

STATE OF NEW YORK

3438--A

Cal. No. 1408

2023-2024 Regular Sessions

IN SENATE

January 31, 2023

Introduced by Sen. SKOUFIS -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations -- recommitted to the Committee on Investigations and Government Operations in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first report, amended on first report, ordered to a second report and ordered reprinted, retaining its place in the order of second report

AN ACT to amend the public officers law, in relation to making certain public records available on the internet

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

1 Section 1. Section 84 of the public officers law, as added by chapter
2 933 of the laws of 1977, is amended to read as follows:
3 § 84. Legislative declaration. The legislature hereby finds that a
4 free society is maintained when government is responsive and responsible
5 to the public, and when the public is aware of governmental actions. The
6 more open a government is with its citizenry, the greater the under-
7 standing and participation of the public in government. People have a
8 right to know how government operates and spends money.
9 As state and local government services increase and public problems
10 become more sophisticated and complex and therefore harder to solve, and
11 with the resultant increase in revenues and expenditures, it is incum-
12 bent upon the state and its localities to extend public accountability
13 wherever and whenever feasible.
14 The people's right to know the process of governmental decision-making
15 and to review the documents and statistics leading to determinations is
16 basic to our society. Access to such information should not be thwarted
17 by shrouding it with the cloak of secrecy or confidentiality.
18 Since the Freedom of Information Law was first adopted, advances in
19 technology have enhanced the ability to gain access to and widely
20 disseminate public information. Accordingly, the legislature finds that

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

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1 government agencies, when agencies have the ability to do so, should
2 publish public records proactively on the internet that are of public
3 interest and available under this article.

4 The legislature therefore declares that government is the public's
5 business and that the public, individually and collectively and repres-
6 ented by a free press, should have access to the records of government
7 in accordance with the provisions of this article.

8 § 2. Subdivisions 3 and 4 of section 86 of the public officers law, as
9 added by chapter 933 of the laws of 1977, are amended and two new subdi-
10 visions 12 and 13 are added to read as follows:

11 3. "Agency" excludes the judiciary and state legislature, and means
12 any state or municipal department, school district, board, bureau, divi-
13 sion, commission, committee, public authority, public corporation, coun-
14 cil, office or other governmental entity performing a governmental or
15 proprietary function for the state or any one or more municipalities
16 thereof, [~~except the judiciary or the state legislature~~] or any other
17 body, by whatever name, acting on behalf of government which, considered
18 in its totality, is functionally equivalent to an agency as defined in
19 this subdivision because it substantially possesses any of the following
20 features and functions:

21 (a) The body performs a governmental or proprietary function for the
22 state or municipality;

23 (b) The body's members have authority to make decisions or recommenda-
24 tions on policy and administration affecting the conduct of the business
25 of the people in the governmental sector;

26 (c) The body was created by a governmental or governmental-affiliated
27 entity or the body's origin and authority may be traced to governmental
28 action;

29 (d) The body is controlled by, overseen or operationally managed by a
30 governmental or governmental-affiliated entity;

31 (e) The body receives substantial government financial or nonfinancial
32 support;

33 (f) The body's officers and employees are public employees or are
34 nominated or appointed by public employees; or

35 (g) The body was previously determined to be open to public access.

36 4. "Record" means any [~~information kept, held, filed, produced or~~
37 ~~reproduced by, with or for an agency or the state legislature, in any~~
38 ~~physical form whatsoever including, but not limited to, reports, state-~~
39 ~~ments, examinations, memoranda, opinions, folders, files, books, manu-~~
40 ~~als, pamphlets, forms, papers, designs, drawings, maps, photos, letters,~~
41 ~~microfilms, computer tapes or discs, rules, regulations or codes] docu-
42 ments or electronically stored information, including but not limited to
43 any writing, drawing, graph, chart, photograph, sound recording, video
44 recording, image, and other data or data compilation, stored in any
45 medium from which information can be obtained either directly or, if
46 necessary, after translation by the agency into a reasonably usable
47 form.~~

