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NEW JERSEY STATE DEPARTMENT OF ENVIRONMENTAL PROTECTION
NEW JERSEY ADMINISTRATIVE CODE
TITLE 7
CHAPTER 26
SUBCHAPTER 17

CONFIDENTIALITY DETERMINATIONS

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and 48:13A-7.1 et seq.

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7:26-17.1 Scope

(a) This subchapter sets forth the procedures for making information received by the Department in administering the solid waste program under N.J.A.C. 7:26 available to the public and maintaining confidentiality of certain parts of that information.

(b) All information collected by or originated by the Department in connection with solid waste regulatory activities under N.J.A.C. 7:26 shall be generally available to the public except as provided otherwise in this subchapter. Any owner or operator of a solid waste facility or any solid waste collector or transporter required to submit any information pursuant to the Act or this chapter, which in the owner's or operator's opinion, constitutes trade secrets or proprietary information may assert a confidentiality claim by following the procedures set forth in this subchapter and by paying the fee set forth in N.J.A.C. 7:26-4.10.

7:26-17.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Claimant" means any person who submits a confidentiality claim under this subchapter.

"Class confidentiality determination" means a confidentiality determination made by the Department under N.J.A.C. 7:26-17.14 for a class of information.

"Confidential copy" means a record (or copy thereof) submitted to or obtained by the Department, containing information which the claimant asserts is confidential information.

"Confidential information" means information which the Department determines, in accordance with the procedures of this subchapter, to have satisfied all of the following substantive criteria:

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1. The claimant has asserted a confidentiality claim with respect to the information, in compliance with the procedures required by N.J.A.C. 7:26-17.3 through 17.5, and such confidentiality claim has not expired by its terms, been waived or withdrawn;

2. The claimant has shown that disclosure of the information would be likely to cause substantial damage either to the claimant's competitive position or to national security;

3. The claimant has taken reasonable measures to protect the confidentiality of the information, and intends to continue to take such measures;

4. The information is not, and has not been, available or otherwise disclosed to other persons whether by the claimant (except in a manner which protects the confidentiality of the information) or without the consent of the claimant (other than by subpoena or by discovery based on a showing of special need in a judicial proceeding in which the claimant was required to disclose the information to such other persons, as long as the information has not become available to persons not involved in the proceeding);

5. The information is not contained in materials which are routinely available to the general public, including without limitation, initial and final orders in contested case adjudications, press releases, copies of speeches, pamphlets and educational materials;

6. The claimant has not waived the confidentiality claim for the information; and

7. No law, regulation or order by a court or other tribunal of competent jurisdiction specifically requires disclosure of the information or provides that the information is not confidential information.

"Confidentiality claim or "claim" means, with respect to information that a person is required either to submit to the Department or to allow the Department to obtain, a written request by such person, meeting the requirements of this subchapter that the Department treat such information as confidential information.

"Confidentiality determination" means a determination by the Department that assertedly confidential information is or is not confidential information.

"Contract" means an agreement between the Department and a contractor, for which the Department has determined that it is necessary for the contractor to have access to confidential information to enable the contractor to perform the duties required by such agreement.

"Contractor" means a person, other than an employee of the Department, who has entered into an agreement with the Department to perform services or to provide goods for the Department.

"Final public copy" means a copy of a record submitted to or obtained by the Department, identical to the confidential copy except that any confidential information has been blacked out; provided, however, that if the record is not in a form in which the confidential information can be concealed by blacking out, the "final public copy" shall be a copy of such record from which such confidential information has been deleted, containing notations stating where deletions have been made.

"Preliminary public copy" means a copy of a record held by the Department, identical to the confidential copy except that any assertedly confidential information has been blacked out; provided, however, that if the record is not in a form in which confidential information

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can be concealed by blacking out, the "preliminary public copy" shall be a copy of such record from which such confidential information has been deleted, containing notations stating where deletions have been made.

"Requester" means a person who has made a request to the Department to inspect or copy records which the Department possesses or controls.

"Substantiation" means information which a claimant submits to the Department in support of a confidentiality claim pursuant to N.J.A.C. 7:26-17.8.

