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ENVIRONMENTAL PROTECTION

OFFICE OF THE COMMISSIONER

General Practice and Procedure; Non-Public Records

Adopted New Rules: N.J.A.C. 7:1D-3

Proposed: December 6, 2010, 42 N.J.R 2880(a)

Adopted: October 13, 2011 by Bob Martin, Commissioner, New Jersey Department of Environmental Protection.

Filed: , **with substantive changes** not requiring additional public notice and comments (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 47:1A-1, 52:4B-9, 52:13D-21, 52:17B-4, 52:17B-170, and Executive Order No. 9 (Hughes 1963)

DEP Docket Number: 11-10-11

Effective Date: November 7, 2011

Expiration Date: July 8, 2018

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), 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.

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OPRA 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 would violate the citizen's reasonable expectation of privacy. There are also categories of documents the disclosure of which would interfere with Department operations, or the safety and security of citizens of New Jersey. The Department is adopting new N.J.A.C. 7:1D-3 in order to serve both of these legislative policies by facilitating public access to government records while balancing citizens' reasonable expectations of privacy and the integrity and effectiveness of governmental operations. New Subchapter 3 identifies records that the Department has identified as non-public and not subject to production.

This adoption document can be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules/adoptions.html>

Summary of Public Comments and Agency Responses:

The Department received comments on the proposed amendments from the following persons:

1. Elizabeth George-Chenaria, Esq., New Jersey Builders Association
2. Richard Gutman, Esq.
3. Edward A. Hogan, Esq., Norris, McLaughlin, Marcus
4. Jeanne Public

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A summary of the comments and the Department's responses follows. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

Identity of a Complainant – N.J.A.C. 7:1D-3.2(a)2

1. **COMMENT:** The proposed rule “makes confidential those records that reveal the identity of a complainant.” The rules should provide a means by which parties against whom a complaint has been lodged in a bad faith or tortious manner may obtain the identity of the complainant. (3)

2. **COMMENT:** Proposed N.J.A.C. 7:1D-3.2(a)2 would prohibit access to any records that would disclose a complainant's identity. The Department proposes to expand the protection given to complainants in criminal investigations to those providing information in non-criminal matters as well. While the Department seeks to ensure the public's comfort in using the hotline to make reports, the proposed rule fails to balance this concern with the legitimate interests of those against whom complaints may be directed. For example, those against whom complaints are directed are left with no means to effectively verify the credibility of the complaints. Additionally, the term “complainant” is not defined and could be broadly interpreted to apply to anyone who provides information to the Department. The rule must be revised prior to adoption to better balance competing interests while ensuring transparency. (1)

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RESPONSE TO COMMENTS 1 AND 2: The Department is modifying the rule on adoption to define “complainant,” as discussed below. The Department cannot determine whether a complaint was made in bad faith or in a tortious manner until it investigates the allegations of the complaint. Investigation verifies the underlying facts, or shows the complaint to be unfounded. Unfounded complaints are closed. Not all unfounded complaints are made in bad faith or in a tortious manner, and it is not always evident when an investigation is closed that a complaint was not in good faith. Accordingly, it would not be appropriate for the Department to disclose the identity of complainants even in cases where the allegations are deemed unfounded.

The names of Department employees or other government investigators who report environmental violations as part of their employment, and reports by others who are required by law or regulation to report environmental conditions (for example, responsible parties under the Spill Act), will not be redacted from records made available under OPRA.

The protection of the identities of other individuals not obligated to report, but who come forward to provide information to the Department, from potential reprisal from employers or neighbors outweighs the need for disclosure of their identities. As set forth in the proposal Summary, 42 N.J.R. 15 2880, disclosure of the identity of complainants could have a chilling effect, for instance, on the use of the Department hotline to register legitimate complaints or potential violations of the State’s environmental laws and regulations. Calls to the hotline and other complaints made to the Department by those

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who are not obligated by law or regulation to do so help facilitate the Department's core mission to protect the air, waters, land, and natural and historic resources of the State to ensure continued public benefit. (See the Department's Vision Statement 2010, <http://www.state.nj.us/dep/commissioner/vision-priorities.pdf>.) Such protection is not necessary for those who are required by law or regulation or as part of their employment to report environmental conditions. The Department is therefore modifying the rule on adoption to define "complainant" for purposes of the rule as a person who is under no obligation to report to the Department.

