STATE OF NEW YORK

7933

2023-2024 Regular Sessions

IN ASSEMBLY

August 4, 2023

Introduced by M. of A. L. ROSENTHAL -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the public officers law, in relation to creating special proceedings for freedom of information law and open meetings law reviews

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

Section 1. The public officers law is amended by adding a new article 9 to read as follows:

ARTICLE 9
SPECIAL PROCEEDINGS FOR FREEDOM OF INFORMATION LAW AND OPEN MEETINGS LAW REVIEWS

Section 120. Definitions.
121. Procedure to review freedom of information law requests and open meetings law requirements.
122. Appointment of hearing officers.
123. Hearing procedures.
124. Decision of petition for freedom of information law and open meetings law review.
125. Determination not precedent.
126. Waiver of other remedies and right to judicial review.
127. Rules of practice and procedure.

§ 120. Definitions. For the purposes of this article, the following terms shall have the following meanings:

1. "Agency" shall have the same meaning as defined in section eighty-six of this chapter, and shall apply to all entities subject to the provisions of the freedom of information law.

2. "Freedom of information law" shall mean the laws under article six of this chapter.

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

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3. "Hearing officer" shall mean a hearing officer appointed pursuant to section one hundred twenty-two of this article, and shall include judicial hearing officers.

4. "Open meetings law" shall mean the laws under article seven of this chapter.

5. "Public body" shall have the same meaning as defined under section one hundred two of this chapter, and shall apply to all entities subject to the provisions of the open meetings law.

§ 121. Procedure to review freedom of information law requests and open meetings law requirements. 1. The chief administrator of the courts shall establish a "freedom of information law and open meetings law review program" in the supreme court.

2. An individual who has made a request under the freedom of information law and is claiming to be aggrieved by a failure of an agency to appropriately fulfill such request may file a petition for review pursuant to this article provided that such individual shall have first filed an administrative appeal of their freedom of information law request pursuant to paragraph (a) of subdivision four of section eighty-nine of this chapter.

3. An individual claiming a violation of the open meetings law may file a petition for review pursuant to this article provided that such individual shall have first filed a request for an opinion regarding their claim with the New York state committee on open government.

4. Upon determining a freedom of information law appeal pursuant to paragraph (a) of subdivision four of section eighty-nine of this chapter, the appropriate agency shall inform the freedom of information law requestor in writing of their right to court review under this article with their appeal determination and where court review forms may be obtained. Each agency shall also in their appeal determinations notify such requestors of their right to file a proceeding pursuant to article seventy-eight of the civil practice law and rules, within one hundred twenty days of the appeal determination. The petition form for court review shall be provided to such requestors, upon request, at no cost in accordance with the rules promulgated pursuant to section one hundred twenty-seven of this article.

5. The petition for review pursuant to this article shall be filed for freedom of information law reviews within thirty days after the agency appeal determination referenced in subdivision four of this section, or if no response was received to the requestor's appeal, within thirty days of the agency appeal request being made. The petition for review pursuant to this article shall be filed for open meetings law reviews within thirty days after the New York committee on open government issues an opinion or the public body's response regarding the petitioner's claim, or if no response was received, within thirty days of the committee on open government/public body request being made. Failure to file the petition within such time shall constitute a complete defense to the petition and the petition shall be dismissed. A fee of fifty dollars shall be paid upon filing of each petition, which shall be the sole fee required for petitions filed pursuant to this article. The county clerk of each county outside the city of New York shall retain ten dollars of each filing fee and shall pay the balance of each fee to the office of court administration as provided in paragraph (e) of subdivision two of section thirty-nine of the judiciary law.

6. The petition form for freedom of information law and open meetings law review shall be prescribed by the office of court administration after consultation with the New York committee on open government. Such

form shall require the petitioner to set forth their name, mailing address, telephone number, and email address, the name of the agency the freedom of information law request was made to, or the name of the public body alleged to have violated the open meetings law, a concise statement of the ground or grounds upon which review is sought and any such other information as may be required by the office of court administration.