48 12. "Publishable state data" means data collected by a state agency
49 that the agency is permitted, required or able to make available to the
50 public, consistent with any and all applicable laws, rules, regulations,
51 ordinances, resolutions, policies or other restrictions, requirements or
52 rights associated with the state data, including but not limited to
53 contractual or other legal orders, restrictions or requirements. Data
54 shall not be publishable state data if making such data available on a
55 website would violate statute or regulation, including disclosure that
56 would constitute an unwarranted invasion of personal privacy, endanger

1 the public health, safety or welfare, hinder the operation of govern-
 2 ment, including criminal and civil investigations, or impose an undue
 3 financial, operational or administrative burden on the state agency or
 4 state.

5 13. "Business days" and "days" shall be calculated from date of
 6 submission, if electronic, or else postmark date.

7 § 3. Paragraphs (a) and (b) of subdivision 1, paragraphs (c), (d), (e)
 8 and (g) of subdivision 2, paragraph (c) of subdivision 3 and paragraphs
 9 (b) and (c) of subdivision 4 of section 87 of the public officers law,
 10 paragraph (a) and the opening paragraph of paragraph (b) of subdivision
 11 1 as amended by chapter 80 of the laws of 1983, paragraph (b) of subdivi-
 12 sion 1 and paragraph (c) of subdivision 2 as added by chapter 933 of
 13 the laws of 1977, subparagraph iii of paragraph (b) of subdivision 1 as
 14 amended by chapter 7 of the laws of 2023, paragraph (d) of subdivision 2
 15 as amended by chapter 289 of the laws of 1990, paragraph (e) of subdivi-
 16 sion 2 as amended by chapter 155 of the laws of 2022, paragraph (g) of
 17 subdivision 2 as amended by chapter 510 of the laws of 1999, paragraph
 18 (c) of subdivision 3 as amended by chapter 499 of the laws of 2008,
 19 paragraph (b) of subdivision 4 as added by chapter 890 of the laws of
 20 1981 and paragraph (c) of subdivision 4 as added by chapter 102 of the
 21 laws of 2007, are amended and a new subdivision 6 is added to read as
 22 follows:

23 (a) [~~Within sixty days after the effective date of this article, the~~
 24 ~~governing body of each public corporation shall promulgate uniform rules~~
 25 ~~and regulations for all agencies in such public corporation pursuant to~~
 26 ~~such general rules and regulations as may be promulgated by the]~~ The
 27 committee on open government shall promulgate general rules and regu-
 28 lations in conformity with the provisions of this article, pertaining to
 29 the administration of this article.

30 (b) Each agency shall [~~promulgate rules and regulations, in conformity~~
 31 ~~with this article and applicable rules and regulations promulgated~~
 32 ~~pursuant to]~~ adopt the provisions of paragraph (a) of this subdivision,
 33 and pursuant to such general rules and regulations as [~~may be~~] are
 34 promulgated by the committee on open government in [~~conformity with the~~
 35 ~~provisions of this article, pertaining to the availability of records~~
 36 ~~and procedures to be followed]~~ accordance with the provisions of para-
 37 graph (a) of this subdivision, shall promulgate agency-specific rules
 38 and regulations in conformity with the provisions of this article,
 39 including, but not limited to:

- 40 i. the times and places [~~such~~] agency records are available;
 41 ii. the persons from whom such records may be obtained[~~7~~]; and
 42 iii. except when a different fee is otherwise prescribed by statute:
 43 (1) the fees for paper copies of records shall not exceed twenty-five
 44 cents per photocopy not in excess of nine inches by fourteen inches, or
 45 the actual cost of reproducing any other record in accordance with the
 46 provisions of paragraph (c) of this subdivision.
 47 (2) In the case where an identical record has been prepared for a
 48 previous request within the past 6 months and an electronic copy is
 49 available, an agency shall not charge a fee for the reproduction of such
 50 record, except for the actual cost of a storage device or media if one
 51 is provided to the requester in complying with such request.