7:26-17.3 Procedure for making a confidentiality claim

(a) Any person required to submit information to the Department under this chapter, or allow the Department to obtain such information, which such person believes in good faith to constitute confidential information, may assert a confidentiality claim by following the procedures set forth in this subchapter.

(b) A claimant shall submit to the Department (at the address provided in N.J.A.C. 7:26-17.5) a confidential copy and, upon the Department's request, a preliminary public copy of any record containing assertedly confidential information. The preliminary public copy shall carry a notation stating that confidential information has been deleted. The Department may disclose the preliminary public copy to any person, without restriction or limitation.

(c) The claimant shall label the first page of the confidential copy "CONFIDENTIAL COPY." At the top of each page of the confidential copy, which page contains information that the claimant asserts is confidential information, the claimant shall place a boldface heading reading "CONFIDENTIAL." The claimant shall clearly underscore or highlight all information in the confidential copy which the claimant asserts to be confidential, in a manner which shall be clearly visible on photocopies of the confidential copy.

(d) The claimant shall seal the confidential copy in an envelope displaying the word "CONFIDENTIAL" in bold type or stamp on both sides. This envelope shall be enclosed in another envelope for transmittal to the Department. The outer envelope shall bear no markings indicating the confidential nature of the contents.

(e) The claimant shall send the package containing the confidential copy to the Department by certified mail, return receipt requested, or by other means providing a receipt for delivery.

(f) The claimant shall include in the package a written designation of a person to receive notices pursuant to N.J.A.C. 7:26-17.4.

7:26-17.4 Designation by claimant of an addressee for notices and inquiries

A claimant shall designate a person as the proper addressee of communications from the

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Department under this subchapter. To designate such a person, the claimant shall submit the following information to the Department in writing: the name and address of the claimant; the name, address, and telephone number of the designated person; and a request that all Department inquiries and communications (oral and written), including, without limitation, the inquiries and notices listed in N.J.A.C. 7:26-17.5(a), be directed to the designee.

7:26-17.5 Correspondence, inquiries, and notices

(a) The Department shall direct all correspondence, inquiries and notices to the person designated by the claimant pursuant to N.J.A.C. 7:26-17.4, including, without limitation, the following:

1. Notices requesting substantiation of claims, under N.J.A.C. 7:26-17.7(a)1ii;
2. Notices of denial of confidentiality claims and proposed disclosure of information, under N.J.A.C. 7:26- 17.10(a)1;
3. Notices concerning shortened comment and/or waiting periods under N.J.A.C. 7:26-17.17(a);
4. Notices of disclosure under N.J.A.C. 7:26-17.18; and
5. Notices of proposed use of confidential information in administrative proceedings, under N.J.A.C. 7:26- 17.21.

(b) A claimant shall direct all correspondence, inquiries, notices, and submissions concerning confidentiality claims pursuant to this chapter to the Department at the following address:

New Jersey Department of Environmental Protection
Division of Sustainable Waste Management
Mail Code 401-02C
PO Box 420
401 East State Street
Trenton, New Jersey 08625-0420

7:26-17.6 Time for making confidentiality determinations

(a) The Department shall make a confidentiality determination:

1. If the Department receives a request, by a person to whom the Department is restricted from disclosing confidential information pursuant to N.J.A.C. 7:26-17.22 through 17.26 to inspect or copy records containing asserted confidential information which is the subject of a confidentiality claim; or
2. Before taking any action which is inconsistent with the requirements for treatment of confidential information set forth in N.J.A.C. 7:26-17.22 through 17.26.

(b) The Department may, in its discretion, make a confidentiality determination at any time.

