NEW YORK STATE SENATE

THE STENOGRAPHIC RECORD

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3:17 p.m.

REGULAR SESSION

LT. GOVERNOR MARY O. DONOHUE, President

STEVEN M. BOGGESS, Secretary

P R O C E E D I N G S

THE PRESIDENT: The Senate will please come to order.

I ask everyone present to please rise and repeat with me the Pledge of Allegiance.

(Whereupon, the assemblage recited the Pledge of Allegiance to the Flag.)

THE PRESIDENT: With us this afternoon to give the invocation is the Reverend Peter G. Young, from Blessed Sacrament Church in Bolton Landing, New York.

REVEREND YOUNG: For 44 years.

THE PRESIDENT: For 44 years.

REVEREND YOUNG: As we prepare for President's Week and we think of warmer weather, we're caught today in the world of reality, with another snowstorm and cold chills, with all of the sneezes that go with it.

We know that the poor and the needy elderly need to be protected by laws that provide for their life to be healthy and fulfilling. May we remember our New York State citizens as responsible Senate

leadership, that our need is to protect them and their wellness.

We pray for all of the Senators and their families that God will give them the strength to carry on in their important legislative responsibilities on behalf of our New York State citizens.

Amen.

THE PRESIDENT: Reading of the Journal.

THE SECRETARY: In Senate, Saturday, February 8, the Senate met pursuant to adjournment. The Journal of Friday, February 7, was read and approved. On motion, Senate adjourned.

THE PRESIDENT: Without objection, the Journal stands approved as read.

Presentation of petitions.

Messages from the Assembly.

Messages from the Governor.

Reports of standing committees.

The Secretary will read.

THE SECRETARY: Senator Volker, from the Committee on Codes, reports the

following bills:

Senate Print 662, by Senator Volker, an act to amend the Civil Practice Law and Rules;

664, by Senator Volker, an act to amend the Penal Law;

665, by Senator Volker, an act to amend the Penal Law;

685, by Senator Padavan, an act to amend the Penal Law;

763, by Senator Marcellino, an act to amend the Penal Law;

775, by Senator Marcellino, an act to amend the Criminal Procedure Law;

845, by Senator Padavan, an act to amend the Criminal Procedure Law;

851, by Senator Balboni, an act to amend the Penal Law;

877, by Senator Volker, an act to amend the Criminal Procedure Law;

950, by Senator Alesi, an act to amend the Penal Law;

995, by Senator Trunzo, an act to amend the Criminal Procedure Law;

1021, by Senator Skelos, an act to

amend the Criminal Procedure Law;

And Senate Print 1441, by Senator Volker, an act to amend the Penal Law.

All bills ordered direct to third reading.

THE PRESIDENT: All bills reported direct to third reading.

Reports of select committees.

Communications and reports from state officers.

Motions and resolutions.

Senator Skelos.

SENATOR SKELOS: Madam President, if we could go to the noncontroversial reading of the calendar.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 34, by Senator Wright, Senate Print 688, an act to amend the Tax Law, in relation to authorizing the City of Fulton.

SENATOR PATERSON: Lay it aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 36, by Senator DeFrancisco, Senate Print 327, an act to amend the Criminal Procedure Law, in relation to access to sealed records.

SENATOR PATERSON: Lay that aside, please.

ACTING PRESIDENT McGEE: The bill is laid aside.

THE SECRETARY: Calendar Number 40, by Senator Balboni, Senate Print 518, an act to amend the Civil Rights Law, in relation to confidentiality.

ACTING PRESIDENT McGEE: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT McGEE: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 59.

ACTING PRESIDENT McGEE: The bill is passed.

THE SECRETARY: Calendar Number 67, by Senator Velella, Senate Print 112, an act to amend the Vehicle and Traffic Law, in

relation to reporting of accidents.

SENATOR PATERSON: Lay it aside, please.

ACTING PRESIDENT McGEE: The bill is laid aside.

THE SECRETARY: Calendar Number 72, by Senator Marcellino, Senate Print 776, an act to amend the Vehicle and Traffic Law, in relation to the enforcement.

