

NEW JERSEY BOARD OF PUBLIC UTILITIES

Procedures For Determining The Confidentiality Of Submitted Information

(also known as Open Public Records Act or "OPRA" rules)

N.J.A.C. 14:1-12

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14:1-12.1 Scope

(a) This subchapter sets forth the procedures for making information received by the Board of Public Utilities in administering its duties available to the public and maintaining confidentiality of certain parts of the information.

(b) Any person or entity required to submit or who does submit to the Board any information pursuant to Titles 48 and 52 of the New Jersey Statutes or Title 14 of the New Jersey Administrative Code, which in the person's or entity's opinion constitutes trade secrets, proprietary commercial or financial information, or information which if disclosed, would be likely to cause damage to either a competitive or bidding position or national security, may assert a confidentiality claim by following the procedures set forth in this subchapter.

(c) With regard to any determination related to a request for the confidential treatment of information, the provisions of N.J.A.C. 17:44-5.1, 5.2 and 5.4 shall be taken into consideration.

(d) This subchapter is only one of several legal mandates which govern the public release of information submitted to the Board. Because the Board is an agency in but not of the Department of Treasury, pursuant to N.J.S.A. 52:18A-2.1, the Board will apply

the Department of Treasury's OPRA rules in addition to the provisions of this subchapter. In addition, some provisions of OPRA and other applicable statutes, which apply to the confidentiality of submitted information, may apply but are not repeated in these rules. Executive Orders No. 21 and 26 (2002) also apply to the Board's treatment of submitted information.

(e) Nothing in this subchapter shall limit the Board's authority to make a confidentiality determination within the context of a hearing or other proceeding or with regard to any other matter as the Board may deem appropriate.

14:1-12.2 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.

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

"Confidential information" means information which the custodian and/or the Board determines, in accordance with the procedures of this subchapter, to have satisfied the substantive criteria in this subchapter and/or in applicable law described at N.J.A.C. 14:1-12.1(d). Information may be claimed confidential by the person who submitted it, or the Board may on its own initiative determine information to be confidential.

"Confidentiality claim" or "claim" means, with respect to information that a person is required either to submit to the Board or to allow the Board to obtain, an assertion in accordance with this subchapter that the information is entitled to be exempt from public disclosure under applicable law.

"Confidentiality determination" means a determination by the custodian that the asserted confidential information is or is not confidential information.

"Contract" means an agreement between the Board and a contractor, for which the Board has determined 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 Board, who has entered into a contract, as defined herein, with the Board to perform services or to provide goods for the Board.

"Custodian" means the officer officially designated by the Board to oversee the public's access to government records pursuant to N.J.S.A. 47:1A-1 et seq.

"Designee" means the person designated by a claimant in accordance with N.J.A.C. 14:1-12.4 to receive notices and other communications relating to confidentiality claims from the custodian under these rules.

"Final public copy" means a copy of a record submitted to or obtained by the Board, identical to the confidential copy except that any confidential information has been blacked out; however, 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 Board, identical to the confidential copy except that any asserted confidential information has been blacked out; however, if the record is not in a form in which the confidential information 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 Board to inspect or copy records which the Board possesses or controls.

"Substantiation" means information which a claimant submits to the custodian in support of a confidentiality claim made pursuant to N.J.A.C. 14:1-12.8.

14:1-12.3 Procedure for making a confidentiality claim

(a) Any person or entity required to submit or who does submit to the Board information pursuant to Titles 48 and 52 of the New Jersey Statutes or Title 14 of the New Jersey Administrative Code, 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 custodian a confidential copy and a preliminary public copy, as those terms are defined at N.J.A.C. 14:1-12.2, of any record containing asserted confidential information. The preliminary public copy shall carry a notation, in a form to be developed by the custodian, stating that confidential information has been blacked out or deleted. The custodian 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 contains information that the claimant asserts is confidential, 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 custodian. 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 custodian by certified mail, return receipt requested, or by other means providing receipt for delivery.

(f) The claimant shall include in the package a written designation of a person to receive notices and other communications. The designation shall include the information required pursuant to N.J.A.C. 14:1-12.4.

(g) The claimant shall include in the package substantiation of the confidentiality claim as described in N.J.A.C. 14:1-12.8.

14:1-12.4 Designation by claimant of a designee for notices and inquiries

(a) A claimant shall designate a person as the proper addressee of notices and other communications from the custodian under this subchapter. To designate such a person, the claimant shall submit the following information to the custodian in writing:

1. The name and address of the claimant;
2. The name, address, e-mail address, telephone number and facsimile number of the designee, and any other contact information that will assist the Board in rapidly contacting the person regarding the confidentiality determination; and
3. A request that all custodian communications (oral and written), including, without limitation, the notices listed in N.J.A.C. 14:1-12.7 and 12.9, be directed to the designee.

