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

431

2009-2010 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 7, 2009

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

AN ACT to amend the public officers law, the environmental conservation law and the executive law, in relation to freedom of information pertaining to legislative documents; and to repeal certain provisions of the public officers law relating thereto

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

Section 1. The section heading of section 87 of the public officers law, as added by chapter 933 of the laws of 1977, is amended to read as follows:

Access to agency AND STATE LEGISLATIVE records.

S 2. The opening paragraph of paragraph (b) of subdivision 1 of section 87 of the public officers law, as amended by chapter 80 of the laws of 1983, is amended to read as follows:

Each agency AND HOUSE OF THE STATE LEGISLATURE shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:

S 3. The opening paragraph and paragraph (i) of subdivision 2 of section 87 of the public officers law, the opening paragraph as added by chapter 933 of the laws of 1977 and paragraph (i) as added by chapter 368 of the laws of 2001, are amended to read as follows:

Each agency AND HOUSE OF THE STATE LEGISLATURE shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency OR HOUSE OF THE LEGISLATURE may deny access to records or portions thereof that:

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

LBD00995-01-9

(i) if disclosed, would jeopardize [an agency's] SUCH ENTITY'S capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

S 4. Paragraph (d) of subdivision 2 of section 87 of the public officers law, as amended by chapter 289 of the laws of 1990, is amended to read as follows:

(d) are trade secrets or are submitted to an agency OR THE STATE LEGISLATURE 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;

S 5. Subdivision 3 of section 87 of the public officers law, as added by chapter 933 of the laws of 1977, paragraph (c) as amended by chapter 499 of the laws of 2008, is amended to read as follows:

3. Each agency OR HOUSE OF THE LEGISLATURE shall maintain:

(a) a record of the final vote of each member in every agency OR HOUSE proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency OR HOUSE OF THE LEGISLATURE; and

(c) a reasonably detailed current list by subject matter of all records in the possession of the agency OR HOUSE OF THE LEGISLATURE, whether or not available under this article. Each agency shall update its subject matter list annually, and the date of the most recent update shall be conspicuously indicated on the list. Each state agency as defined in subdivision four of this section that maintains a website shall post its current list on its website and such posting shall be linked to the website of the committee on open government. Any such agency that does not maintain a website shall arrange to have its list posted on the website of the committee on open government.

S 6. Subdivision 4 of section 87 of the public officers law, as added by chapter 890 of the laws of 1981, paragraph (c) as added by chapter 102 of the laws of 2007, is amended to read as follows:

4. (a) Each state agency [which] OR HOUSE OF THE LEGISLATURE THAT maintains records containing trade secrets, to which access may be denied pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations OR RULES in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;

(2) the manner of identifying persons within the agency OR HOUSE OF THE LEGISLATURE to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;

(3) the manner of safeguarding against any unauthorized access to the records.

(b) As used in this subdivision the term "agency" or "state agency" means [only] EITHER HOUSE OF THE STATE LEGISLATURE, a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

(c) Each state agency that maintains a website shall post information related to this article and article six-A of this chapter on its website. Such information shall include, at a minimum, contact information for the persons from whom records of the agency may be obtained, the times and places such records are available for inspection and copying, and information on how to request records in person, by mail, and,

if the agency accepts requests for records electronically, by e-mail. This posting shall be linked to the website of the committee on open government.

S 7. Section 88 of the public officers law is REPEALED.

S 8. Paragraph (b) of subdivision 1 of section 89 of the public officers law, as amended by chapter 182 of the laws of 2006, is amended to read as follows:

(b) The committee shall:

i. furnish to any agency OR HOUSE OF THE LEGISLATURE advisory guidelines, opinions or other appropriate information regarding this article;

ii. furnish to any person advisory opinions or other appropriate information regarding this article;

iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;

iv. request from any agency OR HOUSE OF THE LEGISLATURE such assistance, services and information as will enable the committee to effectively carry out its powers and duties;

v. develop a form, which shall be made available on the internet, that may be used by the public to request a record; and

vi. report on its activities and findings regarding this article and article seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

S 9. Paragraph (a) of subdivision 2 of section 89 of the public officers law, as added by chapter 933 of the laws of 1977, is amended to read as follows:

(a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency OR EACH HOUSE OF THE LEGISLATURE may delete identifying details when it makes records available.