7. No petition for freedom of information law or open meetings law review shall relate to more than one request.

8. The petition may be made by a person who has knowledge of the facts stated therein and who is authorized in writing by the requestor to file such petition. Such written authorization shall be made a part of such petition.

9. Commencement of a proceeding under this article shall not stay the requirements for filing a proceeding under article seventy-eight of the civil practice law and rules.

10. The petitioner shall mail a copy of the petition within five days from the date of filing with the clerk of the supreme court to the records access officer of the agency or public body named in the petition, or if there is no such officer, then to the head, chief executive or governing body of such entity. In the event that service is made by personal delivery, the records access officer or other appropriate person shall provide a receipt for such service to the petitioner stating the date and time of service.

§ 122. Appointment of hearing officers. 1. The chief administrator of the courts shall appoint a panel of hearing officers selected from persons requesting to serve as such hearing officers who shall have submitted resumes of qualifications. Hearing officers to be appointed to the panel shall be qualified by training, interest, experience, temperament and knowledge of New York's freedom of information law and open meetings law but need not be attorneys. The chief administrator of the court shall randomly assign a hearing officer or hearing officers, or may assign a judicial hearing officer designated pursuant to article twenty-two of the judiciary law, to conduct an informal hearing on the petition for review with the applicants and a representative of the agency which made the determination sought to be reviewed or the public body for which an open meetings law violation has been alleged. Hearing officers assigned shall not possess any conflict of interest with regard to the petitions to be heard. Hearing officers shall be compensated at least one hundred dollars per hearing for their services in accordance with a fee schedule to be established by the chief administrator of the courts.

2. A hearing officer shall disqualify himself or herself from a hearing where such officer possesses a conflict of interest. Such hearing officer shall also disqualify himself or herself from a hearing where such hearing officer has a direct or indirect interest in any agency or public body for which a petition has been filed or a direct or indirect interest with a petitioner. For the purposes of this article, a hearing officer shall be deemed to have a direct or indirect interest in any agency or public body for which a petition has been filed or with a petitioner, when the hearing officer, spouse, registered domestic partner, any of his or her children, mother, father, brother, or sister:

(a) has an interest in any contract with the agency, public body, or petitioner;

(b) is employed by the agency, public body, or petitioner; or

(c) serves on the board of directors of the agency or is an elected official of the public body.

3. Where a hearing officer disqualifies himself or herself, such hearing officer shall notify the chief administrator of the court who shall reassign the case to another hearing officer.

§ 123. Hearing procedures. 1. Hearings under this article shall be held within forty-five days of the filing of a petition. In the event all such hearings cannot be held within forty-five days, hearings may be held at a later date in accordance with the rules promulgated pursuant to section one hundred twenty-seven of this article. Such hearing, where practicable, shall be held virtually/remotely via video conferencing or telephone conferencing. If for any reason it is not possible to conduct a hearing virtually/remotely then the hearing shall occur at a location within the county in which the petitioner resides. A hybrid hearing may be held where some parties including the hearing officer appear in person and others appear remotely/virtually. The petitioner and agency or public body shall be advised by mail and/or email of the time and place of such hearing and how to appear electronically via video or telephone at least ten business days prior to the date of the hearing; provided, however, that failure to receive such notice in such time period shall not bar the holding of a hearing.

2. The petitioner shall not be required to present expert witnesses nor be represented by an attorney at such hearing. Such proceedings shall be conducted on an informal basis in such manner as to do substantial justice between the parties. The petitioner shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence. All statements and presentation of evidence made at the hearing by either party shall be made or presented to the hearing officer who shall assure that decorum is maintained at the hearing. The hearing officer shall consider the best evidence presented in each particular case. Such evidence may include, but shall not be limited to, the request made and response provided thereto. The agency or public body shall have the burden of proving why the information sought is exempt from disclosure under the freedom of information law or made available as required by the open meetings law, and if fees are being charged the burden of proving why such fees are proper.

