

9069

I N A S S E M B L Y

January 20, 2012

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:

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

4 Access to agency AND STATE LEGISLATIVE records.

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

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

15 S 3. The opening paragraph and paragraph (i) of subdivision 2 of
16 section 87 of the public officers law, the opening paragraph as added by
17 chapter 933 of the laws of 1977 and paragraph (i) as amended by chapter
18 154 of the laws of 2010, are amended to read as follows:

19 Each agency AND HOUSE OF THE STATE LEGISLATURE shall, in accordance
20 with its published rules, make available for public inspection and copy-
21 ing all records, except that such agency OR HOUSE OF THE STATE LEGISLA-
22 TURE may deny access to records or portions thereof that:

23 (i) if disclosed, would jeopardize the capacity of an agency OR HOUSE
24 OF THE STATE LEGISLATURE or an entity that has shared information with
25 an agency OR HOUSE OF THE STATE LEGISLATURE to guarantee the security of

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

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1 its information technology assets, such assets encompassing both elec-
2 tronic information systems and infrastructures; or

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

6 (d) are trade secrets or are submitted to an agency OR THE STATE
7 LEGISLATURE by a commercial enterprise or derived from information
8 obtained from a commercial enterprise and which if disclosed would cause
9 substantial injury to the competitive position of the subject enter-
10 prise;

11 S 5. Subdivision 3 of section 87 of the public officers law, as added
12 by chapter 933 of the laws of 1977, paragraph (c) as amended by chapter
13 499 of the laws of 2008, is amended to read as follows:

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

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

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

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

30 S 6. Subdivision 4 of section 87 of the public officers law, as added
31 by chapter 890 of the laws of 1981, paragraph (c) as added by chapter
32 102 of the laws of 2007, is amended to read as follows:

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

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

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

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

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

50 (c) Each state agency that maintains a website shall post information
51 related to this article and article six-A of this chapter on its
52 website. Such information shall include, at a minimum, contact informa-
53 tion for the persons from whom records of the agency may be obtained,
54 the times and places such records are available for inspection and copy-
55 ing, and information on how to request records in person, by mail, and,
56 if the agency accepts requests for records electronically, by e-mail.

1 This posting shall be linked to the website of the committee on open
2 government.

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

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

7 (b) The committee shall:

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

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

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

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

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

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

25 S 9. Paragraph (a) of subdivision 2 of section 89 of the public offi-
26 cers law, as amended by section 11 of part U of chapter 61 of the laws
27 of 2011, is amended to read as follows:

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

34 S 10. Subparagraphs iv and v of paragraph (b) of subdivision 2 of
35 section 89 of the public officers law, as amended by section 11 of part
36 U of chapter 61 of the laws of 2011, are amended to read as follows:

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

41 v. disclosure of information of a personal nature reported in confi-
42 dence to an agency and not relevant to the ordinary work of such agency
43 OR HOUSE OF THE STATE LEGISLATURE;

44 S 11. Subdivisions 3, 4 and 5 of section 89 of the public officers
45 law, subdivision 3 as amended by chapter 223 of the laws of 2008, subdi-
46 vision 4 as amended by chapter 22 of the laws of 2005, paragraph (c) of
47 subdivision 4 as amended by chapter 492 of the laws of 2006, subdivision
48 5 as added by chapter 890 of the laws of 1981, paragraph (a) of subdivi-
49 sion 5 as amended by chapter 403 of the laws of 2003 and paragraph (d)
50 of subdivision 5 as amended by chapter 339 of the laws of 2004, are
51 amended to read as follows:

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

1 approximate date, which shall be reasonable under the circumstances of
2 the request, when such request will be granted or denied, including,
3 where appropriate, a statement that access to the record will be deter-
4 mined in accordance with subdivision five of this section. An [agency]
5 ENTITY shall not deny a request on the basis that the request is volumi-
6 nous or that locating or reviewing the requested records or providing
7 the requested copies is burdensome because the [agency] ENTITY lacks
8 sufficient staffing or on any other basis if the [agency] ENTITY may
9 engage an outside professional service to provide copying, programming
10 or other services required to provide the copy, the costs of which the
11 [agency] ENTITY may recover pursuant to paragraph (c) of subdivision one
12 of section eighty-seven of this article. An [agency] ENTITY may require
13 a person requesting lists of names and addresses to provide a written
14 certification that such person will not use such lists of names and
15 addresses for solicitation or fund-raising purposes and will not sell,
16 give or otherwise make available such lists of names and addresses to
17 any other person for the purpose of allowing that person to use such
18 lists of names and addresses for solicitation or fund-raising purposes.
19 If an [agency] ENTITY determines to grant a request in whole or in part,
20 and if circumstances prevent disclosure to the person requesting the
21 record or records within twenty business days from the date of the
22 acknowledgement of the receipt of the request, the [agency] ENTITY shall
23 state, in writing, both the reason for the inability to grant the
24 request within twenty business days and a date certain within a reason-
25 able period, depending on the circumstances, when the request will be
26 granted in whole or in part. Upon payment of, or offer to pay, the fee
27 prescribed therefor, the entity shall provide a copy of such record and
28 certify to the correctness of such copy if so requested, or as the case
29 may be, shall certify that it does not have possession of such record or
30 that such record cannot be found after diligent search. Nothing in this
31 article shall be construed to require any entity to prepare any record
32 not possessed or maintained by such entity except the records specified
33 in subdivision three of section eighty-seven [and subdivision three of
34 section eighty-eight] of this article. When an [agency] ENTITY has the
35 ability to retrieve or extract a record or data maintained in a computer
36 storage system with reasonable effort, it shall be required to do so.
37 When doing so requires less employee time than engaging in manual
38 retrieval or redactions from non-electronic records, the [agency] ENTITY
39 shall be required to retrieve or extract such record or data electron-
40 ically. Any programming necessary to retrieve a record maintained in a
41 computer storage system and to transfer that record to the medium
42 requested by a person or to allow the transferred record to be read or
43 printed shall not be deemed to be the preparation or creation of a new
44 record.

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

52 4. (a) Except as provided in subdivision five of this section, any
53 person denied access to a record may within thirty days appeal in writ-
54 ing such denial to the head, chief executive or governing body of the
55 entity, or the person therefor designated by such head, chief executive,
56 or governing body, who shall within ten business days of the receipt of

1 such appeal fully explain in writing to the person requesting the record
2 the reasons for further denial, or provide access to the record sought.
3 In addition, each [agency] ENTITY shall immediately forward to the
4 committee on open government a copy of such appeal when received by [the
5 agency] SUCH ENTITY and the ensuing determination thereon. Failure by an
6 [agency] ENTITY to conform to the provisions of subdivision three of
7 this section shall constitute a denial.

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

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

22 i. the [agency] ENTITY had no reasonable basis for denying access; or
23 ii. the [agency] ENTITY failed to respond to a request or appeal with-
24 in the statutory time.

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

34 (1-a) A person or entity who submits or otherwise makes available any
35 records to any agency OR HOUSE OF THE STATE LEGISLATURE, may, at any
36 time, identify those records or portions thereof that may contain crit-
37 ical infrastructure information, and request that the agency OR HOUSE OF
38 THE STATE LEGISLATURE that maintains such records except such informa-
39 tion from disclosure under subdivision two of section eighty-seven of
40 this article. Where the request itself contains information which if
41 disclosed would defeat the purpose for which the exception is sought,
42 such information shall also be excepted from disclosure.

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

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

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

53 (1) inform the person who requested the exception of the [agency's]
54 ENTITY'S intention to determine whether such exception should be granted
55 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.

1 S 13. Subdivision 3 of section 713 of the executive law, as amended by
2 section 16 of part B of chapter 56 of the laws of 2010, is amended to
3 read as follows:

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

7 S 14. This act shall take effect immediately.