52 (c) if disclosed would impair present or imminent contract awards or
 53 collective bargaining negotiations;

54 (d) are trade secrets or are submitted to an agency by a commercial
 55 enterprise or derived from information obtained from a commercial enter-
 56 prise under compulsion of law or regulation and which if disclosed would

1 cause substantial injury to the competitive position of the subject
2 enterprise;

3 (e) are compiled for such agency's law enforcement purposes only to
4 the extent that disclosure would:

5 i. interfere with such agency's law enforcement investigations or
6 judicial proceedings, provided however, that any agency, which is not
7 conducting the investigation that the requested records relate to, that
8 is considering denying access pursuant to this subparagraph shall
9 receive confirmation from the law enforcement or investigating agency
10 conducting the investigation that disclosure of such records will inter-
11 fere with an ongoing investigation;

12 ii. deprive a person of a right to a fair trial or impartial adjudi-
13 cation;

14 iii. identify a confidential source or disclose confidential informa-
15 tion relating to a criminal investigation; or

16 iv. reveal criminal investigative techniques or procedures, except
17 routine techniques and procedures;

18 (g) are inter-agency or intra-agency deliberative materials, including
19 recommendations, proposals, suggestions, and other subjective documents
20 reflecting the personal opinions of the writer or writers rather than
21 the policy of the agency, which are not:

22 i. statistical or factual tabulations or data;

23 ii. instructions to staff that affect the public;

24 iii. final agency policy or determinations;

25 iv. external audits, including but not limited to audits performed by
26 the comptroller and the federal government; or

27 (c) a reasonably detailed current list by subject matter of all
28 records in the possession of the agency, whether or not available under
29 this article. Each agency shall update its subject matter list annually,
30 and the date of the most recent update shall be conspicuously indicated
31 on the list. Each state agency as defined in subdivision four of this
32 section [~~that maintains a website~~] shall post its current list on its
33 website and such posting shall be linked to the website of the committee
34 on open government. [~~Any such agency that does not maintain a website~~
35 ~~shall arrange to have its list posted on the website of the committee on~~
36 ~~open government.~~]

37 (b) As used in this subdivision the term "agency" or "state agency"
38 means [~~only a state department, board, bureau, division, council or~~
39 ~~office and any public corporation the majority of whose members are~~
40 ~~appointed by the governor~~] a board, bureau, division, commission,
41 committee, public authority, public corporation, council, office or
42 other governmental entity performing a governmental or proprietary func-
43 tion for the state, except the judiciary or the state legislature.

44 (c) Each state agency [~~that maintains~~] shall maintain a website
45 [~~shall~~] and post information related to this article and article six-A
46 of this chapter on its website. Such information shall include, at a
47 minimum, contact information for the persons from whom records of the
48 agency may be obtained, the times and places such records are available
49 for inspection and copying, and information on how to request records in
50 person, by mail, and[~~, if the agency accepts requests for records elec-~~
51 ~~tronically,~~] by e-mail. This posting shall be linked to the website of
52 the committee on open government.

53 (d) Every state agency shall make its publishable state data available
54 on the agency's website or to the office of information technology
55 services to be available on the state's open data website.

1 (e) Every agency shall make available on its website's homepage a link
2 to that agency's current fiscal year budget.

3 6. Whenever there is a question as to whether or not a record should
4 be disclosed, it shall be presumed that the requestor is entitled to the
5 record.

6 § 4. Subdivision 1, paragraphs (a) and (b) of subdivision 2, subdivi-
7 sions 3 and 4 and paragraph (h) of subdivision 5 of section 89 of the
8 public officers law, subdivision 1 as added by chapter 933 of the laws
9 of 1977, paragraph (a) of subdivision 1 as amended by chapter 33 of the
10 laws of 1984, paragraph (b) of subdivision 1 as amended by chapter 182
11 of the laws of 2006, paragraph (a) of subdivision 2 as amended by
12 section 11 of part U of chapter 61 of the laws of 2011, paragraph (b) of
13 subdivision 2 as amended by section 2 of part GGG of chapter 59 of the
14 laws of 2019, subdivision 3 as amended by chapter 223 of the laws of
15 2008, paragraph (c) of subdivision 3 as added by chapter 47 of the laws
16 of 2018, subdivision 4 as amended by chapter 22 of the laws of 2005,
17 paragraph (c) of subdivision 4 as amended by chapter 453 of the laws of
18 2017, paragraph (d) of subdivision 4 as added by chapter 487 of the laws
19 of 2016 and paragraph (h) of subdivision 5 as added by chapter 890 of
20 the laws of 1981, are amended to read as follows:

