

EXECUTIVE ORDER NO. 47

WHEREAS, New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1, et seq., provides that government records shall be readily accessible for inspection, examination, and copying by any citizen, with certain exceptions for the protection and preservation of the public interest; and

WHEREAS, the Open Public Records Act requires agencies to safeguard from public access a citizen's personal information whenever disclosure thereof would violate a reasonable expectation of privacy; and

WHEREAS, the Open Public Records Act sets forth certain exemptions of government records from public access, and specifies that exemptions may be established by any other statute, by resolution of either or both houses of the Legislature, by regulation promulgated under the authority of any statute or Executive Order of the Governor, by Executive Order of the Governor, by Rules of Court, or by any federal law, federal regulation, or federal order; and

WHEREAS, upon the enactment of the Open Public Records Act in 2002, in anticipation of the Act's effective date of July 7, 2002, the State agencies conducted a review of their government records and identified those that should be exempted from public disclosure in order to protect the public interest or to protect citizens' reasonable expectations of privacy; and

WHEREAS, the State agencies published proposed regulations in the New Jersey Register dated July 1, 2002, to establish exemptions from public access to their records in order to protect the public interest or to protect citizens' reasonable expectations of privacy; and

WHEREAS, Executive Order No. 21 (2002) directed that the records covered by the exemptions proposed in the July 1, 2002, Register would be exempt from public access until the proposed regulations were adopted; and

WHEREAS, Executive Order No. 26 (2002) modified Executive Order No. 21 (2002) for the purpose of redefining some of the exemptions that had been proposed by the agencies on July 1, 2002; and

WHEREAS, thereafter, the State agencies did not proceed with promulgating as regulations the proposed exemptions published in the July 1, 2002 Register based on their understanding that exemptions had been put into effect by the provisions of Executive Order Nos. 21 and 26 (2002); and

WHEREAS, certain rulings of the Superior Court of New Jersey, Law Division, and the Government Records Council subsequently upheld the ability of State agencies to apply the exemptions that were put into effect by virtue of Executive Order Nos. 21 and 26 (2002); and

WHEREAS, on June 5, 2010, the Appellate Division of the Superior Court of New Jersey issued an opinion, Slaughter v. Government Records Council, 413 N.J. Super. 544 (App Div. 2010), which reversed a decision of the Government Records Council and held that one of these exemptions, which had been consistently applied since 2002 by the Department of Law and Public Safety for the reasons expressed above, was not effective because it had never been formally promulgated as a regulation under the provisions of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1; and

WHEREAS, the court held further that the Department of Law and Public Safety should have the opportunity to determine

whether to adopt the exemption as a regulation under the Administrative Procedure Act; and

WHEREAS, to afford the Department of Law and Public Safety such an opportunity, the court delayed the effectiveness of its decision until November 5, 2010 and permitted the department to continue to apply the exemption up to that date; and

WHEREAS, in accordance with the Slaughter opinion, the State agencies conducted a review of their exemptions and the Departments of Law and Public Safety, Corrections, Military and Veterans Affairs, Environmental Protection, and Community Affairs determined to propose these exemptions for adoption as regulations; and

WHEREAS, the rule proposals of these agencies have been submitted to the Office of Administrative Law for publication in accordance with the Administrative Procedure Act; and

WHEREAS, because of the requirements of the formal rulemaking process, these proposals cannot be finalized prior to the deadline of November 5, 2010 established by the court in Slaughter; and

WHEREAS, it is in the public interest that these exemptions do not lose their force and effect during the pendency of the rulemaking process;

NOW, THEREFORE, I, CHRIS CHRISTIE, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. The exemptions from public access that have been proposed by the Departments of Law and Public Safety, Corrections, Military and Veterans Affairs, Environmental Protection, and Community Affairs, set forth in Appendix A

attached hereto, shall be and shall remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act.

2. Any provision of Executive Order No. 21 (2002) and Executive Order No. 26 (2002) that applies to any exemption initially proposed by an agency in the July 1, 2002 a New Jersey Register, is hereby rescinded.

3. This Order shall take effect immediately and shall expire on November 15, 2011.

GIVEN, under my hand and seal this
3rd day of November,
Two Thousand and Ten, and
of the Independence of the
United States, the Two
Hundred and Thirty-Fifth.

/s/ Chris Christie
Governor

Attest:

/s/ Kevin M. O'Dowd
Deputy Chief Counsel to the Governor

Appendix A

Smart Growth Development Impact

The proposed amendment will have an insignificant impact on smart growth and there is an extreme unlikelihood that the rule would evoke a change in housing production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey because the proposed amendment concerns the filling of prescriptions for controlled substances.

Full text of the proposal follows (additions indicated in boldface thus):

SUBCHAPTER 7. PRESCRIPTION REQUIREMENTS FOR CONTROLLED DANGEROUS SUBSTANCES

8:65-7.5 Manner of issuance of prescriptions

(a) All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions for use and the full name, address, proper academic degree or other definitive identification of the professional practice for which he or she is licensed and registration number of the practitioner. All prescriptions for controlled substances, regardless of schedules, shall be presented to the pharmacist for filling within 30 days after the date when issued, **except as provided in (a)1 below**. A practitioner may sign a prescription in the same manner as he would sign a check or legal document (for example, J.H. Smith or John H. Smith). Where an oral order is not permitted, prescriptions shall be written in ink or indelible pencil or typewriter and shall be manually signed by the practitioner. The prescription may be prepared by a secretary or agent of the practitioner for the signature of the practitioner, but the prescribing practitioner is responsible in case the prescription does not conform in all essential respects to the law or rules. A corresponding liability rests upon the pharmacist who fills a prescription not prepared in the form prescribed by these rules.

1. When up to three separate prescriptions for a total of up to a 90-day supply of a Schedule II controlled substance are issued to a patient by a physician pursuant to N.J.S.A. 45:9-22.19 (P.L. 2009, c. 165), a pharmacist shall fill such prescriptions.

i. All three prescriptions may be accepted at one time and held pending filling as indicated below:

(1) The first prescription shall be filled no later than 30 days after the date of issuance; and

(2) The second and third prescriptions shall be filled no later than 30 days after the date indicated on the prescription as the earliest date on which the prescription may be filled.

ii. Prescriptions presented individually shall be filled as indicated below:

(1) The first prescription shall be filled no later than 30 days after the date of issuance;

(2) The second and third prescriptions shall be presented to the pharmacy and filled no later than 30 days after the date indicated on the prescription as the earliest date on which the prescription may be filled.

iii. A patient shall not be provided with more than a 30-day supply of a Schedule II medication at one time.

(b)-(c) (No change.)

(a)

ATTORNEY GENERAL

Confidentiality of Records

Proposed New Rules: N.J.A.C. 13:1E-3

Authorized By: Paula T. Dow, Attorney General.

Authority: N.J.S.A. 47:1A-1 and 52:17B-4; and Executive Order No. 9 (Hughes 1963).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2010-269.

Submit written comments by December 31, 2010 to:

Philip H. Hopkins, Jr., Deputy Attorney General
Administrative Practice Officer
Department of Law and Public Safety
Office of the Attorney General
P.O. Box 081
Trenton, NJ 08625-0081

The agencies proposal follows:

Summary

On January 8, 2002, the Legislature passed and the Acting Governor approved P.L. 2001, c. 404, which enacted changes in the law concerning public access to government records. The law became effective July 7, 2002. This law expands the public's right of access to government records and facilitates the way in which that access is provided by the custodian of those records. Section 18 of the law authorized public agencies to take administrative action as may be necessary for smooth and efficient implementation of the act.

The act provides that all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c. 73 as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; or any Federal law, Federal regulation or Federal order. The Attorney General, pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented, and Executive Order No. 9 (Hughes 1963), proposes to classify as exempt from public access certain records of the Department of Law and Public Safety or agencies within or allocated to the Department. The act also provides that a public agency should be mindful of the need to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. The rules proposed in N.J.A.C. 13:1E-3 are designed to serve both these legislative policies by facilitating public access to government records while, at the same time, balancing citizens' reasonable expectations of privacy and the integrity and effectiveness of governmental operations.

On July 1, 2002, departments in the Executive Branch, including Law and Public Safety, proposed rules to implement the act; the Department of Law and Public Safety's rules were published at 34 N.J.R. 2267(a). On July 5, 2002, Governor James E. McGreevey issued Executive Order No. 21, which directed that the records exempted from disclosure by the proposed rules were exempt under the Executive Order until the rules were adopted. Executive Order No. 21 was modified by Executive Order No. 26 issued by Governor McGreevey on August 13, 2002. Executive Order No. 26 modified the list of records considered exempt under Executive Order No. 21 and the published rules. Neither Executive Order has been rescinded or further modified. Agencies in the Department of Law and Public Safety have operated under the authority of Executive Order No. 21 as modified. The rules proposed in July 2002 were not formally adopted in accordance with administration direction.

On June 5, 2010, the Appellate Division issued an opinion in the case *Slaughter v. Government Records Council*, 413 N.J. Super. 544, which overturned a decision of the Government Records Council and held that the exemptions of records from public access contained in the 2002 proposed rules recognized and continued in paragraph 4 of Executive Order No. 21 were not intended to be permanent in the absence of a rule. The opinion did not invalidate the confidentiality standards contained in the executive orders, but rather stated that the Department should be afforded the opportunity to decide whether to adopt exemptions as rules. The Department has therefore decided to propose as new rules the confidentiality standards governing access to government records that have been in use under paragraph 4 of Executive Order No. 21.

A summary of the proposed new rules follows:

Proposed new Subchapter 3 contains a list of records deemed by the Attorney General to be confidential and not subject to public access under the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented.

Proposed new N.J.A.C. 13:1E-3.1 describes the scope and applicability of the subchapter. The rules apply to all divisions within the

Department as well as those assigned or allocated to the Department, commonly known as "in but not of" agencies.

Proposed new N.J.A.C. 13:1E-3.2 sets forth those records of the Department that are not deemed government records for the purposes of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, in addition to those deemed exempt under other authority. Proposed paragraph (a)1 includes Standard Operating Procedures and training materials. Proposed paragraph (a)2 includes records of background investigations for public employment, licensing or appointment to public office, whether open, closed or inactive. Proposed paragraph (a)3 includes records which may reveal the identity of a confidential informant or source, or reveal an agency's surveillance or investigative techniques, procedures or undercover personnel. Proposed paragraph (a)4 includes records in connection with discipline, discharge, employee performance, evaluation or other related activities, whether open, closed or inactive. Proposed paragraph (a)5 includes any inventory of State and local emergency resources compiled and any plans or policies compiled by an agency for emergency response purposes, including employee contact information, which if disclosed would substantially interfere with the State's ability to protect against acts of sabotage or terrorism. Proposed paragraph (a)6 concerns records pertaining to the collective negotiations process. Proposed paragraph (a)7 includes the duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer.

