STATE OF NEW YORK

7245

IN SENATE

January 5, 2018

Introduced by Sen. KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the public officers law, in relation to enacting the integrity in government act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "integrity in government act".

§ 2. Paragraph (a) of subdivision 1 of section 89 of the public officers law, as amended by chapter 33 of the laws of 1984, is amended and six new paragraphs (c), (d), (e), (f), (g) and (h) are added to read as follows:

(a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed

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

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for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties. **The executive director of the committee shall maintain a permanent office in Albany in such suitable space as the commissioner of the department of state provides. All papers required to be filed with or served upon the committee shall be delivered to such office. Each member shall receive two hundred dollars per day for each day such member is present at a committee hearing or meeting, and shall be entitled to reimbursement for actual and necessary expenses incurred in connection therewith.**

(c) The committee shall, subject to the civil service law, employ such employees as may be necessary to carry out the provisions of this section. The committee may enter into such contractual agreements as may be necessary for the discharge of its duties, within the limits of its appropriated funds and in accordance with established procedures.

(d) i. Any person denied the right to inspect or copy records, denied the right to attend any meeting of a public agency or denied any other right conferred by this article and article seven of this chapter may appeal therefrom to the committee by filing a notice of appeal with the committee. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives notice in fact that such meeting was held. For purposes of this paragraph, such notice of appeal shall be deemed to be filed on the date it is received by said committee or on the date it is postmarked, if received more than thirty days after the date of the denial from which such appeal is taken.

ii. Upon receipt of such notice, the committee shall serve upon all parties, by certified or registered mail, a copy of such notice together with any other notice or order of such committee. In the case of the denial of a request to inspect or copy records contained in a public employee's personnel or medical file, the committee shall include with its notice or order an order requiring the public agency to notify any employee whose records are subject of an appeal, and the employee's collective bargaining representative, if any, of the committee's proceedings and, if any such employee or collective bargaining representative has filed an objection, the agency shall provide the required notice to such employee and collective bargaining representative by certified mail, return receipt requested or by hand delivery with a signed receipt. A public employee whose personnel or medical file is the subject of an appeal may intervene as a party in the proceedings on the matter before the committee.

(e) i. The committee shall, after due notice to the parties and subject to the provisions of this article and article seven of this chapter, promptly review the alleged violation of said articles. The committee shall have the power to investigate all alleged violations of this article and article seven of this chapter and may for the purpose of investigating any violation hold a hearing, administer oaths, examine witnesses, receive oral and documentary evidence, have the power to subpoena witnesses under procedural rules adopted by the committee to compel attendance and to require the production for examination of any books and papers which the committee deems relevant in any matter under investigation or in question. In case of a refusal to comply with any such subpoena or to testify with respect to any matter upon which that

person may be lawfully interrogated, a court of competent jurisdiction, on application of the committee, may issue an order requiring such person to comply with such subpoena and to testify; failure to obey any such order of the court may be punished by the court as a contempt thereof.

ii. The committee shall hear and decide each appeal within six months after the filing of the notice of appeal. The committee shall adopt regulations establishing criteria for those appeals which shall be privileged in their assignment for hearing. Any such privileged appeal shall be heard not later than thirty days after receipt of a notice of appeal and decided not later than sixty days after a hearing.

iii. If a notice of appeal concerns an announced agency decision to meet in executive session or an ongoing agency practice of meeting in executive sessions, for a stated purpose, the committee or a member or members of the committee designated by its chairperson shall serve notice upon the parties and hold a preliminary hearing on the appeal not later than seventy-two hours after receipt of the notice, provided such notice shall be given to the parties at least forty-eight hours prior to such hearing. During such preliminary hearing, the committee shall take evidence and receive testimony from the parties. If after the preliminary hearing the committee finds probable cause to believe that the agency decision or practice is in violation of article seven of this chapter, the agency shall not meet in executive session for such purpose until the committee decides the appeal. If probable cause is found by the committee, it shall conduct a final hearing on the appeal and render its decision not later than five days after the completion of the preliminary hearing. Such decision shall specify the committee's findings of fact and conclusions of law.

iv. The committee, at its discretion, may issue an order to discontinue all work resulting from an alleged violation of this article and article seven of this chapter if irreparable harm is deemed to potentially occur. This order will hold until a decision is rendered by the committee on the alleged violation.

(f) i. In any appeal to the committee, the committee may confirm the action of the agency or order the agency to provide relief that the committee, in its discretion, believes appropriate to rectify the denial of any right conferred by this article and article seven of this chapter. The committee may declare null and void any action taken at any meeting which a person was denied the right to attend and may require the production or copying of any public record. In addition, upon finding that a denial of any right created by this article and article seven of this chapter was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with article seven of this chapter the committee may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars.

ii. If the committee finds that a person has taken an appeal frivolously, without reasonable grounds, after such person has been given an opportunity to be heard at a hearing conducted in accordance with article seven of this chapter, the committee may, in its discretion, impose against that person a civil penalty of not less than twenty dollars nor more than one thousand dollars.

iii. The committee shall notify a person of a penalty levied against him pursuant to this subdivision by written notice sent by certified or registered mail. If a person fails to pay the penalty within thirty days

of receiving such notice, a court of competent jurisdiction shall, on application of the committee, issue an order requiring the person to pay the penalty imposed.