S 10. Subparagraphs iv and v of paragraph (b) of subdivision 2 of section 89 of the public officers law, subparagraph iv as added by chapter 933 of the laws of 1977 and subparagraph v as amended by chapter 545 of the laws of 1998, are amended to read as follows:

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency [requesting] or HOUSE OF THE LEGISLATURE maintaining it; or

v. disclosure of information of a personal nature reported in confidence to an agency OR HOUSE OF THE LEGISLATURE and not relevant to the ordinary work of such agency OR HOUSE; or

S 11. Subdivisions 3, 4 and 5 of section 89 of the public officers law, subdivision 3 as amended by chapter 223 of the laws of 2008, subdivision 4 as amended by chapter 22 of the laws of 2005, paragraph (c) of subdivision 4 as amended by chapter 492 of the laws of 2006, subdivision 5 as added by chapter 890 of the laws of 1981, paragraph (a) of subdivision 5 as amended by chapter 403 of the laws of 2003 and paragraph (d) of subdivision 5 as amended by chapter 339 of the laws of 2004, are amended to read as follows:

3. (a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. An [agency] ENTITY shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the [agency] ENTITY lacks sufficient staffing or on any other basis if the [agency] ENTITY may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the [agency] ENTITY may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An [agency] ENTITY may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes. If an [agency] ENTITY determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the [agency] ENTITY shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven [and subdivision three of section eighty-eight] of this article. When an [agency] ENTITY has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the [agency] ENTITY shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

(b) All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form.

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] ENTITY shall immediately forward to the committee on open government a copy of such appeal when received by [the agency] SUCH ENTITY and the ensuing determination thereon. Failure by an [agency] ENTITY to conform to the provisions of subdivision three of this section shall constitute a denial.

(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] ENTITY involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an [agency] ENTITY 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] ENTITY 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] ENTITY had no reasonable basis for denying access; or

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

5. (a) (1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency OR HOUSE OF THE LEGISLATURE may, at the time of submission, request that the agency OR HOUSE OF THE LEGISLATURE except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency OR HOUSE OF THE LEGISLATURE, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency OR HOUSE OF THE LEGISLATURE that maintains such records except such information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.

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

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

(1) inform the person who requested the exception of the [agency's] ENTITY'S intention to determine whether such exception should be granted or continued;

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

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

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

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the [agency] ENTITY with the head of the [agency] ENTITY, the chief executive officer or governing body or their designated representatives.

(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on public access to records. The notice shall contain a statement of the reasons for the determination.

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

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

(f) Where the [agency] ENTITY denies access to a record pursuant to paragraph (d) of subdivision two of section eighty-seven of this article, the [agency] ENTITY shall have the burden of proving that the record falls within the provisions of such exception.

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

(h) As used in this subdivision the term ["agency" or "state agency"] ENTITY means [only] EITHER HOUSE OF THE STATE LEGISLATURE, a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

S 12. Section 70-0113 of the environmental conservation law, as added by chapter 723 of the laws of 1977, is amended to read as follows:

S 70-0113. Confidentiality.

The provisions of section [eighty-eight of article six] EIGHTY-SEVEN of the public officers law shall apply to information confidentially disclosed by applicants to the department, except as otherwise provided in this chapter.

S 13. Subdivision 3 of section 713 of the executive law, as added by chapter 403 of the laws of 2003, such section as renumbered by section 2

of part B of chapter 1 of the laws of 2004, is amended to read as follows:

3. Any reports prepared pursuant to this article shall not be subject to disclosure pursuant to section [eighty-eight] EIGHTY-SEVEN of the public officers law.

S 14. This act shall take effect immediately.