if confidential and forwarded to the Chief Enforcement Counsel.

The phrase "treated as if" leads to the conclusion that the confidential designation is temporary and documents could at a later date be made public. It is not clear whether you envision the Division to be included in the broad statement of "...the New York State Board of Elections ...".

Complaints, as well as the names of both the complainants and the subjects, must always be kept confidential unless the Chief Enforcement Counsel decides release is appropriate. It is solely within the purview of the Chief Enforcement Counsel, not the board, to determine what documents are confidential, and if information is subject

to release. Please refer to the Memorandum on Independence of the Division, Public Interest Privilege, Open Meetings Law and FOIL.

III. Enforcement Document Protocol

This section of the proposal points to the board's attempt to circumvent the plain language of §§ 3-102(3) and 3-104 (1) which gives the Division sole authority to investigate all complaints alleging violations of Article 14 of the Election Law, as well as other statutes governing campaigns, elections and related proceedings.

In this section, and others, the board gives itself the authority to take action regarding enforcement documents. The proposal does not however state that such action must be taken at a meeting of the board. Any action of the board in reference to Division documents would raise serious and fundamental issues as to the fairness of investigations and prosecutions. Despite this, the proposal flagrantly disregards statutory language which requires that any vote of the board must be taken at a meeting of the board where there is a quorum present.

Further the proposal calls for a "majority vote of the commissioners" to take action. This is contrary to Election Law §3-100(4) which requires the affirmative vote of three commissioners for any official action of the state board of elections.

The proposal does not contain a notice provision to the Chief Enforcement Counsel, any prosecutorial agencies, the complainants, or the subjects if a vote is contemplated or taken to release a specific document. Further, it provides no mechanism for an opportunity to object to the board's contemplated action, or stay provisions to prevent the release of the information. The release of information before the conclusion of the investigation would have a profound impact on the investigation and any future investigations contemplated by the Division.

The Memorandum details the ethical obligations that attach to investigations and prosecutions. These obligations require investigative agencies and prosecutors to seek justice in an unbiased, non-partisan manner and not use the information obtained for personal or political gain. They include the obligation to limit disclosure and publicity to ensure a fair trial to the accused. These ethical obligations are not limited to prosecutorial and investigatory agencies (i.e. the Division), but extend to the conduct of the board and staff when action is taken with respect to Division documents.

Enforcement documents that would be exempt from mandatory disclosure under the Freedom of Information Law shall not be shared with persons outside of the agency unless authorized by a majority vote of the commissioners.

It is not clear what you mean by "mandatory disclosure" in this paragraph. Statutory exemptions do not determine whether a document is exempt for disclosure. Please refer to the memo sections on Public Interest Privilege, FOIL.

Enforcement documents shall be provided to staff within the agency only as necessary to assist the commissioners in their review and consideration of the matter, as determined by the Board.

Distribution of documents must be limited to Counsel and the Co-Executive Directors. This section conflicts with the Compliance section.

See memo in reference to ethical obligations of document release.

Nothing in this policy shall prevent the commissioners by majority vote from authorizing the release, in whole or in part, of any document submitted to the Board unless there is an express statutory prohibition with respect to a document's contents preventing such action.

This section again calls for a “majority vote of the commissioners” to take action. This is contrary to Election Law §3-100(4) which requires the affirmative vote of three commissioners for any official action of the state board of elections.

It is not clear what you mean by “express statutory prohibition” in this paragraph. Statutory exemptions do not determine whether a document is exempt from disclosure. Please refer to the memo sections on Public Interest Privilege, FOIL.

It is solely within the purview of the Chief Enforcement Counsel, not the board, to determine what documents are confidential, and if and when information is subject to release. Please refer to the Memorandum on Independence of the Division, Public Interest Privilege, Open Meetings Law and FOIL.

The Board may determine that a matter referenced in an enforcement document for policy reasons or otherwise should be discussed in public session. See *Spargo v State Commn*, 140 AD2d 26 (1988).

