

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

OFFICE OF THE SECRETARY

Statutory Authority: 29 Delaware Code, Section 8003(7) (29 Del.C. §8003(7))
8 DE Admin. Code 900

FINAL

Secretary's Order No.: 2018-OTS-0037

Date of Issuance: June 30, 2018

Effective Date of the Amendment: August 11, 2018

900 Policies and Procedures Regarding FOIA Requests

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 29 Del.C. §10113(b)(4), DNREC hereby revises Section 900 of Title 8 of the Delaware Administrative Code to correct all referencing errors contained therein by replacing all current citations of 29 Del.C. §10002(g) with 29 Del.C. §10002(l). This correction is necessitated as a result of changes made to Delaware Code subsequent to DNREC's promulgation of its FOIA Regulations, as set forth in then-DNREC Secretary Collin O'Mara's Order issued December 1, 2011, and as previously published in the December 1, 2011 edition of the State of Delaware *Register of Regulations*.

Findings of Fact

Based on Delaware law and the record as reflected in the prior Secretary's Order referenced above, I make the following findings of fact:

1. The proposed regulation is not in conflict with Delaware law; and
2. The proposed regulation is an appropriate exercise of the Department's responsibilities and authority.

Decision and Order Concerning the Regulation

NOW THEREFORE, under the above-described statutory authority, and for the reasons set forth above, I hereby ORDER that the revisions to 8 DE Admin. Code 900: Policies and Procedures Regarding FOIA Requests, be adopted and promulgated as follows, to wit:

1. Section 3.7.1 shall be corrected to replace each instance of the citation, "29 Del.C. §10002(g)" with "29 Del.C. §10002(l)"; and
2. Section 6.7.1 shall be corrected to replace the citation, "29 Del.C. §10002(g)(2)" with "29 Del.C. §10002(l)(2)".

The effective date of this Order is ten (10) days from the date of its publication in the Delaware *Register of Regulations*, in accordance with 29 Del.C. §10118(g).

Shawn M. Garvin,
Secretary

900 Policies and Procedures Regarding FOIA Requests

1.0 Purpose

The purpose of this policy is to set forth the rules and procedures for responding to requests from the public for Public Records under Title 29, Chapter 100 of the **Delaware Code**, the Freedom of Information Act.

Agency employees are reminded that all Public Records requested under FOIA shall be considered open and subject to disclosure to the Requesting Party, and any information therein may be withheld only if a specific exception applies. Exceptions shall be construed in a manner that shall further the accountability of the Agency and to comply with the policy that the public shall have reasonable access to Public Records.

2.0 Definitions

The following words and terms, when used in this policy, shall have the following meaning unless the context clearly indicates otherwise:

"Agency" means the Department of Natural Resources and Environmental Control or DNREC.

"FOIA" means the Freedom of Information Act as established pursuant to Title 29, Chapter 100 of the Delaware Code.

"FOIA Coordinator" shall mean the person designated by the Secretary to receive and process FOIA Requests.

"FOIA Request" or "Request" means a request to inspect or copy Public Records pursuant to Chapter 29, Section 10003 of the Delaware Code and in accordance with the policy hereunder.

"FOIA Request Form" means the form promulgated by the Office of the Attorney General upon which requests for Public Records may be made.

"Non-Custodial Records" shall have the meaning set forth in Section 3.6.

"Public Record" shall have the meaning set forth in 29 Del.C. §10002.

"Requesting Party" shall mean the party filing a FOIA Request.

"Secretary" means the Secretary of the Department of Natural Resources and Environmental Control or DNREC.

3.0 Records Request, Response Procedures and Access

3.1 Form of Request

3.1.1 All FOIA Requests shall be made in writing to the Agency in person, by email, by fax, or online in accordance with the provisions hereunder. FOIA Requests may be submitted using the FOIA Request Form promulgated by the Office of the Attorney General; provided, however, that any FOIA Request that otherwise conforms with the policy hereunder shall not be denied solely because the request is not on the proper form. Copies of the FOIA Request Form may be obtained from the Agency's website, or from the office or website of any state agency.

