NEW YORK STATE OF OPPORTUNITY. | Adirondack Park Agency

LEILANI CRAFTS ULRICH
Chairwoman

TERRY MARTINO
Executive Director

MEMORANDUM

TO: James Townsend, Counsel

FROM: Paul Van Cott, Associate Attorney

DATE: September 30, 2015

RE: Proposed Rule Making - FOIL Rules (9 NYCRR § 587.1)

For consideration, please find enclosed a draft proposal to replace APA's existing Freedom of Information Law ("FOIL") rules in 9 NYCRR § 587.1. A red-lined version of § 587.1 with some brief explanatory comments is also enclosed. We have consulted with the Committee on Open Government ("COOG") in our drafting of these rules. Staff seek reaffirmation of the Agency's June 2014 direction to staff to proceed with a formal rule making. Prior to taking that step, staff will again seek input on the proposed rules from the Local Government Review Board, other key stakeholders and the Division of Budget, and will advise you of any material comments that we receive.

Goal of proposed rulemaking: *To eliminate Agency FOIL rules that duplicate requirements and procedures of Article 6 of the Public Officers Law and COOG's FOIL rules in 21 NYCRR Part 1401.*

Statutory/Regulatory Context: FOIL is set forth in Article 6 of the Public Officers Law ("POL"). The statute empowers the Committee on Open Government to adopt rules for the administration of FOIL, which it has done in 21 NYCRR Part 1401.

Other agencies and local governments, including APA, are required by FOIL to adopt rules that conform to FOIL and the rules set forth in 21 NYCRR Part 1401.

Draft Proposal

This draft proposal seeks to replace existing § 587.1 in its entirety to achieve the goal described above. As currently written, most of § 587.1 is duplicative of FOIL and/or COOG's rules, or no longer conforms to FOIL due to changes to the law that have occurred since § 587.1 became effective in 1979. The draft proposal is intended to ensure conformance with FOIL and COOG's rules without duplication of those requirements and procedures, by limiting Agency FOIL regulations to those specifically necessary for the Agency's implementation of FOIL.

Enclosures

Section 587.1 is repealed and a new section 587.1 is adopted to read as follows:

587.1 Access to Agency Records:

(a) *Purpose.* The Agency shall provide access to records in conformance with the requirements and procedures set forth in article 6 of the Public Officers Law, entitled "Freedom of Information Law," and its implementing regulations in 21 NYCRR Part 1401. This section provides regulations specific to the Agency's responsibilities under the Freedom of Information Law.

(b) *Records access officer.* One or more designated project administrators shall be the Agency's records access officer(s). The business address of the records access officer(s) is at the Adirondack Park Agency, PO Box 99, Ray Brook, NY 12977. The record access officer(s) shall coordinate the Agency's response to requests for access to records.

(c) *Availability of records.* Records may be requested electronically at FOIL@apa.ny.gov or shall be available for public inspection and copying at the Adirondack Park Agency, 1133 NYS Route 86, Ray Brook, New York 12977.

(d) *Hours for public inspection.* Requests for public access to records shall be accepted and records produced during all hours that the Agency is regularly open for business. Except on State holidays, or during weather or other emergencies, these hours are 8:30 a.m. to 5:00 p.m., Monday through Friday.

(e) *Trade Secrets.* A person submitting records to the Agency may identify information therein for which an exception from disclosure is requested. The records access officer(s) shall identify the person(s) within the Agency who shall have custody and/or access to such information and the manner of safeguarding against unauthorized

access to such information until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(f) *Appeal of denial of access to records.* Any person denied access to records, or denied a requested exception from disclosure of records, in whole or in part, may appeal in writing to the Agency's Counsel. The business address of the Agency's Counsel is P.O. Box 99, Ray Brook, New York 12977.

PART 587
ACCESS TO AGENCY RECORDS; OPEN MEETINGS; CONFLICTS OF INTEREST

(Statutory authority: Executive Law, § 804[9]; Public Officers Law, §§ 87[1][b], 95, 104[3])

Sec.

587.1 Access to agency records
587.2 Open meetings
587.3 Conflicts of interest
587.4 Ex parte communications prohibited

§ 587.1 Access to agency records.

~~(a) *Purpose and scope.* This section provides information concerning the availability of agency records for public inspection and copying pursuant to the Freedom of Information Law (Public Officers Law, article 6).~~

~~(b) *General rule.* The agency shall, in accordance with this section and the regulations of the Committee on Public Access to Records (21 NYCRR Part 1401), furnish to the public the information and records required by the Freedom of Information Law. This section does not limit or abridge any right to access to records granted by law.~~

Comment [PTV1]: Now the Committee on Open Government.