3. All parties shall be required to appear at the hearing in person or in accordance with subdivision two of this section. Failure to appear shall result in the petition being determined upon inquest by the hearing officer based upon the available evidence submitted.

4. The hearing officer shall determine all questions of fact and law de novo.

§ 124. Decision of petition for freedom of information law and open meetings law review. 1. The hearing officer shall make a decision in writing with respect to the petition within thirty days after conclusion of the hearing conducted with respect thereto. The hearing officer's decision may grant the petition in full or in part or may deny the petition. The hearing officer may award the petitioner costs against the respondent agency or public body in an amount not to exceed the fee paid by the petitioner to file the petition for review. In unusual circumstances, the hearing officer may extend the thirty-day time limit by sending written notice to the petitioning party and a copy to the denying agency or public body, setting forth the reasons for the extension, and the day on which a decision is expected to be issued, which shall not exceed an additional thirty days. As used in this section, the term "unusual circumstances" shall mean, but only to the extent reasonably

necessary to the proper resolution of a petition: (a) the need to obtain additional documentation from the agency and a copy of the records involved; or (b) the need to conduct extensive research on issues of first impression.

2. If the hearing officer determines from the petition and upon the evidence presented at the hearing that the determination by the agency or public body being reviewed to withhold information is improper or the fees being sought are excessive, he or she shall order a correction of the decision made in whole or in part, in such manner as shall be in accordance with law.

3. If the hearing officer determines that the petitioner did not qualify for review pursuant to section one hundred twenty-one of this article, the petition shall be denied without prejudice and the petitioner, notwithstanding any other provision of law, shall be permitted to commence a proceeding pursuant to article seventy-eight of the civil practice law and rules with the understanding that the statute of limitations for such a proceeding shall not be tolled by petitions filed under this article.

4. The decision of the hearing officer shall state the findings of fact and the evidence upon which it is based. Such decisions shall be attached to and made part of the petition for review and shall be dated and signed. Where the decision of the hearing officer determines that the petitioner did not qualify for review pursuant to section one hundred twenty-one of this article, a notice shall be attached to such decision stating that the petitioner may seek judicial review of their freedom of information law request pursuant to article seventy-eight of the civil practice law and rules, and that the last day to file for judicial review is one hundred twenty days after having been served with a copy of such decision. Where the decision of the hearing officer determines that the petition is granted in full or in part, a notice shall be attached to such decision stating that the determination of the freedom of information law request shall be changed in compliance with such decision and that such change shall be followed by name, telephone number and/or address of the agency.

5. The hearing officer shall promptly transmit the decision to the clerk of the court, who shall file and enter it in accordance with the rules promulgated pursuant to section one hundred twenty-seven of this article.

6. The hearing officer shall promptly mail a copy of the decision to the petitioner, the agency or public body named in the petition.

§ 125. Determination not precedent. No transcript of testimony shall be made of a hearing held under this article. The hearing officer's decision of a petition under this article shall not constitute precedent for any purpose or proceeding involving the parties or any other person or persons.

§ 126. Waiver of other remedies and right to judicial review. A petitioner to an action pursuant to this article may seek judicial review pursuant to article seventy-eight of the civil practice law and rules, provided that such review shall be maintained against the same parties named in the freedom of information law or open meetings law petition.

§ 127. Rules of practice and procedure. The chief administrator of the courts shall adopt such rules of practice and procedure, consistent with this article, as may be necessary to implement the freedom of information law and open meetings law review procedure established under this article. Such rules shall provide for the scheduling of evening hearings where practicable, the availability of petition forms, and the proce-

dures for the filing of decision rendered by hearing officers pursuant to the provisions of this article.

§ 2. This act shall take effect one year after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.