

4872

2011-2012 Regular Sessions

I N A S S E M B L Y

February 8, 2011

Introduced by M. of A. SIMOTAS -- read once and referred to the Committee on Codes

AN ACT to amend the civil rights law, the criminal procedure law, the family court act and the civil practice law and rules, in relation to protecting the identity of undercover public officers and employees

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

1 Section 1. Subdivision 1 of section 50-a of the civil rights law, as
2 amended by chapter 137 of the laws of 2002, is amended to read as
3 follows:
4 1. All personnel records, used to evaluate performance toward contin-
5 ued employment or promotion, under the control of any police agency or
6 department of the state or any political subdivision thereof including
7 authorities or agencies maintaining police forces of individuals defined
8 as police officers in section 1.20 of the criminal procedure law and
9 such personnel records under the control of a sheriff's department or a
10 department of correction of individuals employed as correction officers
11 and such personnel records under the control of a paid fire department
12 or force of individuals employed as firefighters or
13 firefighter/paramedics and such personnel records under the control of
14 the division of parole for individuals defined as peace officers pursu-
15 ant to subdivisions twenty-three and twenty-three-a of section 2.10 of
16 the criminal procedure law shall be considered confidential and not
17 subject to inspection or review without the express written consent of
18 such police officer, firefighter, firefighter/paramedic, correction
19 officer or peace officer within the division of parole except as may be
20 mandated by lawful court order. FOR PURPOSES OF THIS SECTION, PERSONNEL
21 RECORDS SHALL INCLUDE ANY REPORT, PAPER, PICTURE, PHOTOGRAPH, COURT FILE
22 OR OTHER DOCUMENT, IN THE CUSTODY OR POSSESSION OF ANY PUBLIC OFFICER OR
23 EMPLOYEE, WHICH TENDS TO IDENTIFY BY NAME OR IMAGE AN INDIVIDUAL WHO IS
24 PERFORMING OR HAS PERFORMED OFFICIAL DUTIES IN A COVERT OR UNDERCOVER

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

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1 CAPACITY AND WHOSE PERSONNEL RECORDS ARE OTHERWISE COVERED BY THIS
2 SUBDIVISION.

3 S 2. Section 60.15 of the criminal procedure law is amended by adding
4 a new subdivision 3 to read as follows:

5 3. WHEN A PUBLIC OFFICER OR EMPLOYEE, INCLUDING BUT NOT LIMITED TO A
6 POLICE OFFICER AS DEFINED IN SECTION 1.20 OF THIS PART OR A PEACE OFFI-
7 CER AS DEFINED IN SECTION 2.10 OF THIS PART, IS PERFORMING OR HAS
8 PERFORMED OFFICIAL DUTIES IN A COVERT OR UNDERCOVER CAPACITY AND IS
9 CALLED AS A WITNESS IN A CRIMINAL PROCEEDING:

10 (A) THE PEOPLE MAY MAKE A REQUEST OF THE COURT THAT THE IDENTITY OF
11 THE WITNESS BE PROTECTED. THERE SHALL BE A PRESUMPTION THAT THE WITNESS
12 WOULD BE ENDANGERED OR HIS OR HER EFFECTIVENESS COMPROMISED IF HIS OR
13 HER IDENTITY IS DISCLOSED AND THAT THEREFORE THE PEOPLE HAVE MADE A
14 SHOWING THAT THE WITNESS SHOULD BE EXCUSED FROM PROVIDING HIS OR HER
15 IDENTITY. THE DEFENDANT MAY THEREUPON SEEK TO REBUT THE PRESUMPTION
16 AND/OR DEMONSTRATE THE MATERIALITY OF THE WITNESS'S IDENTITY TO THE
17 ISSUE OF GUILT OR INNOCENCE. IF THE PRESUMPTION HAS NOT BEEN REBUTTED,
18 THE COURT SHALL THEN BALANCE THE INTERESTS AND IF IT DETERMINES THAT THE
19 NEED OF THE PUBLIC OFFICER OR EMPLOYEE WITNESS FOR ANONYMITY EXCEEDS THE
20 DEFENDANT'S NEED TO OBTAIN THE WITNESS'S IDENTITY FOR PURPOSES OF
21 CROSS-EXAMINATION, THE COURT SHALL DIRECT THAT THE WITNESS TESTIFY UNDER
22 A PSEUDONYM SUCH AS A SHIELD NUMBER.

