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Increasing Transparency in City Government

One of the chief objectives of the Bloomberg administration has been to make the operation of city government more fair and effective by making it easier for members of the public to interact with city government and to examine and better understand its operations. From publishing new measurements of the performance of city agencies to making proposed agency rules available on the city's website for public comment, the administration has made clear its realization that access to information is essential for effective public participation in the processes of government. The Law Department has assisted in this effort in many ways, including the drafting and review of rules and legislation and defending administration initiatives in court. This article will examine several examples of this work.



Regulation of Lobbying

An important part of the Law Department's work in promoting transparency in city government has focused on the regulation of lobbying. In 2006, attorneys of the Division of Legal Counsel, working with representatives of the City Council and the Mayor's office, helped draft legislation, enacted by the City Council as Local Laws 15 and 16 of 2006, which amended the city's lobbying laws. The amendments strengthened enforcement and addressed the issue of "pay-to-play" by prohibiting gifts by lobbyists to city officers and employees and excluding political campaign contributions by lobbyists from being matched by public financing.

The legislation also took several steps to shed increased light on the activities of lobbyists. First, it mandated that lobbyists and their clients file statements and reports required by the lobbying law electronically and that the City Clerk's office maintain all filings in electronic form so that they are readily available for public review. Second, the legislation required that lobbyists provide more specific information on the subjects of their lobbying efforts in order that the matter sought to be influenced is readily identifiable. Third, the legislation imposed additional reporting requirements on lobbyists who engage in fundraising or political consulting activities. As a result of these amendments, members of the public are better able to learn about efforts to influence decision-making in city government.

Administrative Tribunals

The administrative tribunals of city agencies, which

adjudicate alleged violations of agency rules and other applicable provisions of law, form a key point of contact between residents of the city and their government. For that reason, the administration has for some years sought to maximize the fairness, effectiveness and reliability of these adjudicatory bodies.

In 2007, in an effort to promote uniform standards of conduct for hearing officers and administrative law judges, the City's Office of Administrative Trials and Hearings (OATH) and the Mayor jointly promulgated a code of conduct, based on the Code of Judicial Conduct that applies in the courts of New York State, governing all city administrative tribunals.

At the same time, the value of OATH as an independent and professional adjudicatory agency became increasingly apparent, spurring efforts by the administration to centralize the city's adjudicatory functions in that agency, a move that would provide "one-stop shopping" for adjudications, handled by highly trained hearing officers with unquestioned professionalism and impartiality, who would utilize standardized hearing procedures where practicable.

An important step in this direction was the enactment of Local Law 35 of 2008, drafted with the assistance of Law Department attorneys, which provided for the consolidation into OATH of the city's Environmental Control Board (ECB), a tribunal that adjudicates many health, safety and environmental violations. The increased efficiency and procedural improvements that resulted from this consolidation were followed by the next key step, the proposal of the 2010 Charter Revision Commission that the Mayor be authorized to consolidate additional city tribunals into OATH by executive order. This proposal, adopted by the voters at the 2010 general election, also provided for a committee, appointed by the Mayor, to make recommendations, after considering public comment, concerning the transfer of particular tribunals into OATH.

The Mayor's Committee on Consolidation of Administrative Tribunals, on which the author serves as an appointee of the Mayor, is chaired by the Deputy Mayor for Legal Affairs, Carol Robles Roman. Its report, which appeared on June 7 of this year, recommended, among other proposals, the consolidation into OATH of two major city tribunals—the Department of Health and Mental Hygiene Tribunal and the Taxi and Limousine Commission Tribunal.

The report included a detailed appendix, the result of careful study by the Law Department, the Mayor's office and the affected agencies, which set forth the procedural adjustments that would be necessary to implement the

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consolidations. The Mayor adopted these recommendations, including the appendix, in Executive Order No. 148, and they took effect on July 3. Law Department attorneys are now working with OATH and the relevant agencies to amend agency rules and procedures to reflect the consolidations. The committee is considering whether to recommend the consolidation of additional administrative tribunals.

Reforming Rulemaking

Several administration initiatives have aimed at increasing public access to and understanding of rulemaking by city agencies. The most important of these, undertaken in cooperation with the City Council, was Local Law 46 of 2010, which took effect on Jan. 4, 2011. The stated purpose of this enactment, drafted with the assistance of attorneys of the Legal Counsel Division, is to enhance public participation in the rulemaking process and to assist small businesses in the city by ensuring that their interests are considered in the city's regulatory system.

Local Law 46 provides that each rule proposed by a city agency be reviewed not only for legal issues by the Law Department (as has been the case for many years), but also by the Mayor's Office of Operations for issues of practicability and impact on the regulated community. Both the Law Department and the Office of Operations, following completion of their review, are now required to issue a certification to that effect, which must be published with the proposed rule in the City Record.

The law also provides that each rulemaking agency, prior to the required public hearing on its proposed rule, conduct outreach to the community that would be affected by the regulation. Certain rules, including rules promulgated pursuant to emergency rulemaking procedures, rules that establish or modify fees and rules that implement the requirements of a particular provision of law with little or no exercise of discretion, are exempt from the requirements of Local Law 46.

Assisting Small Business

The Law Department has also assisted in two administration initiatives aimed at helping small businesses generally, and new businesses in particular, interface with the city agencies that regulate them. NYC Business Express, located within the Department of Small Business Services (DSBS), and the NYC New Business Acceleration Team (NBAT), located within the Office of the Mayor, were both designed with the help of attorneys of the Legal Counsel Division, together with others in the Law Department, who have been providing ongoing advice to both programs.