The modification codifies the Department's interpretation of the exemption that was part of the Department's regulations that were proposed in July 2002 (34 N.J.R. 2227(a)) and modified pursuant to Governor McGreevey's Executive Order 21 in July 2002 (as modified by Executive Order 26 (2002)). The Department has processed over 105,000 record requests under OPRA and has not been challenged on its application of the exemption for identity of a complainant under the circumstances described in the comment, or as defined in the modified rule.

3. COMMENT: The Department should not be allowed to protect the names of complainants who call in to report bears, deer or other species, since those alleged "complainants" are in fact hunters who call in with fake reports so that complaints can be lodged that are inaccurate, fake and lead to the decimation and wildlife murder of those species. (4)

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RESPONSE: The Department has no evidence of false reports from hunters regarding bears, deer or other species. As discussed above in the response to Comments 1 and 2, the need to protect the identities of individuals who report environmental concerns to the Department outweighs the need for the public disclosure of the complainant's identity.

Threatened and/or Endangered Species – N.J.A.C. 7:1D-3.2(a)3

4. **COMMENT:** The Department's proposed confidentiality statement at proposed N.J.A.C. 7:1D-3.2(a)3ii fails to recognize the role of consultants in development projects. It should be expected that applicants would rely on outside animal and/or plant species consultants and experts in project work, and would need to be able to share the basis for the permitting decisions. The scope of the confidentiality rule should be revised and broadened to reflect this applicant-consultant relationship and necessary sharing of information. (1)

5. **COMMENT:** Proposed N.J.A.C. 7:1D-3.2(a)3 limits the disclosure of the location of threatened and/or endangered animal species, endangered plant species and plant species of concern to only the owner of a subject property. However, in many instances a property owner's agent, engineer or consultant will need the information. The proposed rule should provide for disclosure to any such agents of a property owner.

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Potential purchasers of a property may also require such information in connection with pre-purchase due diligence; therefore, the rule should also provide for disclosure (either by a property owner or the Department) in such instances. In addition, a property owner may have a duty to disclose knowledge of threatened or endangered species information to a property purchaser, and the rule should enable a property owner to do so. (3)

RESPONSE TO COMMENTS 4 AND 5: The Department will not disclose the specific location of threatened and/or endangered animal species, endangered plant species and plant species of concern to the agent of a property owner. However, this does not preclude the agent from obtaining relevant records. The property owner, who is entitled to the records, would submit the request. The property owner could then provide the records to his or her agents. In those instances when the Department requires the property owner to sign a non-disclosure agreement, the Department specifies in the agreement what records can be shared with an agent, and what records cannot be shared.

Often it will be necessary for a property owner's agent to have information on threatened and/or endangered animal species, endangered plant species and plant species of concern in order that the agent may assist the property owner in submitting a permit application or similar submission to the Department or other government entity. In such a case, it is appropriate for the property owner to share records with his or her agent. In order that it is clear that the property owner may disclose relevant records to his or her

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agents (for example, engineers and environmental consultants), the Department is modifying the rule on adoption to add new N.J.A.C. 7:1D-3.2(a)3iii, which will allow the disclosure to such persons for the limited purpose of preparing and submitting an application to the Department or any other governmental regulatory authority for a permit, approval, authorization, or other determination, provided the recipients of the records also agree in writing to keep the records confidential. Such disclosure would not, however, extend to potential purchasers of a property, or to a property owner's real estate agent (unless the real estate agent requires the record for the limited purpose of the modified rule). A potential purchaser would be able to obtain relevant information (although not the precise location) through other publicly available sources, as discussed in the response to Comments 7 and 8 below.

The modified rule requires the property owner to submit to the Department his or her agent's written statement agreeing to keep the records confidential. The Department will keep the written statements on file in order that it knows with whom the property owner has shared the records. Through the modified rule, the Department intends to balance the need for a property owner and his or her agents to share records relevant to land use decisions, and the Department's need to protect endangered and/or threatened animal species or endangered plant species or plant species of concern.

6. COMMENT: The term "precise location" in N.J.A.C. 7:1D-3.2(a)3 is vague and ambiguous and must be further defined. (1)

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RESPONSE: The commonly accepted meaning and usage of the term “precise” used to modify the term “location” is sufficient, especially in the context of the intent of the non-disclosure of “[p]ortions of records containing the precise location of endangered and/or threatened animal species or endangered plant species or plant species of concern.”

