STATE OF NEW YORK

4633

2023-2024 Regular Sessions

IN ASSEMBLY

February 21, 2023

Introduced by M. of A. MCGOWAN -- read once and referred to the Committee on Governmental Employees

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 freedom of information law

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

Section 1. Section 86 of the public officers law is amended by adding two new subdivisions 12 and 13 to read as follows:

12. "State agency" means any state department, division, commission, public authority or public corporation.

13. "Head of agency" means the commissioner, acting commissioner, deputy commissioner, superintendent, director, deputy director, or chief executive officer of a state agency.

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

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

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

(ii) deny such request in writing**;** or

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

(2) Any entity which furnishes such a written acknowledgement and statement shall have up to thirty days from the date of the request to

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

LBD05635-01-3

grant or deny such request, and where such request is granted, such entity shall have up to a maximum of ninety days from the date of the request to make such record available to the person requesting it. When a state agency grants a request for records from a person and the records are not made available within thirty days of such request, the head of such agency shall have a duty to review such request and direct such agency, in writing, to make the records available to the person who made the request no later than ninety days from the date of such request, and to ensure such records are made available. When a state agency receives a request for records and provides a statement of the approximate date when such request will be granted or denied, the head of such agency shall have a duty to direct such agency, in writing, to make such determination no later than thirty days from the date of such request, and to ensure such determination is made by such agency within such time. When a state agency has not denied a request for records or made records available within thirty days of a request for records, the head of such agency shall sign a certification, under penalty of perjury, which shall be signed and posted on the agency's website within forty-five days of the date of the request, and which shall include:

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

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

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

(iv) Whether the head of such agency directed, in writing, that the records be made available to the person who requested them no later than ninety days after the date of such request. When a state agency receives a request for records, and a determination whether to grant or deny such request has not been made within thirty days of such request, the head of such agency shall have a duty to notify the governor that the agency has failed to make such determination, as required by this article, and to provide a copy of such request. Upon receipt of such notice, the governor, and any senior staff member of the governor, shall have an affirmative duty to review such request and to direct such state agency, in writing, to make a determination within forty-five days of the request and to direct such state agency, in writing, to make the requested records available within ninety days of the request, if such agency grants such request. If such state agency fails to make a determination to grant or deny a request within forty-five days of the request, or fails to make the requested records available within ninety days of the request, the governor, and any senior appointed staff member of the governor, shall each sign a separate certification, under penalty of perjury, which shall be signed and posted on the governor's website within sixty days after the record request and shall state whether the governor, or any senior appointed staff member, directed such state agency, in writing, to make a determination within forty-five days of the request and whether the governor, or any senior appointed staff member, directed such state agency to make the requested records available within ninety days of the request, if such agency granted such request.

(3) An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an

outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes. If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

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

ARTICLE 285

OFFENSES AGAINST TRANSPARENCY IN GOVERNMENT

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

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

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

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

a. a duty to review a request for records;

b. a duty to direct a state agency to make a determination, in writing;

c. a duty to direct a state agency, in writing, to make records available in response to a request for records, or

d. a duty to provide a signed certification; and

3. such person, with intent, fails to review a request for records, fails to direct a state agency to make a determination in writing, fails

to direct a state agency to make records available in writing, or fails to provide a signed certification. Notwithstanding any law to contrary, the state or any state agency shall not indemnify or save harmless or pay any penalty or legal fees of any person who is guilty of criminal failure to comply with the freedom of information law. All those found guilty of criminal failure to comply with the freedom of information law shall not use public funds, or monies from political action committees or campaign committees for the payment of fines or legal fees.

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

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