Because a 60-day comment period has been provided on this notice of proposal, this notice is excepted from the rulemaking calendar requirement of N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules implement the requirements of N.J.S.A. 47:1A-1 et seq. as amended and supplemented by P.L. 2001, c. 404. The proposed new rules will have a positive social impact by balancing the competing policies in the statute and to exclude records where it would not be in the public interest to permit unqualified access to certain records. The proposed new rules provide safeguards to protect the investigative and law enforcement functions of the Department to ensure due process to citizens as well as effective and thorough operations.

Economic Impact

The proposed new rules will not have an economic impact on the public in excess of that provided by the statute. The proposed rules do not impose any additional costs.

Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are not subject to any Federal standards. The Federal Freedom of Information Act, 5 U.S.C. §§ 550a et seq., does not apply to records of State government and does not constitute a Federal standard.

Jobs Impact

The proposed new rules will not have an impact on the number of jobs generated or lost in New Jersey.

Agriculture Industry Impact

The proposed new rules will not have an impact on the agriculture industry in New Jersey.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposed new rules do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rules provide for the confidentiality of certain government records.

Smart Growth Impact

The proposed new rules will not have an impact on the achievement of smart growth or implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed new rules will have an insignificant impact on affordable housing in New Jersey and there is an extreme unlikelihood

that the regulation would evoke a change in the average costs associated with housing because the proposed new rules concern access to government records.

Smart Growth Development Impact

The proposed new rules will have an insignificant impact on smart growth and there is an extreme unlikelihood that the regulation would evoke a change in housing production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey because the proposed new rules concern access to government records.

Full text of the proposal follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

SUBCHAPTER[S] 2 [THROUGH 3]. (RESERVED)

SUBCHAPTER 3. CONFIDENTIALITY OF RECORDS

13:1E-3.1 Scope and applicability

The rules in this subchapter apply to the Department of Law and Public Safety and all divisions and agencies in the Department, including those agencies allocated to the Department to satisfy the requirements of Article V, Section 4, Paragraph 1 of the New Jersey Constitution, commonly known as "in but not of" agencies.

13:1E-3.2 Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

1. Standard Operating Procedures and training materials;
2. Records concerning background investigations or evaluations for public employment, appointment to public office or licensing, whether open, closed or inactive;
3. Records which may reveal the identity of a confidential informant, a confidential source, a citizen informant, or an agency's surveillance, security or investigative techniques or procedures or undercover personnel;
4. Records relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation or other related activities, whether open, closed or inactive, except for the final agency determination;
5. That portion of any inventory of State and local emergency resources compiled and any policies or plans compiled by an agency pertaining to the mobilization, deployment, or tactical operations involved in responding to emergencies, including employee emergency contact information, which, if disclosed, would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of terrorism or sabotage;
6. Records pertaining to the collective negotiations process; and
7. The duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer.

Site Recovery Act, N.J.S.A. 13:1K-6 et seq., or the New Jersey Underground Storage of Hazardous Substances, N.J.S.A. 58:10A-21 et seq., shall complete the site investigation and submit a site investigation report with a [Preliminary Assessment/Site Investigation] form [available from the Department] found on the Department's website at www.nj.gov/dep/srp/srra/forms by the later of the following:

1. By [November 26, 2010] **March 1, 2011**; or
2. [Two hundred seventy days] **One year** after the initiation of remediation, pursuant to N.J.A.C. 7:26C-2.2(b).

CORRECTIONS

(a)

THE COMMISSIONER

Records Designated Confidential

Proposed New Rules: N.J.A.C. 10A:22-2.3, 10A:31-6.10 and 10A:34-1.6

Authorized By: Gary M. Lanigan, Commissioner, Department of Corrections.

Authority: N.J.S.A. 30:1B-6, 30:1B-10, 2C:52-1 et seq., 47:1A-1 through 47:1A-5 and 2A:4A-60 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2010-234.

Submit written comments by December 3, 2010 to:

Karen J. Wells, Supervisor, Administrative Rules Unit
Office of the Commissioner
New Jersey Department of Corrections
P.O. Box 863
Trenton, New Jersey 08625-0863

The agency proposal follows:

Summary

The Department of Corrections has determined that the comment period for this notice of proposal shall be 60 days; therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, this notice is excepted from the rulemaking calendar requirement.

The Open Public Records Act (OPRA) provides that all government records shall be subject to public access unless exempt from such access by P.L. 1963 c. 73 as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; rule promulgated under the authority of any statute or Executive Order of the Governor; rules of Court; any Federal law, Federal regulation or Federal order. The Commissioner, pursuant to N.J.S.A. 47:1A-1 et seq., Executive Orders No. 9 (1963), 21 (2002) and 26 (2002), proposes to classify as exempt from public access certain records held or controlled by the Department or agencies within the Department of Corrections. The Act also provides that a public agency should be mindful of the need to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. The new rules proposed in N.J.A.C. 10A:22-2.3, 10A:31-6.10 and 10A:34-1.6 are designed to serve both these legislative policies by facilitating public access to government records while at the same time, balancing citizens' reasonable expectations of privacy and the integrity and effectiveness of government operations. The rules set forth a list of records that are designated confidential and shall not be released for purposes of ensuring safety and security within the Department of Corrections. These rules include, but are not limited to, certain informant documents, investigative records and medical records.

Social Impact

The proposed new rules, implement the requirements of N.J.S.A. 47:1A-1 et seq. as amended and supplemented by P.L. 2001, c. 404. The law requires that government records be readily accessible for inspection, copying or examination by citizens of this State, unless exempt by law or rule, but also calls upon a public agency to safeguard from public

disclosure access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. These proposed new rules, attempt to balance the competing policies in the statute and to exclude records where it would not be in the public interest to permit indiscriminate disclosure or copying of certain records. The proposed new rules also provide safeguards to protect the legitimate privacy interests of persons and affected parties.

Economic Impact

The proposed new rules will not have an economic impact on the public in excess of that provided by the statute. Persons requesting copies of government records will be required to pay the fees authorized by the statute for copies of records (see N.J.S.A. 47:1A-5). The proposed new rules do not impose any additional costs. The cost incurred will depend on the type and volume of records requested and the medium of delivery.

Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are not subject to any Federal standards. The Federal Freedom of Information Act, 5 U.S.C. §§550a et seq., does not apply to records of State, county and municipal government and does not constitute a Federal standard.

Jobs Impact

The proposed new rules will cause neither the generation nor the loss of any jobs.

Agriculture Industry Impact

The proposed new rules shall have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed new rules do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rules impose compliance requirements on Department of Corrections staff in regard to records being requested by persons who are seeking access to government records pursuant to N.J.S.A. 47:1A-1 et seq. The cost to the State, county or municipal of providing the record does not depend on whether the requester is a small business.

Smart Growth Impact

The proposed new rules shall have no impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed new rules shall have no impact on housing affordability. The proposed new rules concerning records designated confidential affect inmates, the New Jersey Department of Corrections, county and municipal governmental entities responsible for the enforcement of the rules.

Smart Growth Development Impact

The proposed new rules shall have no impact on smart growth development because they would not evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey. The proposed new rules concerning records designated confidential affects inmates, the New Jersey Department of Corrections, county and municipal governmental entities responsible for the enforcement of the rules.

Full text of the proposed new rules follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

CHAPTER 22 RECORDS

SUBCHAPTER 2. GOVERNMENT RECORDS

10A:22-2.3 [(Reserved)] Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., any other law, rule promulgated under the authority of any statute or Executive Order

of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq.:

1. Informant documents and statements;
2. Special Investigations Division investigations records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility;
3. A record, which consists of any alcohol, drug or other substance abuse information, testing, assessment, evaluation, report, summary, history, recommendation or treatment, including any assessment instruments;
4. Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;
5. A report or record relating to an identified individual, which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement;
6. Comprehensive criminal history information (rap sheet);
7. Records of another department or agency allocated to that department in the possession of the Department of Corrections when those records are made confidential by a rule of that department or agency allocated to that department adopted pursuant to N.J.S.A. 47:1A-1 et seq., and Executive Order No. 9 (1963) or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure; or
8. The Department of Corrections Disaster/Terrorism Contingency Report.

(b) An inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.

CHAPTER 31 ADULT COUNTY CORRECTIONAL FACILITIES

SUBCHAPTER 6. MANAGEMENT INFORMATION SYSTEM AND RECORDS

10A:31-6.10 [(Reserved)] Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., any other law, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq.:

1. Informant documents and statements;
2. Internal Affairs/investigative unit investigations records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility;
3. A record, which consists of any alcohol, drug or other substance abuse information, testing, assessment, evaluation, report, summary, history, recommendation or treatment, including any assessment instruments;
4. Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;
5. A report or record relating to an identified individual, which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement;
6. Comprehensive criminal history information (rap sheet);
7. Records of another department or agency allocated to that department in the possession of the Department of Corrections when those records are made confidential by a rule of that department or agency allocated to that department adopted pursuant to N.J.S.A. 47:1A-1 et seq., and Executive Order No. 9 (1963) or pursuant to

another law authorizing the department or agency to make records confidential or exempt from disclosure; or

8. The Department of Corrections Disaster/Terrorism Contingency Report.

(b) An inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.

CHAPTER 34 NEW JERSEY MUNICIPAL DETENTION FACILITIES

SUBCHAPTER 1. GENERAL PROVISIONS

10A:34-1.6 Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., any other law, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq.:

1. Informant documents and statements;
 2. Internal Affairs/investigative unit investigations records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a detention facility;
 3. A record, which consists of any alcohol, drug or other substance abuse information, testing, assessment, evaluation, report, summary, history, recommendation or treatment, including any assessment instruments;
 4. Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;
 5. A report or record relating to an identified individual, which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the detention facility or other designated place of confinement;
 6. Comprehensive criminal history information (rap sheet);
 7. Records of another department or agency allocated to that department in the possession of the Department of Corrections when those records are made confidential by a rule of that department or agency allocated to that department adopted pursuant to N.J.S.A. 47:1A-1 et seq., and Executive Order No. 9 (1963) or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure; or
 8. The Department of Corrections Disaster/Terrorism Contingency Report.
- (b) An inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.