ACTING PRESIDENT McGEE: Read the last section.

THE SECRETARY: Section 3. This act shall take effect on the first day of November.

ACTING PRESIDENT McGEE: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 58. Nays, 1. Senator Duane recorded in the negative.

ACTING PRESIDENT McGEE: The bill is passed.

Senator Skelos, that completes the reading of the noncontroversial calendar.

SENATOR SKELOS: Madam President, if we could go to the controversial reading of

the calendar.

ACTING PRESIDENT McGEE: The Secretary will read.

THE SECRETARY: Calendar Number 34, by Senator Wright, Senate Print 688, an act to amend the Tax Law, in relation to authorizing the City of Fulton.

SENATOR SCHNEIDERMAN: Explanation.

ACTING PRESIDENT McGEE: Senator Wright, an explanation has been requested.

SENATOR WRIGHT: Thank you, Madam President.

The bill before us this afternoon was introduced at the request of the City of Fulton, subject to a home-rule message that they have adopted and has been filed with us. It provides for the imposition of an additional sales and compensating use tax beginning the period of March 1, 2003, and ending November 30, 2005.

The city currently utilizes a 3 percent sales tax. This would increase it to the 4 percent extension. This is at the request of the city, to address their

financial needs, having suffered some major losses in their tax rolls and facing continuing increases in municipal costs.

ACTING PRESIDENT McGEE: Senator Paterson.

SENATOR PATERSON: Madam President, I understood that Senator Wright explained to us that there was a home-rule message that accompanied the bill. The explanation is satisfactory.

I suggest we read the last section.

ACTING PRESIDENT McGEE: Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

ACTING PRESIDENT McGEE: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 59.

ACTING PRESIDENT McGEE: The bill is passed.

THE SECRETARY: Calendar Number 36, by Senator DeFrancisco, Senate Print 327, an act to amend the Criminal Procedure Law, in relation to access to sealed records.

SENATOR PATERSON: Explanation, please.

ACTING PRESIDENT McGEE: Senator DeFrancisco, an explanation has been requested.

SENATOR DeFRANCISCO: Yes. This bill would basically allow for the unsealing of records under extraordinary circumstances, a determination that would have to be made at the discretion of a court, to be able to review those records with respect to disciplinary proceedings in certain professions, including attorneys, doctors, dentists, pharmacists, school district employees, nurses and the like.

ACTING PRESIDENT McGEE: Senator Paterson.

SENATOR PATERSON: Madam President, if the Senator would yield for a question.

ACTING PRESIDENT McGEE: Senator DeFrancisco, would you yield for a question?

SENATOR DeFRANCISCO: Yes. As long as it's the same question as last year.

(Laughter.)

SENATOR PATERSON: I'm trying to recall that question.

(Laughter.)

SENATOR PATERSON: The interests of justice is cited as really the theory of law that permits us at times to seal the records, generally feeling that there is some either lack of competence on the part of the defendant when this case is -- the convicted, or perhaps mental disease or disability, lack of age of majority or something that gives this individual in a sense a second opportunity or would not be befallen too much by the strength of the conviction that's before the court.

What I would like to know, Madam President, is if Senator DeFrancisco would explain to us the difference between the interests of justice and the extraordinary circumstances -- specifically, what those extraordinary circumstances are -- that would compel us to want to know what the information was that we'd previously sealed.

SENATOR DeFRANCISCO: Well, if you look at the purposes for the sealing and

the purposes for unsealing, I think it might shed light on that issue.

First of all, a criminal standard of proof is a substantially greater standard than a standard that would be with respect to relevant proof in a disciplinary action for a professional.

For example, there may not be sufficient proof in a conviction in a child abuse case, and therefore the case is either dismissed or the records are sealed, depending upon the court's determination. But it may be very relevant in a case of a schoolteacher, whether or not that proof reaches a criminality level, whether it's sufficient enough to provide proof of disciplinary action or suspension in the professional arena.

So I think that's basically the difference. A court would have to determine that the materials that would be unsealed would be extraordinarily important or of extraordinary circumstance that should be known by the disciplinary authority for purposes of licensing. And I think that's the distinction.

