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

6078

2015-2016 Regular Sessions

I N A S S E M B L Y

March 13, 2015

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

AN ACT to amend the public officers law, the arts and cultural affairs law, the executive law and the legislative law, in relation to the retention of state electronic records; and to repeal subdivision 1 of section 88 of the public officers law, relating to rules and regulations governing access to state legislative records; to repeal section 5 of the executive law, relating to executive records; and to repeal section 70-0113 of the environmental conservation law, relating to information confidentially disclosed by applicants

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

Section 1. Legislative intent. The legislature finds that procedures and practice that promote transparency and accountability in the executive and legislative branches serve the public interest and encourage public faith in government. Current policies which allow for the destruction of emails and other electronic governmental records and exempt the legislature from the Freedom of Information Law (FOIL) run counter to these principles of transparency and accountability.

Computers and other electronic devices create many of the new records we use today, most commonly via emails. These records, although electronic in format, are the same as records in other formats. Electronic records show how you conduct business, make decisions, and carry out your work. They are evidence of decisions and actions. Fundamental records management principles should apply to electronic records, as they apply to other record formats.

The executive branch has adopted a policy allowing automatic deletion of emails after 90 days, which has the potential to severely limit the public availability of vital information regarding the operations of agencies. The consequences of such a policy are illustrated in a 2015 court case where the former Deputy Secretary for Gaming and Racing indi-

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

LBD09918-01-5

cated he was "aghast" to find that emails dating from 2013 relevant to the case had been deleted. The deletion of these emails undermines the ability of the plaintiff in the case to seek redress. An administration spokesman defended deletion of the emails on the grounds they had not been the subject of a FOIL request.

This legislation would ensure that under the guidance of the State Archivist, agencies and legislative bodies would need to take a proactive approach to the preservation of electronic records. It would establish strict standards for permanent preservation of the records of policymakers, and prohibit deletion of emails from other government officials for at least seven years. It is modeled on federal policies adopted after extensive study of appropriate practices for handling electronic records. The state already uses email management software that would enable implementation of such a policy at minimal cost.

The exemption of the legislature from the Freedom of Information Law also undermines transparency and accountability. The public should have access to the same types of information from the legislature that it can already access from the Executive Branch through the FOIL process. Recent scandals involving individual legislators only highlight the need for increasing the availability of information regarding legislative records. This bill would establish the same standards for treating the Executive and Legislative branches under FOIL. The bill would also extend to the legislature the various exemptions from disclosure in the FOIL law, including records that would compromise personal privacy rights or that are related to internal deliberations of the body or agency.

S 2. Subdivision 3 of section 86 of the public officers law, as added by chapter 933 of the laws of 1977, is amended and a new subdivision 6 is added to read as follows:

3. "Agency" means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary [or the state legislature].

6. "ARCHIVES" MEANS ANY INSTITUTION THAT ARCHIVES RECORDS FOR THE STATE, AND PROVIDES A MEANS FOR PUBLIC ACCESS AND REVIEW OF SUCH RECORDS, INCLUDING A RESEARCH UNIVERSITY, THAT IS SELECTED BY THE GOVERNOR FOR RECORD RETENTION.

S 3. Subdivision 1 of section 88 of the public officers law is REPEALED.

S 4. The public officers law is amended by adding a new section 88-a to read as follows:

S 88-A. ELECTRONIC RECORDS RETENTION. 1. EACH AGENCY, IN CONJUNCTION WITH THE STATE ARCHIVES, SHALL PRESERVE ELECTRONIC RECORDS IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION.

2. EACH AGENCY SHALL IDENTIFY THE ACCOUNTS OF PUBLIC OFFICERS, STATE OFFICIALS AND POLICY MAKERS WHO, BY VIRTUE OF THEIR WORK, OFFICE, OR POSITION, ARE LIKELY TO CREATE OR RECEIVE PERMANENTLY VALUABLE RECORDS. FOR THE PURPOSE OF THIS SECTION, "POLICY MAKER" MEANS ANY INDIVIDUAL SUBJECT TO SECTION SEVENTY-THREE-A OF THE PUBLIC OFFICERS LAW.