Reliance on In the Matter of Spargo v. New York State Commn. on Govt. Integrity (140 AD2d 26 [3rd Dept. 1988]) is misplaced. In Spargo, the State Board of Elections (SBOE) conducted an investigation into the petitioner’s political fundraising activity. The petitioner, claiming to be a “data subject” under Public Officers Law § 92(3), commenced an Article 78 proceeding to prohibit the public dissemination of the SBOE’s investigative file. The petitioner alleged that disclosure of the SBOE’s investigative file would be a violation of article 6-A of the Public Officers Law, also known as the Personal Privacy Protection Law (“PPPL”). The Supreme Court granted the petition to prohibit respondents from publicly revealing the contents of the SBOE’s investigative file.

*The Appellate Division, Third Department, reversed, holding that under this set of circumstances, the PPPL was inapplicable and therefore did not bar public disclosure of the SBOE investigative file. In reversing the lower court's decision, the Appellate Division found that Spargo was not a "data subject" and the subject matter in question – the SBOE's investigative file – did not contain the type of records which the PPPL was intended to protect from public dissemination.*¹⁷

In coming to this determination, the court engaged in a comprehensive analysis of PPPL's content, as well as the legislative intent behind its enactment and found that, "[t]he PPPL ... like the Federal law upon which it was patterned, was enacted to protect against the increasing dangers to personal privacy posed by modern computerized data collection and retrieval systems."

*In relying on Spargo to support public discussions of Division matters, the board ignores the Appellate Division's reference to FOIL. The court did not stop with its review of PPPL, but contrasted it to FOIL, finding the SBOE investigative file did constitute FOIL records and in the sole footnote of the decision, the court stated, "**The petition in this case is solely grounded upon the PPPL, which we have found inapplicable. However, we express no opinion on any other ground upon which relief could have been requested (emphasis added).**"*

Therefore, the court goes out of its way to point out that it was not foreclosing upon the possibility that matters relating to an SBOE investigation should be kept confidential for some reason other than the PPPL.

Using the Spargo decision as a guide, Division documents would be the equivalent of the SBOE's investigative file – and therefore not a record which falls under the purview of the PPPL, but a record which falls under the purview of FOIL, and subject to FOIL exemptions.

The holding in Spargo is inapplicable to enforcement-related matters. It is an extremely broad, and inaccurate proposition that the board "may determine that a matter referenced in an enforcement document for policy reasons or otherwise should be discussed in public session.

No particular subject or general matter referenced in an Enforcement Document by

¹⁷ Citing the applicable definitions found in Public Officers Law § 92, the court stated, "Further indication that only records in an indexed computer database or the like are protected by the PPPL is found in the definition of 'record' as 'any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject' and 'personal information' as 'any information concerning a data subject which because of name, number, symbol, mark or other identifier, can be used to identify that data subject.'" *Id.*, at 30. "The records at issue in this case, manually compiled paper records, not electronically indexed in any fashion, do not permit retrieval under petitioner's name or other identifier. Therefore, while they do constitute records under FOIL, they are not records under the PPPL. For the same reason, references to petitioner in the files are not 'personal information' and petitioner is not a 'data subject' within the purview of the PPPL." *Id.* at 31.

reason of that fact shall be deemed to prevent such subject or general matter from being studied, researched or addressed when within the scope of other persons' functions within the agency.

This paragraph opens the possibility of dissemination of any Enforcement Document at the discretion of an individual Commissioner for study, research or addressed within the scope of other persons function within the agency. Again, the board attempts to usurp the authority of the Division. Distribution of documents must be limited to Counsel and the Co-Executive Directors. No further distribution shall be permitted without the express consent of the chief enforcement counsel.

IV. Executive Session Consideration of Enforcement Matters

Executive session deliberations regarding requests for subpoena authority or criminal referrals will generally be treated in a confidential manner, but nothing in this policy shall prevent the consideration of Enforcement matters in open session, at the discretion of the Board and in accordance with law.

This provision is contrary to the conclusions on the Inspector General "...that disclosure of Enforcement Division materials while investigations are pending not only has the potential to impede or obstruct investigations, but potentially undermines principles of fundamental fairness in investigations and prosecutions." Further, it violates the ethical obligations imposed upon the Division, and therefore the board, to seek justice in an unbiased, non-partisan manner and not use the information for personal or political gain and limit disclosure and publicity to ensure a fair trial to the accused.

