



Adirondack Park Agency

LEILANI CRAFTS ULRICH
Chairwoman

TERRY MARTINO
Executive Director

MEMORANDUM

TO: Terry Martino

FROM: James Townsend, Counsel

DATE: May 4, 2016

RE: Rulemaking – Freedom of Information Law

Please find attached a revised rule for the Adirondack Park Agency's implementation of the Freedom of Information Law (FOIL). Staff have incorporated comments from the Committee on Open Government (COG) into the revised rule. Staff request Agency permission to initiate a formal rulemaking for the revised rule, including obtaining prior approval from the Executive Chamber. A draft resolution is attached for the Agency's consideration.

The revised rule responds to comments provided to Agency staff by three members of the New York State Assembly during the public comment period for the proposed consensus rule. A copy of their comment letter is attached. Due to these comments, the proposed consensus rule must be withdrawn in favor of a formal rulemaking process.

Staff had developed the original draft rule with input from COG. That agency complimented the brevity of staff's draft rule and indicated that it met the substantive requirements of FOIL.

The Agency proposed the draft as a consensus rule after obtaining constructive feedback and support on the rule from Adirondack local government and environmental representatives. The Adirondack Council, Adirondack Mountain Club, Adirondack Wild and Protect! submitted a joint letter offering several technical changes that staff incorporated into the consensus rule.

In their comment letter on the consensus rule, the Assembly members suggested clarification of the different appeal processes applicable to denials of (1) requests for access to records and (2) requests for exceptions to disclosure. This clarification is provided in subdivision (g) of the revised rule, and was reviewed by COG.

The Agency's proposed consensus rule did not include a subdivision on fees applicable to FOIL requests, relying instead on the provisions regarding fees in COG's rules that the Agency is required to follow. To respond to the comment of the Assembly members on this omission, staff have added a subdivision on fees that underscores a policy of encouraging electronic responses to FOIL requests by not charging fees and retaining the Agency's discretion to charge fees for large numbers of hard copies and for large documents. This rule conforms with COG's requirements.

Finally, the Assembly members noted that the Agency's existing rules are more open to oral requests for documents; the proposed consensus rule provided that oral requests may be accepted in staff's discretion. We have modified this language slightly in the revised draft. Our more discretionary approach to oral requests is acceptable to COG and is not inconsistent with COG's model FOIL rule. The longstanding staff practice of accepting oral requests when documents are readily available, such as requests for a specific permit, will continue under the revised rule.

Written FOIL requests make it easier for staff to track the large volume of requests the Agency receives, and to ensure that timely and accurate responses are provided. Submitting written requests is simple for the public. Short emails suffice and forms are available on our website and at the front desk.

Finally, the revised rule incorporates the substance, but not the precise language, of the technical changes offered by the environmental groups on staff's original draft rule. Two of those changes prompted comments from the Assembly members which are addressed in the revised rule. Generally, the environmental groups had asked for specific references to COG's rules in what became the proposed consensus rule. In this revised rule, staff continue to include a number of references to COG's rules in response to the comments from the environmental groups.

With these changes, the revised rule still advances the goals of updating the Agency's FOIL rules to eliminate requirements that duplicate those already set forth in FOIL and COG's rules in 21 NYCRR Part 1401. The revised rule will make it easier for the Agency to keep its FOIL rules current in the future, while maintaining the Agency's strong policy of openness and accessibility to the public.

JTT:mp
Attachments

WHEREAS, Executive Law §§ 804(9) and 809(14), and Public Officers Law Article 6 (FOIL) empower the Adirondack Park Agency (Agency) to adopt, amend and repeal rules and regulations; and

WHEREAS, the State Administrative Procedure Act (SAPA) governs any rule making undertaken by the Agency; and

WHEREAS, SAPA § 202 requires the Agency to submit a notice of proposed rulemaking to the Secretary of State for publication in the State Register and to afford the public an opportunity to comment on the proposed rule; and

WHEREAS, the Agency seeks to repeal and replace its regulations in 9 NYCRR § 587.1 pertaining to Agency implementation of FOIL; and

WHEREAS, SAPA § 201-a(2)(a) does not require a job impact statement for the proposed rule, because it will not have any measureable impact on jobs and employment opportunities and does not place any new or increased regulatory burden on any person; and

WHEREAS, SAPA §§ 202-a, 202-b, and 202-bb requires the Agency to develop and issue a regulatory impact statement, a regulatory flexibility analysis and a rural area flexibility analysis for any rule proposed for adoption; and

WHEREAS, the proposed rule is a Type II State Environmental Quality Review Act action pursuant to 9 NYCRR § 586.5(b) because it does not effect substantive change in Agency jurisdiction or project review procedures.

NOW, THEREFORE, BE IT RESOLVED that:

- I. Pursuant to SAPA § 202, Agency staff shall submit a notice of proposed rulemaking for the proposed rule accompanying this resolution to the Secretary of State for publication in the State Register and shall hold public hearings on the proposed rule and afford the public a 45-day period to submit comments on the proposed rule. Prior to submission of the notice of proposed rulemaking to the Secretary of State, Agency staff shall obtain approval of the proposal from the Executive Chamber. The Executive Director may make non-substantive or technical changes to the proposed rule based on those consultations.
- II. For purposes of complying with SAPA, Agency staff shall develop and issue with the notice of proposed rulemaking a draft job impact statement, regulatory impact statement, regulatory flexibility analysis and rural area flexibility analysis.

Resolved and adopted by the Agency on this 13th day of May, 2016.

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 those authorities. Additional information about the agency's implementation of the Freedom of Information Law is on the agency's website at www.apa.ny.gov.