3. (A) THE PROVISIONS OF THIS SECTION AND OF ARTICLE SIX OF THIS CHAPTER SHALL APPLY TO ALL AGENCY-ADMINISTERED EMAIL ACCOUNTS OF ANY PUBLIC OFFICER, STATE OFFICIAL OR POLICY MAKER, INCLUDING ACCOUNTS MANAGED BY OTHER STAFF, INCLUDING, BUT NOT LIMITED TO PERSONAL ASSISTANTS, CONFIDENTIAL ASSISTANTS, OR ADMINISTRATIVE ASSISTANTS.

(B) THE PROVISIONS OF THIS SECTION AND OF ARTICLE SIX OF THIS CHAPTER SHALL APPLY TO ALL AGENCY-ADMINISTERED EMAIL ACCOUNTS OF ANY PUBLIC OFFICER, STATE OFFICIAL OR POLICY MAKER, REGARDLESS OF THE ADDRESS NAMES USED BY THE PUBLIC OFFICIAL FOR AGENCY BUSINESS.

4. ELECTRONIC RECORDS SHALL BE MAINTAINED IN ACCORDANCE WITH THE FOLLOWING GENERAL RECORDS RETENTION SCHEDULE:

(A) EMAIL OF POLICY MAKERS. AGENCIES SHALL TRANSFER DOCUMENTATION ADEQUATE TO IDENTIFY, SERVICE, AND INTERPRET THE PERMANENT ELECTRONIC RECORDS, WHICH INCLUDES THE POSITION TITLE AND BEGIN AND END DATES FOR EACH EMAIL ACCOUNT CAPTURED IN THIS SUBDIVISION. THE DISPOSITION OF EMAIL DESCRIBED IN THIS PARAGRAPH IS PERMANENT. SUCH EMAIL SHALL BE TRANSFERRED TO THE STATE ARCHIVES NO SOONER THAN FIFTEEN YEARS AFTER THE DATE OF THE EMAIL AND NO LATER THAN TWENTY-FIVE YEARS AFTER THE AGENCY DETERMINED CUT-OFF DATE.

(B) EMAIL OF OTHER OFFICIALS. AGENCIES SHALL TRANSFER DOCUMENTATION ADEQUATE TO IDENTIFY, SERVICE, AND INTERPRET THE PERMANENT ELECTRONIC RECORDS, WHICH INCLUDES THE POSITION TITLE AND BEGIN AND END DATES FOR EACH EMAIL ACCOUNT CAPTURED IN THIS SUBDIVISION. THE DISPOSITION OF EMAIL DESCRIBED IN THIS PARAGRAPH IS TEMPORARY. SUCH EMAIL SHALL BE TRANSFERRED TO THE STATE ARCHIVES NO SOONER THAN SEVEN YEARS AFTER THE DATE OF THE EMAIL, PROVIDED, HOWEVER, THAT LONGER RETENTION IS AUTHORIZED IF REQUIRED FOR BUSINESS USE BY THE AGENCY.

5. PRODUCTION OF ELECTRONIC RECORDS BY AGENCIES SHALL COMPLY WITH THE FOLLOWING PROVISIONS:

(A) AGENCIES SHALL TRANSFER TO THE STATE ARCHIVES DOCUMENTATION ADEQUATE TO IDENTIFY, SERVICE, AND INTERPRET THE PERMANENT ELECTRONIC RECORDS.

(B) DOCUMENTATION FOR DATA FILES AND DATA BASES MUST INCLUDE RECORD LAYOUTS, DATA ELEMENT DEFINITIONS, AND CODE TRANSLATION TABLES (CODEBOOKS) FOR CODED DATA. DATA ELEMENT DEFINITIONS, CODES USED TO REPRESENT DATA VALUES, AND INTERPRETATIONS OF THESE CODES MUST MATCH THE ACTUAL FORMAT AND CODES AS TRANSFERRED.