14:1-12.5 Correspondence, inquiries and notices

(a) The custodian shall direct all correspondence, inquiries and notices to the designee, including, without limitation, the following:

1. Notices of requests submitted to the Board for the confidential information that was submitted by the claimant; and
2. Notices of the Board's denial of the confidentiality claims.

(b) A claimant shall direct all correspondence, inquiries, notices and submissions concerning confidentiality claims under this subchapter to the custodian at:

Records Custodian
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

14:1-12.6 Time for making confidentiality determinations

(a) The custodian shall make a confidentiality determination within seven business days after the custodian's receipt of a request to inspect or copy records containing asserted confidential information, unless:

1. A reasonable extension is necessary because the records are in storage or in use. In such a case, the records custodian shall so advise the requester within seven business days after the custodian receives the request, and shall make arrangements to promptly make available a copy of the record;
2. The requester consents to a reasonable extension of time; or
3. The request for access to records would substantially disrupt the Board's operations. In such a case the custodian may deny access to the record without making the confidentiality determination, provided that the custodian first attempts to reach a reasonable solution with the requester, which accommodates the interests of the requester and the Board.

(b) The custodian shall not take any action which is inconsistent with the requirements for the treatment of information that has been claimed confidential, set forth in N.J.A.C. 14:1-12.10 until a determination has been made as to whether the information is confidential or not.

(c) Requests received after 4:00 P.M. will be considered as received on the next business day.

(d) Except as otherwise provided in (a) above, the custodian may, in his or her discretion, make a confidentiality determination at any time.

14:1-12.7 Notice of pending confidentiality determination

(a) When the custodian is required, pursuant to N.J.A.C. 14:1-12.6(a), to make a confidentiality determination, the custodian shall send a notice to the designee for each claimant who is known to have asserted a claim applicable to such information. The notice shall include the following:

1. A copy of the request form, with any information that is exempt from public disclosure under N.J.S.A. 47:1A-1 et seq. removed; and
2. The earliest date that the information may be made available to the public under this chapter, if the asserted confidential information is determined not to be confidential.

(b) If the identity of the claimant is immediately discernable from the information supplied on the request form, the custodian shall notify the claimant's designee by fax, telephone or e-mail as soon as feasible, but no later than two business days after receiving the request. If the identity of the claimant is not immediately discernible, the custodian shall notify the claimant's designee of the request as soon as it is reasonably possible to identify the claimant.

14:1-12.8 Substantiation of confidentiality

(a) To substantiate a confidentiality claim, a claimant shall submit the following information, as applicable, pursuant to the procedure set forth in N.J.A.C. 14:1-12.3 through 12.5:

1. Measures taken by the claimant to prevent disclosure of the information to others;
2. Whether the information is 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;
3. The extent to which the information has been disclosed to others, and the precautions taken to prevent further disclosure;
4. If the Board, custodian or any other state or Federal agency or court of competent jurisdiction has previously made a confidentiality determination relevant to the pending confidentiality claim, copies of all such determinations;
5. A description of any harmful effects which disclosure would have upon, including but not limited to, the claimant's competitive or bidding position, trade secrets, proprietary commercial or financial information, or national security, and an explanation of the causal relationship between the disclosure and such harmful effects;
6. The period of time for which the claimant desires that the custodian treat the asserted confidential information as confidential information;
7. If known, any provision in a statute, rule, Order or other document, which would exempt the information from public disclosure; and
8. Any other substantiation which the claimant believes to be relevant in establishing that the custodian should determine the information to be confidential information.

(b) The substantiation shall be supported by an affidavit from a person with personal knowledge of the information, certifying its truth and accuracy.

(c) 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.

(d) Substantiation may be updated and/or supplemented by the submittal of additional information at any time. However, if an update or supplement is submitted after the custodian receives a request for the release of information that is claimed as confidential, the custodian shall take the update or supplement into account in its confidentiality determination only to the extent that the deadlines in this chapter permit.

14:1-12.9 Final confidentiality determination

(a) If, after review of all the information submitted pursuant to this subchapter, the custodian determines that the asserted confidential information is not confidential information, the custodian shall as quickly as feasible:

1. Notify the claimant's designee of the determination through reasonable efforts to contact them by telephone, e-mail, fax, or other means provided in the designation submittal; and
2. Provide written notice that meets the requirements of (b) below to the claimant's designee by certified mail, return receipt requested.