iv. The committee shall provide due notice to the parties and review affidavits and written arguments that the parties may submit and grant or deny such leave summarily at its next regular meeting. The committee shall grant such leave unless it finds that the appeal: (A) does not present a claim within the committee's jurisdiction; (B) would perpetrate an injustice; or (C) would constitute an abuse of the committee's administrative process. Any party aggrieved by the committee's denial of such leave may apply to a court of competent jurisdiction, within fifteen days of the committee meeting at which such leave was denied, for an order requiring the committee to hear such appeal.

v. In making the findings and determination, the committee shall consider the nature of any justice or abuse of administrative process, including but not limited to: (A) the nature, content, language or subject matter of the request or the appeal; (B) the nature, content, language or subject matter to prior or contemporaneous requests or appeals by the person making the request or taking the appeal; and (C) the nature, content, language or subject matter of other verbal and written communications to any agency or any official of any agency from the person making the request or taking the appeal.

vi. Notwithstanding any provision of this section to the contrary, in the case of an appeal to the committee of a denial by a public agency, the committee may, upon motion of such agency, confirm the action of the agency and dismiss the appeal without a hearing if it finds, after examining the notice of appeal and construing all allegations most favorably to the appellant, that (A) the agency has not violated this article and article seven of this chapter or (B) the agency has committed a technical violation that constitutes a harmless error that does not infringe the appellant's rights.

(g) i. If in the judgment of the committee circumstances so warrant, it may at any time after the filing of a notice of appeal endeavor to resolve the appeal by any method of dispute resolution prescribed by rule of the committee including, but not limited to, mediation.

ii. The terms of any mediation agreement may contain such provisions as may be agreed upon by the committee, the appellant and the respondent.

iii. The members of the committee and its staff shall not publicly disclose what transpired in the course of mediation efforts.

iv. If a mediation agreement is entered into, the committee shall embody such agreement in an order and serve a copy of such order upon all parties to the agreement. Violation of such an order may cause the imposition of civil penalties.

(h) Any party aggrieved by the decision of said committee may appeal to the judiciary therefrom, the court may conduct an in camera review of the original or a certified copy of the records which are at issue in the appeal but were not included in the record of the committee's proceedings, admit the records into evidence and order the records to be sealed or inspected on such terms as the court deems fair and appropriate, during the appeal. The committee shall have standing to defend, prosecute or otherwise participate in any appeal of any of its decisions and to take an appeal from any judicial decision overturning or modifying a decision of the committee. If agreement is a jurisdictional prerequisite to the committee taking any such appeal, the committee shall be deemed to be aggrieved. Legal counsel employed or retained by

said committee shall represent said committee in all such appeals and in any other litigation affecting said committee. Any appeal taken pursuant to this section shall be privileged in respect to its assignment for trial over all other actions except writs of habeas corpus and actions brought by or on behalf of the state, including information on the relation of private individuals. If the court finds that any appeal taken pursuant to this section is frivolous or taken solely for the purpose of delay, it shall order the party responsible therefor to pay to the party injured by such frivolous or dilatory appeal costs or attorney's fees of not more than one thousand dollars. Such order shall be in addition to any other remedy or disciplinary action required or permitted by statute or by rules of court.

§ 3. Paragraphs (b) and (c) of subdivision 4 of section 89 of the public officers law, paragraph (b) as amended by chapter 22 of the laws of 2005 and paragraph (c) as amended by chapter 453 of the laws of 2017, are amended to read as follows:

(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 involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.~~

~~(c) The court in such a proceeding: (i) may assess, against such agency 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, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency 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 and the court finds that the agency had no reasonable basis for denying access~~] appeal to the committee on open government pursuant to subdivision one of this section.

§ 4. Section 107 of the public officers law, as added by chapter 511 of the laws of 1976, subdivision 1 as amended by chapter 44 of the laws of 2010 and subdivision 2 as amended by chapter 397 of the laws of 2008 and such section as renumbered by chapter 652 of the laws of 1983, is amended to read as follows:

§ 107. Enforcement. [~~1.~~] Any aggrieved person shall have standing to enforce the provisions of this article 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 a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government.~~

~~An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.~~

~~2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held.~~

~~3. 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 minutes of such executive session have been made available to the public~~] **an appeal to the committee on open government pursuant to section eighty-nine of this chapter**.

§ 5. Paragraph (a) and the opening paragraph of paragraph (b) of subdivision 1, paragraph (c) of subdivision 3, and paragraph (c) of subdivision 4 of section 87 of the public officers law, paragraph (a) and the opening paragraph of paragraph (b) of subdivision 1 as amended by chapter 80 of the laws of 1983, paragraph (c) of subdivision 3 as amended by chapter 499 of the laws of 2008, and paragraph (c) of subdivision 4 as added by chapter 102 of the laws of 2007, are amended to read as follows:

(a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government **pursuant to section eighty-nine of this article** in conformity with the provisions of this article, pertaining to the administration of this article.

Each agency 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 **pursuant to section eighty-nine of this article** in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:

(c) a reasonably detailed current list by subject matter of all records in the possession of the agency, 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 **pursuant to section eighty-nine of this article**. 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 **pursuant to section eighty-nine of this article**.

(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 **pursuant to section eighty-nine of this article**.

§ 6. This act shall take effect on the first of April next succeeding the date on which it shall have become a law.