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7:26-17.7 Notice of initial confidentiality determination and of requirement to submit substantiation of claim

(a) If the Department initially determines that any of the assertedly confidential information may be confidential information, the Department shall:

1. Notify each claimant who is known to have asserted a claim applicable to such information, and who has not previously been furnished with notice with regard to the information in question, of the following:

i. That the Department is in the process of making a confidentiality determination with respect to the claimant's claim;

ii. That the claimant is required to substantiate the claim as required by N.J.A.C. 7:26-17.8.

iii. All address of the office to which the claimant's substantiation must be addressed;

iv. The time allowed for submission of substantiation, pursuant to N.J.A.C. 7:26-17.9;

v. The method for requesting a time extension under N.J.A.C. 7:26-17.9(b); and

vi. That a claimant's failure to furnish substantiation within the time allocated in N.J.A.C. 7:26-17.9 shall operate as a waiver of the claimant's claim; and

2. Furnish, to any requester whose request for inspection or copying of the information is pending, notice that:

i. The information which is the subject of the request may be confidential information;

ii. The Department must undertake further inquiry before granting or denying the requester's request; and

iii. After the Department has made a confidentiality determination concerning the information which is the subject of the request, the Department will grant or deny the request.

(b) The Department shall send the notice required by (a)1 and 2 above by certified mail, return receipt requested, or by other means providing a receipt for delivery.

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(c) If the Department is able to determine whether all of the assertedly confidential information is or is not confidential information, without the need for submission of substantiation under N.J.A.C. 7:26-17.8, such determination shall have the effect of a final confidentiality determination pursuant to N.J.A.C. 7:26-17.10. The Department shall provide such notices of determination as are required by N.J.A.C. 7:26-17.10.

7:26-17.8 Substantiation of confidentiality

(a) If the Department has determined that any assertedly confidential information may be confidential and notified the claimant pursuant to N.J.A.C. 7:26-17.7(a) and (b), the claimant shall substantiate the confidentiality claim by submitting information to the Department in the following areas within the time allotted in N.J.A.C. 7:26-17.9:

1. Measures taken by the claimant to prevent disclosure of the information to others;
2. The extent to which the information has been disclosed to others, and the precautions taken to prevent further disclosure;
3. If the Department, USEPA or any other agency has previously made a confidentiality determination relevant to the pending confidentiality claim, copies of all such confidentiality determinations;
4. A description of any substantial harmful effects which disclosure would have upon the claimant's competitive position, an explanation of why such harmful effects are substantial, and an explanation of the causal relationship between disclosure and such harmful effects;
5. The period of time for which the claimant desires that the Department treat the assertedly confidential information as confidential information; and
6. Any other substantiation which is relevant in establishing that the assertedly confidential information is confidential information.

(b) The claimant may assert a confidentiality claim for any information submitted to the Department by the claimant as part of his or her substantiation pursuant to this section. If the claimant fails to assert a confidentiality claim for such information at the time of submission, the claimant shall be deemed to have waived all such claims with respect to the information.

7:26-17.9 Time for submission of substantiation

(a) The claimant shall submit substantiation within 30 days after the date of the claimant's receipt of the written notice provided under N.J.A.C. 7:26-17.7(a)1.

(b) The Department may, in its discretion, extend the time allotted for submission of substantiation pursuant to (a) above if, before the expiration of the allotted time, the claimant submits a written request for the extension of such allotted time; provided, however, that except in extraordinary circumstances, the Department shall not approve such an extension of time in connection with a request to inspect or copy assertedly confidential information

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pursuant to N.J.S.A 47:1A-1 et seq. without the consent of any person whose request to inspect or copy the allegedly confidential information under N.J.S.A. 47:1A-1 et seq. is pending.

(c) If a claimant fails to submit substantiation within the time allotted pursuant to this section, the claimant shall be deemed to have waived all confidentiality claims with respect to the information for which the substantiation was required.

7:26-17.10 Final confidentiality determination

(a) If, after review of all the information submitted pursuant to N.J.A.C. 7:26-17.7 and 17.8, the Department determines that the assertedly confidential information is not confidential information, the Department shall take the following actions:

1. The Department shall so notify the claimant by certified mail, return receipt requested. The notice shall state the basis for the determination, that it constitutes final agency action concerning the confidentiality claim, and that the Department shall make the information available to the public on the 14th day following receipt by the claimant of the written notice. The notice shall include a copy of the final public copy to be made available to the public; and

2. On or after the 14th day following receipt by the claimant of the written notice required by (a)1 above, the Department shall send written notice of the determination to any requester with a pending request to inspect or copy the information which was the subject of the confidentiality claim. The Department shall send the notice by certified mail, return receipt requested.

