

DEPARTMENT OF TRANSPORTATION

OFFICE OF THE SECRETARY

Statutory Authority: 29 Delaware Code, Chapter 100 (29 **Del.C.** Ch. 100)
2 **DE Admin. Code** 2101

FINAL

ORDER

2101 Freedom of Information Act (FOIA)

The proposed Freedom of Information Act (FOIA) Regulations establish the procedures the Department of Transportation will follow in responding to requests for information and documents from the public under the Freedom of Information Act (29 **Del.C.** Chapter 100). The Department published the proposed regulations with a notice seeking public comment in the June 1, 2008 edition of the Delaware Register of Regulations. The comment period remained open through June 30, 2008. No comments were received.

Summary of the Evidence and Information Submitted

Although no comments were received on the document as published, an internal review of the document prompted the following minor changes; none of which the Department considers as substantive:

1. Unnecessary periods removed from some subsection numbers.
2. Unnecessary underlining removed from subsection 5.2.
3. The first line in Section 6, Requests for Confidentiality was changed from "A person may request records or portions of records submitted to the Department that are confidential." To "A person may request that records or portions of records submitted to the Department be treated as confidential." The purpose of this change was to clarify the intent of the section.

Findings of Fact

Based on Delaware Law and the record in this docket, I make the following findings of fact:

1. The proposed regulations meet the requirements of the Administrative Procedures Act and are not in conflict with Delaware Law.
2. The adoption of these regulations is in the best interest of the State of Delaware.

Decision and Effective Date

Based on the provisions of 29 **Del.C.** Chapter 100 and the record in this docket, I hereby adopt the Freedom of Information Act Regulations as set forth in the version attached hereto, to be effective on August 12, 2008.

IT IS SO ORDERED THIS 16TH DAY OF JULY, 2008.

Jennifer Cohan, Acting Secretary
Delaware Department of Transportation

2101 Freedom of Information Act (FOIA)

1.0 Purpose

The purpose of this regulation is to prescribe procedures relating to the inspection and copying of public records retained by the Department of Transportation ("the Department") pursuant to 29 Del.C. Chapter 100, the Freedom of Information Act ("FOIA"). It is the Department's goal in establishing this regulation to maximize the amount of information available to the public, establish a reasonable fee structure for copying public records, and to streamline procedures used to disseminate this information.

This regulation applies to the Department in dealing with requests from the public for information as set forth in the Freedom of Information Act. This regulation does not apply to the Department in its normal course of business with Federal, State, or local agencies, nor to private parties (corporate or individual) with whom the Department is conducting business (permit, contractual agreement, licenses, etc.), provided the public records are germane to the business being conducted. Record requests handled under 21 Del.C. §305 are also not covered by these regulations.

A new and integral part of the FOIA regulation is a procedure outlined to address the confidential treatment of information submitted to the Department. This confidentiality procedure is a necessary part of the FOIA regulation, in that any information submitted to the Department is subject to public review unless deemed to be confidential by the Secretary in accordance with Delaware Code and the criteria and procedures established in this regulation.

It is the intent of the Department, as well as the State of Delaware, that public business be performed in an open and public manner so that the citizens will have the opportunity to be advised of the performance of Department officials and of their decisions. In accordance with Delaware's FOIA laws, the public has the right to "reasonable access" to public records. FOIA provides that it shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records. All requests for information made pursuant to FOIA shall be processed in the manner prescribed below.

2.0 Definitions

"Confidential information" means information determined by the Secretary to constitute a trade secret, or commercial or financial information which is of a confidential nature.

"Department" means the Department of Transportation of the State of Delaware.

"Requestor" shall mean any individual, organization or business that submits a request for information under the Delaware Freedom of Information Act.

"Responsible Official" means:

For a Corporation: A President, Vice-President, Secretary, or Treasurer of the corporation or any other person who performs similar policy or decision making functions for the corporation, or a duly authorized representative of such person approved in advance by the Department including a successor in interest to one of these persons if the Department is notified in writing of the substitution of the party.

