

COMMUNITY AFFAIRS

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 pre-payment 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.