

ENVIRONMENTAL PROTECTION

OFFICE OF THE COMMISSIONER

General Practice and Procedure

Records Not Subject to Disclosure

Proposed Amendment: N.J.A.C. 7:1D-3.2

Authorized By: Catherine R. McCabe, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 47:1A-1 and Executive Order No. 9 (Hughes 1963).

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

DEP Docket Number: 06-18-11.

Proposal Number: PRN 2018-121.

A **public hearing** concerning this rule proposal will be held on:

Thursday, January 31, 2019, at 10:00 A.M. at:

New Jersey Department of Environmental Protection

Public Hearings Room, 1st Floor

401 East State Street

Trenton, New Jersey

Directions to the hearing room may be found at the Department's website address

<http://www.state.nj.us/dep/where.htm>.

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Submit written comments by close of business on February 15, 2019, electronically at www.nj.gov/dep/rules/comments. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

The Department encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Nathalie Verhaegen, Esq.

Attention: DEP Docket No. 06-18-11

Office of Legal Affairs

New Jersey Department of Environmental Protection

401 East State Street, 7th Floor

Mail Code 401-04L

PO Box 402

Trenton, NJ 08625-0402

Written comments may also be submitted at the public hearing.

The agency proposal follows:

Summary

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As the Department is providing a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to 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, as defined therein, shall be subject to public access, unless otherwise exempt thereunder or by 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.

Notwithstanding, OPRA charges public agencies with the responsibility 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. Additionally, the act exempts from disclosure security measures and surveillance techniques, which, if disclosed, would create a safety risk to residents of New Jersey and to property and information that, if disclosed, would give an advantage to competitors.

The proposed amendments to N.J.A.C. 7:1D-3.2 are consistent with these provisions as they facilitate public access to government records while protecting residents' reasonable expectations of privacy, the integrity and effectiveness of governmental operations, and public safety and security.

Potentially Dangerous Species

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The Department proposes new N.J.A.C. 7:1D-3.2(a)4 to exempt from disclosure, government records that would allow individuals to identify, track, or otherwise determine the location of species that, in the opinion of the Division of Fish and Wildlife, are potentially capable of inflicting serious or fatal injuries or being a menace to public health. This exemption is necessary to protect the public from harm that may occur from seeking out and encountering and/or interfering with the Department's efforts to manage these species. The proposed exemption applies to records containing information that, if disclosed, could potentially allow individuals to track or otherwise locate these species, such as locations of sightings, dens, nests, or other habitation sites, locations of traps, or other control techniques implemented by the Department's Division of Fish and Wildlife (DFW) biologists, and tracking or locational information generated by collars, tags, or transmitters affixed to such species by the Department including, but not limited to, radio frequency identification tags (RFID) and passive integrated transponder tags (PIT). The release of this information would jeopardize the Department's ability to protect public safety by increasing the likelihood that individuals seek out and encounter these species and/or interfere with the Department's management efforts. The Department has documented numerous instances where members of the public have placed themselves and others, including Department employees, in danger because of such activities.

In crafting this exemption, the Department proposes to include those species that, as determined by the Department's Division of Fish and Wildlife, are considered potentially capable of inflicting serious or fatal injuries or being a menace to public health with a non-

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exhaustive, illustrative list that includes bear, nondomestic dogs, nondomestic cats, venomous and constrictor snakes, and exotic species.

Proposed N.J.A.C. 7:1D-3.2(a)4i allows disclosure to a property owner, at the property owner's request, of government records that would allow individuals to identify, track, or otherwise determine the location of species on their property. Through this exemption, the Department is seeking to balance the rights of property owners to be aware of the presence of the species on their property against the Department's obligation to protect the public from harm that may occur from seeking out and encountering and/or interfering with the Department's efforts to manage these species.