21 1. (a) i. The committee on open government is continued and shall
22 consist of [~~the lieutenant governor or the delegate of such officer, the~~
23 ~~secretary of state or the delegate of such officer, whose office shall~~
24 ~~act as secretariat for the committee, the commissioner of the office of~~
25 ~~general services or the delegate of such officer, the director of the~~
26 ~~budget or the delegate of such officer, and~~] seven [other] persons, none
27 of whom shall hold any other state or local public office except the
28 representative of local governments as set forth herein, to be appointed
29 as follows: [~~five by the governor, at least two of whom are or have been~~
30 ~~representatives of the news media, one of whom shall be a representative~~
31 ~~of local government who, at the time of appointment, is serving as a~~
32 ~~duly elected officer of a local government, one by the temporary presi-~~
33 ~~dent of the senate, and one by the speaker of the assembly. The persons~~
34 ~~appointed by the temporary president of the senate and the speaker of~~
35 ~~the assembly shall be appointed to serve, respectively, until the expi-~~
36 ~~ration of the terms of office of the temporary president and the speaker~~
37 ~~to which the temporary president and speaker were elected. The four~~
38 ~~persons presently serving by appointment of the governor for fixed terms~~
39 ~~shall continue to serve until the expiration of their respective terms.~~
40 ~~Thereafter, their respective successors shall be appointed for terms of~~
41 ~~four years. The member representing local government shall be appointed~~
42 ~~for a term of four years, so long as such member shall remain a duly~~
43 ~~elected officer of a local government.] two representatives, each of
44 whom is from the news media or a nongovernmental nonprofit group that
45 works on issues related to transparency or open government, two repre-
46 sentatives of local government who, at the time of appointment, are
47 serving as duly elected officers of a local government, and three
48 private citizens of the state, none of whom may be custodians of public
49 records, members of the news media or a nonprofit group that works on
50 issues related to transparency or open government, or a staff member or
51 spokesperson for an organization that represents custodians or reque-
52 sters of public records. Of the seven members, at least two shall be
53 attorneys admitted to practice in New York and at least two shall
54 possess expertise concerning electronic records, including electronic
55 storage, retrieval, review, and reproduction technologies.~~

1 ii. Members of the committee shall be appointed from a pool of appli-
2 cants identified by the governor and the governor shall publish on the
3 governor's website notice of the governor's intent to consider appli-
4 cants for positions on the committee on open government and the notice
5 shall include the application procedures, criteria for evaluating appli-
6 cants' qualifications, and procedures for resolving any conflicts of
7 interest; and solicit recommendations for committee members from agen-
8 cies, news media, and nongovernmental nonprofit groups that work on
9 issues related to transparency or open government; and post names and
10 qualifications of applicants on the governor's website; and when evalu-
11 ating an applicant, consider the need for geographic, political, racial,
12 ethnic, cultural, and gender diversity on the committee and ensure the
13 neutrality of the committee.

14 iii. Subject to the advice and consent of the senate, the governor
15 shall appoint the members of the committee from the pool of applicants
16 created pursuant to this section.

17 iv. The committee shall [~~hold no less than two meetings annually~~] meet
18 at least monthly, but may meet at any time.

19 v. The members of the committee shall be entitled to reimbursement for
20 actual expenses incurred in the discharge of their duties.