(C) DIGITAL GEOSPATIAL DATA FILES MUST INCLUDE THE DOCUMENTATION SPECIFIED IN PARAGRAPH (B) OF THIS SUBDIVISION. IN ADDITION, DOCUMENTATION FOR DIGITAL GEOSPATIAL DATA FILES CAN INCLUDE METADATA THAT CONFORMS TO THE FEDERAL GEOGRAPHIC DATA COMMITTEE'S CONTENT STANDARDS FOR DIGITAL GEOSPATIAL METADATA, AS SPECIFIED IN EXECUTIVE ORDER 12906 OF APRIL 11, 1994 (3 CFR, 1995 COMP., P. 882).

(D) DOCUMENTATION FOR ELECTRONIC FILES CONTAINING TEXTUAL DOCUMENTS WITH SGML TAGS MUST INCLUDE A TABLE FOR INTERPRETING THE SGML TAGS, WHEN APPROPRIATE.

(E) DOCUMENTATION FOR THE FOLLOWING TYPES OF ELECTRONIC RECORDS MUST CONFORM TO FORMATS SPECIFIED IN NATIONAL ARCHIVES AND RECORDS ADMINISTRATION BULLETIN 2014-04; APPENDIX A: REVISED FORMAT GUIDANCE FOR THE TRANSFER OF PERMANENT ELECTRONIC RECORDS. TABLES OF FILE FORMATS; PROVIDED, HOWEVER, THAT THE STATE ARCHIVE MAY APPROVE ADDITIONAL ACCEPTABLE FILE FORMATS:

(I) EMAIL MESSAGES WITH ATTACHMENTS;

(II) SCANNED IMAGES OF TEXTUAL RECORDS;

(III) RECORDS IN PORTABLE DOCUMENT FORMAT (PDF);

(IV) DIGITAL PHOTOGRAPHIC RECORDS; AND

(V) WEB CONTENT RECORDS.

6. (A) ANY AGGRIEVED PERSON SHALL HAVE STANDING TO ENFORCE THE PROVISIONS OF THIS SECTION AGAINST A PUBLIC BODY BY THE COMMENCEMENT OF A PROCEEDING PURSUANT TO ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES, OR AN ACTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.

IN ANY SUCH ACTION OR PROCEEDING, IF A COURT DETERMINES THAT AN AGENCY FAILED TO COMPLY WITH THE PROVISIONS OF THIS SECTION, THE COURT SHALL HAVE THE POWER, IN ITS DISCRETION, UPON GOOD CAUSE SHOWN, TO DECLARE THAT THE AGENCY VIOLATED THE PROVISIONS OF THIS SECTION. IF THE COURT DETERMINES THAT AN AGENCY HAS VIOLATED THE PROVISIONS OF THIS SECTION, THE COURT MAY REQUIRE THE MEMBERS OF THE AGENCY TO PARTICIPATE IN A TRAINING SESSION CONCERNING THE OBLIGATIONS IMPOSED BY THIS SECTION CONDUCTED BY THE STAFF OF THE COMMITTEE ON OPEN GOVERNMENT.

(B) IN ANY PROCEEDING BROUGHT PURSUANT TO THIS SECTION, COSTS AND REASONABLE ATTORNEY'S FEES MAY BE AWARDED BY THE COURT, IN ITS DISCRETION, TO THE SUCCESSFUL PARTY. IF A COURT DETERMINES THAT AN ELECTRONIC RECORD WAS NOT RETAINED IN MATERIAL VIOLATION OF THIS ARTICLE, THE COURT SHALL AWARD COSTS AND REASONABLE ATTORNEY'S FEES TO THE SUCCESSFUL PETITIONER, UNLESS THERE WAS A REASONABLE BASIS FOR THE AGENCY TO BELIEVE THAT IT WAS IN COMPLIANCE WITH THE PROVISIONS OF THIS SECTION.

(C) THE STATUTE OF LIMITATIONS IN AN ARTICLE SEVENTY-EIGHT PROCEEDING WITH RESPECT TO AN ACTION TAKEN AT EXECUTIVE SESSION SHALL COMMENCE TO RUN FROM THE DATE THE ELECTRONIC RECORD AT ISSUE HAS BEEN MADE AVAILABLE TO THE PUBLIC.