23 (B) IF REQUESTED BY THE PEOPLE, THE COURT SHALL TAKE SUCH OTHER MEAS-
24 URES AS ARE NECESSARY, CONSISTENT WITH RIGHTS OF THE DEFENDANT, TO SAFE-
25 GUARD THE IDENTITY OF THE WITNESS.

26 (C) UPON REQUEST OF THE DEFENDANT DURING A JURY TRIAL, THE COURT SHALL
27 INSTRUCT THE JURY THAT THE USE OF A PSEUDONYM OR ANY OTHER ADDITIONAL
28 MEASURE TO PROTECT THE IDENTITY OF THE WITNESS IS NOT A FACTOR FROM
29 WHICH AN INFERENCE UNFAVORABLE TO THE DEFENDANT MAY BE DRAWN.

30 S 3. The family court act is amended by adding a new section 343.6 to
31 read as follows:

32 S 343.6. RULES OF EVIDENCE; TESTIMONY GIVEN BY A PUBLIC OFFICER OR
33 EMPLOYEE. WHEN A PUBLIC OFFICER OR EMPLOYEE, INCLUDING BUT NOT LIMITED
34 TO A POLICE OFFICER AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE
35 LAW OR A PEACE OFFICER AS DEFINED IN SECTION 2.10 OF SUCH LAW, IS
36 PERFORMING OR HAS PERFORMED OFFICIAL DUTIES IN A COVERT OR UNDERCOVER
37 CAPACITY AND IS CALLED AS A WITNESS IN A DELINQUENCY PROCEEDING:

38 1. THE PRESENTMENT AGENCY MAY MAKE A REQUEST OF THE COURT THAT THE
39 IDENTITY OF THE WITNESS BE PROTECTED. THERE SHALL BE A PRESUMPTION THAT
40 THE WITNESS WOULD BE ENDANGERED OR HIS OR HER EFFECTIVENESS COMPROMISED
41 IF HIS OR HER IDENTITY IS DISCLOSED AND THAT THEREFORE THE PRESENTMENT
42 AGENCY HAS MADE A SHOWING THAT THE WITNESS SHOULD BE EXCUSED FROM
43 PROVIDING HIS OR HER IDENTITY. THE RESPONDENT MAY THEREUPON SEEK TO
44 REBUT THE PRESUMPTION AND/OR DEMONSTRATE THE MATERIALITY OF THE
45 WITNESS'S IDENTITY TO THE ISSUE OF GUILT OR INNOCENCE. IF THE PRESUMP-
46 TION HAS NOT BEEN REBUTTED, THE COURT SHALL THEN BALANCE THE INTERESTS
47 AND IF IT DETERMINES THAT THE NEED OF THE PUBLIC OFFICER OR EMPLOYEE
48 WITNESS FOR ANONYMITY EXCEEDS THE RESPONDENT'S NEED TO OBTAIN THE
49 WITNESS'S IDENTITY FOR PURPOSES OF CROSS-EXAMINATION, THE COURT SHALL
50 DIRECT THAT THE WITNESS TESTIFY UNDER A PSEUDONYM SUCH AS A SHIELD
51 NUMBER.

52 2. IF REQUESTED BY THE PRESENTMENT AGENCY, THE COURT SHALL TAKE SUCH
53 OTHER MEASURES AS ARE NECESSARY, CONSISTENT WITH RIGHTS OF THE RESPOND-
54 ENT, TO SAFEGUARD THE IDENTITY OF THE WITNESS.