This section allows the board to consider requests for subpoenas and referrals in open session "at the discretion of the Board and in accordance with law." The section does not define "at the discretion of the Board and in accordance with law." Nor does it provide or reference any statutory authority it intends to consider. Finally it makes no provision for notice to the chief enforcement counsel, any prosecutorial agencies, the complainants, or the targets if a public discussion is contemplated.

Further, Election Law §3-100(4) requires the affirmative vote of three commissioners for any official action of the state board of elections. "At the discretion of the Board" is contrary to this requirement.

Please refer to the sections on Independence of the Division, Public Interest Privilege, Open Meetings Law and FOIL for specific legal argument.

Executive sessions for the consideration of enforcement matters will typically be attended by the co-executive directors, counsel and the chief enforcement counsel. Other staff persons, as required by the commissioners, may be asked to attend.

Attendance at Executive session must be limited to Counsel and the Co-Executive Directors unless consented to by the chief enforcement counsel.

Proposed Executive Session Minutes will be drafted in accordance with requirements of the Open Meetings Law by the office of counsel for consideration by the commissioners .

V. Compliance Unit Referrals of Enforcement Matter

When the commissioners refer a matter to the Compliance Unit, only that portion of an Enforcement Document relevant to the compliance referral should be shared with the Compliance Unit auditors. The Compliance Unit will not share the Enforcement Document with the committee being audited and the Compliance Unit will not disclose that the committee is the subject of an enforcement matter, unless otherwise directed by the Board.

It is solely within the purview of the Chief Enforcement Counsel, not the board to determine what documents are confidential, and if and when information is subject to release. Please refer to the Memorandum on Independence of the Division, Public Interest Privilege, Open Meetings Law and FOIL.

The section does not indicate who determines what is relevant and what criteria will be used for that determination.

Election Law §3-100(4) requires the affirmative vote of three commissioners for any official action of the state board of elections. "Otherwise directed by the Board" is contrary to this requirement.

VI. Civil Hearing Process Pursuant to 9 NYCRR 6218

Documents and records produced or part of the 9 NYCRR 6218 hearing process are not privileged, confidential or exempt from public disclosure unless there is an independent basis for such privilege or confidentiality; provided, however, the Board will not identify a person as a respondent or release a Report / Complaint initiating a 6218 proceeding until the respondent has been served.

Court documents are public and subject to release. The underlying investigative documents are still confidential. The identity of the respondent, if represented by counsel should not be revealed until the respondent or her/his counsel has been served.

VII. Confidentiality of Closed Enforcement Matters

Enforcement Documents will continue to be treated in a confidential manner even after the investigation to which they relate is closed provided they remain exempt

from release under the Freedom of Information Law or until authorized for release, in whole in part, by majority vote of the Board.

It is solely within the purview of the Chief Enforcement Counsel, not the board to determine what documents are confidential, and if and when information is subject to release. Please refer to the Memorandum on Independence of the Division, Public Interest Privilege, Open Meetings Law and FOIL.

This section calls for a “majority vote of the commissioners’ to take action. This is contrary to Election Law §3-100(4) which requires the affirmative vote of three commissioners for any official action of the state board of elections.

VIII. Compliance Activity

Nothing in this policy prevents interactions with any committee or person related to compliance efforts, provided the confidentiality of enforcement documents and appropriate confidentiality of deliberations of enforcement matters is maintained.

All SBOE staff must comply with the ethical standards as explained in Memorandum.

IX. Custody of Enforcement Documents

Within the agency due care shall be taken to insure that others do not unnecessarily overhear any discussions concerning the information contained in any Enforcement Documents, and the documents should not be left in the open or be kept in such a manner that they could be inadvertently shared.

All SBOE staff must comply with the ethical standards as explained in Memorandum.

9 NYCRR 6202.1

Section 6202.1. Examination and copying of records

(a) *Applicability.* The provisions of this Part shall be applicable to all records of the State Board of Elections available for public inspection and copying.

(b) *List of available records.* A current list of all board records available for inspection and copying shall be maintained by the records access officer and such list shall be available for public inspection and copying.

