

4307--A

2015-2016 Regular Sessions

I N S E N A T E

March 12, 2015

Introduced by Sens. KRUEGER, PARKER -- 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, the arts and cultural affairs law, the executive law and the legislative law, in relation to the retention of state electronic records; 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:

1 Section 1. Legislative intent. The legislature finds that procedures
2 and practice that promote transparency and accountability in the execu-
3 tive and legislative branches serve the public interest and encourage
4 public faith in government. Government policies which allow for the
5 destruction of emails and other electronic governmental records and
6 exempt the legislature from the Freedom of Information Law (FOIL) run
7 counter to these principles of transparency and accountability.
8 Computers and other electronic devices create many of the new records
9 we use today, most commonly via email. These records, although electron-
10 ic in format, are the same as records produced in other formats. Elec-
11 tronic records show how one conducts business, makes decisions, and
12 carries out the people's work. They are evidence of decisions and
13 actions. Fundamental records management principles should apply to
14 electronic records, as they apply to any record formats.
15 The executive branch has adopted a policy allowing automatic deletion
16 of emails after 90 days, which has the potential to severely limit the
17 public availability of vital information regarding the operations of

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

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1 agencies. The consequences of such a policy are illustrated in a 2015
2 judicial proceeding where the former Deputy Secretary for Gaming and
3 Racing indicated he was "aghast" to find that emails dating from 2013
4 relevant to the case had been deleted. The deletion of these emails
5 undermines the ability of the plaintiff in the case to seek redress. An
6 administration spokesman defended deletion of the emails on the ground
7 they had not been the subject of a FOIL request.

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

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

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

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

38 6. "ARCHIVES" MEANS ANY INSTITUTION AS DEFINED BY SECTION 57.05 OF THE
39 ARTS AND CULTURAL AFFAIRS LAW.

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

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

44 S 88-A. ELECTRONIC RECORDS RETENTION. 1. EACH STATE AGENCY, AS
45 DEFINED BY PARAGRAPH B OF SUBDIVISION FOUR OF SECTION EIGHTY-SEVEN OF
46 THE PUBLIC OFFICERS LAW, AND THE STATE LEGISLATURE IN CONJUNCTION WITH
47 THE STATE ARCHIVES, SHALL PRESERVE ELECTRONIC RECORDS IN ACCORDANCE WITH
48 THE PROVISIONS OF THIS SECTION.

49 2. EACH AGENCY SHALL IDENTIFY THE ACCOUNTS OF POLICY MAKERS SUBJECT TO
50 THE PROVISIONS OF THIS ARTICLE. FOR THE PURPOSE OF THIS SECTION, "POLI-
51 CY MAKER" MEANS ANY STATEWIDE ELECTED OFFICIAL, STATE OFFICER OR EMPLOY-
52 EE, MEMBER OF THE LEGISLATURE, OR LEGISLATIVE EMPLOYEE SUBJECT TO
53 SECTION SEVENTY-THREE-A OF THE PUBLIC OFFICERS LAW.

54 3. (A) THE PROVISIONS OF THIS SECTION AND ARTICLE SIX OF THIS CHAPTER
55 SHALL APPLY TO ALL EMAIL ACCOUNTS OF ANY POLICY MAKER, INCLUDING

1 ACCOUNTS MANAGED BY OTHER STAFF, INCLUDING, BUT NOT LIMITED TO PERSONAL
2 ASSISTANTS, CONFIDENTIAL ASSISTANTS, OR ADMINISTRATIVE ASSISTANTS.

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

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

8 (A) EMAIL AND OTHER ELECTRONIC RECORDS OF POLICY MAKERS. AGENCIES
9 SHALL TRANSFER DOCUMENTATION ADEQUATE TO IDENTIFY, SERVICE, AND INTER-
10 PRET THE PERMANENT ELECTRONIC RECORDS, WHICH INCLUDES THE POSITION TITLE
11 AND BEGIN AND END DATES FOR EACH EMAIL ACCOUNT CAPTURED IN THIS SUBDIVI-
12 SION. THE DISPOSITION OF ELECTRONIC RECORDS DESCRIBED IN THIS PARAGRAPH
13 IS PERMANENT. SUCH ELECTRONIC RECORDS SHALL BE TRANSFERRED TO THE STATE
14 ARCHIVES NO SOONER THAN FIFTEEN YEARS AFTER THE DATE OF THE CREATION OF
15 THE ELECTRONIC RECORD AND NO LATER THAN TWENTY-FIVE YEARS AFTER THE
16 CREATION OF THE ELECTRONIC RECORD.