And I know it's opposed by the trial lawyers, and I am one of them. But the fact of the matter, I think the difference is in standard and the importance of making sure we have professions that can discipline for behavior, though not criminal, are protected.

ACTING PRESIDENT McGEE: Senator Paterson.

SENATOR PATERSON: Madam President, if Senator DeFrancisco would continue to yield.

SENATOR DeFRANCISCO: Yes.

ACTING PRESIDENT McGEE: The Senator continues to yield.

SENATOR PATERSON: Then, Senator, if the interests of justice is short of the comparison with the extraordinary circumstances, am I not correct in asserting that the circumstances have to be at that point prejudicial?

Because, since there may not have been a conviction, you might have a case where -- let's say it's a child abuse case, it's settled in favor of the defendant, so they sealed the records of that particular

case.

Are we suggesting that in an extraordinary circumstance, even though there was not a formal conviction, that there still is information that would be helpful, let's say, if someone were becoming a doctor or one of the other professions, a teacher or something like that?

SENATOR DeFRANCISCO: There are many criminal cases that are sealed for lack of evidence, or may be sealed because they don't want a child to testify or the information to get out in the public. But the fact of the matter is that may be relevant to whether someone should continue practicing a specific profession.

And what I'm saying is it's two different standards, two different purposes. It's much more serious to have someone convicted of a criminal charge. That's why there's a much greater burden of proof. However, there's a much lower standard whether someone has the qualifications or the moral standards to practice a profession.

And for those reasons, I think

they're entirely consistent. The reason for the extraordinary circumstances, we don't think every sealed criminal case should be made available to every particular disciplinary authority. But this at least gives an opportunity in a serious case, in a very important case where there wasn't enough criminal evidence to bear on the person's qualifications to continue in that profession.

ACTING PRESIDENT McGEE: Senator Paterson.

SENATOR PATERSON: Madam President, I believe that Senator DeFrancisco's bill, as he perceives it, would be one that would address this issue in what he's calling an extraordinary circumstance.

What I'm afraid of is what's extraordinary in concept may become in practice something that happens all the time, whereby there's almost a witch-hunt for people who maybe have been involved in different types of cases in their lives, the cases were sealed, they weren't convicted of anything, and yet just the accusation impinges upon their opportunity perhaps to even receive a

job later.

So if Senator DeFrancisco would yield for another question.

SENATOR DeFRANCISCO: Yes.

ACTING PRESIDENT McGEE: The Senator yields.

SENATOR PATERSON: And somewhat of a bifurcated question.

I'm interested in an example of what an extraordinary circumstance would be. Moreover, what I'm interested in is where Senator DeFrancisco can assure us that we can hold the threshold of that standard throughout the longevity of this law.

SENATOR DeFRANCISCO: Well, first of all, I keep getting back to a child situation. There's many cases where cases are dropped, sealed or otherwise, when there's sealed allegations brought by a child, for lack of proof or the child not being willing to come forward or the parents not willing for the child to go forward.

Under those circumstances, if it's a profession or a group that happens to have close relationships with kids or deals with

kids all the time, I think that that would qualify as an extraordinary circumstance that the disciplinary committee or the licensing authority might be in a position to want to know that, to review any other circumstances that might have arisen in that background check.

There is no way anybody can assure in every case that a standard is going to be applied exactly the way everyone wants it in every case. That's what judicial discretion is all about. And the purpose for extraordinary circumstances is to show how high a level that we are holding the judiciary to in making that unsealing of the records.

In addition, the person involved has a right to notice that there is an attempt to unseal those records, and that person has the opportunity to be heard before the ultimate determination is made of unsealing.

But that's much more preferable, in my mind, to making it a blanket rule that you can never get inside of those records just because they were sealed. And that's what the Court of Appeals has ruled, based upon the law

as it now reads.

ACTING PRESIDENT McGEE: Senator Schneiderman.

SENATOR SCHNEIDERMAN: Yes, Madam President, if the sponsor would yield to a few questions.