21 (b) The committee shall:

22 i. [~~furnish to any agency advisory guidelines, opinions or other~~
23 ~~appropriate information regarding this article~~] issue advisory opinions
24 to any agency or person which shall be made available on the committee's
25 website;

26 ii. [~~furnish to any person advisory opinions or other appropriate~~
27 ~~information regarding this article~~] provide annual training to agencies,
28 public officials and public employees on articles six and seven of this
29 chapter;

30 iii. promulgate rules and regulations [~~with respect to the implementa-~~
31 ~~tion of subdivision one and paragraph (c) of subdivision three of~~
32 ~~section eighty-seven~~] to carry out the provisions of this article which
33 shall be made available on the committee's website;

34 iv. [~~request from any agency such assistance, services and information~~
35 ~~as will enable the committee to effectively carry out its powers and~~
36 ~~duties~~] assign appeals officers to review appeals of decisions by agen-
37 cies and issue orders and opinions. The committee shall employ or
38 contract with attorneys to serve as appeals officers to review appeals
39 and, if necessary, to hold hearings on a regional basis under this arti-
40 cle. Each appeals officer must comply with all of the following: (A)
41 complete a training course provided by the committee prior to acting as
42 an appeals officer; (B) if a hearing is necessary, hold hearings
43 regionally as necessary to ensure access to the remedies provided by
44 this article and article seven of this chapter; and (C) comply with the
45 procedures under this article and article seven of this chapter and any
46 rules or regulations promulgated by the committee;

47 v. [~~develop a form, which shall be made available on the internet,~~
48 ~~that may be used by the public to request a record~~] establish an
49 informal mediation program to resolve disputes under this article and
50 article seven of this chapter; and

51 vi. report on its activities [~~and findings~~], including the number and
52 nature of complaints filed with the committee, its decisions, and any
53 recommended changes to the law regarding this article and article seven
54 of this chapter, [~~including recommendations for changes in the law,~~] to
55 the governor and the legislature annually, on or before [~~December~~
56 ~~fifteenth~~] October thirty-first.

1 (c) The committee shall appoint an executive director who shall not be
2 an existing state employee and who shall serve for a term of five years,
3 unless removed by a majority vote of the committee. The executive direc-
4 tor shall receive a salary in the same amount as set forth for state
5 officers in subdivision two of section one hundred sixty-nine of the
6 executive law. The executive director may serve no more than two terms.

7 (d) The executive director shall not seek election nor accept appoint-
8 ment to any political office during their tenure as executive director
9 and for one year thereafter.

10 (e) The executive director shall ensure that the duties of the commit-
11 tee on open government are carried out and shall monitor appeals and
12 complaints submitted to the committee.

13 (a) The committee on [~~public access to records may~~] open government
14 shall promulgate guidelines regarding deletion of identifying details or
15 withholding of records otherwise available under this article to prevent
16 unwarranted invasions of personal privacy. [~~In the absence of such~~
17 ~~guidelines, an agency may delete identifying details when it makes~~
18 ~~records available.~~]

19 (b) An unwarranted invasion of personal privacy includes, but shall
20 not be limited to:

21 i. disclosure of employment, medical or credit histories or personal
22 references of applicants for employment;

23 ii. disclosure of items involving the medical or personal records of a
24 client or patient in a medical facility;

25 iii. sale or release of lists of names of natural persons and residen-
26 tial addresses if such lists would be used for solicitation or fund-
27 raising purposes;

28 iv. disclosure of information of a personal nature when disclosure
29 would result in economic or personal hardship to the subject party and
30 such information is not relevant to the work of the agency requesting or
31 maintaining it;

32 v. disclosure of information of a personal nature reported in confi-
33 dence to an agency and not relevant to the ordinary work of such agency;

34 vi. information of a personal nature contained in a workers' compen-
35 sation record, except as provided by section one hundred ten-a of the
36 workers' compensation law;

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

40 viii. disclosure of law enforcement arrest or booking photographs of
41 an individual, unless public release of such photographs will serve a
42 specific law enforcement purpose and disclosure is not precluded by any
43 state or federal laws.

