

DEPARTMENT OF STATE
PUBLIC SERVICE COMMISSION

Statutory Authority: 26 Delaware Code, Section 209(a) (26 **Del.C.** §209(a))
26 **DE Admin. Code** 1008

FINAL

IN THE MATTER OF THE ADOPTION OF RULES AND
REGULATIONS GOVERNING THE PROCEDURE FOR
INSPECTION AND COPYING OF PUBLIC RECORDS
UNDER THE FREEDOM OF INFORMATION ACT, 29
Del.C. §§10001-10006 (OPENED AUGUST 17, 2010;
REOPENED MAY 10, 2011)

PSC REGULATION DOCKET NO. 62

ORDER NO. 7963

AND NOW, this 10th day of May, 2011:

WHEREAS, by Order No. 7868 dated November 18, 2010, the Delaware Public Service Commission (the "Commission") adopted Rules and Regulations Governing the Procedure for Inspection and Copying of Public Records Under the Freedom of Information Act, 29 **Del.C.** §§10001-10006 (the "FOIA Regulations"); and

WHEREAS, the FOIA Regulations became effective on December 1, 2010; and

WHEREAS, on April 15, 2011, the Governor signed House Bill No. 5, which amended Section 10003 of the Freedom of Information Act, 29 **Del.C.** §§10001-10006; and

WHEREAS, the Commission's FOIA Regulations require amendment in order to be consistent with the recent amendment to Section 10003 of the Freedom of Information Act; and

WHEREAS, the amendment to the FOIA Regulations is not a substantive amendment that would require publication and a public comment period under Subchapter II of the Administrative Procedures Act, 29 **Del.C.** §§10101 *et seq.*;

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NO FEWER THAN THREE COMMISSIONERS:

1. That, pursuant to 26 **Del.C.** §§209(a) and 821, and 29 **Del.C.** §§10113(b)(5), the Commission hereby adopts the amended *Delaware Public Service Commission Freedom of Information Act Regulations Governing the Procedure for Inspection and Copying of Public Records*, a true and correct copy of which is attached hereto as Exhibit A, as official regulations as defined by 29 **Del.C.** §1132.

2. That, pursuant to 26 **Del.C.** §§10113 and 10118, the Secretary of the Commission shall transmit to the Registrar of Regulations for publication in the *Delaware Register* a copy of this Order (with the attached amended FOIA Regulations). An exact copy of the FOIA Regulations attached hereto shall be published as final, official regulations in the *Delaware Register*.

3. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Arnetta McRae, Chair

Jeffrey J. Clark, Commissioner

Joann T. Conaway, Commissioner

Jaymes B. Lester, Commissioner

Dallas Winslow, Commissioner

ATTEST: William F. O'Brien, Executive Director

1008 Regulations Governing Requests Made Pursuant to the Freedom of Information Act

1.0 Definitions

Capitalized terms not otherwise defined in these regulations shall have the meanings given those terms in FOIA and the Commission's Rules of Practice and Procedure (see 26 **DE Admin. Code** §1001), as applicable.

"Affected Party" means any party who has submitted Third Party Confidential Records.

"FOIA" shall mean the Freedom of Information Act, 29 **Del.C.**, Ch. 100, as may be amended from time to time.

"Third Party Confidential Records" are records submitted to the Commission by a third party under a claim of confidentiality pursuant to the Commission's Rules of Practice and Procedure. Records will not be considered Third Party Confidential Records for purpose of these regulations if the records were not identified and submitted as confidential in accordance with the Commission's Rules of Practice and Procedure.

2.0 General

- 2.1 The Commission promulgates these regulations, pursuant to 29 **Del.C.** §10003(b), to establish procedures regarding requests made to the Commission pursuant to FOIA for public records in the possession of the Commission. The Commission is under no obligation under FOIA to answer written questions, analyze data, create documents not already in its possession or compile information in a record. FOIA requests shall be made for the purposes of obtaining existing documents in the Commission's possession.
- 2.2 Consistent with FOIA, it is the Commission's desire that the public have access to the Commission's public records under reasonable terms and conditions. These regulations establish reasonable fees for compiling and photo-copying public records and provide instructions regarding how to make FOIA requests with the Commission and how such requests will be processed.
- 2.3 Commission staff may perform the duties of the Commission under these regulations.

3.0 Requests

- 3.1 Persons requesting requests for records pursuant to FOIA shall submit an original and one copy of a written letter request indicating that the request is being made pursuant to FOIA. The written request shall be addressed to:

Delaware Public Service Commission
Attn.: Commission Secretary
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

Requests by electronic mail will not be entertained.

- 3.2 Requests shall indicate clearly where records are to be sent.
- 3.3 Requests for records shall describe the records sought in sufficient detail to enable their location with reasonable effort.
- 3.4 Records may not be produced to any person who has an outstanding balance with the Commission relating to a prior FOIA request.
- 3.5 Requests that do not comply with these regulations may be denied in whole or in part.

