S T A T E O F N E W Y O R K

5779

2009-2010 Regular Sessions

I N A S S E M B L Y

February 20, 2009

Introduced by M. of A. BRODSKY -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the public officers law and the executive law, in relation to providing for the review by the attorney general of requests denied under the Freedom of Information Law

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision 4 of section 89 of the public officers law, as amended by chapter 22 of the laws of 2005, paragraph (c) as amended by chapter 492 of the laws of 2006, is amended to read as follows:

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

UPON RECEIPT OF A COPY OF AN APPEAL UNDER PARAGRAPH (A-1) OF THIS SUBDIVISION, EACH AGENCY SHALL IMMEDIATELY FORWARD TO THE COMMITTEE ON OPEN GOVERNMENT A COPY OF SUCH APPEAL WHEN RECEIVED BY THE AGENCY AND THE ENSUING DETERMINATION THEREON.

(A-1) EXCEPT AS PROVIDED IN SUBDIVISION FIVE OF THIS SECTION, A PERSON DENIED ACCESS TO A RECORD PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION MAY WITHIN THIRTY DAYS APPEAL IN WRITING SUCH DENIAL TO THE ATTORNEY GENERAL, WHO SHALL WITHIN TWENTY BUSINESS DAYS OF THE RECEIPT OF SUCH APPEAL, ADJUDGE SUCH APPEAL MERITORIOUS OR NON-MERITORIOUS. COPIES OF

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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SUCH DETERMINATION SHALL BE PROMPTLY FORWARDED BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE PERSON REQUESTING THE RECORD AND THE AGENCY MAKING FURTHER DENIAL THEREOF. SUCH DETERMINATION SHALL STATE THE OUTCOME OF THE APPEAL AND SHALL BRIEFLY EXPLAIN THE REASONS THEREFOR.

(1) IF AN APPEAL IS DETERMINED TO BE NON-MERITORIOUS, THE PERSON REQUESTING THE RECORD MAY PROCEED PURSUANT TO PARAGRAPH (B) OF THIS SUBDIVISION. PROCEEDING PURSUANT TO THE PROVISIONS OF THIS PARAGRAPH SHALL NOT BE DEEMED A NECESSARY CONDITION PRECEDENT FOR PROCEEDING PURSUANT TO PARAGRAPH (B) OF THIS SUBDIVISION.

(2) IF AN APPEAL IS DETERMINED TO BE MERITORIOUS, THE ATTORNEY GENERAL SHALL ORDER THE AGENCY TO PROVIDE ACCESS TO THE RECORD SOUGHT. AN AGENCY AGGRIEVED BY SUCH AN ORDER MAY BRING A PROCEEDING FOR REVIEW OF SUCH DENIAL PURSUANT TO ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES; PROVIDED THAT NO SUCH PROCEEDING PURSUANT TO ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES MAY BE BROUGHT UNLESS SUCH AGENCY SHALL HAVE NOTIFIED THE ATTORNEY GENERAL AND THE PERSON REQUESTING THE RECORD OF ITS INTENT TO INSTITUTE SUCH A PROCEEDING, IN THE MANNER PRESCRIBED FOR THE SERVICE OF A SUMMONS, WITHIN TWENTY BUSINESS DAYS OF THE MAILING OF THE DETERMINATION BY THE ATTORNEY GENERAL. THE COURT MAY EXTEND THIS PERIOD FOR AN ADDITIONAL TWENTY BUSINESS DAYS FOR GOOD CAUSE SHOWN.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

(c) The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when:

i. the agency had no reasonable basis for denying access; or

ii. the agency failed to respond to a request or appeal within the statutory time.

S 2. The executive law is amended by adding a new section 63-e to read as follows:

S 63-E. ADJUDICATION BY ATTORNEY GENERAL OF APPEALS FOR THE DENIAL OF ACCESS TO A RECORD UNDER THE FREEDOM OF INFORMATION LAW. THE ATTORNEY GENERAL SHALL REVIEW APPEALS FOR THE DENIAL OF ACCESS TO A RECORD UNDER THE FREEDOM OF INFORMATION LAW PURSUANT TO PARAGRAPH (A-1) OF SUBDIVISION FOUR OF SECTION EIGHTY-NINE OF THE PUBLIC OFFICERS LAW. THE ATTORNEY GENERAL SHALL PRESCRIBE SUCH RULES OF PROCEDURE AND FORMS AS MAY BE DEEMED NECESSARY OR CONVENIENT TO THE EXECUTION OF THE PROVISIONS OF THIS SECTION.

S 3. This act shall take effect on the one hundred twentieth day after it shall have become a law. Effective immediately the department of law is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.