44 3. (a) Each entity subject to the provisions of this article, within
45 [~~five~~] ten business days of the receipt of a [~~written request for a~~
46 ~~record reasonably described~~] record or records request, shall make such
47 record or records available to the [~~person requesting it, deny such~~
48 ~~request in writing~~] requestor or furnish a written acknowledgement of
49 the receipt of such request [~~and a statement of the approximate date,~~
50 ~~which shall be reasonable under the circumstances of the request, when~~
51 ~~such request will be granted or denied,~~] including, where appropriate, a
52 statement that access to the record or records will be determined in
53 accordance with subdivision five of this section. Such acknowledgement
54 shall include:

55 i. a statement of the approximate date, which shall be reasonable
56 under the circumstances of the request not to exceed twenty business

1 days from receipt of the original request, and advising if exceptions
2 will apply, when such request will be granted or denied, including,
3 where appropriate, a statement that access to the record will be deter-
4 mined in accordance with subdivision five of this section; or

5 ii. if an agency determines to grant a request in whole or in part,
6 and if circumstances prevent disclosure to the person requesting the
7 record or records within twenty business days from the date of the
8 acknowledgement of the receipt of the request, the agency shall state,
9 in writing, both the reason for the inability to grant the request with-
10 in twenty business days and a date certain within a reasonable period,
11 depending on the circumstances, when the request will be granted in
12 whole or in part, and advise if exceptions will apply.

13 iii. In the event that the agency determines it cannot grant access to
14 any of the requested record or records: (A) a statement of determination
15 that access to the requested record or records cannot be granted because
16 the request was made to the wrong agency; (B) a statement of determi-
17 nation that access to the requested record or records cannot be granted
18 because the request is too vague; or (C) a statement of determination
19 that access to the requested record or records cannot be granted because
20 the record or records do not exist.

21 (b) Where appropriate, an agency shall make a determination under this
22 subdivision for each category of record in a records request containing
23 more than one records request.

24 (c) An agency shall not deny a request on the basis that the request
25 is voluminous or that locating, generating, or reviewing the requested
26 records or providing the requested copies is burdensome because the
27 agency lacks sufficient staffing or on any other basis if the agency may
28 engage an outside professional service to provide copying, programming
29 or other services required to provide the copy, the costs of which the
30 agency may recover pursuant to paragraph (c) of subdivision one of
31 section eighty-seven of this article.

32 (d) An agency may require a person requesting lists of names of
33 natural persons and residential addresses to provide a written certifi-
34 ication that such person will not use such lists of names and addresses
35 for solicitation or fund-raising purposes and will not sell, give or
36 otherwise make available such lists of names and addresses to any other
37 person for the purpose of allowing that person to use such lists of
38 names and addresses for solicitation or fund-raising purposes. [~~If an~~
39 ~~agency determines to grant a request in whole or in part, and if circum-~~
40 ~~stances prevent disclosure to the person requesting the record or~~
41 ~~records within twenty business days from the date of the acknowledgement~~
42 ~~of the receipt of the request, the agency shall state, in writing, both~~
43 ~~the reason for the inability to grant the request within twenty business~~
44 ~~days and a date certain within a reasonable period, depending on the~~
45 ~~circumstances, when the request will be granted in whole or in part.]~~

46 (e) Upon payment of, or offer to pay, the fee prescribed therefor, the
47 entity shall provide a copy of such record and certify to the correct-
48 ness of such copy if so requested, or as the case may be, shall certify
49 that it does not have possession of such record or that such record
50 cannot be found after diligent search. Nothing in this article shall be
51 construed to require any entity to prepare any record not possessed or
52 maintained by such entity except the records specified in subdivision
53 three of section eighty-seven and subdivision three of section eighty-
54 eight of this article. When an agency has the ability to retrieve or
55 extract a record or data maintained in a computer storage system with
56 reasonable effort, it shall be required to do so. When doing so requires

1 less employee time than engaging in manual retrieval or redactions from
2 non-electronic records, the agency shall be required to retrieve or
3 extract such record or data electronically. Any programming necessary to
4 retrieve a record maintained in a computer storage system and to trans-
5 fer that record to the medium requested by a person or to allow the
6 transferred record to be read or printed shall not be deemed to be the
7 preparation or creation of a new record.