INSURANCE

(a)

DEPARTMENT OF BANKING AND INSURANCE OFFICE OF CONSUMER PROTECTION SERVICES

Limitations on the Use of Specific Terms or Designations in the Sale of Life Insurance

Proposed New Rules: N.J.A.C. 11:4-60

Authorized By: Douglas A. Wheeler, Director, Division of Insurance.

Authority: N.J.S.A. 17:1-8.1, 17:15e, 17B:30-4 and 17B:30-15.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2010-232.

Submit comments by December 3, 2010 to:

Robert J. Melillo, Chief
Legislative and Regulatory Affairs

MILITARY AND VETERANS' AFFAIRS

OFFICE OF THE ADJUTANT GENERAL

Confidentiality of Records and Criteria for Requesting Records and Information

Proposed New Rules: N.J.A.C. 5A:11

Authorized By: Major General Glenn K. Rieth, The Adjutant General, Commissioner, Department of Military and Veterans' Affairs.

Authority: N.J.S.A. 38A:3-6(o), 47:1A-1 et seq. and 52:14B-3; and Executive Order No. 9 (Hughes 1963).

Calendar Reference: See Summary below for explanation of exception to rulemaking calendar requirement.

Proposal Number: PRN 2010-290.

Submit written comments by January 14, 2011 to:

WO1 David S. Snedeker

Director, Information and Administrative Services Division

Department of Military and Veterans' Affairs

PO Box 340

Trenton, New Jersey 08625-0340

The agency proposal follows:

Summary

On January 8, 2002, the Legislature passed and the Acting Governor approved P.L. 2001, c. 404, known as the Open Public Records Act, which enacted changes in the law concerning public access to government records. The law was effective July 7, 2002. This law expands the pub-

lic's right of access to government records and facilitates the way in which that access is provided by the custodian of those records. Section 18 of the law authorizes public agencies to take anticipatory administrative action in advance as may be necessary for the smooth and efficient implementation of the Act. The Department of Military and Veterans' Affairs proposes new rules establishing the process by which members of the public may seek access to government records in the possession or control of the Department or agencies within the Department under the revised law. The Act requires the custodian of government records of a public agency to adopt a form for providing public access to government records. The proposed rules in Subchapter 2 establish a process to be followed by members of the public who seek access to government records held or controlled by agencies within the Department.

The Act provides that all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c. 73, as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Rules of Court; any Federal law, Federal regulation or Federal order. The Commissioner, pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), proposes to classify as exempt from public access certain records held or controlled by the Department or agencies within the Department. The Act also provides that a public agency should be mindful of the need to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. The rules proposed in Subchapter 1 are designed to serve both these legislative policies by facilitating public access to government records while, at the same time, balancing citizen's reasonable expectations of privacy and the integrity and effectiveness of governmental operations.

Proposed new N.J.A.C. 5A:11-1.1 states the scope and applicability of the rules contained in Subchapter 1. These new rules apply to agencies under the supervision of the Commissioner and those not under the supervision of the Commissioner, commonly known as "in but not of" agencies.

Proposed new N.J.A.C. 5A:11-1.2 provides that the Commissioner will designate a person to be Department records custodian. This person will be the custodian of records for the Office of the Commissioner as well as the Department. The address of the custodian of record is set out in this rule and will be made available to the public by posting on the Department website.

Proposed new N.J.A.C. 5A:11-1.3 provides that all requests for access to government records under the public access to government records law must be on a form approved by the Department. The requester will be asked to provide certain information on the form, including a name, address and telephone number; a brief description of the records requested, type of access (examination, inspection or copying) and medium requested; and the requester's signature and date submitted to the proper custodian. The form will also provide space for: specific directions and procedures for requesting a government record; which records will be made available; when the record will be available; the fee to be charged; the amount of prepayment of fees that is required; a statement of the requester's right to challenge a denial and the procedures for challenging a denial; whether the requester has agreed to grant an extension of time; the toll free number of the Government Records Council; a certification by the requester that they have not been convicted of an indictable offense; the custodian to sign and date; and reasons if access is denied. Copies of the form are available on the Department website.

Proposed new N.J.A.C. 5A:11-1.4 establishes the procedure for submitted requests for access to government records. Forms may be hand-delivered during normal business hours, mailed, or

transmitted electronically by e-mail or website access to the Department custodian. All requests must be delivered to the custodian of records in order to trigger the requirements of the public access to government records law. Upon receipt of the form, the custodian will review it for clarity and completeness and will advise the requester of any deficiencies or request additional information, provided the requester has included contact information. The requester's identity will be required in order to insure compliance with the provision of the law that prohibits a person convicted of an indictable offense under the laws of this State, any other state or the United States, from receiving personal information concerning the person's victim or the victim's family. Requests for records will be assigned a tracking number, if available, which will be used to track the request and respond to inquiries. The custodian will estimate the fee, including the cost of any special form of mailing requested. A request shall not be deemed complete until the custodian receives any prepayment required. A requester will also be required to prepay any special mailing or delivery costs such as UPS or Express Mail. A requester will not be charged for ordinary mailing costs. There is no charge for merely inspecting records.

Proposed new N.J.A.C. 5A:11-1.5 provides that the balance of any fee over and above the estimated prepaid fee is due on delivery of the record.

Proposed new N.J.A.C. 5A:11-1.6 specifies the records for which a citizen is ordinarily entitled to immediate access. These documents include budgets, bills, vouchers, contracts and public employee salary and overtime information.

Proposed new N.J.A.C. 5A:11-1.7 provides that, except as otherwise provided by law, if the custodian fails to grant access to a government record within seven business days after the custodian receives the completed request or such other time as may be required under the law or may be agreed upon, the failure will be deemed a denial of the request for access. As provided in the

statute, a custodian need not respond to an anonymous request until the requester reappears before the custodian.

Proposed new N.J.A.C. 5A:11-1.8 provides that if requested records are stored in an offsite storage facility outside of the regular business office of the agency, the custodian will advise the requester of the date the records will be available and the estimated cost within seven business days of receipt of the request form. This section codifies the requirements of the statute.

Proposed new N.J.A.C. 5A:11-1.9 codifies the requirements of the statute concerning delivery of records in the medium requested. The custodian will deliver the record in the medium requested unless the agency does not maintain the record in that medium and cannot reasonably convert it. In such a case, the custodian will advise the requester of the cost of providing the record in the medium requested. Such charge may include labor.

Proposed new N.J.A.C. 5A:11-1.10 deals with the computation of time. Consistent with statutes, court rules and case law, it provides that in computing the time period for granting access, the day the request is received is not included in the computation, but the last day of the period so computed is to be included. This section also clarifies that a request is not complete until the requester provides all necessary information and all applicable fees are paid.

Proposed new N.J.A.C. 5A:11-2 contains a list of records deemed by the Commissioner to be confidential and not subject to public access under the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented. This subchapter is proposed under the authority of N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963). Under authority of the statute, that Executive Order authorized the head or principal executive of each principal department of State government to adopt and promulgate regulations setting forth which records of the department shall not be deemed public records. The regulations apply to all divisions within the department as well as

those assigned or allocated to the department, commonly known as in, but not of, agencies. Proposed new N.J.A.C. 5A:11-2.1 describes the scope and applicability of the subchapter.

Proposed new N.J.A.C. 5A:11-2.2 sets forth those records of the Department that are not deemed government records for the purposes of N.J.S.A. 47:1A-1 et seq., as amended and supplemented and establishes the responsibility for access to records of the Department held by the Office of Information Technology (OIT), the State Records Center of the Division of Archives and Records Management (DARM) of the Department of State, or in an offsite storage facility outside of the regular business office of the agency, and furthermore, institutes legal custody of, and responsibility for access to, records of the Department transferred to the State Archives.

Because a 60-day comment period has been provided on this notice of proposal, this notice is exempted from the rulemaking calendar requirement of N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules implement the requirements of N.J.S.A. 47:1A-1 et seq. as amended and supplemented by P.L. 2001, c. 404. The proposed new rules will have a positive social impact by establishing a procedure for public access to government records held or controlled by the Department of Military and Veterans' Affairs. The law requires that government records be readily accessible for inspection, copying or examination by citizens of this State unless exempt by law or regulation, but also calls upon a public agency to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. These proposed new rules attempt to balance the competing policies in the statute and to exclude records where it would not be in the public in-

terest to permit indiscriminate disclosure or copying of certain records. The proposed new rules also provide provisions to protect and safeguard the citizen's reasonable expectation of privacy.

Economic Impact

The proposed new rules will not have an economic impact on the public in excess of that provided by the statute. Persons requesting copies of government records will be required to pay the fees authorized by the statute for copies of records. The proposed rules do not impose any additional costs. The cost incurred will depend on the type and volume of records requested and the medium of delivery.

The Department, however, will incur costs in processing requests for access to government records in the time set by the Act.

Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are not subject to any Federal standards. The Federal Freedom of Information Act, 5 U.S.C. §§ 550a et seq., does not apply to records of State government and does not constitute a Federal standard.

Jobs Impact

The proposed new rules will not have an impact on the number of jobs generated or lost in the private sector in New Jersey. They may, however, require public agencies in this State to increase the number of employees designated to respond to requests for public access.

Agriculture Industry Impact

The proposed new rules will not have an impact on the agriculture industry in New Jersey.

Regulatory Flexibility Analysis

The proposed new rules do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rules impose compliance requirements on all persons seeking access to government records pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented. All persons, including small businesses, will be required to submit requests for access to government records on a form approved by the Department. The statute requires the custodian of records to adopt a form for access to records. The statute authorizes fees for copies of government records. There is no exception for small businesses. The cost depends on the number of copies requested. The proposed new rules provide that the fee will be the maximum set forth in the statute or a fee authorized by the statute that does not exceed the actual cost of providing the record. The cost to the Department of providing the record does not depend on whether the requester is a small business.

Smart Growth Impact

The proposed new rules will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed new rules will have an insignificant impact on affordable housing in New Jersey and there is an extreme unlikelihood that the rules would evoke a change in the average

costs associated with housing because the rules pertain to confidentiality of records and criteria for requesting records and information from the Department of Military and Veterans' Affairs.

Smart Growth Development Impact

The proposed new rules will have an insignificant impact on smart growth and there is an extreme unlikelihood that the rules would evoke a change in housing production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey because the rules pertain to records confidentiality of records and criteria for requesting records and information from the Department of Military and Veterans' Affairs.