As indicated in the proposal Summary, the purpose of withholding this information is to prevent harm to the endangered and/or threatened animal species or endangered plant species or plant species of concern that the Department is charged with conserving. (42 N.J.R. at 2880) The word “precise” in this context, therefore, means location information sufficiently detailed that if released would likely increase the risk of harm from poaching, collecting, or destruction of habitat, or disturbance of the animal species such that its existence is further threatened. See also response to Comment 10 below.

7. **COMMENT:** Permit applicants should be provided the species information prior to a permitting decision being issued, without having to request it from the Department. Proposed N.J.A.C. 7:1D-3.2(a)3i(2) not only places an unjustified responsibility on the applicant to request the information, but places the applicant on an unequal footing of not knowing the factors affecting his application. (1)

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8. COMMENT: The rules are too narrowly drawn and ignore the dynamics of the Department's permitting process. Prior to taking formal action on a permit application, Department personnel typically advise an applicant of issues likely to lead to permit denial, affording the applicant an opportunity to revise the application to address these issues. When an applicant believes that there is merit to the position advanced by the Department's staff, he may then revise his application to address these concerns, rather than proceeding to the point of formal permit denial. Under the proposed rule, however, species sighting information would be denied the permit applicant in such a situation, leaving the applicant unable to meaningfully evaluate the concerns expressed by the Department staff. In such a situation, the applicant would be faced with the Hobson's choice of either modifying his application without having the information needed to make an informed evaluation as to whether such a modification is truly warranted, or incurring the delay and expense of accepting a permit denial and then requesting a hearing before getting the information in question for the first time. The rule must be revised prior to adoption so that the species location information is available to a permit applicant any time it is relevant to the Department's review of the application. (1)

RESPONSE TO COMMENTS 7 AND 8: All applicants for Department land use permits must be submitted by, or on behalf of the property owner, or must include evidence of the property owner's consent. N.J.A.C. 7:1D-3.2(a)3i(1) requires the Department to provide precise location information to property owners. As discussed in

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the response to Comments 4 and 5 above, the Department is modifying the rule on adoption to allow a property owner to disclose the precise location of threatened and/or endangered animal species, endangered plant species or plant species of concern to his or her agent, for limited purposes, subject to a written statement agreeing to keep the information confidential.

The Department acknowledges that occurrences of endangered and/or threatened animal species or endangered plant species or plant species of concern on property adjacent to or in close proximity to the property that is the subject of an application to the Department may also have an impact on permit decisions; however, existing mechanisms, specifically the Natural Heritage data request procedures and the publicly available Landscape Project Map and Natural Heritage Grid Maps (available for viewing on Department GIS web applications or as data layers on Department GIS servers) provide applicants with sufficient information regarding the presence of these resources that an applicant may proceed before the Department. The provisions within Department land use regulations that protect imperiled species are directed at their habitats, not merely at protecting the documented location of a species. It is not necessary that an applicant for a Department land use permit know the precise location of the imperiled species on a neighboring property; the existence of suitable habitat, available publicly, informs the applicant of factors likely to affect his or her application before the Department.

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If the Department makes a permit decision based on the presence of imperiled species, and the permit decision is the subject of a challenge, the rule provides that the specific location of the species will be disclosed to the applicant. (N.J.A.C. 7:1D-3.2(a)3i(2))

9. COMMENT: In those situations where the Department would make available records containing species location information pursuant to proposed N.J.A.C. 7:1D-3.2(a)3i(3), the Department would redact the identity of the reporter of the species information. Such a lack of transparency in situations that do not involve a “complainant,” but rather an individual providing information, is unwarranted. The Department has no process to verify sighting reports and the qualifications of the reporter.

The rule leaves property owners, permit applicants and other interested parties in the defensive position while the credibility and veracity of the reporter is assumed, but cannot be verified. Greater balance is needed in the proposed rule and its application. (1)

RESPONSE: The Department believes that citizens who voluntarily provide information regarding the location of imperiled plants and wildlife species have a reasonable expectation that their names will not be disclosed. The Department’s statutory responsibility for conservation of these species means that the Department has a clear interest in obtaining information regarding their locations within the State. Disclosing

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the names of individuals who voluntarily submit such information would likely discourage the submission of such information and undermine the Department's efforts to conserve these important public resources.