Proposed N.J.A.C. 7:1D-3.2(a)4i(1) makes confidential, those records that reveal the identity of a person who provided information contained in the records if that person did not provide the information in the course of employment with the State of New Jersey. Release of the identity of persons who are providing information about species that are potentially capable of inflicting serious or fatal injuries or being a menace to public health in their personal capacity could have a chilling effect on such reports and, thus, hamper the Department's efforts to meeting its obligation to protect the public from harm and effectively manage these species.

Blue Acres

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The Department also proposes at N.J.A.C. 7:1D-3.2(c) to protect information related to Blue Acres acquisitions, program offerings, active projects, and title investigations, in the same manner as its other land acquisition programs, as such disclosure would give an advantage to the Department's competitors in land acquisitions. In these instances, the Department is engaging in "arms-length" negotiations and release of such information would hamper negotiations and jeopardize the Department's ability to complete purchases of land for open space and flood control that are beneficial to the public at large and maximize its use of public dollars. Such disclosure places the Department at a disadvantage in negotiations by providing a potential seller with information it would not otherwise have to disclose or be privy to in a private transaction. It also potentially provides third-parties with information that might allow them to undermine the Department's efforts. The records shall, however, be made available no later than 48 hours before formal action is to be taken, except under certain circumstances, as disclosure at that point would no longer be likely to disadvantage the Department.

Social Impact

The Department anticipates a positive social impact because of this rulemaking. The proposed new rules are consistent with the requirements of OPRA to ensure appropriate access to government records while implementing reasonable restriction to ensure the protection of public safety and the integrity of the Department's Blue Acres land acquisitions.

Economic Impact

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The proposed amendments 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 under 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 rules 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.

Environmental Impact

The proposed amendments will have a positive environmental impact by allowing the Department to engage in efforts to track and control potentially dangerous species without disclosing information that would endanger public safety. Additionally, protecting confidential information related to Blue Acres transactions will further the Department's efforts to obtain flood prone properties and reduce environmental impacts that result from flooding.

Jobs Impact

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

Regulatory Flexibility Statement

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 amendments do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act. The proposed amendments impose restrictions on all persons seeking access to government records pursuant to OPRA. There is no exception for small businesses.

Housing Affordability Impact Analysis

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 and the average cost of housing in the State. The Department has determined that the proposed rulemaking will evoke no influence in the overall average cost

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associated with housing in the State. The rules relate solely to the Department's production of government records.

Smart Growth Development Impact Analysis

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.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

In accordance with N.J.S.A. 52:14B-4(a)(2) and 2C:48B-2, the Department has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

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

SUBCHAPTER 3. NON-PUBLIC RECORDS

7:1D-3.2 Records not subject to disclosure

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(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. (No change.)

2. Records that reveal the identity of a complainant. For purposes of this paragraph, “complainant” means a person who submits a report, complaint, or an allegation to the Department either alleging violation of environmental law or reporting an environmental concern and who is not obligated by law or rule to submit such a report, complaint, or allegation; [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.-iii. (No change.)

iv. For the purposes of this paragraph, 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[.]; **and**

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4. Portions of records that identify, track, or otherwise determine the location of any animal or bird which, in the opinion of the Division of Fish and Wildlife, is potentially capable of inflicting serious or fatal injuries or being a menace to public health including, but not limited to, bears, nondomestic dogs, nondomestic cats, venomous and constrictor snakes, and exotic species. This includes, but is not limited to, records containing information regarding sightings, dens, nests or other habitation sites, locations of traps or other control techniques, and tracking or locational information generated by collars, tags, or transmitters affixed to such species by the Department including, but not limited to, radio frequency identification tags (RFID) and passive integrated transponder tags (PIT).

i. The Department shall disclose the records identified in (a)4 above to the owner of land upon which the potentially dangerous species has been located, if requested by the landowner.

(1) Prior to providing records containing the location of potentially dangerous species under this subparagraph, the Department shall redact the name of the person who provided the information contained in the records, if the Department determines that the person providing such information did not provide this information in the course of his or her employment with the State of New Jersey.

(b) (No change.)

(c) Records related to Green Acres, Blue 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

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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 records 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.