Full text of the proposed new rules follows:

CHAPTER 11

CONFIDENTIALITY OF RECORDS AND CRITERIA FOR REQUESTING RECORDS AND INFORMATION

SUBCHAPTER 1. GOVERNMENT RECORDS

5A:11-1.1 Scope and applicability

The rules in this subchapter apply to the Department of Military and Veterans' Affairs and all divisions and agencies in the Department, including those agencies allocated to the Department to satisfy the requirements of Article V, Section 4, Paragraph 1 of the New Jersey Constitution, commonly known as "in but not of" agencies.

5A:11-1.2 Custodian of records

(a) Pursuant to P.L. 2001, c. 404, the Commissioner shall designate a custodian of records for the Department of Military and Veterans' Affairs, who shall be responsible for requests for access to government records of the Office of the Commissioner.

(b) The address and other contact information for the records custodian shall be posted on the Department of Military and Veterans' Affairs website and otherwise made available to the public.

The contact information is as follows:

Custodian of Records

Department of Military and Veterans' Affairs

PO Box 340

Trenton, New Jersey 08625-0340

5A:11-1.3 Requests for government records

(a) All requests for access to government records pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented, held or controlled by the Department of Military and Veterans' Affairs or a division or agency thereof, shall be in writing on a form approved by the Department.

For the purposes of this chapter, access means inspection, examination or copying.

(b) The requester shall be requested to provide the following information on the form:

1. The name, address, and telephone number of the requester;

2. A description of the government record sought, method of access and if copies are sought, the medium requested and mode of delivery; and

3. The date submitted to the division or agency custodian.

(c) The request form shall also include an identified space for:

1. The custodian to indicate whether the request is granted or denied;

2. Specific directions and procedures for requesting a record;

3. A statement that prepayment of fees is required and the fees to be charged;

4. The time period within which the public agency is required to make the record available;

5. The custodian to sign and date the form;

6. A statement of the requester's right to challenge a decision by the custodian to deny access;

7. The reasons for a denial of a request, in whole or in part;

8. The procedures for challenging a denial of access;

9. The custodian to indicate whether the requester has agreed to grant an extension of time;

10. A certification by the requester that they have not been convicted of an indictable offense under the laws of this State, any other state or the United States; and

11. The toll free number of the Government Records Council.

(d) Copies of the request form shall be available at the office of the Department custodian and on the Department website.

5A:11-1.4 Procedures for requests

(a) Request forms shall be hand-delivered during normal business hours of the public agency, mailed, or transmitted electronically by e-mail or website access by the requester to the custodian of records.

(b) Any officer or employee of the Department who receives a request for access to a government record shall direct the requester to the custodian of the records.

(c) Upon receipt of the request form, the custodian shall review the request form for clarity and completeness. If the request form is unclear as to the government record requested, the custodian shall advise the requester of the deficiency, provided contact information is included on the form. The custodian may require the requester to provide additional information to identify the record or to ascertain the requester's identity and status to determine whether access is authorized. The custodian shall deny a request for access if the request is unclear or incomplete after attempting to reach a reasonable resolution with the requester. A request shall not be deemed complete until the custodian receives the pre-payment required under this section.

(d) All inquiries and processes involving the request shall include a tracking number.

(e) Upon receipt of a request form, the custodian shall estimate the cost of providing the records and shall require the pre-payment of the estimated sum, and of any special mailing or delivery costs. Payment shall be made by check or money order payable to the State of New Jersey. Except as provided otherwise by law or regulation, costs shall be those set forth in N.J.S.A. 47:1A-1 et seq., as amended and supplemented.

(f) The custodian shall sign and date the request form, enter the estimated fee and, if applicable, tracking number, and provide the requester with a copy.

(g) No fee shall be charged for inspecting or examining government records.

(h) Upon request, a custodian may allow requesters to use their own photocopying equipment to copy public records, provided that it will not disrupt the business operations of the custodian and will not endanger the public records. No special fee shall be charged to a requester who utilizes its own equipment.

5A:11-1.5 Delivery of records

The custodian shall notify the requester when the records are available and shall collect any additional fees and charges due prior to delivery of copies.

5A:11-1.6 Immediate access to certain records

Immediate access ordinarily shall be granted for requests to inspect, examine or copy budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.

5A:11-1.7 Failure to respond

Except as provided in N.J.A.C. 5A:11-1.8, a custodian shall grant or deny access within seven business days after receiving a request completed in accordance with N.J.A.C. 5A:11-1.4 or such additional time as may be allowed by law or these rules or as may be agreed to by the requester. The failure to grant access shall be deemed a denial of the request, unless the requester has elected not to provide a name, address, telephone number or other means of contact. If the requester has elected not to provide contact information, the custodian shall not be required to respond until seven business days after the requester reappears before the custodian seeking a response to the original request.

5A:11-1.8 Records stored offsite

If the requested record is in storage offsite at a facility outside of the regular business office of the agency, the custodian shall so advise the requester within seven business days after the custodian receives the request. The custodian shall advise the requester of the date when the record will be made available. If the record is not made available by the identified date, the request shall be deemed denied.

5A:11-1.9 Requests for copies of a government record in a specified medium

(a) Unless otherwise specifically requested, copies of records shall be provided in printed form on ordinary business size paper. The requester may request that the agency provide a copy of a record in a specific medium. If the agency maintains the government record in the medium requested, the custodian shall provide the record in the medium sought.

(b) If the agency does not maintain the government record in the medium requested, the custodian shall convert the record to the medium requested if reasonable or provide a copy in some other meaningful medium. If a requester asks for copies of a record in a medium not routinely used by the agency, not routinely developed or maintained by the agency, or requiring a substantial amount of manipulation or programming of information technology, the custodian may charge, in addition to the actual cost of duplication, a special charge which shall be reasonable and shall be based upon the cost of any extensive use of information technology or for the labor cost of providing the service actually incurred. The requester shall be given the opportunity to review and object to the charge prior to its being incurred. If the requester objects to the charge

and refuses to withdraw the request, the custodian may deny the request after attempting to reach a reasonable solution that accommodates the interests of the requester and the agency.

(c) Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined or copied is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the division or agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies. The requester shall have the opportunity to review and object to the charge prior to its being incurred. If the requester objects to the charge and refuses to withdraw the request, the custodian may deny the request after attempting to reach a reasonable solution that accommodates the interests of the requester and the agency.

5A:11-1.10 Computation of time

(a) In computing any period of time under P.L. 2001, c. 404 or these rules, the business day a completed request for access is received is not to be included. The last business day of the period so computed is to be included.

(b) For purposes of P.L. 2001, c. 404 and these rules, a request for access is deemed to be complete when the requester provides the information required by N.J.A.C. 5A:11-1.4 and pre-pays the fees required by P.L. 2001, c. 404 and these rules.

SUBCHAPTER 2. CONFIDENTIALITY OF RECORDS

5A:11-2.1 Scope and applicability

The rules in this subchapter apply to the Department of Military and Veterans' Affairs and all divisions and agencies in the Department, including those agencies allocated to the Department to satisfy the requirements of Article V, Section 4, Paragraph 1 of the New Jersey Constitution, commonly known as "in but not of" agencies.

5A:11-2.2 Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

1. Concerning Doyle Veterans' Memorial Cemetery:
 - i. NJDMAVA FORM 24P Application for Interment and Verification of Eligibility;
 - ii. NJDMAVA FORM 24-1 Pre-Registration;
 - iii. DD FORM 214; and
 - iv. Death Certificate;
2. All forms, records, and information relating to the application by, treatment of, progress of, evaluation of, and discharge of participants in the program known as Veterans' Haven;
3. Concerning veterans' healthcare services and veterans' memorial homes:

i. Accident, incident, and investigative reports;

ii. Medication error reports;

iii. Computerized medical records;

iv. Quality improvement minutes and reports;

v. Admission applications and records;

vi. Veterans' memorial homes waiting lists; and

vii. Residents' financial affairs;

4. Concerning veterans' programs:

i. Post-Traumatic Stress Disorder/Readjustment Counseling Program records of individual participants;

ii. Clinicians' reports for the treatment/counseling of individual participants; and

iii. Individual student records kept by the New Jersey State approving authority;

5. Concerning human resources:

i. Personnel files to include those of the State Guard and Naval Militia;

ii. Medical files to include workers' compensation files;

iii. Working documents used to project a reduction in force;

iv. Parts of internal investigations that are sensitive in nature, include protected personal information, or that would include an employee's disability;

v. Working documents used in conducting an internal investigation; and

vi. Medical information obtained through interviews;

6. Concerning youth programs and activities:

i. Cadet applications, medical, academic, performance, disciplinary, and family information files;

ii. Mentor applications and files; and

iii. Serious incident reports involving persons;

7. Information on the donors, lenders, or benefactors regarding the contribution of any artifact or gift for exclusive use by the Museum System, as typically contained on DA Form 2609, financial reports, or other such records;

8. Concerning emergency operations plans and orders of the New Jersey National Guard, State Guard, and Naval Militia:

i. All Military Support to Civil Authorities operations plans, operations orders, fragmentary orders, briefings and related mission tasking and personnel rosters prior to the execution of the plans; and

ii. All intelligence information, reports or briefings gathered and presented;

9. Concerning the Office of the Inspector General (IG):

i. Correspondence or documents received from a witness or a person requesting assistance; and

ii. IG report of inspections:

(1) IG report of investigation/inquiry; and

(2) Police reports;

iii. Investigations from other agencies; and

iv. DA Form 1559 R 9;

10. Information concerning individuals as follows:

i. Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;

ii. Home addresses, home telephone numbers, personal e-mail addresses or other personal contact information;

iii. Information in an income or other tax return; and

iv. Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness, except as otherwise required by law to be disclosed;

11. Test questions, scoring keys and other examination data pertaining to the administration of an examination or an application for public employment or licensing;

12. Records of another department or agency allocated to that department in the possession of this Department or any agency allocated to this Department when those records are made confidential by a regulation of that department or agency allocated to that department adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure; and

13. Records of this Department or any agency allocated to this Department held by the Office of Information Technology (OIT), the State Records Storage Center of the Division of Archives and Record Management (DARM), in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of

this agency and be accessible for inspection or copying only through a request to the proper custodian of this Department or agency allocated to this Department. In the event that records of this Department or any agency allocated to this Department have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.