55 S 4. The civil practice law and rules is amended by adding a new Rule
56 4516-a to read as follows:

1 RULE 4516-A. TESTIMONY BY CERTAIN PUBLIC OFFICERS AND EMPLOYEES. WHEN
2 A PUBLIC OFFICER OR EMPLOYEE, INCLUDING BUT NOT LIMITED TO A POLICE
3 OFFICER AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW OR A
4 PEACE OFFICER AS DEFINED IN SECTION 2.10 OF SUCH LAW, IS PERFORMING OR
5 HAS PERFORMED OFFICIAL DUTIES IN A COVERT OR UNDERCOVER CAPACITY AND IS
6 CALLED AS A WITNESS IN A CIVIL ENFORCEMENT ACTION BROUGHT BY A GOVERN-
7 MENTAL ENTITY:

8 (A) SUCH GOVERNMENTAL ENTITY OR THE PUBLIC EMPLOYER OF THE WITNESS MAY
9 MAKE A REQUEST OF THE COURT THAT THE IDENTITY OF THE WITNESS BE
10 PROTECTED. THERE SHALL BE A PRESUMPTION THAT THE WITNESS WOULD BE ENDAN-
11 GERED OR HIS OR HER EFFECTIVENESS COMPROMISED IF HIS OR HER IDENTITY IS
12 DISCLOSED AND THAT THEREFORE THE GOVERNMENT ENTITY HAS MADE A SHOWING
13 THAT THE WITNESS SHOULD BE EXCUSED FROM PROVIDING HIS OR HER IDENTITY.
14 THE RESPONDENT MAY THEREUPON SEEK TO REBUT THE PRESUMPTION AND/OR DEMON-
15 STRATE THE MATERIALITY OF THE WITNESS'S IDENTITY TO THE ISSUE OF GUILT
16 OR INNOCENCE. IF THE PRESUMPTION HAS NOT BEEN REBUTTED, THE COURT SHALL
17 THEN BALANCE THE INTERESTS AND IF IT DETERMINES THAT THE NEED OF THE
18 PUBLIC OFFICER OR EMPLOYEE WITNESS FOR ANONYMITY EXCEEDS THE RESPOND-
19 ENT'S NEED TO OBTAIN THE WITNESS'S IDENTITY FOR PURPOSES OF CROSS-EXAMI-
20 NATION, THE COURT SHALL DIRECT THAT THE WITNESS TESTIFY UNDER A PSEUDO-
21 NYM SUCH AS A SHIELD NUMBER.

22 (B) IF REQUESTED BY SUCH GOVERNMENTAL ENTITY OR SUCH PUBLIC EMPLOYER,
23 THE COURT SHALL TAKE SUCH OTHER MEASURES AS ARE NECESSARY, CONSISTENT
24 WITH RIGHTS OF THE ADVERSE PARTY, TO SAFEGUARD THE IDENTITY OF THE
25 WITNESS.

26 (C) DURING A JURY TRIAL, UPON REQUEST BY THE PARTY AGAINST WHOM THE
27 ACTION IS BROUGHT, THE COURT SHALL INSTRUCT THE JURY THAT THE USE OF A
28 PSEUDONYM OR ANY OTHER ADDITIONAL MEASURE TO PROTECT THE IDENTITY OF THE
29 WITNESS IS NOT A FACTOR FROM WHICH AN INFERENCE UNFAVORABLE TO SUCH
30 PARTY MAY BE DRAWN.

31 (D) NOTHING IN THIS SECTION SHALL BE CONSTRUED TO PROHIBIT OR OTHER-
32 WISE AFFECT APPROPRIATE MEASURES TO SAFEGUARD THE IDENTITY OF A WITNESS
33 THAT MAY BE TAKEN IN ANY CIVIL ACTION THAT IS NOT WITHIN THE SCOPE OF
34 THIS SECTION.

35 S 5. Severability. If any clause, sentence, paragraph, section or part
36 of this act shall be adjudged by any court of competent jurisdiction to
37 be invalid, the judgment shall not affect, impair or invalidate the
38 remainder thereof, but shall be confined in its operation to the clause,
39 sentence, paragraph, section of part thereof directly involved in the
40 controversy in which the judgment shall have been rendered.

41 S 6. This act shall take effect immediately.