7. NOTHING IN THIS SECTION SHALL BAR AN EMPLOYEE OF AN AGENCY FROM MAINTAINING A RECORD SLATED FOR DESTRUCTION UNDER THE RETENTION SCHEDULES DEVELOPED PURSUANT TO SECTION 57.06 OF THE ARTS AND CULTURAL AFFAIRS LAW, IF SUCH RECORD IS RELEVANT TO AN ONGOING MATTER AND SUCH DISCLOSURE WOULD NOT VIOLATE ANY PRIVILEGE OR CONFIDENTIALITY INTEREST.

S 5. Subparagraphs vi and vii of paragraph (b) of subdivision 2 of section 89 of the public officers law, as amended by section 11 of part U of chapter 61 of the laws of 2011, are amended and a new subparagraph viii is added to read as follows:

vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; [or]

vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law[.]; AND

VIII. COMMUNICATIONS OF A PERSONAL NATURE BETWEEN STATE LEGISLATORS AND THEIR CONSTITUENTS.

S 6. The arts and cultural affairs law is amended by adding a new section 57.06 to read as follows:

S 57.06. ELECTRONIC RECORDS RETENTION. 1. THE STATE ARCHIVES SHALL DEVELOP AND IMPLEMENT A PROTOCOL FOR THE PRESERVATION OF ELECTRONIC RECORDS OF THE STATE IN ACCORDANCE WITH THE PROVISIONS OF THIS ARTICLE. SUCH PROTOCOL SHALL INCLUDE:

(A) A PROCESS BY WHICH SENDERS AND RECIPIENTS OF ELECTRONIC MAIL CAN CATEGORIZE SUCH MAIL INTO RECORDS THAT WILL BE RETAINED, AND THOSE THAT WILL BE SUBJECT TO PROCEDURES FOR REGULAR DISPOSITION OF SUCH RECORDS IN THE ORDINARY COURSE OF BUSINESS;

(B) THE DELINEATION OF SUCH OTHER STANDARDS OR PROCEDURES WHICH WILL ASSIST IN THE IDENTIFICATION AND PRESERVATION OF ELECTRONIC RECORDS;

(C) THE IDENTIFICATION OF SOFTWARE AND OTHER TECHNOLOGICAL AIDS THAT WOULD FACILITATE RECORDS PRESERVATION AND REVIEW, AND WHICH MAY BE PURCHASED WITHIN AVAILABLE RESOURCES; AND

(D) A SCHEDULE FOR RECORDS RETENTION FOR SPECIFIC TYPES OF RECORDS AND IDENTIFICATION OF HISTORICALLY IMPORTANT RECORDS DEVELOPED IN CONCERT WITH THE AGENCIES PROVIDING THE ELECTRONIC RECORDS.

2. NOTHING IN THIS SECTION SHALL BAR AN EMPLOYEE OF THE STATE ARCHIVES FROM MAINTAINING A RECORD SLATED FOR DESTRUCTION UNDER THE RETENTION SCHEDULE, OR FROM PROVIDING SUCH RECORD TO AN AGENCY, IF SUCH RECORD IS RELEVANT TO AN ONGOING MATTER, AND SUCH DISCLOSURE WOULD NOT VIOLATE ANY PRIVILEGE OR CONFIDENTIALITY INTEREST.

S 7. Section 5 of the executive law is REPEALED.

S 8. Subdivision 3 of section 713 of the executive law, as amended by section 16 of part B of chapter 56 of the laws of 2010, 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] ARTICLE SIX of the public officers law.

S 9. The legislative law is amended by adding a new section 33-a to read as follows:

S 33-A. DISCLOSURE. ALL MEMBERS, OFFICERS AND EMPLOYEES OF THE SENATE AND THE ASSEMBLY SHALL BE SUBJECT TO THE PROVISIONS OF ARTICLE SIX OF THE PUBLIC OFFICERS LAW.

S 10. Section 70-0113 of the environmental conservation law is REPEALED.

S 11. This act shall take effect on the one hundred twentieth day after it shall have become a law.