The Department's responsibility to be fiscally responsible with taxpayer money, including its use of staff resources, in the conservation of these species means that it has no interest in accepting inaccurate, unreliable or fallacious species location information. Consequently, the Department does not incorporate such information into its decision making or tools before it subjects the information to rigorous review. The review protocols are detailed in several reports available on the Departments website:

http://www.nj.gov/dep/fgw/ensp/landscape/landscape_faqs.pdf (see Appendix III);

http://www.nj.gov/dep/fgw/ensp/landscape/lp_report_2_1.pdf (see Appendix I); and

http://www.nj.gov/dep/fgw/ensp/landscape/lp_report_3_0.pdf (see Appendix I).

Notably, among the rare species data that the Department may use in its land use regulatory process, the vast majority (82 percent) of records are from the Department's Endangered and Nongame Species Program staff or from surveys conducted by professional biologists in connection with permit applications, or Department-funded or Department-permitted studies. Only 18 percent of the records are from voluntary reports by private citizens. Of the reports by private citizens, many come from within the same geographic area where the species occurrence is also documented by Department staff or other professional surveys. Consequently, most records of species location will not have the identity of the person making the report redacted when the records are released.

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10. COMMENT: Proposed N.J.A.C. 7:1D-3.2(a)3ii would enable the Department to require a confidentiality statement from the property owner or applicant regarding the precise location of the species before records may be accessed. This statement would be required where the Department makes the determination that it is “likely” that such disclosure would “create a substantial risk of harm, theft, or destruction to the species or habitats or the area or place where the species or habitats are located.” The Department should explain how it would make such determinations of “likelihood of substantial risk.” Further, the scope of the harm is overly broad as it contemplates harm not just to the species itself or the immediate habitat, but also the “area” or “place” where these are found. The proposed rule should be more specific and narrowed. (1)

RESPONSE: The Department evaluates the “likelihood of substantial risk” based on the biology and behavior of the species, the fragility of the species in the wild, and the risk of “purposeful” destruction to the species or its habitat. For example, the Department will be especially guarded with respect to location information for species that are sought after by poachers or collectors and that command a high price in the illegal pet or hobby trade. Location information that would likely increase the ease with which a collector might locate and collect individuals would require a confidentiality agreement. Similarly, the Department is likely to require a confidentiality agreement for location information pertaining to species that are particularly sensitive to human disturbance.

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For example, the Department would not provide the location of a bald eagle nest, because adult bald eagles will abandon a nest if the birds are frequently disturbed by human presence. Protected snake species are highly prized and often collected for the illegal pet trade. Due to hatred, fear or the perceived potential threat of a venomous snake, individuals intentional destroy rattlesnake dens.

The Department will not require a confidentiality statement when there is no risk to the species as a result of disclosure. For example, although it would not disclose the location of a rattlesnake den, the Department would not withhold the location of a reported rattlesnake road kill.

Sabotage and Terrorism – N.J.A.C. 7:1D-3.2(b)

11. COMMENT: The rules are ambiguous and can reasonably be interpreted as a determination that all records in the listed categories have satisfied the “substantially interfere” standard of Governor McGreevey’s Executive Order No. 21 (2002). While all records in some of the eight categories of non-public documents at N.J.A.C. 7:1D-3.2(b) presumably satisfy the required standard, certain records in other categories may not. The Department should return to the precise language of Governor McGreevey’s sabotage/terrorism exemption in order not to prejudge the confidentiality of all records in all eight categories. (2)

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RESPONSE: Governor McGreevey's Executive Order 26 Summary of State Agency Rule Changes modifying the Department's 2002 proposal of OPRA rules identified 10 categories of records that would not be disclosed if the Department determined that disclosure 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 sabotage or terrorism.

The Department's adopted rule identifies eight categories of records as examples of the types that will not be disclosed, depending upon the Department's determination of the likelihood of substantial interference. Documents related to the Toxic Catastrophe Prevention Act, Governor McGreevey's category 4(ix), are not in the adopted rule because they are addressed in the Department's Toxic Catastrophe Prevention Act Program rules at N.J.A.C. 7:31. Discharge Prevention Containment and Countermeasures and Discharge Cleanup (category 4(vii)), and Removal Plans and related general site plans (category 4(viii)), were separated in the Executive Order 26 Summary of State Agency Rule Changes. N.J.A.C. 7:1E, Discharges of Petroleum and Other Hazardous Substances, uses the terms "discharge prevention, containment and countermeasures plan" and "discharge cleanup and removal plans." The latter term should not have been divided across categories 4(vii) and (viii), because there are not two separate plans (a discharge cleanup plan and a removal plan), but a single discharge cleanup and removal plan. The Department

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combined the N.J.A.C. 7:1E-related records in a single category at N.J.A.C. 7:1D-3.2(b)7.