3.1.2 All requests shall adequately describe the records sought in sufficient detail to enable the Agency to locate such records with reasonable effort. The Requesting Party shall be as specific as possible when requesting records. To assist the Agency in locating the requested records, the Agency may request that the Requesting Party provide additional information known to the Requesting Party, such the types of records, dates, parties to correspondence, and subject matter of the requested records.

3.2 Method of Filing Request

3.2.1 FOIA Requests may be made by mail or in person to the FOIA Coordinator at: DNREC FOIA Coordinator, OTS, 89 Kings Highway, Dover, DE 19901, by email to: DNREC_FOIA_Request@state.de.us, by fax at: (302) 739-6242; or via online request form, which may be found on the Agency's home page at www.dnrec.delaware.gov.

3.3 FOIA Coordinator

3.3.1 The Secretary shall designate a FOIA Coordinator, who shall serve as the point of contact for FOIA Requests and coordinate the Agency's responses thereto. The FOIA Coordinator shall be identified on the Agency's website. The FOIA Coordinator may designate other Agency employees to perform specific duties and functions hereunder.

3.3.2 The FOIA Coordinator and/or his or her designee, working in cooperation with other Agency employees and representatives, shall make every reasonable effort to assist the Requesting Party in identifying the records being sought, and to assist the Agency in locating and providing the requested records. The FOIA Coordinator and/or his or her designee will also work to foster cooperation between the Agency and the Requesting Party. Without limitation, if a Requesting Party initiates a FOIA Request that would more appropriately be directed to another agency, the FOIA Coordinator shall promptly forward such request to the relevant agency and promptly notify the Requesting Party that the request has been forwarded. The Agency may close the initial request upon receipt of a written confirmation from the FOIA Coordinator of the relevant agency that the relevant agency has received such request. The Agency shall provide the Requesting Party with the name and phone number of the FOIA Coordinator of the relevant agency.

3.3.3 The FOIA Coordinator shall maintain a document tracking all FOIA Requests for the then-current calendar year. For each FOIA Request, the document shall include, at a minimum: the Requesting Party's contact information; the date the Agency received the Request; the Agency's response deadline pursuant to §3.4; the date of the Agency's response pursuant to §3.4 (including the reasons for any extension pursuant to §3.4.1); the names, contact information and dates of correspondence with individuals contacted in connection with requests pursuant to §§3.3.2, 3.5 and 3.6; the dates of review by the Agency pursuant to §3.7 and the names of individuals who conducted such reviews; the amount of copying and/or administrative fees assessed; and the date of final disposition.

3.4 Agency Response to Requests

3.4.1 The Agency shall respond to a FOIA Request as soon as possible, but in any event within fifteen (15) business days after the receipt thereof, either by providing access to the requested records; denying access to the records or parts of them; or by advising that additional time is needed because the request is

for voluminous records, requires legal advice, or a record is in storage or archived. If access cannot be provided within fifteen (15) business days, the Agency shall cite one of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.

3.4.2 If the Agency denies a request in whole or in part, the Agency's response shall indicate the reasons for the denial. The Agency shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.

3.5 Requests for Email

3.5.1 Requests for email records shall be fulfilled by the Agency from its own records, if doing so can be accomplished by the Agency with reasonable effort. If the Agency determines that it cannot fulfill all or any portion of such request, the Agency shall promptly request that the Department of Technology and Information ("DTI") provide the email records to the Agency. Upon receipt from DTI, the Agency may review the email records in accordance with § 3.7 hereunder.

3.5.2 Before requesting DTI to provide email records, the Agency shall provide a written cost estimate from DTI to the Requesting Party, listing all charges expected to be incurred by DTI in retrieving such records. Upon receipt of the estimate, the Requesting Party may decide whether to proceed with, cancel or modify the request.