(c) *Location of records.* All available records shall be located at 40 North Pearl Street, Suite 5, Albany, NY 12207-2729.

(d) *Hours of inspection.* Records may be inspected and copied each day the office is open to the public, commencing one-half hour after such office hours begin and terminating 15 minutes before the close of such hours.

(e) *To whom and where request made.* A request for a particular record from the Board of Elections shall be made to the ~~public information officer~~ Co-Counsel, who shall be the board's records access officer, or his/her designee. A request for a particular record from the Division of Election Law Enforcement shall be made to the Division's Internal Control Officer, who shall be the Division's record's access officer, or her/his designee.

(f) *Form of request and identification.* Where an applicant wishes to examine or copy an available Board record, he/she shall submit a written and signed request on a form to be provided by the board. Where an applicant wishes to examine or copy an available Division record, he/she shall submit a written and signed request on a form to be provided by the Division. Within five business days of the receipt of the request, the records access officer of the board shall make the requested records available, shall deny the request in writing, or shall furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied. If, within 10 business days after the date of the acknowledgment of the receipt of the request for records, access to the requested records is neither granted nor denied, the request shall be deemed to be denied and the applicant shall have the right to appeal in accordance with the provisions of subdivision (u) of this section.

(g) *Description of record required.* A request for a record shall adequately specify or describe the record sought to be inspected or copied.

(h) *Number of records permitted.* The records access officer, or his designee, shall have the discretion to limit the number of records of any type or types an applicant may request and receive at any one time.

(i) *Treatment of records.* No marks of any kind shall be made on any record provided for inspection.

(j) *Area restriction.* Inspection or copying of records shall be permitted only in the area designated by the records access officer for such purpose.

(k) *Duplicate requests.* If duplicate requests are received from applicants for a particular record, the applicant making the first request physically received by the board shall first receive the record.

(l) *Limitation of examination time.* The records access officer or his designee may fix reasonable limitations on the time any applicant may have to examine any record.

(m) *Temporary unavailability of records.* Where a record is in use by the board, or filing or intake procedures relating thereto have not been concluded, the filing of a request for such a record may be reasonably delayed until such a use or procedure is completed.

(n) *Return for board business.* Whenever a record made available for inspection or copying is required for the business of the board, the records access officer, or his designee, may require the return of the record. In such case the applicant shall return the record upon demand.

(o) *Provision of photostatic copies.* Photostatic copies of available records may be obtained from the board by ordering same at a fee of 25 cents per page plus postage.

(p) *Provisions for use of telephone lines to transmit available records.* Any request for board records to be transmitted over telephone lines shall be paid for at a fee of \$.65 per page.

(q) *Provisions for producing data on computer printouts or magnetic media.* The fee for producing any data on computer printouts or magnetic media shall be in an amount not to exceed the actual cost of reproduction.

(r) *Mailing of data on computer printouts or magnetic media.* If the board is requested to mail any computer tapes, computer discs or any other electronic recording, the cost of postage shall be in addition to the fee charged for the actual cost of production. Orders may be made by mail provided the requested computer printout or magnetic media is sufficiently identified.

(s) *Release of records.* No records shall be released by the board unless all fees and charges have been paid in advance.

(t) *Individual accounts.* Any person, corporation, association or other entity which wished to establish an account with the board for the purpose of facilitating payment for requested records may request the board to create such an account. Such account shall be created when the board receives a certified check, bank check or money order made payable to the New York State Board of Elections. The minimum amount required to establish such an account is \$100. Such funds shall be placed in a special account with balances maintained for each individual account. Each transmittal, mailing or receipt from the board shall contain a statement of the charges for the transaction and the balance remaining in the account.

(u) *Denial of access.* In the event a request for a record is denied on grounds other than that the board or Division does not maintain such a record or no such record is found, the applicant shall be provided with a form advising him/her of his/her right to appeal the denial of the application ~~to the State Board of Elections~~. Such appeal shall, in the case of a board record, be made to the New York State Board of Elections, and in the case of a Division record shall be made to the Division of Election Law Enforcement. The board or Division shall, within seven business days of the receipt of the appeal, fully explain in writing to the person requesting the record the reasons for denial, or provide access to the record sought.

