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:

Section 1. Section 84 of the public officers law, as added by chapter 933 of the laws of 1977, is amended to read as follows:

§ 84. Legislative declaration. The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government. **People have a right to know how government operates and spends money.**

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

Since the Freedom of Information Law was first adopted, advances in technology have enhanced the ability to gain access to and widely 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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government agencies, when agencies have the ability to do so, should publish public records proactively on the internet that are of public interest and available under this article.

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

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

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

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

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

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

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

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

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

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

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

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

the public health, safety or welfare, hinder the operation of government, including criminal and civil investigations, or impose an undue financial, operational or administrative burden on the state agency or state.

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

§ 3. Paragraphs (a) and (b) of subdivision 1, paragraphs (c), (d), (e) and (g) of subdivision 2, paragraph (c) of subdivision 3 and paragraphs (b) and (c) of subdivision 4 of section 87 of the public officers law, paragraph (a) and the opening paragraph of paragraph (b) of subdivision 1 as amended by chapter 80 of the laws of 1983, paragraph (b) of subdivision 1 and paragraph (c) of subdivision 2 as added by chapter 933 of the laws of 1977, subparagraph iii of paragraph (b) of subdivision 1 as amended by chapter 7 of the laws of 2023, paragraph (d) of subdivision 2 as amended by chapter 289 of the laws of 1990, paragraph (e) of subdivision 2 as amended by chapter 155 of the laws of 2022, paragraph (g) of subdivision 2 as amended by chapter 510 of the laws of 1999, paragraph (c) of subdivision 3 as amended by chapter 499 of the laws of 2008, paragraph (b) of subdivision 4 as added by chapter 890 of the laws of 1981 and paragraph (c) of subdivision 4 as added by chapter 102 of the laws of 2007, are amended and a new subdivision 6 is added to read as follows:

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

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

i. the times and places [~~such~~] agency records are available;

ii. the persons from whom such records may be obtained[~~,~~]; and

iii. except when a different fee is otherwise prescribed by statute:

(1) the fees for paper copies of records shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision.

(2) In the case where an identical record has been prepared for a previous request within the past 6 months and an electronic copy is available, an agency shall not charge a fee for the reproduction of such record, except for the actual cost of a storage device or media if one is provided to the requester in complying with such request.

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

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

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

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

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

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;

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

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

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

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

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

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

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

§ 4. Subdivision 1, paragraphs (a) and (b) of subdivision 2, subdivisions 3 and 4 and paragraph (h) of subdivision 5 of section 89 of the public officers law, subdivision 1 as added by chapter 933 of the laws of 1977, paragraph (a) of subdivision 1 as amended by chapter 33 of the laws of 1984, paragraph (b) of subdivision 1 as amended by chapter 182 of the laws of 2006, paragraph (a) of subdivision 2 as amended by section 11 of part U of chapter 61 of the laws of 2011, paragraph (b) of subdivision 2 as amended by section 2 of part GGG of chapter 59 of the laws of 2019, subdivision 3 as amended by chapter 223 of the laws of 2008, paragraph (c) of subdivision 3 as added by chapter 47 of the laws of 2018, subdivision 4 as amended by chapter 22 of the laws of 2005, paragraph (c) of subdivision 4 as amended by chapter 453 of the laws of 2017, paragraph (d) of subdivision 4 as added by chapter 487 of the laws of 2016 and paragraph (h) of subdivision 5 as added by chapter 890 of the laws of 1981, are amended to read as follows:

1. (a) i. The committee on open government is continued and shall consist of [~~the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and~~] seven [~~other~~] persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: [~~five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government.~~] two representatives, each of whom is from the news media or a nongovernmental nonprofit group that works on issues related to transparency or open government, two representatives of local government who, at the time of appointment, are serving as duly elected officers of a local government, and three private citizens of the state, none of whom may be custodians of public records, members of the news media or a nonprofit group that works on issues related to transparency or open government, or a staff member or spokesperson for an organization that represents custodians or requestors of public records. Of the seven members, at least two shall be attorneys admitted to practice in New York and at least two shall possess expertise concerning electronic records, including electronic storage, retrieval, review, and reproduction technologies.

ii. Members of the committee shall be appointed from a pool of applicants identified by the governor and the governor shall publish on the governor's website notice of the governor's intent to consider applicants for positions on the committee on open government and the notice shall include the application procedures, criteria for evaluating applicants' qualifications, and procedures for resolving any conflicts of interest; and solicit recommendations for committee members from agencies, news media, and nongovernmental nonprofit groups that work on issues related to transparency or open government; and post names and qualifications of applicants on the governor's website; and when evaluating an applicant, consider the need for geographic, political, racial, ethnic, cultural, and gender diversity on the committee and ensure the neutrality of the committee.

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

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

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

(b) The committee shall:

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

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

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

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

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

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

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

(d) The executive director shall not seek election nor accept appointment to any political office during their tenure as executive director and for one year thereafter.

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

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

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

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

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

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

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

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;

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

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

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

3. (a) Each entity subject to the provisions of this article, within [~~five~~] ten business days of the receipt of a [~~written request for a record reasonably described~~] record or records request, shall make such record or records available to the [~~person requesting it, deny such request in writing~~] requestor or 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 or records will be determined in accordance with subdivision five of this section. Such acknowledgement shall include:

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

days from receipt of the original request, and advising if exceptions will apply, 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; or

ii. 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, and advise if exceptions will apply.

iii. In the event that the agency determines it cannot grant access to any of the requested record or records: (A) a statement of determination that access to the requested record or records cannot be granted because the request was made to the wrong agency; (B) a statement of determination that access to the requested record or records cannot be granted because the request is too vague; or (C) a statement of determination that access to the requested record or records cannot be granted because the record or records do not exist.

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

(c) An agency shall not deny a request on the basis that the request is voluminous or that locating, generating, 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.

(d) An agency may require a person requesting lists of names of natural persons and residential 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.~~]

(e) 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.

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

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

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

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

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

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

iii. The committee on open government shall maintain the confidentiality of any record provided under this subdivision.

iv. A person or agency may not be civilly or criminally liable for providing a record to the committee on open government under this subdivision.

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

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

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

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

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

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

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

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

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

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

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

~~(c)~~] **(d)** The court in such a proceeding: (i) [~~may~~] **shall** assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section [~~in which such person has substantially prevailed, and~~] when the agency failed to respond to a request or appeal within the statutory time; [~~and~~] (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access**; and (iii) shall assess, against such requestor involved, reasonable attorney's fees and other litigation costs reasonably incurred by an agency in any case under the provisions of this section in which the court finds that the requestor's records request or pattern of records requests is frivolous, vexatious, or made in bad faith**.

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

(ii) An appeal from an agency taken from an order of the court requiring disclosure of any or all records sought:

(A) shall be given preference;

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

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

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

§ 5. This act shall take effect immediately.