

4580--A

2009-2010 Regular Sessions

I N S E N A T E

April 24, 2009

Introduced by Sen. C. JOHNSON -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the public officers law, in relation to exceptions to the freedom of information law

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

1 Section 1. Subdivision 5 of section 89 of the public officers law, as
2 added by chapter 890 of the laws of 1981, paragraph (a) as amended by
3 chapter 403 of the laws of 2003, and paragraph (d) as amended by chapter
4 339 of the laws of 2004, is amended to read as follows:
5 5. (a) (1) A person acting pursuant to law or regulation who, subse-
6 quent to the effective date of this subdivision, submits [any informa-
7 tion] RECORDS to any state agency may, at the time of submission,
8 request that the agency except [such] information IN SUCH RECORDS from
9 disclosure under paragraph (d) of subdivision two of section eighty-sev-
10 en of this article. Where the request itself contains information which
11 if disclosed would defeat the purpose for which the exception is sought,
12 such information shall also be excepted from disclosure.
13 (1-a) A person or entity who submits or otherwise makes available any
14 records to any agency, may, at any time, identify those records or
15 portions thereof that may contain critical infrastructure information,
16 and request that the agency that maintains such records except such
17 information from disclosure under subdivision two of section eighty-sev-
18 en of this article. Where the request itself contains information which
19 if disclosed would defeat the purpose for which the exception is sought,
20 such information shall also be excepted from disclosure.
21 (2) The request for an exception shall be in writing and state the
22 reasons why [the information] AND IDENTIFY WHICH PORTIONS OF THE RECORDS
23 should be excepted from disclosure.

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

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1 (3) [Information submitted as provided in subparagraphs one and one-a
2 of this paragraph shall be excepted from disclosure and be maintained
3 apart by the agency from all other records until fifteen days after the
4 entitlement to such exception has been finally determined or such
5 further time as ordered by a court of competent jurisdiction.

6 (b) On the initiative of the agency at any time, or upon the request
7 of any person for a record excepted from disclosure pursuant to this
8 subdivision, the agency shall:

9 (1) inform the person who requested the exception of the agency's
10 intention to determine whether such exception should be granted or
11 continued;

12 (2) permit the person who requested the exception, within ten business
13 days of receipt of notification from the agency, to submit a written
14 statement of the necessity for the granting or continuation of such
15 exception;

16 (3) within seven business days of receipt of such written statement,
17 or within seven business days of the expiration of the period prescribed
18 for submission of such statement, issue a written determination grant-
19 ing, continuing or terminating such exception and stating the reasons
20 therefor; copies of such determination shall be served upon the person,
21 if any, requesting the record, the person who requested the exception,
22 and the committee on public access to records.

23 (c) A denial of an exception from disclosure under paragraph (b) of
24 this subdivision may be appealed by the person submitting the informa-
25 tion and a denial of access to the record may be appealed by the person
26 requesting the record in accordance with this subdivision:

27 (1) Within seven business days of receipt of written notice denying
28 the request, the person may file a written appeal from the determination
29 of the agency with the head of the agency, the chief executive officer
30 or governing body or their designated representatives.] AN AGENCY SHALL
31 ACKNOWLEDGE RECEIPT OF A REQUEST FOR AN EXCEPTION FROM DISCLOSURE BY
32 INFORMING THE PERSON WHO SUBMITTED SUCH REQUEST THAT THE EXCEPTION FROM
33 DISCLOSURE, IF APPROVED, SHALL REMAIN IN EFFECT FOR A PERIOD OF UP TO
34 FIVE YEARS FROM THE DATE OF SUCH ACKNOWLEDGEMENT. AN AGENCY SHALL MAKE
35 A DETERMINATION ON A REQUEST FOR EXCEPTION FROM DISCLOSURE WITHIN TWENTY
36 DAYS OF THE ACKNOWLEDGED RECEIPT OF A REQUEST AND INFORM THE PERSON WHO
37 REQUESTED THE EXCEPTIONS OF THE AGENCY'S DETERMINATION OF WHETHER SUCH
38 EXCEPTION HAS BEEN GRANTED OR CONTINUED.

