

# STATE OF NEW YORK

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3940

2019-2020 Regular Sessions

## IN SENATE

February 21, 2019

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Introduced by Sens. KRUEGER, COMRIE, LIU, MONTGOMERY, PARKER, SANDERS --  
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, 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 regu-  
lations 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 Assem-  
bly, 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  
18 agencies. The consequences of such a policy are illustrated in a 2015

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

LBD08593-01-9

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

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

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

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

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

37 6. "Archives" means any institution as defined by section 57.05 of the  
38 arts and cultural affairs law.

39 § 3. Subdivision 1 of section 88 of the public officers law is  
40 REPEALED.

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

43 § 88-a. Electronic records retention. 1. Each state agency, as  
44 defined by paragraph b of subdivision four of section eighty-seven of  
45 the public officers law, and the state legislature in conjunction with  
46 the state archives, shall preserve electronic records in accordance with  
47 the provisions of this section.

48 2. Each agency shall identify the accounts of policy makers subject to  
49 the provisions of this article. For the purpose of this section, "poli-  
50 cy maker" means any statewide elected official, state officer or employ-  
51 ee, member of the legislature, or legislative employee subject to  
52 section seventy-three-a of the public officers law.

53 3. (a) The provisions of this section and article six of this chapter  
54 shall apply to all email accounts of any policy maker, including  
55 accounts managed by other staff, including, but not limited to personal  
56 assistants, confidential assistants, or administrative assistants.

1 (b) The provisions of this section and of article six of this chapter  
2 shall apply to all email accounts of any policy maker, regardless of the  
3 address names used by the public official for agency business.

4 4. Electronic records shall be maintained in accordance with the  
5 following general records retention schedule:

6 (a) Email and other electronic records of policy makers. Agencies  
7 shall transfer documentation adequate to identify, service, and inter-  
8 pret the permanent electronic records, which includes the position title  
9 and begin and end dates for each email account captured in this subdivi-  
10 sion. The disposition of electronic records described in this paragraph  
11 is permanent. Such electronic records shall be transferred to the state  
12 archives no sooner than fifteen years after the date of the creation of  
13 the electronic record and no later than twenty-five years after the  
14 creation of the electronic record.

15 (b) Email and other electronic records of other officials. Agencies  
16 shall transfer documentation adequate to identify, service, and inter-  
17 pret the permanent electronic records, which includes the position title  
18 and begin and end dates for each email account captured in this subdivi-  
19 sion. The disposition of electronic records described in this paragraph  
20 is temporary. Such electronic records shall be transferred to the state  
21 archives no sooner than seven years after the date of creation of the  
22 electronic record, provided, however, that longer retention is author-  
23 ized if required for business use by the agency.

24 5. Production of electronic records by agencies shall comply with the  
25 following provisions:

26 (a) Agencies shall transfer to the state archives documentation  
27 adequate to identify, service, and interpret the permanent electronic  
28 records.

29 (b) Documentation for data files and data bases must include record  
30 layouts, data element definitions, and code translation tables (code-  
31 books) for coded data. Data element definitions, codes used to represent  
32 data values, and interpretations of these codes must match the actual  
33 format and codes as transferred.

34 (c) Digital geospatial data files must include the documentation spec-  
35 ified in paragraph (b) of this subdivision. In addition, documentation  
36 for digital geospatial data files can include metadata that conforms to  
37 the Federal Geographic Data Committee's Content Standards for Digital  
38 Geospatial Metadata, as specified in Executive Order 12906 of April 11,  
39 1994 (3 CFR, 1995 Comp., p. 882).

40 (d) Documentation for electronic files containing textual documents  
41 with SGML tags must include a table for interpreting the SGML tags, when  
42 appropriate.

43 (e) Documentation for the following types of electronic records must  
44 conform to formats specified in National Archives and Records Adminis-  
45 tration Bulletin 2014-04; Appendix A: Revised Format Guidance for the  
46 Transfer of Permanent Electronic Records. Tables of File Formats;  
47 provided, however, that the state archive may approve additional accept-  
48 able file formats:

- 49 (i) email messages with attachments;
- 50 (ii) scanned images of textual records;
- 51 (iii) records in portable document format (PDF);
- 52 (iv) digital photographic records; and
- 53 (v) web content records.

54 6. (a) Any aggrieved person shall have standing to enforce the  
55 provisions of this section by the commencement of a proceeding pursuant  
56 to article seventy-eight of the civil practice law and rules, or an

1 action for declaratory judgment and injunctive relief. In any such  
2 action or proceeding, if a court determines that an agency failed to  
3 comply with the provisions of this section, the court shall have the  
4 power, in its discretion, upon good cause shown, to declare that the  
5 agency violated the provisions of this section. If the court determines  
6 that an agency has violated the provisions of this section, the court  
7 may require the members of the agency to participate in a training  
8 session concerning the obligations imposed by this section conducted by  
9 the staff of the state archives.

10 (b) In any proceeding brought pursuant to this section, costs and  
11 reasonable attorney's fees may be awarded by the court, in its  
12 discretion, to the successful party. If a court determines that an elec-  
13 tronic record was not retained in material violation of this article,  
14 the court shall award costs and reasonable attorney's fees to the  
15 successful petitioner, unless there was a reasonable basis for the agen-  
16 cy to believe that it acted in compliance with the provisions of this  
17 section.

18 (c) The statute of limitations in an article seventy-eight proceeding  
19 with respect to an action taken at executive session shall commence to  
20 run from the date the electronic record at issue has been made available  
21 to the public.

22 7. Nothing in this section shall bar an employee of an agency from  
23 maintaining a record slated for destruction under the retention sched-  
24 ules developed pursuant to section 57.06 of the arts and cultural  
25 affairs law, if such record is relevant to an ongoing matter and such  
26 disclosure would not violate any privilege or confidentiality interest.

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

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

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

38 viii. communications of a personal nature between state legislators  
39 and their constituents.

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

42 § 57.06. Electronic records retention. 1. The state archives shall  
43 develop and implement a protocol for the preservation of electronic  
44 records of the state in accordance with the provisions of this article.  
45 Such protocol shall include:

46 (a) a process by which senders and recipients of electronic mail can  
47 categorize such mail into records that will be retained, and those that  
48 will be subject to procedures for regular disposition of such records in  
49 the ordinary course of business;

50 (b) the delineation of such other standards or procedures which will  
51 assist in the identification and preservation of electronic records;

52 (c) the identification of software and other technological aids that  
53 would facilitate records preservation and review, and which may be  
54 purchased within available resources; and

1 (d) a schedule for records retention for specific types of records and  
2 identification of historically important records developed in concert  
3 with the agencies providing the electronic records.

4 2. Nothing in this section shall bar an employee of the state archives  
5 from maintaining a record slated for destruction under the retention  
6 schedule, or from providing such record to an agency, if such record is  
7 relevant to an ongoing matter, and such disclosure would not violate any  
8 privilege or confidentiality interest.

9 § 7. Section 5 of the executive law is REPEALED.

10 § 8. Subdivision 3 of section 713 of the executive law, as amended by  
11 section 16 of part B of chapter 56 of the laws of 2010, is amended to  
12 read as follows:

13 3. Any reports prepared pursuant to this article shall not be subject  
14 to disclosure pursuant to [~~section eighty-eight~~] article six of the  
15 public officers law.

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

18 § 33-a. Disclosure. All members, officers and employees of the senate  
19 and the assembly shall be subject to the provisions of article six of  
20 the public officers law.

21 § 10. Section 70-0113 of the environmental conservation law is  
22 REPEALED.

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