

**DEPARTMENT OF STATE
PUBLIC SERVICE COMMISSION**

Statutory Authority: 29 Delaware Code, Section 103(3) (3 **Del.C.** §103(b))
8 **DE Admin. Code** 1202

FINAL

ORDER NO. 8790

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; REOPENED NOVEMBER 8, 2011)

PSC REGULATION DOCKET NO. 62

1202 Policies and Procedures Regarding FOIA Requests

AND NOW, this 22nd day of September, 2015, in accordance with 26 **Del.C.** §209(a)(1) and 29 **Del.C.** §§10113(b) and 10003(b), for the reasons stated below, this ORDER is adopted to amend the regulations of Public Service Commission (“Commission”) setting forth the Policies and Procedures regarding requests under the Delaware Freedom of Information Act (“FOIA”).

NATURE OF PROCEEDINGS

1. On October 20, 2011, the Governor of the State of Delaware signed Executive Order Number 31 which directed each executive branch agency to implement and promulgate uniform FOIA policies in substantial compliance with the form attached to the Executive Order. In accordance with Executive Order Number 31, 26 **Del.C.** §209(a)(1), and 29 **Del.C.** §10113(b)(1), the Commission repealed its prior regulations and adopted new final regulations governing the policies and procedures regarding FOIA requests in Order No. 8082, dated December 20, 2011. These regulations were published in the Delaware *Register of Regulations* on January 1, 2012, and became effective ten days from the date of publication in the Delaware *Register of Regulations*, in accordance with 29 **Del.C.** §10118(g).

2. Pursuant to 78 **Del. Laws**, c. 382, §1, 29 **Del.C.** §10002 of Delaware’s FOIA statute was amended, effective August 1, 2012. As a result, certain subsections incorporated by the Commission’s regulations were renumbered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

3. The Commission has statutory authority to promulgate regulations pursuant to 26 **Del.C.** §209(a)(1).

4. Pursuant to 29 **Del.C.** §10113(b), regulations describing an agency’s procedures for obtaining information, nonsubstantive changes in existing regulations that correct technical errors, and amendments to existing regulations that make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations are exempted from the notice and public comment requirements of 29 **Del.C.** Ch. 101.

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE
OF NOT FEWER THAN THREE COMMISSIONERS:**

5. Under the statutory authority and for the reasons set forth in the body of this Order, the Commission does hereby ORDER that the regulations attached as Exhibit “A” be, and that they hereby are, adopted and promulgated as set forth below to make certain technical corrections consistent with the amendments of 78 **Del. Laws**, c. 382, §1.

6. That, pursuant to 29 **Del.C.** §§1133 and 10115(a), the Secretary shall transmit to the Registrar of Regulations for publication in the Delaware *Register of Regulations* a copy of this Order.

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

8. 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:

Dallas Winslow, Chair
Joann T. Conaway, Commissioner
Harold B. Gray, Commissioner
K. F. Drexler, Commissioner
Mike Karia, Commissioner

ATTEST:

Donna Nickerson, Secretary

1202 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.

Commission 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 Commission and 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:

“**Affected Party**” means any party who has submitted Third Party Confidential Records.

“**Commission**” means the Public Service Commission of Delaware.

“**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 this policy.

“**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 State.

“**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, 26 **DE Admin. Code** §1001. Records will not be considered Third Party Confidential Records for purpose of this policy if the records were not identified and submitted as confidential in accordance with the Commission’s Rules of Practice and Procedure, 26 **DE Admin. Code** §1001.

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 either the Commission or the FOIA Coordinator in accordance with the provisions of this policy. FOIA Requests may be submitted in person, by email, by fax, or online using the FOIA Request Form promulgated by the Office of the Attorney General; provided, however, that any FOIA Request that otherwise conforms with this policy shall not be denied solely because the request is not on the promulgated form. Copies of the FOIA Request Form may be obtained from the Commission’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 Commission to locate such records with reasonable effort. The Requesting Party shall be as specific as possible when requesting records. To assist the Commission in locating the requested records, the Commission may request the Requesting Party to provide additional information known to the Requesting Party, such as 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 Commission, 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware 19904; or to the FOIA Coordinator, Delaware Department of State, Office of the Secretary, 401 Federal Street, Suite 3, Townsend Building, Dover, Delaware 19901; by fax at (302) 739-4849 or (302) 739-3811; by online request form, which may be found on the Commission's home page at <http://depdc.delaware.gov/default.shtml>; or by email to the FOIA Coordinator email address listed at www.sos.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 Commission's responses. The FOIA Coordinator shall be identified on the Commission's website. The FOIA Coordinator may designate other Commission employees to perform specific duties and functions hereunder.