8 [~~(b)~~] (f) All entities shall [~~, provided such entity has reasonable~~
9 ~~means available,~~] accept requests for records submitted in the form of
10 electronic mail and shall respond to such requests by electronic mail,
11 using forms, to the extent practicable, consistent with the form or
12 forms developed by the committee on open government pursuant to subdivi-
13 sion one of this section and provided that the written requests do not
14 seek a response in some other form. Agencies shall not require requests
15 to be made in any specific format and may not ignore or deny requests
16 not made in the agency's preferred format.

17 [~~(e)~~] (g) Each state agency, as defined in subdivision five of this
18 section, that maintains a website shall ensure its website provides for
19 the online submission of a request for records pursuant to this article.

20 (h) All responses to requests shall be attributed to a natural person
21 who is an employee of the responding entity. Responses containing denial
22 of requests, asserting exceptions to disclosure, or asserting that
23 records do not exist, shall be sworn under the penalty of perjury.

24 4. (a) Except as provided in subdivision five of this section, any
25 person denied access to a record may within [~~thirty~~] ninety days appeal
26 in writing such denial to the [~~head, chief executive or governing body~~
27 ~~of the entity, or the person therefor designated by such head, chief~~
28 ~~executive, or governing body, who shall within ten business days of the~~
29 ~~receipt of such appeal fully explain in writing to the person requesting~~
30 ~~the record the reasons for further denial, or provide access to the~~
31 ~~record sought. In addition, each agency shall immediately forward to the~~
32 ~~committee on open government a copy of such appeal when received by the~~
33 ~~agency and the ensuing determination thereon~~] committee on open govern-
34 ment. Failure by an agency to conform to the provisions of subdivision
35 three of this section shall constitute a denial. A written appeal shall
36 include, if available, a copy of the original request for public record
37 or records, and the agency's response, if any.

38 i. Upon receipt of an appeal under this subdivision, the committee on
39 open government shall assign an appeals officer to determine whether the
40 appeal is within the committee's jurisdiction, frivolous or without
41 factual basis, reduce that conclusion to writing and transmit a copy to
42 the requestor and to the responsible records access officer and request
43 a written response from the agency. Upon receipt of a request from the
44 committee on open government an agency shall provide a written response
45 to the appeal within fifteen days after receiving the request for a
46 response; and if the appeal alleges the agency failed to respond to a
47 request within the statutory time, provide a response to the record
48 request; and if the appeal alleges the agency denied a request in
49 violation of this article, provide a copy of the record, a descriptive
50 index of the record, or a written reason why the record is being with-
51 held, as appropriate.

52 ii. The agency or requestor shall provide an affidavit or statement of
53 facts at issue in the appeal within the time provided in a request that
54 the committee on open government may make.

55 iii. The committee on open government shall maintain the confidential-
56 ity of any record provided under this subdivision.

1 iv. A person or agency may not be civilly or criminally liable for
2 providing a record to the committee on open government under this subdivi-
3 vision.

4 v. The provision of a record or a description of a record to the
5 committee on open government under this subdivision may not be construed
6 as a waiver of any applicable privilege.

7 vi. Upon receipt of the agency response and any additional information
8 requested under this subdivision, the committee on open government shall
9 invite the requestor to participate in an informal mediation; and issue
10 a written decision within fifteen days of the date the requestor
11 declines informal mediation or declares the informal mediation termi-
12 nated; or if unable to reach a decision based on the written
13 submissions, schedule an informal conference with the requestor and the
14 agency that may be conducted by teleconference or written testimony
15 submitted by electronic mail, and issue a written decision within
16 fifteen days of the informal conference; or if unable to issue a deci-
17 sion within the times specified in this paragraph and paragraph (b) of
18 this subdivision, state in writing the reason for its inability to issue
19 a decision and issue a decision as soon as possible but not later than
20 sixty days after the filing of the appeal.

21 v. The committee on open government shall send a copy of the written
22 decision to the requestor and the responding agency.