17 (B) EMAIL AND OTHER ELECTRONIC RECORDS OF OTHER OFFICIALS. AGENCIES
18 SHALL TRANSFER DOCUMENTATION ADEQUATE TO IDENTIFY, SERVICE, AND INTER-
19 PRET THE PERMANENT ELECTRONIC RECORDS, WHICH INCLUDES THE POSITION TITLE
20 AND BEGIN AND END DATES FOR EACH EMAIL ACCOUNT CAPTURED IN THIS SUBDIVI-
21 SION. THE DISPOSITION OF ELECTRONIC RECORDS DESCRIBED IN THIS PARAGRAPH
22 IS TEMPORARY. SUCH ELECTRONIC RECORDS SHALL BE TRANSFERRED TO THE STATE
23 ARCHIVES NO SOONER THAN SEVEN YEARS AFTER THE DATE OF CREATION OF THE
24 ELECTRONIC RECORD, PROVIDED, HOWEVER, THAT LONGER RETENTION IS AUTHOR-
25 IZED IF REQUIRED FOR BUSINESS USE BY THE AGENCY.

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

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

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

36 (C) DIGITAL GEOSPATIAL DATA FILES MUST INCLUDE THE DOCUMENTATION SPEC-
37 IFIED IN PARAGRAPH (B) OF THIS SUBDIVISION. IN ADDITION, DOCUMENTATION
38 FOR DIGITAL GEOSPATIAL DATA FILES CAN INCLUDE METADATA THAT CONFORMS TO
39 THE FEDERAL GEOGRAPHIC DATA COMMITTEE'S CONTENT STANDARDS FOR DIGITAL
40 GEOSPATIAL METADATA, AS SPECIFIED IN EXECUTIVE ORDER 12906 OF APRIL 11,
41 1994 (3 CFR, 1995 COMP., P. 882).

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

45 (E) DOCUMENTATION FOR THE FOLLOWING TYPES OF ELECTRONIC RECORDS MUST
46 CONFORM TO FORMATS SPECIFIED IN NATIONAL ARCHIVES AND RECORDS ADMINIS-
47 TRATION BULLETIN 2014-04; APPENDIX A: REVISED FORMAT GUIDANCE FOR THE
48 TRANSFER OF PERMANENT ELECTRONIC RECORDS. TABLES OF FILE FORMATS;
49 PROVIDED, HOWEVER, THAT THE STATE ARCHIVE MAY APPROVE ADDITIONAL ACCEPT-
50 ABLE FILE FORMATS:

- 51 (I) EMAIL MESSAGES WITH ATTACHMENTS;
52 (II) SCANNED IMAGES OF TEXTUAL RECORDS;
53 (III) RECORDS IN PORTABLE DOCUMENT FORMAT (PDF);
54 (IV) DIGITAL PHOTOGRAPHIC RECORDS; AND
55 (V) WEB CONTENT RECORDS.

1 6. (A) ANY AGGRIEVED PERSON SHALL HAVE STANDING TO ENFORCE THE
2 PROVISIONS OF THIS SECTION BY THE COMMENCEMENT OF A PROCEEDING PURSUANT
3 TO ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES, OR AN
4 ACTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF. IN ANY SUCH
5 ACTION OR PROCEEDING, IF A COURT DETERMINES THAT AN AGENCY FAILED TO
6 COMPLY WITH THE PROVISIONS OF THIS SECTION, THE COURT SHALL HAVE THE
7 POWER, IN ITS DISCRETION, UPON GOOD CAUSE SHOWN, TO DECLARE THAT THE
8 AGENCY VIOLATED THE PROVISIONS OF THIS SECTION. IF THE COURT DETERMINES
9 THAT AN AGENCY HAS VIOLATED THE PROVISIONS OF THIS SECTION, THE COURT
10 MAY REQUIRE THE MEMBERS OF THE AGENCY TO PARTICIPATE IN A TRAINING
11 SESSION CONCERNING THE OBLIGATIONS IMPOSED BY THIS SECTION CONDUCTED BY
12 THE STAFF OF THE STATE ARCHIVES.

13 (B) IN ANY PROCEEDING BROUGHT PURSUANT TO THIS SECTION, COSTS AND
14 REASONABLE ATTORNEY'S FEES MAY BE AWARDED BY THE COURT, IN ITS
15 DISCRETION, TO THE SUCCESSFUL PARTY. IF A COURT DETERMINES THAT AN ELEC-
16 TRONIC RECORD WAS NOT RETAINED IN MATERIAL VIOLATION OF THIS ARTICLE,
17 THE COURT SHALL AWARD COSTS AND REASONABLE ATTORNEY'S FEES TO THE
18 SUCCESSFUL PETITIONER, UNLESS THERE WAS A REASONABLE BASIS FOR THE AGEN-
19 CY TO BELIEVE THAT IT ACTED IN COMPLIANCE WITH THE PROVISIONS OF THIS
20 SECTION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 S 8. Subdivision 3 of section 713 of the executive law, as amended by
14 section 16 of part B of chapter 56 of the laws of 2010, is amended to
15 read as follows:

16 3. Any reports prepared pursuant to this article shall not be subject
17 to disclosure pursuant to [section eighty-eight] ARTICLE SIX of the
18 public officers law.

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

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

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

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