ENVIRONMENTAL PROTECTION

OFFICE OF THE COMMISSIONER

General Practice and Procedure; Non-Public Records

Proposed New Rules: N.J.A.C. 7:1D-3

Authorized By: Bob Martin, Commissioner, Department of Environmental Protection

Authority: N.J.S.A. 47:1A-1, 52:4B-9, 52:13D-21, 52:17B-4, 52:17B-170, and

Executive Order No. 9 (Hughes 1963)

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

DEP Docket Number: 11-10-11

Proposal Number: PRN 2010-

Submit written comments by (60 days after publication) to:

Alice A. Previte, Esq.

Attention: DEP Docket Number 11-10-11

Office of Legal Affairs

P.O. Box 402

Trenton, N.J. 08625-0402

The agency proposal follows:

Summary

Because a 60-day comment period has been provided on this notice of proposal, this notice is excepted from the rulemaking calendar requirement under N.J.A.C. 1:30-3.3(a)5.

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), provides that all government records shall be subject to public access unless exempt from such access by P.L. 1963, c.73 as amended and supplemented, any other statute, resolution of either or both houses of the Legislature, regulation promulgated under the authority of any statute or Executive Order of the Governor, Rules of Court, any Federal law, Federal regulation or Federal order.

OPRA provides that a public agency should be mindful of the need to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. There are also categories of documents the disclosure of which would interfere with Department operations, or the safety and security of citizens of New Jersey. Proposed new N.J.A.C. 7:1D-3 is designed to serve both of these legislative policies by facilitating public access to government records while balancing citizens' reasonable expectations of privacy and the integrity and effectiveness of governmental operations.

N.J.A.C. 7:1-3 Non-Public Records

Proposed new Subchapter 3 identifies records that the Department has identified as non-public and not subject to production. Unlike confidential information, which the Department will redact in accordance with OPRA, N.J.S.A. 47:14A-1.1 (Definitions,

particularly “government record”), 47:14A-5 (Times during which records may be inspected, examined, copied; access; copy fees), rule of court, or similar protection, the Department will not produce documents of the type identified in proposed Subchapter 3. The categories of documents are the same as were protected under Executive Order 21 (McGreevey 2002), as modified by Executive Order 26 (McGreevey 2002) (collectively, the EOs), except as specifically identified below.

As set forth in proposed N.J.A.C. 7:1D-3.1, Scope, the records identified are not the only records that are not subject to production. Throughout the Department’s rules in Title 7 of the Administrative Code are program-specific categories of records. The categories in the proposed subchapter are also in addition to those documents that are exempt, or are not deemed “government records,” under OPRA, N.J.S.A. 47-14A-1.1, Definitions.

The Department proposes at N.J.A.C. 7:1D-3.2(a)1 to make records relating to mediation proceedings conducted by or on behalf of the Department confidential. This exemption is intended to help ensure the integrity of the mediations the Department conducts, since mediations may not involve attorneys, and the attorney-client privilege would not attach as it would for settlement discussions. The New Jersey courts have stressed that mediation proceedings should be confidential. The final agreement that results from the mediation will be a government record, subject to production under OPRA.

Proposed N.J.A.C. 7:1D-3.2(a)2 makes confidential those records that reveal the identity of a complainant. This exemption is supported by the OPRA exemption for records of criminal investigations, which records would include the identity of the

complainant. However, the Department believes protection of the identity of complainants who provide information to the Department in non-criminal matters is necessary. Release of the identity of complainants could have a chilling effect, for instance, on the use of the Department hotline to register complaints or potential violations of the environmental laws and regulations.

Proposed N.J.A.C. 7:1D-3.2(a)3, which applies to documents related to threatened and endangered animal species, endangered plant species and plant species of concern, is not among the categories of documents protected under the EOs. The Department will disclose to a property owner the location of threatened and/or endangered animal species, endangered plant species and plant species of concern, if the animal or plant is on the property. Likewise, if a permit, application or approval decision is challenged, and the decision was based on the location of an endangered and/or threatened animal species, endangered plant species, or plant species of concern, then the Department will provide records relating to the specific resource and location relied upon. A confidentiality agreement may be required if the Department determines that such is necessary to prevent harm to the plant or animal species or its habitat. Harm could include, for example, further depletion through poaching, collection; or destruction of habitat.

The Department does not want to risk the possibility that someone will harm (intentionally or otherwise) a plant or animal that is the subject of Department protection, which could happen if the Department made the locations of the plants or animals readily available. Through this exemption, the Department is trying to balance the need of property owners against the Department's obligation to protect threatened and endangered animal species, endangered plant species and plant species of concern.

Proposed N.J.A.C. 7:1D-3.2(b) identifies as non-public those records that have homeland security implications. If access to the record would interfere with the State's security, then the record will not be produced. Records that fall into this category include policies or plans for responding to emergencies, certain information relating to nuclear power plants, low level generators of radioactive waste, national defense information relating to Lockheed Martin's Aegis Radar System facility, environmental emergency procedures, inundation maps that are submitted as part of Emergency Action Plans under the Dam Safety Standards; Discharge Prevention Containment and Countermeasures and Discharge Cleanup Removal Plans and related general site plans; and certain radioactive materials licenses and advisories.

The Department does not propose to include offsite consequence analyses developed pursuant to the Toxic Catastrophe Prevention Act, which are included in the EOs, because such records have been addressed in the Toxic Catastrophe Prevention Act Program rules, N.J.A.C. 7:31 (40 N.J.R. 5109(a), 41 N.J.R. 1206(b)).

The Department proposes at N.J.A.C. 7:1D-3.2(c) to protect information related to Green Acres and Natural Lands Trust acquisitions, program offerings, active projects, and title investigations, if disclosure would jeopardize these transactions. The Department is concerned that releasing this information would hamper negotiations for land purchases. The State's bottom line would be known, while the seller or other potential purchaser of a property would not be required to divulge such information while negotiating a possible sale. The records shall be made available no later than 48 hours before formal action is to be taken, except under certain circumstances.

The proposed exemption is not identical to the exemption authorized under the EOs, insofar as the Department proposes to define “active project” as one that has been initiated within two years of the date of the appraisal. This will limit the exemption to only those projects that are likely to be undertaken. Records regarding projects that have not been initiated more than two years after the date of the appraisal would be subject to access under OPRA.

The confidentiality of the information until the closing of title is essential to the integrity of the contracts for purchase, the functioning of the programs, and the achievement of the goals of acquiring and preserving open space and natural resources. This exemption balances the public’s interest in the information with the Department’s obligation to ensure that the taxpayers’ and State’s interests in these transactions are protected.

Social Impact

The proposed new rules implement the requirements of OPRA. The proposed rules will have a positive social impact by establishing the scope of public access to government records held or controlled by the Department. OPRA requires that government records be readily accessible for inspection, copying or examination by citizens of this State unless exempt by law or regulation, and also calls upon a public agency to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure would violate the citizen’s reasonable expectation of privacy. These proposed rules attempt to balance the competing policies in the statute and to exclude records where it would not be in the public interest to permit disclosure or

copying of certain records. The proposed rules also provide safeguards to protect endangered and/or threatened animal species, endangered plant species or plant species of concern from further harm; Green Acres and Natural Land Trust land acquisitions if disclosure would jeopardize those transactions; emergency information such as certain emergency preparedness information or nuclear power plant information where disclosure would jeopardize health, safety and welfare; records that reveal the identify of a complainant; and certain information that is a concern from a domestic security perspective.

Economic Impact

The proposed new rules will not have an economic impact on the public. The rules impose no fees or other charges. To the extent that the public must pay for access to government records, the fees are set forth in OPRA, N.J.S.A. 47:1A-1 et seq.

Federal Standards Statement

Executive Order No. 27(1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65) require State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. Although there is a comparable Federal law (Freedom of Information Act, 5 U.S.C. 550a et seq.), the Federal law does not apply to records of State government. Accordingly, no Federal standards analysis is required.

Jobs Impact

The proposed new rules will not have an impact on the number of jobs generated or lost in the private sector in New Jersey.

Agriculture Industry Impact

The proposed new rules will not have an impact on the agriculture industry in New Jersey.

Regulatory Flexibility Analysis

As required by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has evaluated the reporting, recordkeeping and other compliance requirements that the proposed rulemaking would impose upon small businesses. The proposed new rules do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act. The proposed rules impose restrictions on access to Department documents on all persons seeking access to government records pursuant to OPRA. There is no exception for small businesses.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies that adopt, amend or repeal State regulations to include in the rulemaking document a Smart Growth Impact statement that describes the impact of the proposed amendments on the achievement of smart growth and implementation of the State Development and Redevelopment Plan (State Plan). The proposed rulemaking does not relate to the State's official land use and development policies in a way that would either encourage or discourage any

development or redevelopment in this State contrary to the guiding principles of the State Plan. As a result, the Department does not expect this rulemaking to have an impact on the State's achievement of smart growth, or implementation of the State Plan.

Housing Affordability Impact

Pursuant to N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed rulemaking to determine the impact, if any, on the affordability of housing. The Department has determined that the proposed rules will evoke no influence in the overall average cost associated with housing in the State. The rules relate solely to the Department's production of government records.

Smart Growth Development Impact

Pursuant to N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed rulemaking to determine its impact, if any, on smart growth development. The Department has determined that the proposed rules will not impact housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan, as the proposed rules relate to production of government records.

Full text of the proposed new rules follows:

SUBCHAPTER 3 NON-PUBLIC RECORDS

7:1D-3.1 Scope

The categories of records in N.J.A.C. 7:1D-3.2, Records not subject to disclosure, is in addition to protections that are contained in the Open Public Records Act (OPRA), N.J.S.A. 47:14A-1 et seq., any applicable statute, resolution of one or both houses of the Legislature, regulation, Executive Order of the Governor, court order, or subject area-specific protection in Title 7, Department of Environmental Protection, of the New Jersey Administrative Code.

7:1D-3.2 Records not subject to disclosure

(a) The documents, files, data and other records of the Department that are listed below shall not be deemed to be government records subject to public access pursuant to OPRA. Such records shall not be available for inspection, examination or copying by members of the public or by any other individual except authorized members and employees of the Department or except as provided by order of the Governor of the State, a court or tribunal of competent jurisdiction, or applicable law:

1. Records relating to mediation proceedings conducted by or on behalf of the Department, except that any records that were open for public inspection, examination or copying prior to mediation shall continue to be available for public inspection, examination or copying during and after mediation. Final agreements resulting from mediation shall be available for public inspection, examination or copying;
2. Records that reveal the identity of a complainant; and
3. Portions of records containing the precise location of endangered and/or threatened animal species or endangered plant species or plant species of concern.

i. Notwithstanding paragraph (a)3 above:

(1) The Department shall disclose the precise location of endangered and/or threatened animal species, endangered plant species or plant species of concern to the owner of land upon which the animal or plant species has been located.