ACTING PRESIDENT McGEE: Senator DeFrancisco, do you yield?

SENATOR DeFRANCISCO: Yes.

ACTING PRESIDENT McGEE: The Senator yields.

SENATOR SCHNEIDERMAN: Thank you. Through you, Madam President.

Is there anything in this proposed legislation that would limit the regulatory body or agency in its use of these materials once they're unsealed? Is there anything that would prevent the agency from releasing them to the press or the public or otherwise disseminating this sensitive information?

SENATOR DeFRANCISCO: There should be. Let me see.

Well, I think it's -- by saying that it can be released on this standard of extraordinary circumstances to these

regulatory bodies, I would assume that also means, and I would read it to mean, that that's to whom it should be released, and it's not permitted to be released elsewhere.

In fact, the extraordinary circumstances apply to the purpose for the release to these licensing agencies.

SENATOR SCHNEIDERMAN: Thank you. Through you, Madam President, if the sponsor would continue to yield.

ACTING PRESIDENT McGEE: Senator DeFrancisco, do you continue to yield?

SENATOR DeFRANCISCO: Yes.

ACTING PRESIDENT McGEE: The Senator continues to yield.

SENATOR SCHNEIDERMAN: I do believe, though, that -- as I think you're indicating -- there is no language in this legislation which would in any way limit the dissemination of this information by the agency showing the extraordinary circumstances and obtaining it.

Is it possible that that would be something that, as you say, should be added or could be added in a subsequent version of this

legislation?

SENATOR DeFRANCISCO: Well, it certainly could be added.

But when we were talking about the vehicle being a court order authorizing the release to these various agencies, I would think it's pretty apparent from the language as it exists that you're releasing it to only those agencies.

SENATOR SCHNEIDERMAN: Through you, Madam President.

But I don't think there's any limitation in this law or elsewhere that I'm aware of on those agencies then subsequently releasing it.

I mean, there's nothing that says that these agencies, after demonstrating extraordinary circumstances, have to keep it secret, or that they have to provide any other types of protection of the information; is that correct?

SENATOR DeFRANCISCO: There's no specific words.

But if you're talking about a court order releasing it to specifically these

agencies, I would suspect that it's implied in that.

It could be clearer, could be made clearer by an A version of the bill, by making it specific, putting specific language in there that says that upon release to these agencies they shall not release it to anyone else.

SENATOR SCHNEIDERMAN: And through you, Madam President, if the sponsor would continue to yield.

ACTING PRESIDENT McGEE: Senator DeFrancisco, do you continue to yield?

SENATOR DeFRANCISCO: Yes.

ACTING PRESIDENT McGEE: The Senator continues to yield.

SENATOR SCHNEIDERMAN: Again, I think I know the answer, but I want to make sure this is clear. Is there anything in this legislation that would require these agencies to close their hearings relating to this sensitive matter to the public or the press?

SENATOR DeFRANCISCO: They would be bound by whatever their existing regulations are for each of the agencies.

And I'm not so sure that there's any of these agencies that have public hearings, at least at this point. I know the chief judge of the Court of Appeals is calling for open hearings with respect to disciplinary actions against judges and attorneys, which I don't particularly subscribe to. But I don't believe any of these are open to the public during the investigatory stages.

SENATOR SCHNEIDERMAN: Thank you. Through you, Madam President, if the sponsor will continue to yield.

ACTING PRESIDENT McGEE: Senator DeFrancisco, do you continue to yield?

SENATOR DeFRANCISCO: Yes, I will.

ACTING PRESIDENT McGEE: The Senator yields.

SENATOR SCHNEIDERMAN: If there is information, an allegation or an accusation made in a criminal proceeding, defendants have the right to cross-examination, they have a whole series of rights available in criminal proceedings which protect them from false accusations or evidence that perhaps may be

failing in some respect.

Is there any requirement in this legislation or elsewhere that the hearings conducted by the agencies that may obtain this information, or partial information, from a court proceeding provide such due process protections as cross-examination, the right to confront a witness, or other things that are provided to a defendant in a criminal proceeding?