The Department believes that the language of the adopted rule is a reasonable interpretation of the intent of Governor McGreevey's Executive Order 26 Summary of State Agency Rule Changes. As the nature of sabotage and terrorism changes, so must the Department's evaluation of the types of records that, if disclosed, would substantially interfere with the State's ability to defend against sabotage and terrorism. That a document falls outside a specific category does not mean that disclosure is appropriate. The Department must be able to withhold documents of a type similar to those listed in the adopted rule, if required. The Executive Order 26 Summary of State Agency Rule Changes does not preclude the Department's adopted rule, which reflects the Department's experience with making government records available under OPRA.

The commenter expresses concern that all documents within a category are prejudged, such that disclosure is inappropriate. The adopted rule states that the Department must first determine that disclosure 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 sabotage or terrorism. Only then will the record be withheld.

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Green Acres – N.J.A.C. 7:1D-3.2(c)

12. COMMENT: The proposed Green Acres exemption requires confidentiality whenever “a binding contract has not been executed,” even if the project is not “actively under negotiations” and “disclosure of the information would [not] jeopardize” the project. The phrase “a binding contract has not been executed” should be deleted. (2)

RESPONSE: The rule as proposed exempts certain Green Acres-related records from disclosure when a “land transaction, program offering or active project is actively under negotiation, a binding contract has not been executed, or disclosure of the information would jeopardize the land transaction, program offering or active project.” [emphasis supplied] While more than one of these three factors could apply to a particular transaction, offering or project, the existence of any one factor is intended to trigger the exemption. Therefore, the Department is not modifying the rule on adoption.

13. COMMENT: The last sentence of the proposed Green Acres exemption at N.J.A.C. 7:1D-3.2(c) creates the impression that this exemption does not apply to records concerning land acquisitions that have not been initiated within two years after the date of the appraisal. But the exemption’s two-year limitation applies only to “active projects,” not “land acquisitions” or “program offerings.” (2)

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RESPONSE: The two-year limitation in the rule is intended to apply only to “active projects” that have reached the appraisal stage. The two-year limitation would not apply to information pertaining to “land acquisitions” or “program offerings” that are actively under negotiation and for which disclosure of the information would jeopardize the acquisition or offering. In general, the Green Acres Program and the Natural Lands Trust use “land acquisitions” to refer to the planning and internal deliberation leading up to a matter becoming an “active project.” A “land offering” is generally an offer of sale to the State by a property owner. It contains confidential information about the owner’s asking price and other details that the owner might not choose to disclose if the property is offered for sale on the open market. During the time it takes the Department to evaluate the land offering or decide on a course of action for a land acquisition, it either receives or produces information which, if disclosed, would jeopardize the very land acquisition or land offering that it is trying to bring to fruition.

Once a decision is made to try to purchase a particular property, the Department obtains an appraisal of the property with the objective of executing a binding contract for the purchase of the property. The proposed acquisition is considered to be an “active project” for at least two years after the appraisals are obtained, whether or not the Department is successful in obtaining a binding contract for the purchase. Because the Department is usually still interested in purchasing the property in question even if its initial negotiations with the landowner are not successful, the information in the project

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file still constitutes “information which, if disclosed, would give an advantage to competitors or bidders“ under N.J.S.A. 47:1A-1.1.

Once a binding contract is executed for an active project, it can take more than two years to bring a project to closing. The contract may contain contingencies which, if disclosed, would jeopardize the success of the proposed acquisition. Therefore, on a case by case basis, the Department may not be in a position to disclose project-specific appraisal or contract information even two years after the appraisal is commissioned. (The Department notes that for purposes of this rule, “formal action” on a land acquisition will almost always occur through the real estate closing for the property.)

As a policy matter, the Department will not usually use an appraisal after two years and will commission another appraisal if a project is reactivated after two years. However, the disclosure of other information, such as title reports, may have a detrimental effect on pending negotiations even after the two-year period if such negotiations are still active. On particularly complex projects, negotiations can take more than two years, and disclosure of title defects or other obstacles to acquisition could give competitors the opportunity (one provided at taxpayer expense) to undermine the State’s land acquisition efforts.