3.3.2 The FOIA Coordinator or his or her designee, working in cooperation with other Commission employees and representatives, shall make every reasonable effort to assist the Requesting Party in identifying the records being sought and to assist the Commission in locating and providing the requested records. The FOIA Coordinator or his or her designee will also work to foster cooperation between the Commission 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 Commission 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 Commission shall provide the Requesting Party with the name and phone number of the FOIA Coordinator of the relevant agency.

3.3.3 In addition to the foregoing responsibilities, 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 Commission received the Request; the Commission's response deadline pursuant to §3.4; the date of the Commission'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 Commission pursuant to §3.7 and the names of individuals who conducted such reviews; whether documents were made available; the amount of copying and administrative fees assessed; and the date of final disposition.

3.4 Agency Response to Requests

3.4.1 The Commission shall respond to a FOIA Request as soon as possible, but in any event within fifteen (15) business days after receiving such request, 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 Commission shall cite one of the reasons 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 Commission denies a request in whole or in part, the Commission's response shall indicate the reasons for the denial. The Commission 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 Commission from its own records, if doing so can be accomplished by the Commission with reasonable effort. If the Commission determines that it cannot fulfill all or any portion of such request, the Commission shall promptly request that the Department of Technology and Information ("DTI") provide the email records to the Commission. Upon receipt from DTI, the Commission may review the email records in accordance with §3.7.

3.5.2 Before requesting DTI to provide email records, the Commission 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 Commission but that are either not within its possession or cannot otherwise be fulfilled by the Commission with reasonable effort from records it possesses (collectively, the "Non-Custodial Records"), then the Commission shall promptly request that the relevant public body provide the Non-Custodial Records to the Commission. Prior to disclosure, records may be reviewed in accordance with §3.7 by the Commission, the public body fulfilling the request, or both. Without limitation, Non-Custodial Records shall include budget data relating to the Commission.
- 3.6.2 Before requesting any Non-Custodial Records, the Commission 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 Commission

- 3.7.1 Prior to disclosure, records may be reviewed by the Commission to ensure that those records or portions of records deemed non-public may be removed pursuant to 29 **Del.C.** §10002(g!) 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!) or any other applicable provision of law. Nothing herein shall prohibit the Commission from disclosing or permitting access to Public Records if the Commission 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 Commission shall provide reasonable access for reviewing Public Records during its 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:
 - 4.2.1.1 identifying records;
 - 4.2.1.2 monitoring file reviews; and
 - 4.2.1.3 generating computer records (electronic or print-outs).Administrative fees shall not include any cost associated with the Commission's legal review of whether any portion of the requested records is exempt from FOIA. The Commission 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 Commission 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 Commission 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 Commission in its discretion may 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 or microfiche shall be provided free of charge. The charge for microfilm 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 The Commission may require all fees to be paid prior to performing any service under this policy.
 - 4.5.2 The Commission may require pre-payment of all fees prior to fulfilling any request for records under this policy.
- 4.6 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 Commission in preparing the requested records. The Commission shall prepare an itemized invoice of these charges and provide the same to the Requesting Party for payment.

5.0 Applicability

- 5.1 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 Agency-Specific Provisions.

- 6.1 Fees for archival and historical materials: Special handling of archival and/or historical materials may require the assessment of fees in excess of those listed in Section 4.0 of this policy. Such fees shall be posted online and may include, but are not limited to: fees associated with outsourcing; fees associated with copying of certain bound materials; and fees for the copying or duplication of photographic, video, audio or other special holdings of the Delaware Public Archives and Division of Historical and Cultural Affairs. Unless otherwise noted at www.archives.delaware.gov or www.history.delaware.gov, all requests for copies under this policy shall adhere to the fees set forth in Section 4.0 of this policy.
- 6.2 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:
 - 6.2.1 Upon receipt of a request seeking Third Party Confidential Records, the Commission will notify the Affected Party in writing of the request and identify the party making the request and the Third Party Confidential Records sought.
 - 6.2.2 Within ten (10) days of receipt of the notice required by Rule 6.1.1, 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.
 - 6.2.3 If the Affected Party timely objects to the production of the Third Party Confidential Records, the Affected Party shall provide in writing, at the time of notifying the Commission of its objection, information sufficient to justify a claim of confidentiality under FOIA. Such information shall include, but not be limited to, the following:
 - 6.2.3.1 Any measures taken by the Affected Party to guard against disclosure of the Third Party Confidential Records;
 - 6.2.3.2 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
 - 6.2.3.3 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:
 - 6.2.3.3.1 what those harmful effects would be;
 - 6.2.3.3.2 why the effects should be viewed as substantial; and

- 6.2.3.3.3 how the disclosure would cause such harmful effects.
- 6.2.4 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.
- 6.2.5 Within a reasonable time after receiving the Affected Party's response filed pursuant to 6.1.3, 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 Effective Date

This policy shall become effective immediately.

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

15 DE Reg. 1063 (01/01/12)

19 DE Reg. 434 (11/01/15) (Final)