DSBS, in collaboration with the Department of Information Technology and Telecommunications (DOITT) and the several city agencies that regulate various aspects of

businesses, began working on the Business Express website in 2006. The site allows small business owners to set up personal accounts and, through a form of "one-stop shopping," obtain permits and licenses and access information necessary for their businesses.

Due to the complexities of establishing the program and the variety of legal requirements for the various licenses and permits involved, DSBS and the Mayor's office set up a "Legal Issues Work Group," which included attorneys from the Law Department as well as DSBS, the Mayor's office, DOITT, the Department of Consumer Affairs, the Department of Health and Mental Hygiene, the Finance Department and the Fire Department. The group meets regularly to consider and resolve legal issues raised as the program developed.

Transferring license and permit applications from paper to the Internet has raised a number of issues. The group had to consider the ways in which applicants could attest, electronically, to the accuracy of their applications, as well as how to handle the electronic submission of sensitive information.

In certain circumstances, a license renewal may be conditional upon the fulfillment of certain requirements, or may only last for six months. These and other review procedures had to be converted into an electronic form.

As Business Express continues to be developed, the Mayor's office initiated the NBAT program. The concept of NBAT was first announced in the Mayor's State of the City address in 2010. The program is intended to expedite the permit and license process for new small businesses. The program has been established on a pilot basis with the food industry—restaurants, bars, bakeries and butchers. It ensures that city agencies, including the Fire Department, the Department of Buildings and the Department of Health and Mental Hygiene, coordinate their inspections and reviews, so any problems can be resolved quickly. Law Department attorneys have regularly advised the NBAT team in this initiative to facilitate the creation of new businesses in the city.

Teacher Performance Data

Teacher performance is one of the issues of foremost concern to the administration and to the public. The Law Department has also defended the public's right to access data concerning the measurement of teacher effectiveness. During the 2006-07 school year, the city's Department of Education implemented a special initiative, the "Teacher Data Initiative," to measure and improve teacher performance in the classroom through "value-added modeling."

"Value-added" is a statistical term that refers to a family of statistical models that calculate the effects of individual teachers or schools on student test performance. Value-added is the difference between the average predicted score of a teacher's students and the average actual score of these

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students. The value-added score is intended to measure the teacher's input or effect on the test scores of his or her students—the average student performance on the test subtracting the impact of factors outside a teacher's control. Each teacher's value-added score is embodied in a teacher data report (TDR), which reflects that teacher's impact on the test scores of his or her students over the academic year.

Between August and October 2010, the Education Department received nine requests for TDRs from various news organizations under the Freedom of Information Law (FOIL), specifically including individual teacher names. The Education Department determined that the TDRs do not fall within any of the exemptions from disclosure set forth in FOIL, and are therefore disclosable. However, the United Federation of Teachers (UFT) disagreed, arguing that the TDRs are unreliable and subjective in nature because they reflect the value judgments of those who created them. Therefore, in the UFT's view, they are exempt from disclosure as intra-agency materials under FOIL §87(2)(g) and, alternatively, the names of individual teachers can be withheld on the ground that their disclosure could have a substantial negative impact on the professional reputations of individual teachers and would therefore be an unwarranted invasion of personal privacy under FOIL §87(2)(b).

When the Education Department announced that, notwithstanding UFT's objections, it would disclose the requested TDRs in their entirety, UFT commenced an Article 78 proceeding, challenging the department's final determination. The Supreme Court (Cynthia Kern, J.) rejected petitioner's arguments and dismissed the petition, concluding that the Education Department could reasonably determine that the TDRs do not fall within FOIL §87(2)(g) because they are entirely statistical in nature and, further, that their disclosure would not be an "unwarranted" invasion of personal privacy because "the data at issue relates to the teachers' work and performance...and does not relate to their personal lives" and because "the public's interest in disclosure of the information outweighs the privacy interest of the teachers." *Mulgrew v. Board of Education of the City of New York*, 31 Misc.3d 296, 2011 N.Y. Misc. LEXIS 128 (Sup. Ct., N.Y. Co.).

Petitioner appealed, and on Aug. 25, 2011, the Appellate Division, First Department, affirmed the order of the Supreme Court and upheld the Education Department's determination that no applicable exemption would allow the TDRs as a whole or the names of individual teachers to be withheld from disclosure. 2011 N.Y. App. Div. LEXIS 6218 (1st Dept. 2011). The court agreed with the court below that, although the TDRs are intra-agency materials, they are subject to disclosure as "statistical or factual tabulations or data" under FOIL §87(2)(g)(i).

The court also concluded that, "[a]lthough privacy interests are implicated by the type of information sought to be redacted [i.e., individual teacher names]" the personal privacy

exemption does not apply because "the reports concern information of a type that is of compelling interest to the public, namely, the proficiency of public employees in the performance of their job duties." Therefore, "when balancing the privacy interests at stake against the public interest in disclosure of the information, we conclude that the requested reports should be disclosed." 2011 N.Y. App. Div. LEXIS 6218.

UFT has moved for leave to appeal the decision of the Appellate Division to the Court of Appeals.

Jeffrey D. Friedlander is First Assistant Corporation Counsel of the City of New York and is a member of the Mayor's Committee on Consolidation of Administrative Tribunals discussed in this article. Steven Goulden, senior counsel in the division of legal counsel, and other attorneys in the Law Department assisted in the preparation of this article.