4.0 Responses

- 4.1 The Commission shall respond to a request made under these regulations within ~~ten (10)~~ fifteen (15) business days of receipt of the request. Such response may include the requested records, deny the request in whole or in part, or indicate when the requested records will be produced and under what, if any, conditions. A response to a request for Third Party Confidential Records shall be made pursuant to the procedures and the timeframe set forth in Rule 6 below.
- 4.2 Additional time shall be allowed beyond the fifteen business days provided for in Section 4.1 when a request is for voluminous records, requires legal advice or a record is in storage or archived. In any of these cases, the requestor shall be advised by the custodian of a record, within fifteen business days after the custodian of a record receives the request, stating the need for additional time. Such additional time provided for in this section 4.2 shall be reasonable.
- 4.23 To the extent a FOIA request seeks documents that the Commission, in its sole discretion, may consider voluminous, the Commission may require that the party requesting the records inspect and copy the records at the Commission's office during its regular business hours. Alternatively, the Commission may, in its sole

discretion, employ the assistance of an outside vendor to copy the requested records, in which case the requester will be required to pay the copy charges assessed by such vendor.

5.0 Fees for Photocopying Performed by Commission and Administrative Fees.

- 5.1 Administrative Fees. The Commission may assess administrative fees incurred in responding to a FOIA request as set forth herein. Such fees include:
 - 5.1.1 Staff time associated with processing FOIA requests, including, but not limited to, time spent locating and reviewing files, monitoring file reviews, and generating computer records.
 - 5.1.2 Administrative fees will be billed per quarter hour and will be billed at the current, hourly pay grade rate of the personnel performing the service. Administrative charges will be in addition to any copying charges.
- 5.2 Photocopy Charges
 - 5.2.1 Standard Size Copies. The charge for copying standard size black and white public records shall be \$0.50 per printed page (i.e., single-sided copies are \$0.50 and double-sided copies are \$1.00). The charge for color copies or printouts shall be \$2.00 per page. 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 printouts and maps) shall be as follows: 24 x 26: \$2.00 each; 24 x 36: \$3.00 each; 30 x 42: \$5.00 each; and all larger documents: \$1.00 per square foot. An additional charge of \$1.50 per page will be assessed to color copies.
 - 5.2.3 Microfilm/Microfiche Printouts. Microfilm and/or microfiche printouts made by Commission personnel and printed on standard sized paper will be \$1.00 per page.
 - 5.2.4 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 magnetic tape, diskette or compact disc costs and third-party costs.
- 5.3 Payment for copies and/or administrative charges are due at the time the records are released.

6.0 Requests Seeking Non-Public and Third Party Confidential Records.

- 6.1 Records identified as non-public pursuant to 29 Del.C. §10002(g) shall not be produced in response to a FOIA request. In addition, the following procedures shall apply to requests seeking records that the Commission believes are non-public because they are Third Party Confidential Records:
 - 6.1.1 Upon receipt of a request seeking Third Party Confidential Records, the Commission will notify the Affected Party in writing of the request, identifying the party making the request and the Third Party Confidential Records sought.
 - 6.1.2 Within ten (10) days of receipt of the notice required by Rule 6.1, the Affected Party shall advise the Commission in writing whether it opposes the disclosure of the Third Party Confidential Records. If the Commission is not so notified, it will produce the Third Party Confidential Records.
 - 6.1.3 If the Affected Party timely objects to the production of the Third Party Confidential Records, the Affected Party shall, at the time of notifying the Commission of its objection, provide in writing information sufficient to justify a claim of confidentiality under FOIA. Such information shall include, but not be limited to, the following:
 - 6.1.3.1 Any measures taken by the Affected Party to guard against disclosure of the Third Party Confidential Records;
 - 6.1.3.2 Whether the Third Party Confidential Records have been intentionally or inadvertently disclosed since their submission to the Commission and any actions or precautions taken in connection with such disclosure; and
 - 6.1.3.3 Whether the disclosure of the Third Party Confidential Records would result in substantial or harmful effects on the Affected Party's commercial or financial interests, and if so: (a) what those harmful effects would be; (b) why the effects should be viewed as substantial; and (c) how the disclosure would cause such harmful effects.
 - 6.1.4 The Affected Party bears the burden of establishing confidentiality under FOIA. A unilateral assertion that records are confidential or otherwise not subject to a FOIA request is insufficient to support a finding that requested information is in fact non-public.
 - 6.1.5 Within a reasonable time after receiving the Affected Party's response filed pursuant to Rule 5.1.2, the Commission shall determine whether the Third Party Confidential Documents should be produced pursuant to FOIA despite the Affected Party's claim of confidentiality. Written notice of the Commission's decision shall be provided to the party making the FOIA request and the Affected Party.

7.0 Appeals of Commission's Decision.

As authorized by 29 **Del.C.** §10005, any person denied access to requested records may (i) bring suit in a court of competent jurisdiction within sixty (60) days of such denial or (ii) petition the Attorney General to determine whether a violation of FOIA has occurred. The procedures applicable to such petition are provided in 29 **Del.C.** §10005.

14 DE Reg. 584 (12/01/10)

14 DE Reg. 1397 (06/01/11) (Final)