(b) Records access officer. One or more designated project administrators shall be the agency's records access officer(s) with the responsibilities set forth herein and in 21 NYCRR Part 1401. The business address for the records access officer is: Adirondack Park Agency, P.O. Box 99, Ray Brook, New York 12977, and the email address is: FOIL@apa.ny.gov. In the absence of the records access officer, any agency attorney except the counsel may be designated to serve in that capacity.

(c) Requests for access to records. Requests for access to records may be submitted to the agency in writing by email, mail or in person. Record request forms are available at the Adirondack Park Agency, 1133 NYS Route 86, Ray Brook, New York and on the agency's website at www.apa.ny.gov. Oral requests for access to records may also be allowed, although the agency may require a written request. The agency shall respond to requests for access to records in conformance with 21 NYCRR Part 1401. The agency will provide requested records by email or mail, or make them available for inspection at the Adirondack Park Agency, 1133 NYS Route 86, Ray Brook, New York.

(d) Hours for public inspection. The agency shall accept requests for access to records

and produce records during all regular business hours. Except on State holidays, or during weather or other emergencies, regular business hours are 8:30 a.m. to 5:00 p.m., Monday through Friday.

(e) Fees. (1) No fee will be charged for electronic copies of records; (2) Fees of 25 cents per page may be charged for photocopies of more than fifty pages of records not exceeding 9 by 14 inches in size; and (3) Other fees may be charged for the actual cost of reproducing records in accordance with 21 NYCRR Part 1401.

(f) Requests for exceptions from disclosure of records. Requests for exceptions from disclosure of records shall be governed by section 89(5) of the Freedom of Information Law. A person submitting records to the agency may identify information therein for which an exception from disclosure is requested pursuant to that section and shall specify the facts, in reasonable detail, supporting the request. The records access officer 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.

(g) Appeals. Appeals shall be governed by the Freedom of Information Law or 21 NYCRR Part 1401, as applicable. 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 Adirondack Park Agency, P.O. Box 99, Ray Brook, New York 12977.



THE ASSEMBLY
STATE OF NEW YORK
ALBANY

April 15, 2016

Paul Van Cott
Associate Attorney
Adirondack Park Agency
P.O. Box 99
Ray Brook, NY 12977

Dear Mr. Van Cott:

The Adirondack Park Agency recently proposed amendments to conform its rules on access to agency records to the Freedom of Information Law (FOIL) and the implementing regulations of the Committee on Open Government (*State Register* I.D. #APA-09-16-00005-P). We agree that the Agency's current rules on access to records require updating: except for correcting one typographical error, it has been over thirty years since they were last amended. However, in contrast with statutory and regulatory requirements, the text of the current proposal contains significant errors and omissions that may actually diminish the public's access to records. As a result, we object to the adoption of this consensus rule for the following reasons.

The proposal repeals existing 9 NYCRR §587.1 and adds a new §587.1. Proposed subdivision (f) sets forth an appeal process which is made applicable to both denials of access to records and denials of a request to except certain information filed with the agency, such as trade secrets, from disclosure. The proposed rule provides that in both cases the "rules applicable to an appeal shall be those set forth in 21 NYCRR §1401.7."

These rules of the Committee on Open Government are applicable to appeals of denied requests for access to records, but do not apply to appeals of denials of requests for exceptions from disclosure. In Public Officers Law §89(5)(c), a separate appeals process is set forth for such denials (as well as for denials of access where an exception from disclosure is involved) with a shorter window to appeal (7 days instead of 30 days). In its current rules the Agency recognized this by referencing the two separate appeals processes. The proposed appeal provisions do not account for these statutory requirements, and could result in confusion or impede or delay public access to records.

The notice indicates the Agency's intent to limit duplication by only adopting those regulations that are specifically necessary to implementing FOIL. However, one provision that was excised is explicitly required by FOIL. Public Officers Law §87(1) (b)(iii) requires an agency's FOIL rules to include "the fees for copies of records." The proposal does not contain any reference to fees.

Currently, §587.1(k) states that the Agency may provide copies without charging a fee, or may charge fees for copies under a volume-based schedule: 25¢ per page for the first 10 pages, 20¢ per page for the 11th-50th pages and 15¢ per page thereafter. This fee policy is more favorable to public accessibility than the straight 25¢/page maximum fee under FOIL. It is unclear whether the Agency intends to raise its fees, maintain the current schedule or eliminate any copying fees. This omission deprives the public of the opportunity to make meaningful comments on this important aspect of FOIL.


Other parts of the proposal remove current language that facilitates accessibility of records. Currently the rules provide that records will normally be available upon oral request: this language is weakened to provide only that oral requests may be accepted at the discretion of the records access officer. Current language providing that the records access officer may waive compliance with any formality required by the rules is deleted. These provisions may be permissible as they do not appear in FOIL or the Committee's regulations. Nevertheless, removing them from the Agency's regulations would only lessen the public's ability to access records.

As a result of objections, a proposed consensus rule must be withdrawn. Before proposing any new version of rules updating §587.1, we urge the Authority to review the Committee on Open Government's regulations and its model FOIL rules for public agencies. Any new proposal should also clearly indicate the policy changes the Agency intends to make and its reasons for wanting to do so. Please feel free to contact us if you have any questions on the issues addressed in this letter.

Very truly yours,



Steve Englebright
Member of Assembly
Chair
Assembly Standing Committee
on Environmental Conservation



Crystal D. Peoples-Stokes
Member of Assembly
Chair
Assembly Standing Committee
on Governmental Operations



Kenneth P. Zebrowski
Member of Assembly
Assembly Chair
Administrative Regulations
Review Commission

cc: Robert Freeman, COG