(2) If the Department denies or issues any permit or approval, where any of the aforementioned actions is the subject of a challenge in any administrative or judicial forum, the applicant, or any other person with a constitutional or statutory right to a hearing on that action by the Department, may request, and the Department shall provide, only those Department records containing the location(s) of endangered and/or threatened animal species, endangered plant species or plant species of concern relied upon by the Department to make any of the denials, approvals, or determinations.

(3) Prior to providing the records containing the location(s) of endangered and/or threatened animal species, endangered plant species or plant species of concern under (1) or (2) above, the Department shall redact the name(s) of the person(s) who provided the information contained in the records provided under (1) or (2) above if the Department determines that the person(s) providing such information did not provide this information in the course of his or her employment with the State of New Jersey.

ii. If the Department determines that disclosure under (a)3i above likely to create a substantial risk of harm, theft, or destruction to the species or habitats or the area or place where the species or habitats are located, the Department may require the recipient of the information to state in writing prior to access to the records that he or she shall keep the precise location of endangered and/or threatened animal species, endangered plant species or plant species of concern confidential.

iii. For the purposes of (a)3, the term “endangered and/or threatened animal species” shall have the meaning(s) of the terms “endangered” and/or “threatened” as these terms are defined at N.J.A.C. 7:25-4.1. The term “endangered plant species” shall have the meaning of “endangered species” as the term is defined at N.J.A.C. 7:5C-1.4. The term “plant species of concern” shall have the meaning as set forth at N.J.A.C. 7:5C-3.1.

(b) The Department shall withhold any record if the Department determines that the inspection, examination or copying of that record would substantially interfere with the State’s ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism. Such records include, but are not limited to:

1. Any inventory of enforcement resources, including standard operating procedures, compiled and any policies or plans compiled by the Department pertaining to the mobilization, deployment, or tactical operations involved in responding to emergencies, including employee emergency contact information;
2. Information related to a nuclear power plant, which, if disclosed, would jeopardize the public health, safety and welfare or the security of the plant;
3. Listing of Low Level Radioactive Waste generators including amounts of waste generated and shielding designs for sources of radiation;
4. National defense related information from Lockheed Martin’s Aegis Radar System facility;
5. Environmental Emergency Procedures detailing plans such as emergency procedures for wastewater treatment facilities pursuant to New Jersey Pollutant Discharge Elimination rules, N.J.A.C. 7:14A-6.12(D);

6. Inundation maps submitted as part of Emergency Action Plans pursuant to Dam Safety Standards, N.J.A.C. 7:20-1.7(f) and 1.11(i);
 7. Discharge Prevention Containment and Countermeasures and Discharge Cleanup Removal Plans and related general site plans; and
 8. Radioactive Materials Licenses issued by the Nuclear Regulatory Commission and advisories issued by the Nuclear Regulatory Commission that address lessons learned, security or enforcement issues.
- (c) Information related to Green Acres and Natural Lands Trust land acquisitions, program offerings and active projects, including appraisals, valuations and title investigations shall be made available for public inspection, examination and copying no later than 48 hours before formal action is to be taken on any land transaction, program offering or active project unless the land transaction, program offering or active project is actively under negotiation, a binding contract has not been executed, or disclosure of the information would jeopardize the land transaction, program offering or active project. An active project is one that has been initiated within two years of the date of appraisal.

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order No. 27 (1994) and N.J.S.A. 52:14B-23, permit the public to understand accurately and plainly the purposes and expected consequences of this proposal. I hereby authorize this proposal.

Date: _____

Bob Martin, Commissioner
Department of Environmental Protection

November 1, 2010

The Honorable Robert Martin
Commissioner
Department of Environmental Protection
401 East State Street
PO Box 402
Trenton, NJ 08625-0402

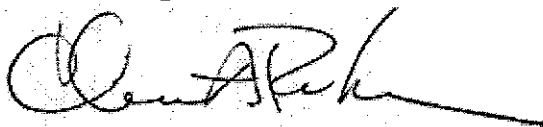
RE: General Practice and Procedure; Non-Public Records
Proposed New Rules: N.J.A.C. 7:1D-3

Dear Commissioner Martin:

Pursuant to section 3 of P.L. 2004, c. 89, the Smart Growth Ombudsman has reviewed the referenced notice of proposal and has determined that, although the proposal pertains to the smart growth areas because it is a proposal that would apply statewide, the subject matter of the proposal is not addressed in the State Development and Redevelopment Plan and, therefore, the proposal is not inconsistent with that Plan.

Please do not hesitate to contact me if you have any questions or desire additional information regarding this determination.

Sincerely,



Charles A. Richman
Smart Growth Ombudsman



verification upon request of the Department. Historically, the Department has found that most nurseries and plant dealers utilize one to four suppliers of rose plants, requiring the filing and maintenance of one to four inspection certificates. No professional services are likely to be needed to comply with these rules.

To the extent that these rules add a better quality product to the stream of commerce and decrease the number on virus infected plants shipped to the State, the re-adoption of these rules will be beneficial to both small businesses and consumers, alike. No differentiation in requirements based upon business size is, therefore, provided.

Smart Growth Impact

These rules proposed for re-adoption implement economic development strategies outlined in the Department's Smart Growth Plan. The rules proposed for re-adoption are consistent with the State's smart growth goals as they encourage the continued viability of the State's nursery industry. Therefore, the Department anticipates that there will be a positive impact on the achievement of smart growth and the implementation of the State's Development and Redevelopment Plan.

Housing Affordability Impact

The rules proposed for re-adoption will have an insignificant impact on affordable housing in New Jersey and there is an extreme unlikelihood that the rules would evoke a change in the average costs associated with housing because the rules prevent the movement into the State of diseased, virus infected rose plants.

Smart Growth Development Impact

The rules proposed for re-adoption will have an insignificant impact on smart growth and there is an extreme unlikelihood that the rules would evoke a change in house production in Planning Areas 1 or 2 within designated centers under the State Development and Redevelopment Plan in New Jersey because the rules prevent the movement into the State of diseased, virus infected rose plants.

Full text of the rules proposed for re-adoption may be found in the New Jersey Administrative Code at N.J.A.C. 2:19.

COMMUNITY AFFAIRS

(a)

THE COMMISSIONER

Government Records

Proposed New Rules: N.J.A.C. 5:3

Authorized By: Lori Grifa, Commissioner, Department of Community Affairs.

Authority: N.J.S.A. 47:1A-1, 52:14B-3 and 52:27D-3(f); and Executive Order No. 9 (Hughes 1963).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2010-266.

Submit written comments by December 31, 2010 to:

Michael L. Ticktin, Esq.
 Chief, Legislative Analysis
 Department of Community Affairs
 PO Box 802
 Trenton, NJ 08625
 Fax No. (609) 633-6729

The agency proposal follows:

Summary

The Open Public Records Act, P.L. 2001, c. 404, ("the Act") became effective July 7, 2002. This law expanded the public's right of access to government records and facilitated the way in which access is to be provided by custodians of those records.

On July 1, 2002, the Department of Community Affairs, in common with other State agencies, proposed rules establishing the process by which members of the public may seek access to government records in

the possession or control of the Department or agencies within the Department under the revised law. Due to subsequent directives given to all agencies, however, these proposed rules were never adopted. However, they became effective, and were deemed to have continued in effect, pursuant to Executive Order No. 21 (McGreevey 2002). The Government Records Council subsequently affirmed this understanding. However, in the recent case of *Slaughter v. Government Records Council*, 413 N.J. Super. 544(App. Div. 2010), the Appellate Division reversed the ruling of the Government Records Council and held that Executive Order No. 21 was applicable for an interim period only, but allowed the department whose records were at issue in the *Slaughter* case until November 5, 2010 to adopt the exemptions from disclosure that had been proposed in 2002, either in their original or modified form. Since the holding of the Appellate Division applies equally to the rules of other agencies, including the Department of Community Affairs, the Department is therefore re-proposing the rule proposal published on July 1, 2002 at 34 N.J.R. 2175(a), without the requirement, invalidated by a subsequent court decision, that requests could only be submitted on a form approved by the Department.

The Act requires the custodian of government records of a public agency to adopt a form for providing public access to government records, though use of this form is not mandatory. The proposed rules in Subchapter 1 establish a process to be followed by members of the public who seek access to government records held or controlled by agencies within the Department.

The Act provides that all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c. 73 as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Rules of Court; any Federal law, Federal regulation or Federal order. The Commissioner, pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), proposes to classify as exempt from public access certain records held or controlled by the Department or agencies within the Department. The Act also provides that a public agency should be mindful of the need to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. The rules proposed in Subchapter 2 are designed to serve both these legislative policies by facilitating public access to government records while, at the same time, balancing citizen's reasonable expectations of privacy and the integrity and effectiveness of governmental operations.

Subchapter 1. Access to Government Records

Proposed new N.J.A.C. 5:3-1.1 states the scope and applicability of the rules contained in the subchapter. These new rules apply to agencies under the supervision of the Commissioner and those not under the supervision of the Commissioner, commonly known as "in but not of" agencies.

Proposed new N.J.A.C. 5:3-1.2 provides that the Commissioner will designate a person to be Department records custodian. This person will be the custodian of records for the Office of the Commissioner. Each division director or agency shall designate a custodian of records for that division or agency. The address of custodians of record shall be made available to the public by posting on the Department web site.

Proposed new N.J.A.C. 5:3-1.3 provides that the Department is to provide a form to standardize requests for access to government records. Such a form is currently in use. On this form, the requestor is asked to provide certain information, including a name, address and telephone number; a brief description of the records requested, type of access (examination, inspection or copying) and medium requested; and the requestor's signature and date submitted to the proper custodian. The form also provides space for: specific directions and procedures for requesting a government record; which records will be made available; when the record will be available; the fee to be charged; the amount of prepayment of fees that is required; a statement of the requestor's right to challenge a denial and the procedures for challenging a denial; whether the requestor has agreed to grant an extension of time; the toll free number of the Government Records Council; a certification by the requestor that they have not been convicted of an indictable offense; the

custodian to sign and date; and reasons if access is denied. Copies of the form shall be available at division and agency offices and on the Department and agency web site. Use of the form is not mandatory.