3.6 Requests for Other Non-Custodial Records

3.6.1 If all or any portion of a FOIA Request seeks records controlled by the Agency but that are either not within its possession or cannot otherwise be fulfilled by the Agency with reasonable effort from records it possesses (collectively, the "Non-Custodial Records"), then the Agency shall promptly request that the relevant public body provide the Non-Custodial Records to the Agency. Prior to disclosure, records may be reviewed in accordance with §3.7 hereunder by the Agency, the public body fulfilling the request, or both. Without limitation, Non-Custodial Records shall include budget data relating to the Agency.

3.6.2 Before requesting any Non-Custodial Records, the Agency shall provide a written cost estimate to the Requesting Party, listing all charges expected to be incurred in retrieving such records. Upon receipt of the estimate, the Requesting Party may decide whether to proceed with, cancel or modify the request.

3.7 Review by Agency

3.7.1 Prior to disclosure, records may be reviewed by the Agency to ensure that those records or portions of records deemed non-public may be removed pursuant to 29 Del.C. ~~§10002(g)~~ §10002(l) or any other applicable provision of law. In reviewing the records, all documents shall be considered Public Records unless subject to one of the exceptions set forth in 29 Del.C. ~~§10002(g)~~ §10002(l) or any other applicable provision of law. Nothing herein shall prohibit the Agency from disclosing or permitting access to Public Records if the Agency determines to disclose such records, except where such disclosure or access is otherwise prohibited by law or regulation.

3.8 Hours of Review

3.8.1 The Agency shall provide reasonable access for reviewing Public Records during regular business hours.

4.0 Fees

4.1 Photocopying Fees

4.1.1 In instances in which paper records are provided to the Requesting Party, photocopying fees shall be as follows:

4.1.1.1 Standard Sized, Black and White Copies: The first 20 pages of standard sized, black and white copied material shall be provided free of charge. The charge for copying standard sized, black and white Public Records for copies over and above 20 shall be \$0.10 per sheet (i.e., \$0.10 for a single-sided sheet, \$0.20 for a double-sided sheet). This charge applies to copies on the following standard paper sizes: 8.5" x 11"; 8.5" x 14"; and 11" x 17".

4.1.1.2 Oversized Copies/Printouts: The charge for copying oversized Public Records shall be as follows:
18" x 22": \$2.00 per sheet
24" x 36": \$3.00 per sheet
Documents larger than 24" x 36": \$1.00 per square foot

4.1.1.3 Color Copies/Printouts: An additional charge of \$1.00 per sheet will be assessed for all color copies or printouts for standard sized copies (8.5" x 11"; 8.5" x 14"; and 11" x 17"), and \$1.50 per sheet for larger copies.

4.2 Administrative Fees

4.2.1 Administrative fees shall be levied for requests requiring more than one hour of staff time to process. Charges for administrative fees may include staff time associated with processing FOIA Requests, including, without limitation, (a) identifying records; (b) monitoring file reviews; and (c) generating computer records (electronic or print-outs). Administrative fees shall not include any cost associated with the

Agency's legal review of whether any portion of the requested records is exempt from FOIA. The Agency shall make every effort to ensure that administrative fees are minimized, and may only assess such charges as shall be reasonably required to process FOIA Requests. In connection therewith, the Agency shall minimize the use of non-administrative personnel in processing FOIA Requests, to the extent possible.