(b) If, after review of the substantiation submitted pursuant to N.J.A.C. 7:26-17.8, the Department determines that the assertedly confidential information is confidential information, the Department shall treat such information as confidential information in accordance with N.J.A.C. 7:26-17.22 through 17.26. The Department shall send written notice of the determination to the claimant and to any requester with a pending request to inspect or copy the information which was the subject of the confidentiality claim. The notice shall state the basis for the determination and that it constitutes final agency action. The Department shall send the notice by certified mail, return receipt requested.

7:26-17.11 Treatment of information pending confidentiality determination

The Department shall treat assertedly confidential information as confidential information, until the Department has made a final determination that the assertedly confidential information is not confidential information.

7:26-17.12 Availability of information to the public after determination that information is not confidential

If the Department determines that assertedly confidential information is not confidential information pursuant to N.J.A.C. 7:26-17.10(a), the Department may disclose such information to

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any person on the date which is 14 days after the claimant's receipt of the written notice of the confidentiality determination.

7:26-17.13 Preparation of final public copy

After the Department makes a final confidentiality determination that a record contains confidential information, the Department shall prepare a final public copy of the record based upon the final confidentiality determination. The Department may disclose the final public copy to any person, without restriction or limitation.

7:26-17.14 Class confidentiality determinations

(a) The Department may make a class confidentiality determination if the Department finds that the items of information within the class share one or more characteristics, which would cause the Department to determine consistently that such information is or is not confidential information.

(b) A class confidentiality determination shall clearly identify the class of information to which it applies. Such identification shall include a list of the common characteristics shared by all information within the class.

(c) A class confidentiality determination shall state that all of the information in the class is or is not confidential information.

7:26-17.15 Disclosure of confidential information to other public agencies

(a) The Department may disclose confidential information to any other State agency or to a Federal agency if:

1. The Department receives a written request for disclosure of the information from a duly authorized officer or employee of the requesting agency;

2. The Department notifies the other agency of any pending confidentiality claim concerning the requested information, or of any confidentiality determination regarding the requested information;

3. The other agency has furnished to the Department a written opinion from the agency's chief legal officer or counsel stating that under applicable law the agency has the authority to compel the person who submitted the information to the Department (or allowed the Department to obtain such information) to disclose such information to the requesting agency;

4. The other agency has adopted regulations or operates under statutory authority that will allow it to preserve confidential information from unauthorized disclosure, and agrees in writing to refrain from disclosure and to safeguard the information in accordance with the requirements of N.J.A.C. 7:26-17.22 and 23, unless:

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i. The requesting agency has statutory authority both to compel production of the information and to disclose it; or

ii. The claimant has consented to disclosure of the information by the requesting agency; and

5. The requesting agency agrees not to disclose the information further unless:

i. The requesting agency has statutory authority both to compel production of the information and to make the proposed disclosure; or

ii. The claimant has consented to disclosure of the information by the requesting agency.

7:26-17.16 Disclosure of confidential information to contractors

(a) The Department may disclose confidential information to a contractor, if it complies with the procedure established under (b) below, and if:

1. The Department determines that such disclosure is necessary in order for the contractor to perform the work required by the contract;

2. The contract provides that the contractor and the contractor's employees shall use the confidential information only for the purpose of performing the duties required by the contract, shall refrain from disclosing the confidential information to anyone other than the Department, shall store all records containing the confidential information in locked cabinets in secure rooms, and shall return to the Department all originals and all copies of the information (and any abstracts or extracts therefrom, or any records containing any of the confidential information) when the confidential information is no longer necessary to enable the contractor to perform obligations under the contract, or at any time upon the request of the Department; and

3. If the claimant so requests, the contractor contracts with the claimant to refrain from further disclosure of the confidential information.

