

LAW AND PUBLIC SAFETY

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:

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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.