SENATOR DeFRANCISCO: No, there's not a separate proceeding as far as this court order. It's a court review based upon the information that's presented in the sealed records, upon notice to the person against whom it's going to be used.

SENATOR SCHNEIDERMAN: Through you, Madam President, I'm referring to the hearing conducted by the regulatory agency, though.

If a regulatory agency obtains records of a proceeding in which someone was accused of committing a crime and the prosecutor subsequently determined that the accusation was false, the case was dropped,

that defendant in the criminal proceeding has the right to cross-examination, to call witnesses.

Is there anything here that requires the administrative agency obtaining that partial information, that accusation, to provide the same procedural protections to the defendant that it provided under our Criminal Procedure Law?

SENATOR DeFRANCISCO: No, because this is not a criminal procedure.

I don't think any of the regulatory agencies that discipline or determine licensing of professionals require a full trial with opportunity to be heard against every allegation. They have an opportunity to present their side of the case as to why there are not extraordinary circumstances in this information being released.

SENATOR SCHNEIDERMAN: Thank you.

And through you, Madam President, one final question, if the sponsor will yield.

SENATOR DeFRANCISCO: Yes.

ACTING PRESIDENT McGEE: The sponsor yields.

SENATOR SCHNEIDERMAN: Is there any provision in this statute or anywhere else to provide funding or any assistance for someone who is being notified that their records are being sought so that they may protect themselves, as in the criminal proceeding presumably you have a right to counsel if you're indigent? Is there anything comparable to provide funding for such protections for someone subject to such a proceeding?

SENATOR DeFRANCISCO: No, there is no such thing.

Once again, this is not a criminal proceeding. There's no legal requirement or constitutional requirement for counsel to be appointed.

It's like any other disciplinary proceeding. If you're the target of a disciplinary proceeding, you're on your own.

SENATOR SCHNEIDERMAN: Thank you. Thank you, Madam President. Thank the sponsor.

On the bill.

ACTING PRESIDENT McGEE: Senator

Schneiderman, on the bill.

SENATOR SCHNEIDERMAN: I think that this is a well-intentioned piece of legislation that is failing in certain critical respects. And I think that -- I appreciate the sponsor's candor. When I asked if there was a provision limiting the use of this information or providing for it to be sealed, I believe his first comment was there should be.

Well, I think there should be. And I think it's something -- that's something that is easily remedied. I would bring your attention to a report issued in September 2002 by the NCSL, their state legislative report, discussing the problem of public dissemination of records that are obtained in these sorts of proceedings, and noting that there are for-profit companies that make it their business to go around and obtain this information and provide it to private firms.

Once this information is released publicly, once this information is released to a regulatory body, there is no restriction on its use. And I don't think this is something

that we should assume or presume. I think that as it's currently drafted, this is a fatal flaw for this particular piece of legislation.

Second of all, the point about due process protections I think is also critical. Under this bill, if someone is accused, wrongfully accused of a crime, the prosecutor decides that the accusation is false, drops the case, this would enable a regulatory body to obtain that information, have that accusation out there, have it released in the press.

But the defendant, the acquitted person would not have the ability to cross-examine the witness, because the procedural protections provided in a criminal proceeding are not present, as the sponsor has acknowledged, in these administrative matters.

And, finally, I think that the fact that someone is given notice of the fact that there is an effort to unseal their records is nice, but if we don't provide funding for counsel for someone to fight against this, it's really an empty right in many, many

cases.

I think that this opens up a lot of dangerous possibilities. I think the law as drafted, providing that in the interests of justice there can be a determination made not to seal records, is working well, is fine. I think that unless there are far greater procedural protections provided to the target of such a proceeding, unless there is a provision to require the hearings to be sealed and restricted dissemination of this information, unless there is funding for an accused person to defend themselves, I think this bill has to be rejected.

I think that some of these things can be addressed. I do agree there are some circumstances in which some information should be easier to obtain. But I have to vote no on this, and encourage my colleagues to vote no, unless these critical issues are resolved.

Thank you, Madam President.

ACTING PRESIDENT McGEE: Any other Senator wishing to speak on the bill?