Proposed new N.J.A.C. 5:3-1.4 establishes the procedure for submitting requests for access to government records. Requests may be hand delivered during normal business hours, mailed or transmitted electronically by facsimile or e-mail to the appropriate division or agency custodian. All requests must be delivered to the appropriate division or agency custodian of records in order to trigger the requirements of the public access to government records law. Upon receipt of the request, the custodian will review it for clarity and completeness and will advise the requestor of any deficiencies or request additional information, provided the requestor has included contact information. The requestor's identity will be required in order to ensure compliance with the provision of the law that prohibits a person convicted of an indictable offense under the laws of this State, any other state or the United States, from receiving personal information concerning the person's victim or the victim's family. Requests for records will be assigned a tracking number that will be used to track the request and respond to inquiries. The custodian will estimate the fee, including the cost of any special services or mailing requested. In accordance with the holding of the Appellate Division in the case of *Smith v. Hudson County Register*, 411 N.J. Super. 538 (App. Div. 2010), the fees shall not exceed actual cost, unless otherwise provided by law or regulation. A request shall not be deemed complete, and records shall not be provided, until any required payment is received by the custodian. A requestor will also be required to prepay any special mailing or delivery costs such as FedEx, UPS or Express Mail, but will not be charged for ordinary mailing costs. There is no charge for merely inspecting records.

Proposed new N.J.A.C. 5:3-1.5 provides that the balance of any fee over and above the estimated prepaid fee is due on delivery of the record.

Proposed new N.J.A.C. 5:3-1.6 specifies the records for which a citizen is ordinarily entitled to immediate access. These documents include budgets, bills, vouchers, contracts and public employee salary and overtime information.

Proposed new N.J.A.C. 5:3-1.7 provides that, except as otherwise provided by law, if the custodian fails to grant access to a government record within seven business days after the custodian receives the completed request or such other time as may be required under the law or may be agreed upon, the failure will be deemed a denial of the request for access. As provided in the statute, a custodian need not respond to an anonymous request until the requestor again contacts the custodian.

Proposed new N.J.A.C. 5:3-1.8 provides that if requested records are archived or stored, the custodian will advise the requestor of the date the records will be available and the estimated cost within seven business days of receipt of the request. This section codifies the requirements of the statute.

Proposed new N.J.A.C. 5:3-1.9 codifies the requirements of the statute concerning delivery of records in the medium requested. The custodian will deliver the record in the medium requested unless the agency does not maintain the record in that medium and cannot reasonably convert it. In such a case, the custodian will advise the requestor of the cost of providing the record in the medium requested. Such charge may include labor.

Proposed new N.J.A.C. 5:3-1.10 deals with the computation of time. Consistent with statutes, court rules and case law, it provides that in computing the time period for granting access, the day the request is received is not included in the computation, but the last day of the period so computed is to be included. This section also clarifies that a request is not complete until all necessary information is provided by the requestor and all applicable fees are paid.

Subchapter 2. Confidentiality of Records

Proposed new Subchapter 2 contains a list of records deemed by the Commissioner to be confidential and not subject to public access under the provisions of N.J.S.A. 47:1A-1 et seq. as amended and supplemented. This subchapter is proposed under the authority of N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963). Under authority of the statute, that Executive Order authorized the head or principal executive of each principal department of State government to adopt and promulgate

regulations setting forth which records of the department shall not be deemed public records. The rules apply to all divisions within the Department as well as those assigned or allocated to the Department, commonly known as "in, but not of" agencies. Proposed new N.J.A.C. 5:3-2.1 describes the scope and applicability of the subchapter.

Proposed new N.J.A.C. 5:3-2.2 sets forth those records of the Department that are not deemed government records for the purposes of N.J.S.A. 47:1A-1 et seq. as amended and supplemented. The categories listed are intended to supplement and clarify statutory categories as they apply to the Department.

Building plans submitted in conjunction with permit applications, as well as information concerning buildings in the high hazards use group and life hazard uses involving hazardous substances or materials, are declared to be nonpublic in the interest of safeguarding public safety and individual security.

Notices, orders, reports and decisions not yet served upon the person(s) to whom they are directed are declared to be nonpublic because the investigation or proceeding is not complete until the person(s) involved receive(s) proper notice. Moreover, it is unfair to have third parties learn about the outcome of a proceeding or investigation before the person(s) involved.

Information concerning loan or tax credit applications in progress or negotiations between parties must be treated as nonpublic in accordance with the general principle that financial information is not subject to public disclosure.

Contract negotiations must be kept nonpublic in fairness to the parties and in accordance with the statutory language concerning not giving advantage to competitors.

Requests or complaints submitted by individuals must be kept nonpublic in order to encourage people to provide the Department with information that will assist it in carrying out its statutory obligations.

Notes of mediators or others involved in dispute resolution must be nonpublic in order to allow such dispute resolution to function. A mediator's notes are part of a dispute resolution process, and must have the same confidential status as inter-agency or intra-agency deliberative material.

Various categories of personal and financial information concerning individuals are declared to be nonpublic because the legitimate expectation of individual privacy with respect to such matters outweighs any need of the public to have such information.

Test questions, scoring keys and other examination data pertaining to examinations or applications for public employment or licensing are declared to be nonpublic in order to protect the integrity of the examination or application process.

Records of other departments held by this Department are given the same status in this Department as they have in the other department. It is necessary that the same records be treated in a uniform manner by any agency that has possession of them. For similar reasons, records of this Department held by the Office of Information Technology or the Division of Archives and Record Management are declared to be available for inspection or copying only through this Department.

Because a 60-day comment period has been provided on this notice of proposal, this notice is excepted from the rulemaking calendar requirement of N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules implement the requirements of N.J.S.A. 47:1A-1 et seq. as amended and supplemented by P.L. 2001, c. 404. As has been the case during the eight years in which the proposed rules have been deemed to have been in effect, the proposed new rules will have a positive social impact by establishing a procedure for public access to government records held or controlled by the Department of Community Affairs. The law requires that government records be readily accessible for inspection, copying or examination by citizens of this State unless exempt by law or regulation, but also calls upon a public agency to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. These proposed new rules attempt to balance the competing policies in the statute and to exclude records where it would not be in the public interest to permit indiscriminate

disclosure or copying of certain records. The proposed new rules also provide safeguards to protect public safety and assure fairness for members of the public who receive notices from the Department, provide information to it or are involved in disputes in which it provides mediation.

Economic Impact

As has been the case for the past eight years, the proposed new rules will not have an economic impact on the public in excess of that provided by the statute. Persons requesting copies of government records will be required to pay fees not exceeding actual copying costs. The cost incurred will depend on the type and volume of records requested and the medium of delivery.

The Department, however, will incur costs in processing requests for access to government records in the time set by the Act.

Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are not subject to any Federal standards. The Federal Freedom of Information Act, 5 U.S.C. §§ 550a et seq., does not apply to records of State government and does not constitute a Federal standard.

Jobs Impact

As has been the case for the past eight years, the proposed new rules will not have an impact on the number of jobs generated or lost in the private sector in New Jersey. The rules may, however, require public agencies in this State to increase the number of employees designated to respond to requests for public access.

Agriculture Industry Impact

The proposed new rules will not have an impact on the agriculture industry in New Jersey.

Regulatory Flexibility Analysis

The proposed new rules do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rules impose compliance requirements on all persons seeking access to government records pursuant to N.J.S.A. 47:1A-1 et seq. as amended and supplemented. All persons, including small businesses, will be required to submit requests for access to government records on a form approved by the Department. The statute requires the custodian of records to adopt a form for access to records. The statute authorizes fees for copies of government records. There is no exception for small businesses. The cost depends on the number of copies requested. The proposed new rules provide that the fee will be in the amount authorized by the statute. The cost to the Department of providing the record does not depend on whether the requestor is a small business.

Smart Growth Impact

The proposed new rules will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed new rules concern access to governmental records. The rules would be most unlikely to have any impact upon housing production costs or to affect housing affordability.

Smart Growth Development Impact

The proposed new rules concern access to governmental records. The rules would be most unlikely to have any impact upon housing production within Planning Areas 1 and 2 or within designated centers under the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

CHAPTER 3 GOVERNMENT RECORDS

SUBCHAPTER 1. GENERAL PROVISIONS

5:3-1.1 Scope and applicability

The rules in this subchapter shall apply to the Department of Community Affairs and all divisions and agencies in the Department,

including those agencies allocated to the Department to satisfy the requirements of Article V, Section 4, Paragraph 1 of the New Jersey Constitution, commonly known as "in but not of" agencies.

5:3-1.2 Custodian of records

(a) Pursuant to P.L. 2001, c. 404, the Commissioner shall designate a custodian of records for the Department of Community Affairs, who shall be responsible for requests for access to government records of the Office of the Commissioner.

(b) Each division director, agency director or governing body, as the case may be, shall designate a custodian of records or designee who shall be responsible for requests for access to records held or controlled by that division or agency.

(c) The address and other contact information for each records custodian shall be made available to the public by posting on the Department of Community Affairs website www.state.nj.us/dca.

5:3-1.3 Requests for government records

(a) All requests for access to government records pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented, held or controlled by the Department of Community Affairs, or a division or agency thereof, shall be in writing. The Department shall provide a form that may be used for this purpose. For the purposes of this chapter, access means inspection, examination or copying.

(b) The requestor shall be requested to provide the following information on the form:

1. The name, address, and telephone number of the requestor;
2. A description of the government record sought, method of access and if copies are sought, the medium requested and mode of delivery; and
3. The date submitted to the division or agency custodian.

(c) The request form shall also include an identified space for:

1. The custodian to indicate whether the request is granted or denied;
2. Specific directions and procedures for requesting a record;
3. A statement that prepayment of fees is required and the fees to be charged;

4. The time period within which the public agency is required to make the record available;

5. The custodian to sign and date the form;

6. A statement of the requestor's right to challenge a decision by the custodian to deny access;

7. The reasons for a denial of a request, in whole or in part;

8. The procedures for challenging a denial of access;

9. The custodian to indicate whether the requestor has agreed to grant an extension of time;

10. A certification by the requestor that they have not been convicted of an indictable offense under the laws of this State, any other state or the United States; and

11. The toll free number of the Government Records Council.

(d) Copies of the request form shall be available at the office of the Department custodian, all division and agency offices, on the Department website, and division or agency website, if any.

5:3-1.4 Procedures for requests

(a) Requests shall be hand-delivered during normal business hours of the public agency, mailed, or transmitted electronically by facsimile, e-mail or website access by the requestor to the appropriate division or agency custodian of records.

(b) Any officer or employee of the Department who receives a request for access to a government record shall direct the requestor to the appropriate division or agency custodian of the record.

