

# STATE OF NEW YORK

5752

2021-2022 Regular Sessions

## IN SENATE

March 17, 2021

Introduced by Sens. TEDISCO, JORDAN, BORRELLO, HELMING, MARTUCCI, OBER-  
ACKER, ORTT, PALUMBO -- read twice and ordered printed, and when  
printed to be committed to the Committee on Investigations and Govern-  
ment Operations

AN ACT to amend the public officers law, in relation to the failure to  
produce records in response to a FOIL request; and to amend the penal  
law, in relation to criminalizing the failure to comply with the free-  
dom of information law

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

1 Section 1. Section 86 of the public officers law is amended by adding  
2 two new subdivisions 10 and 11 to read as follows:

3 10. "State agency" means any state department, division, commission,  
4 public authority or public corporation.

5 11. "Head of agency" means the commissioner, acting commissioner,  
6 deputy commissioner, superintendent, director, deputy director, or chief  
7 executive officer of a state agency.

8 § 2. Paragraph (a) of subdivision 3 of section 89 of the public offi-  
9 cers law, as amended by chapter 223 of the laws of 2008, is amended to  
10 read as follows:

11 (a) (1) Each entity subject to the provisions of this article, within  
12 five business days of the receipt of a written request for a record  
13 reasonably described, shall:

14 (i) make such record available to the person requesting it~~[7]~~;

15 (ii) deny such request in writing; or

16 (iii) furnish a written acknowledgement of the receipt of such request  
17 and a statement of the approximate date, which shall be reasonable under  
18 the circumstances of the request, when such request will be granted or  
19 denied, including, where appropriate, a statement that access to the  
20 record will be determined in accordance with subdivision five of this  
21 section.

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

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1     (2) Any entity which furnishes such a written acknowledgement and  
2 statement shall have up to thirty days from the date of the request to  
3 grant or deny such request, and where such request is granted, such  
4 entity shall have up to a maximum of ninety days from the date of the  
5 request to make such record available to the person requesting it. When  
6 a state agency grants a request for records from a person and the  
7 records are not made available within thirty days of such request, the  
8 head of such agency shall have a duty to review such request and direct  
9 such agency, in writing, to make the records available to the person who  
10 made the request no later than ninety days from the date of such  
11 request, and to ensure such records are made available. When a state  
12 agency receives a request for records and provides a statement of the  
13 approximate date when such request will be granted or denied, the head  
14 of such agency shall have a duty to direct such agency, in writing, to  
15 make such determination no later than thirty days from the date of such  
16 request, and to ensure such determination is made by such agency within  
17 such time. When a state agency has not denied a request for records or  
18 made records available within thirty days of a request for records, the  
19 head of such agency shall sign a certification, under penalty of perju-  
20 ry, which shall be signed and posted on the agency's website within  
21 forty-five days of the date of the request, and which shall include:

22     (i) Whether the head of such agency reviewed the request for records;

23     (ii) Whether the head of such agency directed the agency, in writing,  
24 to make a determination to grant or deny such request within thirty days  
25 from the date of such request;

26     (iii) Whether the request was granted or denied by the agency, or  
27 whether the agency failed to make a determination to grant or deny such  
28 request; and

29     (iv) Whether the head of such agency directed, in writing, that the  
30 records be made available to the person who requested them no later than  
31 ninety days after the date of such request. When a state agency receives  
32 a request for records, and a determination whether to grant or deny such  
33 request has not been made within thirty days of such request, the head  
34 of such agency shall have a duty to notify the governor that the agency  
35 has failed to make such determination, as required by this article, and  
36 to provide a copy of such request. Upon receipt of such notice, the  
37 governor, and any senior staff member of the governor, shall have an  
38 affirmative duty to review such request and to direct such state agency,  
39 in writing, to make a determination within forty-five days of the  
40 request and to direct such state agency, in writing, to make the  
41 requested records available within ninety days of the request, if such  
42 agency grants such request. If such state agency fails to make a deter-  
43 mination to grant or deny a request within forty-five days of the  
44 request, or fails to make the requested records available within ninety  
45 days of the request, the governor, and any senior appointed staff member  
46 of the governor, shall each sign a separate certification, under penalty  
47 of perjury, which shall be signed and posted on the governor's website  
48 within sixty days after the record request and shall state whether the  
49 governor, or any senior appointed staff member, directed such state  
50 agency, in writing, to make a determination within forty-five days of  
51 the request and whether the governor, or any senior appointed staff  
52 member, directed such state agency to make the requested records avail-  
53 able within ninety days of the request, if such agency granted such  
54 request.

55     (3) An agency shall not deny a request on the basis that the request  
56 is voluminous or that locating or reviewing the requested records or

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

38 § 3. Title P of the penal law is amended by adding a new article 285  
39 to read as follows:

40 ARTICLE 285

41 OFFENSES AGAINST TRANSPARENCY IN GOVERNMENT

42 Section 285.05 Criminal failure to comply with the freedom of informa-  
43 tion law.

44 § 285.05 Criminal failure to comply with the freedom of information law.

45 A person is guilty of criminal failure to comply with the freedom of  
46 information law when:

47 1. such person is the governor, any senior appointed staff member of  
48 the governor, or the head of a state agency;

49 2. pursuant to section eighty-nine of the public officers law, such  
50 person has:

51 a. a duty to review a request for records;

52 b. a duty to direct a state agency to make a determination, in writ-  
53 ing;

54 c. a duty to direct a state agency, in writing, to make records avail-  
55 able in response to a request for records, or

56 d. a duty to provide a signed certification; and

1 3. such person, with intent, fails to review a request for records,  
2 fails to direct a state agency to make a determination in writing, fails  
3 to direct a state agency to make records available in writing, or fails  
4 to provide a signed certification. Notwithstanding any law to contrary,  
5 the state or any state agency shall not indemnify or save harmless or  
6 pay any penalty or legal fees of any person who is guilty of criminal  
7 failure to comply with the freedom of information law. All those found  
8 guilty of criminal failure to comply with the freedom of information law  
9 shall not use public funds, or monies from political action committees  
10 or campaign committees for the payment of fines or legal fees.

11 Criminal failure to comply with the freedom of information law is a  
12 class B misdemeanor.

13 § 4. This act shall take effect on the ninetieth day after it shall  
14 have become a law.