Read the last section.

THE SECRETARY: Section 2. This

act shall take effect immediately.

ACTING PRESIDENT McGEE: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT McGEE: Announce the results.

THE SECRETARY: Those recorded in the negative on Calendar Number 36 are Senators Andrews, Brown, Connor, Dilán, Duane, Hassell-Thompson, L. Krueger, Lachman, Montgomery, Parker, Paterson, Sabini, Schneiderman, A. Smith, M. Smith, and Stavisky. Ayes, 44. Nays, 16.

ACTING PRESIDENT McGEE: The bill is passed.

THE SECRETARY: Calendar Number 67, by Senator Velella, Senate Print 112, an act to amend the Vehicle and Traffic Law, in relation to reporting of accidents.

SENATOR SCHNEIDERMAN: Explanation.

ACTING PRESIDENT McGEE: Senator Velella, an explanation has been requested.

SENATOR VELELLA: Yes, Madam President.

This bill provides police officers with the same level of protection as firefighters now enjoy regarding their personal driving records and abstracts.

Currently, the Vehicle and Traffic Law mandates that the Commissioner of Motor Vehicles omits accidents from the personal driving abstract of a firefighter who is involved in an accident while responding to an emergency in an emergency vehicle.

There's an inherent risk in responding to police emergencies, just as fire, and the same protection ought to be given to police officers.

ACTING PRESIDENT McGEE: Senator Schneiderman.

SENATOR SCHNEIDERMAN: Thank you. Through you, Madam President, if the sponsor will yield for a question.

ACTING PRESIDENT McGEE: Senator Velella, will you yield for a question?

SENATOR VELELLA: I thought that explained everything.

Okay, yes.

ACTING PRESIDENT McGEE: The

Senator yields.

SENATOR SCHNEIDERMAN: Senator, is there any provision in this law that would restrict the use of any information not in the abstract created by the Commissioner of Motor Vehicles or someone regulated by the Commissioner of Motor Vehicles?

SENATOR VELELLA: Not that I can see, Senator.

This speaks to the Department of Motor Vehicles releasing an abstract and only talks about that abstract. What other materials might be released, I don't know.

SENATOR SCHNEIDERMAN: I thank the Senator for his enthusiasm, but I wasn't finished with my question yet.

My question is that in this legislation -- in the law as it's currently drafted, violations of the Penal Law or any findings of gross negligence already would be -- the Commissioner cannot omit from a record those findings. Does this legislation address that issue?

SENATOR VELELLA: It does not. It leaves the law intact as it is.

SENATOR SCHNEIDERMAN: So it only relates to acts of ordinary negligence?

SENATOR VELELLA: So that if a police officer were grossly negligent in responding to an emergency call and drove down the sidewalk, irregardless of the fact that there were 40 people there, and crashed into them, that would in my mind be gross negligence. He would still be responsible, and his record would so reflect.

SENATOR SCHNEIDERMAN: Thank you, Madam President.

I'd like to thank the sponsor for that thorough venting of the issue.

ACTING PRESIDENT McGEE: Any other Senator wishing to speak on the bill?

Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT McGEE: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 60.

ACTING PRESIDENT McGEE: The bill is passed.

Senator Robach, that completes the controversial reading of the calendar.

SENATOR ROBACH: Is there any housekeeping at the desk, Madam President?

ACTING PRESIDENT McGEE: Senator Montgomery.

SENATOR MONTGOMERY: Madam President, I would like unanimous consent to be recorded in the negative on Calendar 72.

ACTING PRESIDENT McGEE: Without objection, you will be so recorded.

SENATOR MONTGOMERY: Thank you.

ACTING PRESIDENT McGEE: Senator Robach, there is no housekeeping at the desk.

SENATOR ROBACH: Madam President, there being no other business before the Senate, I move that we stand adjourned till Tuesday, February 11th, at 11:30 a.m.

ACTING PRESIDENT McGEE: On motion, the Senate stands adjourned until Tuesday, February 11th, at 11:30 a.m.

(Whereupon, at 3:46 p.m., the Senate adjourned.)