(b) The written notice required under (a)2 above shall include the following:

1. The date on which the disclosure was made;
2. The name of the agency or other person to which the custodian disclosed the information that was claimed confidential;
3. A brief description of the information disclosed;
4. The basis for the determination; and
5. A statement that the written notice constitutes final agency action concerning the confidentiality claim.

(c) If after review of the substantiation submitted pursuant to this subchapter, the custodian determines that the asserted confidential information is confidential information, the custodian shall:

1. Treat such information as confidential;
2. Send written notice of the determination to the claimant and, if applicable, to any requestor with a pending request to inspect or copy the information which was the subject of the confidentiality claim;
3. State in the notice the basis for the determination and that it constitutes final agency action; and
4. Send notice to the claimant by certified mail, return receipt requested, if applicable.

(d) The custodian's determination under this section shall constitute final agency action.

14:1-12.10 Treatment of information pending confidentiality determination

The custodian shall treat asserted confidential information as confidential information until the custodian has made a final determination that the asserted confidential information is not confidential information.

14:1-12.11 Availability of information to the public after determination that information is not confidential

If the custodian has received a request for asserted confidential information in accordance with this subchapter, and has determined that the information is not confidential, the Custodian may disclose such information to any person on the seventh business day following the request for the confidential information.

14:1-12.12 Disclosure of confidential information to other public agencies

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

1. The custodian notifies the other agency of any pending confidentiality claim concerning the requested information, or of any confidentiality determination regarding the requested information; and
2. The custodian receives a written request for disclosure of the information from a duly authorized officer or employee of the requesting agency, stating that the other agency has adopted regulations or operates under statutory authority that would allow it to preserve confidential information from unauthorized disclosure, and agrees in writing to refrain from further disclosure, unless:
 - 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 the disclosure of the information to the requesting agency.

14:1-12.13 Disclosure of confidential information to contractors

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

1. The custodian 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 custodian, shall store all records containing the confidential information in locked cabinets in secure rooms, and shall return to the custodian 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 its obligations under the contract, or at any time upon the request of the custodian; and
3. At the request of the claimant, 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 custodian 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 custodian information sufficient to establish, to the custodian's satisfaction, that the proposed disclosure involves trade secrets, proprietary commercial or financial information or would likely cause damage to either a competitive or bidding position or national security, the custodian shall refrain from making the disclosure.

14:1-12.14 Disclosure to alleviate an imminent and substantial danger

(a) If the custodian finds that disclosure of confidential information would serve to alleviate an imminent and substantial danger to public health, safety or the environment, the custodian shall:

1. Immediately disclose the confidential information to any person whose role in alleviating the danger to public health and the environment makes such disclosure necessary; and
2. Limit any disclosure pursuant to this paragraph to that information necessary to enable the person to whom it is disclosed to carry out the activities necessary to alleviate the danger.

(b) Any disclosure made pursuant to (a) above 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.

14:1-12.15 Disclosure by consent

(a) The custodian 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.

14:1-12.16 Incorporation of confidential information into accumulations of data

Nothing in this subchapter shall be construed as prohibiting the incorporation of confidential information into accumulations of data subject to disclosure as public records, provided that after consultation with the claimant, the custodian 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 custodian.

14:1-12.17 Confidentiality agreements

(a) The provisions of this subchapter shall supersede the provisions of any agreement imposing any duties of confidentiality or nondisclosure upon the Board, custodian or any employee, or contractor or agent thereof. This section does not govern Board orders, which are not superseded by this subchapter.

(b) Provisions of an agreement imposing confidentiality or nondisclosure duties upon the Board or any employee, contractor or agent thereof shall be of no force or effect.

(c) The Board shall presume that the submitter of any information subject to a previous agreement imposing duties of confidentiality or nondisclosure upon the Board would like the information kept confidential. Therefore, if the Board receives a request for public

disclosure of such information, the Board will notify the submitter in accordance with N.J.A.C. 14:1-12.7, in order to provide the submitter with an opportunity to submit substantiation in accordance with N.J.A.C. 14:1-12.8. The Board recommends that any person who has submitted such information in the past submit updated contact information to the custodian to ensure that the custodian can contact them in the event of a request for public disclosure of the information.

14:1-12.18 Payment for copies

(a) When copies of a record have been requested, payment will be expected at the time the records are picked up, or if the requester would prefer the copies to be mailed, receipt of payment including the cost of mailing the copies by the custodian must occur before the records will be mailed.

(b) For the convenience of the requestor, payment may be made in cash or by check or money order.