For a Partnership or Sole Proprietorship: A general partner or the proprietor, respectively, or the delegation of authority to a representative approved in advance by the Department including a successor in interest to one of these persons if the Department is notified in writing of the substitution of the party.

For a Municipality, State, Federal, or other public agency: Either a principal executive officer or ranking elected official including a successor in interest to one of these persons if the Department is notified in writing of the substitution of the party.

"Secretary" means the Secretary of the Department of Transportation or the Secretary's designee.

"Trade Secret" means a formula, pattern, device or compilation of information which may be used to obtain competitive advantage over others.

3.0 Availability of Records

3.1 Access

3.1.1 The Department will provide reasonable access and facilities for reviewing public records during regular business hours.

3.1.2 The Department shall make all requested records available for review by requestor unless such records or portions of records are determined by the Secretary to be confidential in accordance with Section 6 of this regulation or otherwise exempted from disclosure as records deemed non-public pursuant to 29 Del.C. §10002(g).

3.1.3 The Department reserves the right to deny any request in part or in full which does not comply with the Form of Request procedures pursuant to Section 4.1 of this regulation and/or the provisions of the Freedom of Information Act, as amended.

3.2 Department Records Review

3.2.1 Prior to disclosure, records will be reviewed to insure that those records or portions of records deemed non-public are removed.

3.2.2 Upon request, the Department will provide a log of records which may have been deemed non-public. The log will include the following information:

3.2.2.1 The document's author;

3.2.2.2 The addressee;

3.2.2.3 The date of the document;

3.2.2.4 The title of the document or a brief explanation of the document's contents; and

3.2.2.5 The statutory exemption.

3.2.3 The types of records deemed non-public are as contained in 29 Del.C. §10002(g).

3.2.4 Departmental regulations, brochures, pamphlets, informational bulletins, and other such information are not subject to this regulation.

4.0 Record Request and Response Procedures

4.1 Form of Request

4.1.1 Requests for access to records shall be made in writing to the Department's Director of Public Relations. The request shall adequately describe the records sought in sufficient detail to enable the Department to locate the records with reasonable effort. The Department shall make reasonable effort to assist the requestor in identifying the record being sought. Responses will be coordinated between the Office of Public Relations and the Office of Legal Affairs. The request may be denied in part or in full and returned to the requestor for the following reasons:

4.1.1.1 The request does not adequately describe the records; or

4.1.1.2 The request requires the Department to perform research or to assemble information that has not been compiled; or

4.1.1.3 The request is overly broad. For example, a request for all email records of a state employee or department would be overly broad. The request should be limited to a particular subject, time frame, and/or recipient/sender.

4.2 Department Response to Requests

4.2.1 The Department shall make reasonable effort to determine within ten (10) business days after the receipt of a request whether it can fulfill the request. The actual disclosure of records shall follow promptly thereafter.

4.2.2 If the Department denies a request in whole or in part, the Department shall indicate to the requestor the reasons for the denial.

4.3 Reproduction of Records

4.3.1 The copying of any requested public records may be performed by Department personnel and may be provided to the requestor as follows:

4.3.1.1 If 25 pages or less are requested to be copied, the Department may, if time and personnel are available, make the copies at the time of the review. If personnel are not available, the Department may arrange to copy and mail the records to the requestor. In the alternative, the requestor may elect to pick up copies during regular business hours and submit payment at that time.

- 4.3.1.2 If over 25 pages are requested to be copied the Department may arrange to copy and mail the records to the requestor. In the alternative, the requestor may elect to pick up copies during regular business hours and submit payment at that time.
- 4.3.1.3 If over 250 pages are requested to be copied, the requestor may be required to bring in both copier and personnel to make the desired copies.
- 4.3.1.4 Fragmentation of requests, in order to circumvent the 250 page limit, shall not be allowed.
- 4.3.1.5 The Department shall have discretion based on circumstances involved to make decisions regarding copying.