- 4.2.2 Prior to fulfilling any request that would require a Requesting Party to incur administrative fees, the Agency shall provide a written cost estimate of such fees to the Requesting Party, listing all charges expected to be incurred in retrieving such records. Upon receipt of the estimate, the Requesting Party may decide whether to proceed with, cancel or modify the request.
- 4.2.3 Administrative fees will be billed to the Requesting Party per quarter hour. These charges will be billed at the current hourly pay grade (pro-rated for quarter hour increments) of the lowest-paid employee capable of performing the service. Administrative fees will be in addition to any other charges incurred under this Section 4, including copying fees.
- 4.2.4 When multiple FOIA Requests are submitted by or on behalf of a Requesting Party in an effort to avoid incurring administrative charges, the Agency may in its discretion aggregate staff time for all such requests when computing fees hereunder.
- 4.3 Microfilm and/or Microfiche Printouts: The first 20 pages of standard sized, black and white material copied from microfilm and/or microfiche shall be provided free of charge. The charge for microfilm and/or microfiche printouts over and above 20 shall be \$0.15 per sheet.
- 4.4 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 DVD, CD, or other electronic storage costs) and administrative costs.
- 4.5 Payment
 - 4.5.1 Payment of all fees shall be due no later than the time the records are released to the Requesting Party.
 - 4.5.2 The Agency may require pre-payment of all fees prior to performing any services hereunder.
 - 4.5.3 Appointment Rescheduling or Cancellation: Requesting Parties 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 charges incurred by the Agency in preparing the requested records. The Agency shall prepare an itemized invoice of these charges and provide the same to the Requesting Party for payment.

5.0 Applicability

To the extent any provision in this policy conflicts with any other law or regulation, such law or regulation shall control, and the conflicting provision herein is expressly superseded.

6.0 Requests for Confidentiality

- 6.1 A person may request that certain records or portions of records submitted to DNREC be held 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 DNREC will determine confidentiality of records or portions of records.
- 6.2 Procedure - In order for DNREC 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 for the allegation that the information should be treated as confidential. The request shall contain the following information:
 - 6.2.1 The measures taken to guard against undesired disclosure of the information to others;
 - 6.2.2 The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
 - 6.2.3 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
 - 6.2.4 Verification that significant effort or money has been expended in developing the information.
- 6.3 The following information shall be submitted:
 - 6.3.1 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;
 - 6.3.2 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

- 6.3.3 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.
- 6.4 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.
- 6.5 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 DNREC determines that:
 - 6.5.1 The Responsible Official notified DNREC in writing contemporaneously with the later submission that the later submission contains information previously determined to be confidential; and
 - 6.5.2 The later submission identifies with particularity the prior confidentiality determination; and
 - 6.5.3 The notice to DNREC met the requirements of Section 6.3 above relating to submission of multiple and redacted copies, and included the required affidavit of the Responsible Official; and
 - 6.5.4 The later representations of confidentiality are sufficient to meet the requirements for a confidentiality determination.
- 6.6 Criteria
 - 6.6.1 The Secretary may determine that the information submitted is entitled to confidential treatment if all of the following criteria are met:
 - 6.6.2 Reasonable measures to protect the confidentiality of the information and an intention to continue to take such measures have been satisfactorily shown;
 - 6.6.3 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;
 - 6.6.4 No statute specifically requires disclosure of the information;
 - 6.6.5 A satisfactory showing has been made that disclosure of the information is likely to cause substantial harm to their competitive position; and
 - 6.6.6 Verification that significant effort or money has been expended in developing the information.
- 6.7 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.
 - 6.7.1 If the Secretary determines that disclosure of the information would violate 29 ~~Del.C. §10002(g)(2)~~ §10002(l)(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 DNREC in writing of such changes.
 - 6.7.2 If the Secretary finds that the information is not entitled to confidential treatment, the information will be considered public.
- 6.8 Defense of Secretary's Determination
 - 6.8.1 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.
 - 6.8.2 Information Determined Confidential - If the Secretary makes a confidentiality determination that certain information is entitled to confidential treatment, and DNREC is sued by a requestor for disclosure of that information, DNREC will:
 - 6.8.2.1 Notify each affected party of the suit;
 - 6.8.2.2 Call upon each affected party to furnish assistance where necessary in preparation of DNREC's defense; and
 - 6.8.2.3 Defend the final confidentiality determination, but expect the affected party to cooperate to the fullest extent possible in the defense.

7 DE Reg. 1560 (05/01/04)

15 DE Reg. 864 (12/01/11)

22 DE Reg. 165 (08/01/18) (Final)