Comment [PTV2]: These subdivisions are proposed to be combined and rewritten to make clear that FOIL and 21 NYCRR Part 1401 govern

~~(c) *Definitions.* As used in this section:~~

~~(1) *Record* means any information kept, held, filed, produced or reproduced by, with or for the agency, 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.~~

~~(2) *Statistical tabulation* means a collection or orderly presentation of numerical data logically arranged in columns and rows or graphically. Opinions, policy options and recommendations do not constitute statistical tabulations.~~

~~(3) *Factual tabulation* means a collection of statements of objective information logically arranged and reflecting objective reality, actual existence or an actual occurrence. Opinions, policy opinions and recommendations do not constitute factual tabulations.~~

Comment [PTV3]: This subdivision is proposed to be deleted. "Record" is defined in FOIL and the other two terms – which appear in FOIL - are unnecessary to define.

~~(d) *Designation of records access officer.* (1) The project administrator of the agency or, in his absence, any member of the agency legal staff except the counsel, shall be records access officers. The business address of the records access officer is P.O. Box 99, Ray Brook, New York 12977. It shall be his duty to respond to public requests for access to records. The designation of the records access officer(s) shall not be construed to prohibit agency personnel who have in the past been authorized to make records or information available to the public from continuing to do so.~~

(2) The records access officer will assure that agency personnel:

(i) maintain the up-to-date subject matter list required by section 87(3) of the Public Officers Law;

(ii) assist the person inquiring in identifying requested records, if necessary;

(iii) upon locating the records, take one of the following actions pursuant to the procedures set forth in this section:

(a) make records available for inspection; or

(b) deny access to the records in whole or in part and explain in writing the reasons for such action pursuant to subdivision (i) of this section;

(iv) upon payment or offer to pay the fees set forth in subdivision (j) of this section:

(a) make a copy available; or

(b) permit the person inquiring to copy such records; and

(c) upon request, certify that a record is a true copy;

(v) upon failure to locate records, certify that:

(a) the agency is not the custodian for such records; or

(b) the records of which the agency is a custodian cannot be found after diligent search.

(e) *Location.* The location where records shall be available for public inspection and copying is: Agency Headquarters, Route 86, Ray Brook, New York 12977.

(f) *Hours for public inspection.* (1) Requests for public access to records shall be accepted during all hours the agency is regularly open for business. Except on State holidays, or during weather or other emergencies, these hours are 8:30 a.m. to 5:00 p.m., Monday through Friday.

(2) Records may be copied during regular business hours on all business days to the extent possible in view of priority copying requirements involving regular agency responsibilities. If necessary, copying may be relegated to the early evening hours or by appointment on weekends.

Comment [PTV4]: This subdivision is proposed to be rewritten to rely on FOIL and 21 NYCRR § 1401.2 for non-Agency specific requirements and procedures.

Comment [PTV5]: This subdivision is proposed to be rewritten to include reference to electronic requests.

Comment [PTV6]: This subdivision is proposed to be rewritten to be more consistent with FOIL.

~~(g) *Requests for public access to records.* (1) Normally, records will be available upon oral request, but where necessary to the orderly conduct of business, the agency may require that a request be made in writing or upon a standard form.~~

~~(2) A request shall reasonably describe the record or records sought. Whenever possible, a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought.~~

~~(3) The agency shall respond to any written request reasonably describing the record or records sought within five business days after receipt.~~

~~(4) If the agency does not provide or deny access to the record sought within five business days after receipt of a written request, it shall furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with section 89(5) of the Public Officers Law relative to trade secrets. Failure of the agency to grant or deny access to records within 10 business days after the date of acknowledgment of receipt of a request may be construed as a denial of access and may be appealed as provided in subdivision (i) of this section.~~

~~(5) The records access officer, in his discretion, may waive compliance with any formality required by this section.~~

Comment [PTV7]: This subdivision is proposed to be deleted as duplicative of and not in conformance with 21 NYCRR § 1401.5 of FOIL § 89(3) per laws of 2008.

~~(h) *Required records.* The agency shall maintain:~~

~~(1) a record of the final vote of each member in every agency proceeding;~~

~~(2) a record setting forth the name, public office address, title and salary of every officer or employee of the agency;~~

~~(3) a current list, by subject matter, of all records in its possession, sufficiently detailed to permit identification of the category of the record sought, whether or not available pursuant to the Freedom of Information Law. This list shall be updated not less than twice per year.~~

Comment [PTV8]: This subdivision is proposed to be deleted as duplicative of and non-conforming 21 NYCRR § 1401.6 and FOIL § 87(3)(c), per laws of 2009.