5.0 Fees

5.1 Administrative Fees:

5.1.1 Charges for administrative fees include:

5.1.1.1 Staff time associated with processing FOIA requests will include:

- 5.1.1.1.1 Locating and reviewing files;
- 5.1.1.1.2 Monitoring file reviews;
- 5.1.1.1.3 Generating computer records (electronic or print-outs);
- 5.1.1.1.4 Preparing logs of records deemed non-public; and
- 5.1.1.1.5 Other work items as necessary per request.

5.1.2 Calculation of Administrative Charges: Administrative charges will be calculated as follows:

- 5.1.2.1 Administrative charges will be billed to the requestor per quarter hour. These charges will be billed at the current, hourly pay grade rate, plus benefits (pro-rated for quarter hour increments) of the personnel performing the service. Administrative charges will be in addition to any copying charges.
- 5.1.2.2 Appointment Rescheduling/Cancellation - Requestors who do not reschedule or cancel appointments to view files at least one full business day in advance of the appointment may be subject to the administrative charges incurred by the Department in preparing the requested records. The Department will prepare an itemized invoice of these charges and mail to the requestor for payment.

5.2 Photocopying Fees - The following are charges for photocopies of public records made by Department personnel:

5.2.1 Standard Sized, Black and White Copies

The charge for copying standard sized, black and white public records shall be \$0.25 per sheet. This charge applies to copies on the following standard paper sizes:

- 8.5" x 11"
- 8.5" x 14" and
- 11" x 17"

5.2.2 Oversized Copies/Printouts

The charge for copying oversized public records (including, but not limited to: blueprints, engineering drawings, GIS print-outs, and maps) shall be as follows:

- 18" x 22" \$2.00 each
- 24" x 36" \$3.50 each

5.2.3 Color Copies/Printouts

The charge for standard sized, color copies or color printouts shall be \$0.25 per sheet. This charge applies to copies on the following standard paper sizes:

8.5" x 11"

8.5" x 14" and

11" x 17"

5.2.4 Microfilm and/or Microfiche Printouts

Microfilm and/or microfiche printouts, made by Department personnel on standard sized paper, will be calculated at \$0.25 per printed page.

5.2.5 Electronically Generated Records

Charges for copying records maintained in an electronic format will be calculated by the material costs involved in generating the copies (including, but not limited to: magnetic tape, diskette, or compact disc costs) and administrative costs.

5.2.5.1 In the event that requests for records maintained in an electronic format can be electronically mailed to the requestor, only the administrative charges in preparing the electronic records will be charged.

5.2.6 Other Copying Fees

The Department, at its discretion, may arrange to have records copied by an outside contractor if the Department does not have the resources or equipment to copy such records. In this instance, the requestor will be liable for payment of these costs.

5.3 Exemptions

5.3.1 The first \$25.00 in FOIA charges shall be waived for not-for-profit organizations working in the public interest on the condition that such organizations provide, along with their FOIA request, proof of tax-exempt status and a signed affidavit from an officer or the governing body of the organization which indicates that the requestor is authorized to request the information on behalf of the organization.

5.4 Payment

5.3.1 Payment for copies and/or administrative charges will be due at the time copies are released to the requestor. The Department reserves the right to refuse to make copies for requestors who have outstanding balances.

5.3.2 The Department may require pre-payment of copying and administrative charges prior to mailing copies of requested records and/or in preparing logs of records deemed non-public.

6.0 Requests for Confidentiality

~~[A person may request records or portions of records submitted to the Department that are confidential.]~~ **A person may request that records or portions of records submitted to the Department be treated as confidential.** Certain information may be determined confidential if its disclosure could potentially cause substantial competitive harm to the person or business from whom the information was obtained.

The following section sets forth procedures and criteria by which the Department will determine confidentiality of records or portions of records.

6.1 Procedure

6.1.1 In order for the Department to make a determination that information submitted is of a confidential nature, and therefore to be afforded confidential status, a request must be made in writing to the Secretary at the time the record is submitted. The request shall provide substantiation (following guidelines in 29 Del.C. §10002(g)) for the allegation that the information should be treated as confidential.