(b) Before disclosing confidential information to a contractor under (a) above, the Department shall notify the claimant of the proposed disclosure in writing, delivered by certified mail, return receipt requested, at least 14 days before making the disclosure. The notice shall state the information to be provided, the identity of the contractor and the scheduled date of disclosure. If, at least three working days before the scheduled date of disclosure, the claimant delivers to the Department information sufficient to establish that the proposed disclosure would be likely to cause substantial damage either to the claimant's competitive position or to national security, the Department shall refrain from making the disclosure.

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7:26-17.17 Disclosure to alleviate an imminent and substantial danger

(a) If the Department finds that disclosure of confidential information would serve to alleviate an imminent and substantial danger to public health, safety or the environment, the Department may, in its discretion, take one or more of the following actions:

1. Reduce the time allotted for providing substantiation pursuant to N.J.A.C. 7:26-17.9, and notify the claimant of such reduction;
2. Advance the date on which the Department may disclose information which the Department has determined is not confidential information, pursuant to N.J.A.C. 7:26-17.10(a), and notify the claimant of such advance; or
3. Immediately disclose the confidential information to any person whose role in alleviating the danger to public health and the environment makes such disclosure necessary. Any disclosure pursuant to this paragraph shall be limited to information necessary to enable the person to whom it is disclosed to carry out the activities in alleviating the danger. Any disclosure made pursuant to this paragraph shall not be deemed a waiver of a confidentiality claim and shall not be grounds for any determination that information is no longer confidential information.

7:26-17.18 Notice to claimants of disclosure of confidential information

(a) Promptly after the Department discloses confidential information pursuant to N.J.A.C. 7:26-17.15, 17.16 or 17.17, the Department shall notify any claimant from whom the Department has obtained confidential information of the disclosure. Such notice shall be in writing, and shall contain all contain the following information:

1. The date on which disclosure was made;
2. The name of the agency or other person to which the Department disclosed the confidential information; and
3. A description of the confidential information disclosed.

7:26-17.19 Disclosure by consent

(a) The Department may disclose confidential information in accordance with the written consent of the claimant.

(b) A claimant's consent to a particular disclosure shall not operate as a waiver of a confidentiality claim with regard to further disclosures, unless the authorized disclosure is of such nature that the disclosed information is no longer confidential information.

7:26-17.20 Incorporation of confidential information into cumulations of data

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Nothing in this chapter shall be construed as prohibiting the incorporation of confidential information into cumulations of data subject to disclosure as public records, provided that after consultation with the claimant, the Department has determined that such disclosure is not in a form that would foreseeably allow persons, not otherwise having knowledge of such confidential information, to deduce from it the confidential information or the identity of the person who supplied it to the Department.

7:26-17.21 Disclosure of confidential information in rulemaking, permitting and enforcement proceedings

(a) Notwithstanding any other provision of this subchapter, the Department may disclose confidential information in rulemaking, permitting and enforcement proceedings.

(b) The following procedures shall apply to the disclosure of confidential information by the Department in rulemaking, permitting and enforcement proceedings:

1. The Department may disclose confidential information in an adjudicatory hearing, subject to the protection from making the information available to the public which the administrative law judge may impose under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1 including, without limitation, N.J.A.C. 1:1- 14.1.

2. The Department may disclose confidential information in any enforcement, permitting, or rulemaking proceeding which does not involve an adjudicatory hearing, pursuant to the following procedure:

i. The Department shall inform the claimant that the Department is considering using the information in connection with the proceeding and shall afford the claimant a reasonable period for comment;

ii. The claimant shall submit comments to the Department within the time allotted pursuant to (b)2i above, concerning the proposed uses of confidential information, including comments which may support a determination that the confidential information is not relevant to the proceeding, or that the disclosure of the confidential information in the proceeding is not necessary to serve the public interest;

iii. The Department may disclose the confidential information in the proceeding if, upon consideration of comments submitted pursuant to (b)2ii above, the Department determines that the information is relevant to the subject of the proceeding, that the use of the information in the proceeding will serve the public interest, and that it materially impairs such service of the public interest to limit the use of the information to a manner which preserves its confidentiality; and

iv. The Department shall give the affected person at least five days notice prior to using the information in the proceeding in a manner which may result in the information being made available to the public a confidentiality claim has been made available to the public.

