

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

OFFICE OF THE SECRETARY

Statutory Authority: 29 Delaware Code, Section 8003(7) (29 **Del.C.** §8003(7))

FINAL

ORDER

Policies and Procedures Regarding FOIA Requests

AND NOW, this 1st day of December, 2011 in accordance with 29 **Del.C.** §8003(7) and 29 **Del.C.** §10003(d), for the reasons stated below, this ORDER is adopted repealing the prior regulations and promulgating new regulations setting forth the Policies and Procedures regarding FOIA requests.

NATURE OF PROCEEDINGS

On October 20, 2011, the Governor of the State of Delaware signed Executive Order Number 31, directing each executive branch agency to implement and promulgate Uniform Freedom of Information Act policies in substantial compliance with the form attached to the Executive Order. In accordance with 29 **Del.C.** §10113(b)(1) the Department of Natural Resources and Environmental Control is repealing its prior regulations and adopting new final regulations governing the Policies and Procedures regarding FOIA requests.

The purpose of the new regulations are to prescribe procedures relating to the inspection and copying of public records retained by the Department of Natural Resources and Environmental Control pursuant to 29 **Del.C.** Ch. 100, the Freedom of Information Act. The regulations establish a reasonable fee structure for copying public records and streamlines procedures used to disseminate this information.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Department of Natural Resources and Environmental Control has developed new procedures for responding to requests from the public for information as set forth in 29 **Del.C.** Ch. 100, The Freedom of Information Act. These regulations are in substantial compliance with, and necessary to, effectuate the Governor's Executive Order. The regulations reflect these procedures.

2. The Department of Natural Resources and Environmental Control has statutory authority to promulgate regulations pursuant to 29 **Del.C.** §8003(7).

3. Pursuant to 29 **Del.C.** §10113(b)(1), regulations describing an agency's procedures for obtaining information are exempted from the notice and public comment requirements of 29 **Del.C.** Ch. 101.

DECISION AND ORDER CONCERNING THE REGULATIONS

NOW THEREFORE, under the statutory authority and for the reasons set forth above, the Secretary of the Department of Natural Resources and Environmental Control does hereby ORDER that the regulations be, and that they hereby are, adopted and promulgated as set forth below. 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).

Collin P. O'Mara, Secretary

~~102 Freedom of Information Act Regulation~~

4.0 Purpose

~~The purpose of this regulation is to prescribe procedures relating to the inspection and copying of public records retained by the Department of Natural Resources and Environmental Control ("the Department") pursuant to 29 **Del.C.** Ch. 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. Requests made pursuant to the Hazardous Waste Disclosure Regulation ("HWDR") shall remain independent of this regulation in order to maintain EPA authorization for the Hazardous Waste program.

A new and integral part of the FOIA regulation is a procedure outlined to address the confidential treatment of information submitted to the Department. It is important to understand that 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 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 Natural Resources & Environmental Control.

"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 Natural Resources & Environmental Control 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(d).

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

7 DE Reg. 1565 (5/1/04)

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 and shall adequately describe the records sought in sufficient detail to enable the Department to locate the records with reasonable effort. The Department shall make every reasonable effort to assist the requestor in identifying the record being sought. 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;
- 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 Reasons set forth in Section 3.1.3 or as addressed in other areas of this regulation not specified here.

4.2 Department Response to Requests

4.2.1 The Department shall make every reasonable effort to determine within twenty (20) 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.

7 DE Reg. 1560 (5/1/04)

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;
- 5.1.1.2 Locating and reviewing files;
- 5.1.1.3 Monitoring file reviews;
- 5.1.1.4 Generating computer records (electronic or print-outs); and
- 5.1.1.5 Preparing logs of records deemed non-public.

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 paygrade rate (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 that 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 \$0.10 per printed page (i.e. single-sided copies are \$0.10 and double-sided copies are \$0.20). This charge applies to copies on the following standard paper sizes:

- 5.2.1.1 8.5" x 11";
- 5.2.1.2 8.5" x 14"; and
- 5.2.1.3 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:

- 5.2.2.1 24" x 26" — \$2.00 each;
- 5.2.2.2 24" x 36" — \$3.00 each;
- 5.2.2.3 30" x 42" — \$5.00 each; and
- 5.2.2.4 all copies larger than 30" x 42" shall be calculated at the rate of \$0.60 per square foot.

5.2.3 Color Copies/Printouts

The charge for color copies or color printouts shall be as follows:

- 5.2.3.1 8.5" x 11" — \$1.00 per page;
- 5.2.3.2 8.5" x 14" — \$1.50 per page;
- 5.2.3.3 11" x 17" — \$2.00 per page; and
- 5.2.3.4 all color copies larger than 11" x 17" (including, but not limited to: blueprints, engineering drawings, photographic imagery, GIS print-outs, and maps) shall be calculated at the rate of \$2.50 per square foot.

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 \$0.15 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 administrative charge shall be waived for individuals making a FOIA request to the Department who are not deriving income or other forms of compensation from the use of the information obtained through the FOIA request. To qualify for this exemption, individuals must provide a signed affidavit accompanying the FOIA request, stating that they are not deriving income or other forms of compensation from the use of information obtained through FOIA.

5.3.2 The administrative charge 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.

5.3.3 Individuals and not-for-profit organizations that qualify under 5.3.1 or 5.3.2 shall also be granted a waiver for copying fees of \$25.00 or less. For those requests exceeding \$25.00 in copying fees, charges will be assessed pursuant to Section 5.2 of this regulation.

5.4 Payment

5.4.1 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.

5.4.2 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.

5.4.3 Department personnel will maintain a receipt register and, upon request, provide the requestor with a receipt when payment is received.

6.0 Requests for Confidentiality

A person may request that certain records or portions of records submitted to the Department 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 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 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(d)(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 DE Reg. 1560 (5/1/04)~~

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) 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 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), 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.

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