~~(i) *Denial of access to records.* (1) The agency may deny access to records or portions thereof that:~~

~~(i) are exempted from disclosure by State or Federal statute [or judicial decision];~~

~~(ii) if disclosed, would constitute an unwarranted invasion of personal privacy pursuant to section 89(2) of the Freedom of Information Law;~~

~~(iii) are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject~~

~~enterprise;~~

~~(iv) are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or otherwise come within the exemptions of section 87(2)(e) of the Freedom of Information Law;~~

~~(v) are interagency or intra agency materials which are not:~~

~~(a) statistical or factual tabulations or data;~~
~~(b) instructions to staff that affect the public; or~~
~~(c) final agency policy or determinations; or~~

~~(vi) are otherwise exempt pursuant to section 87(2) of the Freedom of Information Law.~~

~~(2) The agency counsel shall determine appeals regarding denial of access to records under the Freedom of Information Law.~~

~~(3) Denial of access shall be in writing, stating the reason for denial and advising of the right to appeal to the counsel.~~

~~(4) Failure of the agency to respond to a request within five business days after receipt, as required by subdivision (g) of this section, shall be deemed a denial of access by the agency.~~

~~(5) Except as provided in section 89(5) of the Public Officers Law relative to trade secrets, any person denied access to records may appeal within 30 days after receipt of notice of the denial. If the denial is by mail, the 30 day period shall commence to run on the fifth day following the mailing of notice of denial.~~

~~(6) The time for deciding an appeal shall commence upon receipt of a written appeal, identifying:~~

~~(i) the date and location of a request for records;~~

~~(ii) the records that were denied; and~~

~~(iii) the name and return address of the appellant.~~

~~(7) The agency shall, upon receipt, transmit copies of all appeals to the Committee on Public Access to Records.~~

~~(8) Agency counsel shall inform the appellant and the Committee on Public Access to Records of his determination, in writing, within seven business days after receipt of an appeal. He shall either:~~

~~(i) fully explain the reasons for further denial and inform the person inquiring that the~~

denial is subject to court review as provided for in article 78 of the Civil Practice Law and Rules; or

(ii) provide access to the record sought.

Comment [PTV9]: This subdivision is proposed to be deleted as duplicative of and not in conformance with FOIL and 21 NYCRR § 1401.7 per the laws of 1987, 1999, 2001 and 2010.

(j) *Trade secrets.* (1) A person who submits any information to the agency may, at the time of submission, request that the agency except such information from disclosure under section 87(2)(d) of the Freedom of Information Law. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.

(3) Information submitted pursuant to paragraph (1) of this subdivision shall be excepted from disclosure and be maintained by the agency's project administrator in a locked drawer, apart from all other records, until 15 days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(4) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(i) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;

(ii) permit the person who requested the exception, within 10 business days after receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;

(iii) within seven business days after receipt of such written statement, or within seven business days after the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the Committee on Public Access to Records.

(5) A denial of an exception from disclosure under paragraph (4) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting this record in accordance with this paragraph.

(i) Within seven business days after receipt of written notice denying the request, the person may file with the agency counsel a written appeal from the determination.

(ii) The agency counsel shall determine the appeal within 10 business days after receipt. Written notice of the determination containing the reasons therefor shall be served upon

the person, if any, requesting the record, the person who requested the exception and the Committee on Public Access to Records.

(6) A proceeding to review an adverse determination pursuant to paragraph (5) of this subdivision may be commenced pursuant to article 78 of the Civil Practice Law and Rules, and must be commenced within 15 days after the service of the written notice containing the adverse determination.

(7) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.

(8) Where the agency denies access to a record pursuant to this subdivision, the agency shall have the burden of proving that the record falls within the provisions of such exception.

(9) Nothing in this subdivision shall be construed to deny any person access, pursuant to this section or the Freedom of Information Law, to the record or part excepted from disclosure upon the written consent of the person who had requested the exception.

Comment [PTV10]: This subdivision is proposed to be rewritten and to rely on FOIL § 89. It is duplicative and of FOIL § 89 and does not conform to that section per the laws of 2003.

(k) *Fees.* (1) There shall be no fee charged for inspection of records, search for records, or any certification pursuant to this section.

(1) (i) The agency may provide copies of records without charging a fee; or

(ii) The agency will charge the following fee for copies of records:

(a) 25 cents per page for photocopies not exceeding 9 by 14 inches through the 10th page copied;

(b) 20 cents per page for the 11th through the 50th page copied; and

(c) 15 cents per page thereafter.

(3) In the case of records not capable of being copied on regular agency facilities, the agency may, at the option of the person inquiring:

(i) prepare a transcript, in which case there will be a charge for the clerical time involved, in addition to the fee set forth in this subdivision; or

(ii) reproduce the records using available commercial facilities, in which case the fee will be the cost to the agency.

(4) The fee for copies of records not covered by paragraphs (1) through (3) of this subdivision shall not exceed the actual reproduction cost, which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries.

~~(l) *Public notice*. The agency shall post in a conspicuous location:~~

~~(1) the location where records shall be made available for inspection and copying;~~

~~(2) the names, titles, business addresses and business telephone numbers of the records access officers designated in subdivision (d) of this section;~~

~~(3) the right to appeal, by any person denied access to a record, and the name and business address of the counsel, to whom an appeal is to be directed.~~

Comment [PTV11]: This subdivision is proposed to be deleted as duplicative of and not in conformance with FOIL per laws of 2008