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7:26-17.22 Hearing before disclosure of information for which a confidentiality claim has been made

(a) A claimant may request an adjudicatory hearing to contest disclosure of any information for which a confidentiality claim has been made, at any time before disclosure. The request shall be in accordance with the requirements of this section, and shall be delivered to the Department at the following address:

New Jersey Department of Environmental Protection
Office of Administrative Hearings and Dispute Resolution
ATTENTION: Adjudicatory Hearing Requests
401 E. State Street
Mail Code 401-07A
PO Box 420
Trenton, New Jersey 08625-0420

(b) The Department may deny a request for an adjudicatory hearing under (a) above if

1. The claimant fails to provide all information required under this chapter;
2. The Department receives the request after disclosure of the assertedly confidential information occurs;
3. The Department has been ordered to disclose the information by a court of competent jurisdiction, or by any other person or entity with the power and authority to compel disclosure; or

4. The Department determines that disclosure is necessary to alleviate an imminent danger to the environment or to public health or safety, as provided in N.J.A.C. 7:26-17.17.

(c) All adjudicatory hearings shall be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(d) At the adjudicatory hearing, the respondent shall have the burden of showing that the proposed disclosure is not in accordance with this subchapter.

(e) Pending the completion of the adjudicatory hearing, the Department will refrain from disclosing the assertedly confidential information, unless:

1. The Department has been ordered to disclose the information by a court of competent jurisdiction, or by any other person or entity with the power and authority to compel disclosure; or

2. The Department determines that disclosure is necessary to alleviate an imminent danger to the environment or to public health or safety.

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7:26-17.23 Nondisclosure of confidential information

Unless specifically required by any Federal or State law, regulation or order, court order, or applicable court rule, the Department shall not disclose confidential information to any person other than as provided in N.J.A.C. 7:26-17.15 through 17.22.

7:26-17.24 Safeguarding of confidential information

- (a) Submissions to the Department required under this chapter will be opened only by persons authorized by the Department to be engaged in administering this chapter.
- (b) Only those Department employees whose activities necessitate access to information for which a confidentiality claim has been made may open any envelope which is marked "CONFIDENTIAL."
- (c) The Department shall store any records containing confidential information only in locked cabinets in secure rooms; provided, however, that if such records are in a form which is not amenable to such storage, the Department shall store such records in a manner which similarly restricts access by persons to whom disclosure of the confidential information in question is restricted.
- (d) Any records made, possessed, or controlled by the Department or its contractors, and containing confidential information, shall contain indicators identifying the confidential information.
- (e) Every Department employee, representative, and contractor who has custody or possession of confidential information shall take appropriate measures to safeguard such information and to protect against its improper disclosure.

7:26-17.25 Confidentiality agreements

The provisions of this chapter shall supersede the provisions of any agreement imposing any duties of confidentiality or nondisclosure upon the Department or any employee, contractor or agent thereof. Such provisions imposing confidentiality or nondisclosure duties upon the Department or any employee, contractor or agent thereof shall be of no force or effect.

7:26-17.26 Wrongful access or disclosure; penalties

- (a) No person shall disclose, obtain or have possession of any confidential information, except as authorized by this chapter.
- (b) Except in accordance with this chapter, no Department employee, representative, or contractor shall disclose any confidential information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position of employment or contractual relationship with the Department. No such person shall use any such information

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for his or her private gain or advantage, except as permitted by a contract between such person and the Department. If a contractor discloses confidential information in violation of this chapter or of contractual provisions restricting disclosure, such disclosure shall constitute grounds for debarment or suspension as provided in N.J.A.C. 7:1D-2, Debarment, Suspension and Disqualification from Department Contracting.

(c) If the Department finds that any person has violated the provisions of this subchapter, it may:

1. Commence civil action in Superior Court for a restraining order and an injunction barring that person from further disclosing confidential information; and/or

2. Pursue any other remedy available at law or equity.

(d) In addition to any other penalty that may be sought by the Department, violation of this subchapter by a Department employee shall constitute grounds for dismissal, suspension, fine or other adverse personnel action.

(e) Any use of any of the remedies specified under this section shall not preclude the use of any other remedy.