(c) Upon receipt of the request, the custodian shall review the request for clarity and completeness. If the request is unclear as to the government record requested, the custodian shall advise the requestor of the deficiency, provided contact information is included with the request. The custodian may require the requestor to provide additional information to identify the record or to ascertain the requestor's identity and status to determine whether access is authorized. The custodian shall deny a request for access if the request is unclear or incomplete after attempting to reach a reasonable resolution with the requestor. A request shall not be deemed complete until the pre-payment required under this section is received by the custodian.

(d) All inquiries and processes involving the request shall include a tracking number.

(e) Upon receipt of a request for a copy of a record, the custodian shall estimate the cost of providing such a copy and shall require the prepayment of the estimated sum, and of any special mailing or delivery costs. Payment shall be made by cash, check or money order payable to the "Treasurer, State of New Jersey" and shall not exceed actual copying costs, unless otherwise provided by law or regulation.

(f) The custodian shall respond to the request in writing within seven business days and provide the requestor with the amount of any copying cost and directions for submitting payment.

(g) No fee shall be charged for inspecting or examining government records.

(h) Upon request, a custodian may allow requestors to use their own photocopying equipment to copy public records, provided that it will not disrupt the business operations of the custodian and will not endanger the public records. No special fee shall be charged to a requestor who utilizes its own equipment.

5:3-1.5 Delivery of records

The custodian shall notify the requestor when the records are available and shall collect any additional fees and charges, if applicable, that are due prior to delivery of copies.

5:3-1.6 Immediate access to certain records

Immediate access ordinarily shall be granted for requests to inspect, examine or copy budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.

5:3-1.7 Failure to respond

Except as provided in this section, a custodian shall grant or deny access within seven business days after receiving a request completed in accordance with N.J.A.C. 5:3-1.4 or such additional time as may be allowed by law or these rules or as may be agreed to by the requestor. The failure to grant access shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address, telephone number or other means of contact. If the requestor has elected not to provide contact information, the custodian shall not be required to respond until seven business days after the requestor contacts the custodian seeking a response to the original request.

5:3-1.8 Stored or archived records

If the requested record is in storage or archived, the custodian shall so advise the requestor within seven business days after the custodian receives the request. The custodian shall advise the requestor of the date when the record will be made available. If the record is not made available by the identified date, the request shall be deemed denied.

5:3-1.9 Requests for copies of a government record in a specified medium

(a) Unless otherwise specifically requested, copies of records shall be provided in printed form on letter size paper. The requestor may request that the agency provide a copy of a record in a specific medium. If the agency maintains the government record in the medium requested, the custodian shall provide the record in the medium sought.

(b) If the agency does not maintain the government record in the medium requested, the custodian shall convert the record to the medium requested if reasonable or provide a copy in some other meaningful medium. If a requestor asks for copies of a record in a medium not routinely used by the agency, not routinely developed or maintained by the agency, or requiring a substantial amount of manipulation or programming of information technology, the custodian may charge, in addition to the actual cost of duplication, a special charge which shall be reasonable and shall be based upon the cost of any extensive use of information technology or for the labor cost of providing the service actually incurred. The requestor shall be given the opportunity to review and object to the charge prior to its being incurred. If the requestor objects to the charge and refuses to withdraw the request, the custodian may deny the request after attempting to reach a reasonable solution that accommodates the interests of the requestor and the agency.

(c) Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined or copied is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the division or agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies. The requestor shall have the opportunity to review and object to the charge prior to its being incurred. If the requestor objects to the charge and refuses to withdraw the request, the custodian may deny the request after attempting to reach a reasonable solution that accommodates the interests of the requestor and the agency.

5:3-1.10 Computation of time

(a) In computing any period of time under P.L. 2001, c. 404 or this subchapter, the business day a completed request for access is received is not to be included. The last business day of the period so computed is to be included.

(b) For purposes of P.L. 2001, c. 404 and this subchapter, a request for access is deemed to be complete when the requestor provides the information required by N.J.A.C. 5:3-2.3 and pre-pays the fees required by P.L. 2001, c. 404 and this subchapter.

SUBCHAPTER 2. CONFIDENTIALITY OF RECORDS

5:3-2.1 Scope and applicability

The rules in this subchapter shall apply to the Department of Community Affairs and all divisions and agencies in the Department, including those agencies allocated to the Department to satisfy the requirements of Article V, Section 4, Paragraph 1 of the New Jersey Constitution, commonly known as "in but not of" agencies.

5:3-2.2 Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

1. Building plans submitted in conjunction with any permit application;
2. Any information concerning the location or contents of buildings or structures in Use Group H (high hazard) or of life hazard uses involving hazardous materials or substances;
3. Notices, orders, reports and decisions not yet served upon the person(s) to whom they are addressed;
4. Records concerning loan or tax credit applications in progress or negotiations between or among parties involved in any such application;
5. Records concerning contract negotiations;
6. Requests or complaints submitted by individuals;
7. Notes of mediators or other persons involved in dispute resolution;
8. Information concerning individuals as follows:
 - i. Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;
 - ii. Home addresses, home telephone numbers, personal e-mail addresses or other personal contact information;
 - iii. Information in an income or other tax return;
 - iv. Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness, except as otherwise required by law to be disclosed; and
 - v. Any other information the disclosure of which might reasonably be expected to endanger the safety of any person;
9. Test questions, scoring keys and other examination data pertaining to the administration of an examination or an application for public employment or licensing;
10. Records of another department or agency in the possession of this department or any agency allocated to this department when those

records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure; and

11. Records of this department or any agency allocated to this Department held by the Office of Information Technology (OIT), the State Records Storage Center of the Division of Archives and Records Management (DARM), in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the Department and be accessible for inspection or copying only through a request to the proper custodian of this Department or an agency allocated to this Department. In the event that records of this Department or any agency allocated to this Department have been, or shall be, transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives and all requests for access to them shall be submitted directly to the State Archives.

EDUCATION

(a)

COMMISSIONER OF EDUCATION

Fiscal Accountability, Efficiency and Budgeting Procedures

Contracts of District Superintendents

Proposed Amendments: N.J.A.C. 6A:23A-1.2 and 3.1

Authorized By: Rochelle R. Hendricks, Acting Commissioner,
Department of Education.

Authority: N.J.S.A. 18A:7-16.

Calendar Reference: See Summary below for explanation of
exception to calendar requirement.

Proposal Number: PRN 2010-271.

Public hearings on the agency proposal will be held:

Date: Monday, November 29, 2010

Time: 6:00 P.M. to 8:00 P.M.

Location: North Warren Regional High School auditorium
10 Noe Road.
Blairstown, NJ 07825

Date: Thursday, December 2, 2010

Time: 6:00 P.M. to 8:00 P.M.

Location: Cumberland County College
Conference and Events Center
3322 College Drive
Vineland, NJ 08362

Date: Tuesday, December 7, 2010

Time: 6:00 P.M. to 8:00 P.M.

Location: Burlington County Institute of Technology
Westampton Campus auditorium
695 Woodlane Road
Westampton, NJ 08060

Submit written comments by December 31, 2010 to:

Eric Taylor, Director
Office of Statute and Code Review
New Jersey Department of Education
River View Executive Plaza
Building 100, P.O. Box 500
Trenton, New Jersey 08625-0500

The agency proposal follows:

Summary

The Commissioner of Education (Commissioner) proposes that N.J.A.C. 6A:23A, Fiscal Accountability, Efficiency and Budgeting

Procedures, be amended as noted in this Summary. The Commissioner is proposing these amendments pursuant to the authority granted in N.J.S.A. 18:7-16, which requires the Commissioner to provide for three public hearings prior to adoption of these proposed amendments.

The Commissioner proposes to amend N.J.A.C. 6A:23A-1.2 to add definitions for the following terms: "additional district salary increment," "annual salary," "high school," "high school salary increment" and "maximum salary amount." The Commissioner proposes to amend N.J.A.C. 6A:23A-3.1 to provide the Executive County Superintendents with additional standards to be used when reviewing and approving the contracts of district superintendents. These proposed amendments are in compliance with the provisions of N.J.S.A. 18A:7-1 et seq.

N.J.A.C. 6A:23A sets forth, *inter alia*, the standards by which Executive County Superintendents shall review and approve the contracts of district superintendents. The proposed amendments will provide additional standards to be used by the Executive County Superintendents that shall limit the maximum annual salary of district superintendents. The proposed amendments will also provide for the Executive County Superintendents to review and approve the inclusion of certain salary increments and bonus provisions in the contracts of district superintendents.

These proposed amendments will allow district boards of education to control administrative expenses. The proposed amendments will also allow a district board of education to enter into a contract with a superintendent that will reflect the needs and priorities of that school district. The proposed amendments will also allow for the award of compensation to superintendents on the basis of the needs and priorities of a district board of education.

As the Commissioner has provided a 60-day comment period in this notice of proposal, this notice is exempted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

A brief summary of the proposed amendments follows:

Subchapter 1. Purpose, Scope and Definitions

This subchapter provides both the purpose and scope of the chapter, as well as the definitions for the words and terms used in the chapter. The Department proposes to add, at N.J.A.C. 6A:23A-1.2, definitions for the following terms: "additional district salary increment," "annual salary," "high school," "high school salary increment" and "maximum salary amount."

Subchapter 3. Administrator and Board Member Accountability

This subchapter establishes the standards to be used by the Executive County Superintendents in the reviewing and approving of the contracts of district superintendents, assistant superintendents and school business administrators. The subchapter also establishes the process a district board of education must undertake in the event of an early termination of the district superintendent. The subchapter also establishes the standards for the review by the Executive County Superintendents of the certification of a school business administrator.

N.J.A.C. 6A:23A-3.1 Review of employment contracts for superintendents, assistant superintendents and school business administrators

This section establishes the standards to be used by the Executive County Superintendents in the reviewing and approving of the contracts of district superintendents. The Commissioner proposes to amend N.J.A.C. 6A:23A-3.1(a) to clarify that the Executive County Superintendents shall review the contract of any superintendent that has been reappointed when a district board of education has not given the requisite notice of intent to a superintendent pursuant to N.J.S.A. 18A:17-20.1. Additionally, the proposed amendment will clarify that the Executive County Superintendents shall review, pursuant to this section, the contract of any acting, interim or otherwise-serving district superintendent, assistant superintendent, or school business administrator.

The Commissioner proposes to amend N.J.A.C. 6A:23A-3.1(b) to allow for an Executive County Superintendent to be designated to review and approve contracts in a county where there is no Executive County Superintendent.