The Department believes the proposed rule is consistent with the February 27, 2008 Final Decision of the Government Records Council (GRC) in Murray v. Township of Warren (GRC no. 2006-169). In that case, the GRC determined that the requested

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records were exempt from disclosure under N.J.S.A. 47:1A-1.1, which excludes from the definition of a public record “information which, if disclosed, would give an advantage to competitors or bidders.” In the findings and recommendations that were presented to the GRC as part of its decision, the Executive Director of the GRC stated as follows:

[T]he requested records are lawfully exempt from disclosure as information which, if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. At the time of the request, the Township was negotiating the purchase of property belonging to a client of the Complainant. The records responsive to this request represent a part of the negotiation phase that gives a party interested in buying or selling a property a level of bargaining power. The Complainant asserts that disclosure of the records responsive to his August 14, 2006 request would help the negotiation process. The Township of Warren is using the records to substantiate its offer of purchase to the Complainant’s client. Disclosure of the records requested could greatly hinder the Township’s position in the negotiation process by making public the price range at which the Township is willing to obtain the property and could be used to start a bidding war by private companies. Therefore, the requested records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 regarding information which, if disclosed, would give an advantage to competitors or bidders.

At least one subsequent judicial proceeding has distinguished the Murray case in ordering disclosure of information pertaining to a proposed land acquisition (see

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Tractenberg v. Twp. of West Orange, 416 N.J. Super. 354 (App. Div. 2010)). However, the court determined that the acquisition contemplated in the Tractenberg case was not actively under negotiation by the Township of West Orange, stating:

Here, it cannot be said that the competitive advantage exemption clearly applies to these facts. Unlike in Murray, the Township has not initiated negotiations with [the property owner] to purchase the Highlands, nor have they demonstrated that such negotiations are probable any time in the near future. The Township has held the appraisals for over two years, and yet the record indicates that no decision regarding the Highlands has been made. To contend that the mere potential for future negotiations, without a strong showing that negotiations are probable, satisfies the OPRA competitive advantage exemption “subverts the broad reading of OPRA as intended by the Legislature.” Times of Trenton, supra, 183 N.J. at 535. We therefore reject defendant’s argument that OPRA’s competitive advantage exemption applies.

Based on the above, the Department has not modified the rule to address the commenter’s concerns.

14. COMMENT: The owners of property that is the subject of a Green Acres transaction should have the right at all times to have information available on every inch of the property. (4)

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RESPONSE: See response to Comment 13, above, for a more detailed discussion of the rationale for N.J.A.C. 7:1D-3.2(c). See also the proposal Summary, 42 N.J.R. at 2880. This rationale applies whether disclosure is requested by the property owner or a third party. This rationale also applies to records in the possession of the Green Acres Program that pertain to property acquisitions by municipalities and counties receiving Green Acres funding, since those transactions are considered “active projects” within the purview of the rule and present the same concerns as are presented for records pertaining to direct State acquisition of property.

Summary of agency initiated changes

The Department is modifying the rules on adoption to replace references to “information” that is deemed non-public, with references to “records” that are deemed non-public, inasmuch as the Open Public Records Act and the within rules apply to government records.

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 regulations 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

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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.

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

7:1D-3.2 Records not subject to disclosure

(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 individuals 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 from proposal.)
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 regulation to submit such a report, complaint or allegation***; and

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3. Portions of records containing the precise location of endangered an/or threatened animal species or endangered plant species or plant species of concern.

i. (No change from proposal.)

ii. If the Department determines that disclosure under (a)3i above is likely to create a substantial risk of harm, theft or destruction to the species or habitats or the area or place where the species or habitats are located, the Department may require the recipient of the *[information]**records* to state in writing prior to access to the records that he or she shall keep the precise location of endangered and/or threatened animal species, endangered plant species or plant species of concern confidential.

***iii. A property owner who has obtained records in accordance with this paragraph may share the records or disclose the information contained therein to his or her agent (such as an attorney, environmental consultant or engineer) to the extent necessary to prepare and submit an application to the Department or any other governmental regulatory authority for a permit, approval, authorization, or other determination. If a property owner is required to execute a confidentiality agreement in accordance with ii above, the property owner shall not share the records or disclose the information contained therein to his or her agent unless the agent states in writing (on a form provided by the Department) prior to access to the records or information contained therein that he or she shall keep the precise location of endangered and/or threatened animal species, endangered plant species**

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or plant species of concern confidential. The property owner shall submit each such writing to the Department at the address specified on the form.*

*[iii]**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.

(b) (No change from proposal.)

*[Information]**Records* related to Green 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 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 *[information]**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.