PART 6203

9 NYCRR 6203.1

Section 6203.1. Administration of oaths, examination of witnesses and issuance of subpoenas for the purpose of conducting investigations pursuant to chapter 233 of the Laws of 1976 and chapter 55, part H, subpart B of the Laws of 2014

In addition to all duties and powers relating to the administration of the election process, election campaign processes and campaign finance practices:

(a) Any commissioner of the State Board of Elections may designate in writing any employee to administer oaths or affirmations, examine witnesses in public or private hearings, receive evidence and preside at or conduct any hearing or study.

(b) Pursuant to a delegation of its subpoena power by the State Board of Elections, each co-executive director, co-counsel and co-deputy counsel are authorized to issue subpoenas in the name of the State Board of Elections to compel the attendance of any person before the board or any employee designated pursuant to subdivision (a) of this section or to require the production of any books, records, documents or other evidence that the board or any such employee may deem relevant to any hearing or study.

(c) **Requests pursuant to subdivision three of section 3-104 of the Election Law**

(1) The chief enforcement counsel may at any time ask that the board authorize him or her to exercise the powers which the board is otherwise authorized to exercise pursuant to subdivision five and six of section 3-102 of this the Election Law. The board shall vote on whether to grant or refuse to grant such authority no later than twenty days after the chief enforcement counsel makes such request.

(2) Consideration and vote by the board for authorization to act pursuant this section shall only be made at an Executive Session of the board. Attendance during such meetings shall be limited to the Commissioners, the co-executive directors, counsel and the chief enforcement counsel. No other staff persons shall attend such session without the express consent of the chief enforcement counsel.

(3) Documents provided to the board relating to request made pursuant to this section shall remain Division documents and shall be not be shared with any person not authorized to attend the Executive Session considering the request.

(4) All documents of the Division of Election Law Enforcement relating to requests made pursuant to this section are privileged and confidential. Division of

Election Law Enforcement document shall remain privileged and confidential until the chief enforcement counsel agrees, in writing, to their release.

(5) For purposes of considering and voting on such request, the chief enforcement counsel shall be entitled to participate in all matters related thereto and shall vote on the board's granting or refusal to grant such request only when there is a tie. Should the board not vote on such request within twenty days of its submission, or grant the chief enforcement counsel's request, the chief enforcement counsel shall be so empowered to act pursuant to subdivisions five and six of [section 3-102 of the Election Law](#).

(d) Requests pursuant to subdivision five (b) of 3-104 of the Election Law

(1) If the chief enforcement counsel determines that reasonable cause exists to believe a violation warranting criminal prosecution has taken place, the chief enforcement counsel shall present such findings to the board. Within thirty days of such submission, the board shall vote on whether to accept or reject such findings.

(2) Consideration and vote by the board for authorization pursuant this section shall only be made at an Executive Session of the board. Attendance during such meetings shall be limited to the Commissioners, the co-executive directors, counsel and the chief enforcement counsel. No other staff persons shall attend such session without the express consent of the chief enforcement counsel.

(3) Documents provided to the board relating to request made pursuant to this section shall remain Division documents and shall be not be shared with any person not authorized to attend the Executive Session considering the request.

(4) All documents of the Division of Election Law Enforcement relating to requests made pursuant to this section are privileged and confidential. Division of Election Law Enforcement document shall remain privileged and confidential until the chief enforcement counsel agrees, in writing, to their release.

(5) For purposes of voting on acceptance or rejection of findings by the chief enforcement counsel, the chief enforcement counsel shall be entitled to participate in all matters related to the review of his or her report and shall vote on its acceptance or rejection only when there is a tie. Should the board fail to vote to either accept or reject the findings within thirty days of submission of such findings, or should the board accept the findings by the chief enforcement counsel that there is reasonable cause to believe that a violation warranting criminal prosecution has taken place, the chief enforcement counsel shall, forthwith, and in any event no later than seven calendar days of such failure to accept or reject the findings by the board, refer such matter to the attorney general or district attorney with jurisdiction over such matter to commence a criminal action as such term is defined in the criminal procedure law.