39 (4) THE PERSON TO WHOM AN EXCEPTION FROM DISCLOSURE IS GRANTED MAY AT
40 ANY TIME WITHIN ONE MONTH PRIOR TO THE DATE OF EXPIRATION OF THE EXCEP-
41 TION REQUEST IN WRITING THAT THE AGENCY EXTEND THE EXCEPTION FOR A PERI-
42 OD OF ONE YEAR BY EXPLAINING WHY DISCLOSURE WOULD CONTINUE TO CAUSE
43 SUBSTANTIAL INJURY TO THE COMPETITIVE POSITION OF THE COMMERCIAL ENTER-
44 PRISE OR OTHERWISE DENIABLE UNDER SUBDIVISION TWO OF THIS SECTION. SUCH
45 EXTENSIONS SHALL BE RENEWABLE ON A YEARLY BASIS BASED ON THE CONTINUED
46 DEMONSTRATION BY THE COMMERCIAL ENTERPRISE OF THE SUBSTANTIAL INJURY OF
47 ALLOWING DISCLOSURE. A FAILURE TO REQUEST AN EXCEPTION FROM DISCLOSURE
48 OR TO SEEK AN EXTENSION OF SUCH DISCLOSURE SHALL TERMINATE THE APPLICA-
49 TION OF THE PROVISIONS OF THIS SUBDIVISION BUT SHALL IN NO WAY LIMIT OR
50 ABRIDGE THE AUTHORITY OF AN AGENCY TO WITHHOLD RECORDS TO THE EXTENT
51 AUTHORIZED BY SUBDIVISION TWO OF SECTION EIGHTY-SEVEN OF THIS ARTICLE.

52 (B) UPON REQUEST OF ANY PERSON FOR A RECORD EXCEPTED FROM DISCLOSURE,
53 THE AGENCY SHALL INFORM THE PERSON MAKING SUCH REQUEST OF THE EXCEPTION
54 FROM DISCLOSURE AND ITS DATE OF EXPIRATION AND OF THE RIGHT TO APPEAL
55 THE DENIAL OF THE REQUEST IN ACCORDANCE WITH PARAGRAPH (A) OF SUBDIVI-
56 SION FOUR OF THIS SECTION.

1 (C) (1) A DENIAL OF A REQUEST FOR AN EXCEPTION FROM DISCLOSURE OR A
2 REQUEST FOR AN EXTENSION OF AN EXCEPTION PREVIOUSLY GRANTED MAY BE
3 APPEALED BY THE PERSON REQUESTING SUCH EXCEPTION OR ITS EXTENSION.

4 (2) The appeal shall be determined within ten business days of the
5 receipt of the appeal. Written notice of the determination shall be
6 served upon [the person, if any, requesting the record,] the person who
7 requested the exception OR EXTENSION and the committee on [public access
8 to records] OPEN GOVERNMENT. The notice shall contain a statement of
9 the reasons for the determination.

10 (d) A proceeding to review an adverse determination pursuant to para-
11 graph (c) of this subdivision may be commenced pursuant to article
12 seventy-eight of the civil practice law and rules. Such proceeding, when
13 brought by a person seeking an exception from disclosure pursuant to
14 this subdivision, must be commenced within fifteen days of the service
15 of the written notice containing the adverse determination provided for
16 in subparagraph two of paragraph (c) of this subdivision.

17 (e) The person requesting an exception from disclosure pursuant to
18 this subdivision shall in all proceedings have the burden of proving
19 entitlement to the exception.

20 (f) Where the agency denies access to a record pursuant to PARAGRAPH
21 (B) OF THIS SUBDIVISION IN CONJUNCTION WITH paragraph (d) of subdivision
22 two of section eighty-seven of this article, the agency shall have the
23 burden of proving that the record falls within the provisions of such
24 exception.

25 (g) AN AGENCY SHALL NOT DISCLOSE A RECORD IN RESPONSE TO A REQUEST
26 MADE PURSUANT TO THIS ARTICLE DURING THE PENDENCY OF A REQUEST FOR AN
27 EXCEPTION FROM DISCLOSURE, ANY APPEAL MADE PURSUANT TO PARAGRAPH (C) OF
28 THIS SUBDIVISION, OR IF SUCH APPEAL IS DENIED, UNTIL AT LEAST FIFTEEN
29 DAYS FOLLOWING THE DENIAL OF THE APPEAL.

30 (H) Nothing in this subdivision shall be construed to deny any person
31 access, pursuant to the remaining provisions of this article, to any
32 record or part excepted from disclosure upon the express written consent
33 of the person who had requested the exception.

34 [(h)] (I) As used in this subdivision the term "agency" or "state
35 agency" means only a state department, board, bureau, division, council
36 or office and any public corporation the majority of whose members are
37 appointed by the governor.

38 S 2. This act shall take effect immediately.