23 (b) An agency may, within the statutory time for acknowledging a
24 records request under this section, submit a written complaint to the
25 committee on open government alleging that a requestor's records request
26 or pattern of records requests is frivolous, vexatious, or made in bad
27 faith.

28 i. Upon receipt of a complaint under this subdivision, the committee
29 on open government shall send a copy of the complaint to the requestor
30 and request a written response that shall be provided within thirty
31 days.

32 ii. The agency or requestor shall provide an affidavit or statement of
33 facts at issue in the complaint within the time provided in a request
34 that the committee on open government may make.

35 iii. Upon receipt of the requestor's response and any additional
36 information requested under this subdivision, the committee on open
37 government shall issue a written decision within thirty days determining
38 whether the requestor's request or patterns of requests is frivolous,
39 vexatious, or made in bad faith.

40 iv. If the committee on open government finds that the requestor's
41 record request is frivolous, vexatious, or made in bad faith based on
42 the totality of the circumstances, including the number and scope of the
43 requestor's past records requests and the agency's responses to those
44 requests and efforts to cooperate with the requestor, it shall issue an
45 order authorizing the agency to ignore the records request; or respond
46 to a less burdensome version of the request within a reasonable time as
47 determined by the committee on open government.

48 v. The committee on open government shall send a copy of the written
49 decision to the requestor and the complaining agency.

50 (c) Except as provided in subdivision five of this section, a person
51 denied access to a record in [~~an appeal determination~~] a decision under
52 the provisions of [~~paragraph~~] paragraphs (a) and (b) of this subdivision
53 may bring a proceeding for review of such denial pursuant to article
54 seventy-eight of the civil practice law and rules. In the event that
55 access to any record is denied pursuant to the provisions of subdivision
56 two of section eighty-seven of this article, the agency involved shall

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

5 ~~(c)~~ (d) The court in such a proceeding: (i) [~~may~~] shall assess,
6 against such agency involved, reasonable attorney's fees and other liti-
7 gation costs reasonably incurred by such person in any case under the
8 provisions of this section [~~in which such person has substantially~~
9 ~~prevailed, and~~] when the agency failed to respond to a request or appeal
10 within the statutory time; [~~and~~] (ii) shall assess, against such agency
11 involved, reasonable attorney's fees and other litigation costs reason-
12 ably incurred by such person in any case under the provisions of this
13 section in which such person has substantially prevailed and the court
14 finds that the agency had no reasonable basis for denying access; and
15 (iii) shall assess, against such requestor involved, reasonable attor-
16 ney's fees and other litigation costs reasonably incurred by an agency
17 in any case under the provisions of this section in which the court
18 finds that the requestor's records request or pattern of records
19 requests is frivolous, vexatious, or made in bad faith.

20 [~~(d)~~] (e) (i) Appeal to the appellate division of the supreme court
21 must be made in accordance with subdivision (a) of section fifty-five
22 hundred thirteen of the civil practice law and rules.

23 (ii) An appeal from an agency taken from an order of the court requir-
24 ing disclosure of any or all records sought:

25 (A) shall be given preference;

26 (B) shall be brought on for argument on such terms and conditions as
27 the presiding justice may direct, upon application of any party to the
28 proceeding; and

29 (C) shall be deemed abandoned if the agency fails to serve and file a
30 record and brief within sixty days after the date of service upon the
31 petitioner of the notice of appeal, unless consent to further extension
32 is given by all parties, or unless further extension is granted by the
33 court upon such terms as may be just and upon good cause shown.

34 (h) As used in this subdivision the term [~~"agency" or~~] "state agency"
35 means [~~only a state department, board, bureau, division, council or~~
36 ~~office and any public corporation the majority of whose members are~~
37 ~~appointed by the governor~~] a board, bureau, division, commission,
38 committee, public authority, public corporation, council, office or
39 other governmental entity performing a governmental or proprietary func-
40 tion for the state, except the judiciary or the state legislature.

41 § 5. This act shall take effect immediately.