The request shall contain the following information:

- 6.1.1.1 The measures taken to guard against undesired disclosure of the information to others;
- 6.1.1.2 The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
- 6.1.1.3 Whether disclosure of the information would be likely to result in substantial harmful effects on their competitive position, and if so, what those harmful effects would be, why the effects should be viewed as substantial, and an explanation of how the disclosure would cause such harmful effects; and
- 6.1.1.4 Verification that significant effort or money has been expended in developing the information.

6.1.2 The following information shall be submitted:

- 6.1.2.1 Two public versions of the entire package of information that is submitted for determination, with alleged confidential information redacted (this version will be made available for public review).
The public versions shall correspond page for page with the confidential versions, with the confidential portions having been redacted;
- 6.1.2.2 Two confidential versions of the entire package of information that is submitted for determination, that includes the alleged confidential information (this version will be used internally for technical review); and
- 6.1.2.3 Certification through a separate, notarized affidavit that the information is either trade secret, or commercial/financial information that is of a confidential nature. The affidavit will be signed by the Responsible Official.

6.1.3 The burden lies with the party asserting the claim of confidentiality. A unilateral assertion that a record is confidential is insufficient evidence to support the Secretary in making a determination of confidentiality pursuant to this privilege.

6.1.4 After a final determination of confidentiality has been issued by the Secretary, any further submissions containing the same confidential information shall be deemed to be confidential based on the prior determination if the Department determines that:

- 6.1.4.1 The Responsible Official notified the Department in writing contemporaneously with the later submission that the later submission contains information previously determined to be confidential; and
- 6.1.4.2 The later submission identifies with particularity the prior confidentiality determination; and
- 6.1.4.3 The notice to the Department met the requirements of Section 6.1.2 above relating to submission of multiple and redacted copies, and included the required affidavit of the Responsible Official; and
- 6.1.4.4 The later representations of confidentiality are sufficient to meet the requirements for a confidentiality determination.

6.2 Criteria

6.2.1 The Secretary may determine that the information submitted is entitled to confidential treatment if all of the following criteria are met:

- 6.2.1.1 Reasonable measures to protect the confidentiality of the information and an intention to continue to take such measures have been satisfactorily shown;
- 6.2.1.2 The information is not, and has not been, reasonably obtainable by other persons (other than governmental bodies) by use of legitimate means (other than court enforced order) without prior consent;
- 6.2.1.3 No statute specifically requires disclosure of the information;
- 6.2.1.4 A satisfactory showing has been made that disclosure of the information is likely to cause substantial harm to their competitive position; and
- 6.2.1.5 Verification that significant effort or money has been expended in developing the information.

6.3 Final Determination

The Secretary will make a final determination as to whether the information shall be considered public or confidential based upon a review of the information submitted pursuant to this Section. The person making the confidentiality request will be notified in writing of the Secretary's determination.

6.3.1 If the Secretary determines that disclosure of the information would violate 29 Del.C. §10002(g)(2), the information will be deemed confidential until such time as the basis for a determination of confidentiality changes. It is the responsibility of the person who requested that the information be given confidential status to notify the Department in writing of such changes.

6.3.2 If the Secretary finds that the information is not entitled to confidential treatment, the information will be considered public.

6.4 Defense of Secretary's Determination

6.4.1 Verification of Information

There will be instances in which the Secretary may be unable to verify the accuracy of the information submitted for determinations of confidentiality. The Secretary relies heavily upon the information furnished by the affected party in order to make a reasonable determination of confidentiality.

6.4.2 Information Determined Confidential

If the Secretary makes a confidentiality determination that certain information is entitled to confidential treatment, and the Department is sued by a requestor for disclosure of that information, the Department will:

6.4.2.1 Notify each affected party of the suit;

6.4.2.2 Call upon each affected party to furnish assistance where necessary in preparation of the Department's defense; and

6.4.2.3 Defend the final confidentiality determination, but expect the affected party to cooperate to the fullest extent possible in the defense.

7.0 Effective Date of this Regulation

These regulations will become effective 11 days after being published as a final regulation. Any and all FOIA requests currently in process at the time of adoption will be subject to these regulations.

12 DE Reg. 245 (08/01/08)