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# Rulemaking Hearing Rule(s) Filing Form

*Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).*

*Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).*

| | |
|---|---|
| **Agency/Board/Commission:** | Environment and Conservation |
| **Division:** | Office of General Counsel |
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**Revision Type (check all that apply):**
_X_ Amendment
___ New
___ Repeal

**Rule(s)** (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

| **Chapter Number** | **Chapter Title** |
|---|---|
| 0400-01-01 | Fees and Charges for Certain Departmental Services |
| **Rule Number** | **Rule Title** |
| 0400-01-01-.01 | Access to Department of Environment and Conservation Public Records |

Place substance of rules and other info here. Please be sure to include a detailed explanation of the changes being made to the listed rule(s). Statutory authority must be given for each rule change. For information on formatting rules go to http://sos-tn-gov-files.s3.amazonaws.com/forms/Rulemaking%20Guidelines_September2016.pdf.

Chapter 0400-01-01
Fees and Charges for Certain Departmental Services

Amendments

Chapter 0400-01-01 Fees and Charges for Certain Departmental Services is amended by deleting the Chapter title and giving it a new title to read as follows:

Public Records and Fees and Charges for Certain Departmental Services

Authority: T.C.A. §§ 4-5-201, et seq., 10-7-503; 10-7-504(a)(21); 11-1-101; 11-1-108; and 68-203-103.

The Table of Contents to Chapter 0400-01-01 Fees and Charges for Certain Departmental Services is amended by deleting the title of Rule 0400-01-01-.01 in its entirety and substituting instead the following:

0400-01-01-.01 ~~Access to Department of Environment and Conservation~~ Public Records

Authority: T.C.A. §§ 4-5-201, et seq., 10-7-503; 10-7-504(a)(21); 11-1-101; 11-1-108; and 68-203-103.

Rule 0400-01-01-.01 Access to Department of Environment and Conservation Public Records is amended by deleting it in its entirety and substituting instead the following:

0400-01-01-.01 ~~Access to Department of Environment and Conservation~~ Public Records

(1) Purpose

The purpose of this rule is to establish the process by which the Department will provide access to its public records pursuant to the TPRA. Personnel of the Department shall provide timely access and assistance to persons requesting to inspect or receive copies of public records. No provision of these rules shall be used to hinder access to the Department's public records. The public records of the Department are presumed to be open for inspection unless otherwise provided by law. However, the confidentiality, integrity, and organization of records, as well as the efficient and safe operation of the Department, shall be protected.

(2) Definitions

"Department" means the Tennessee Department of Environment and Conservation.

"OORC" means the Tennessee Office of Open Records Counsel.

"Public records" means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. Public records do not include the device or equipment, including, but not limited to, a cell phone, computer, or other electronic or mechanical device or equipment, that may have been used to create or store a public record.

"Public Records Request Coordinator" and "PRRC" mean the individual designated by this rule who has the responsibility to ensure public record requests are routed to the appropriate records custodian and are fulfilled in accordance with the TPRA. The Public Records Request Coordinator may also be a records custodian. The term also includes the Public Records Request Coordinator's designee.

"Records custodian" means the office, official, or employee lawfully responsible for the direct custody and care of a public record. The records custodian is not necessarily the original preparer or receiver of the record.

"Requestor" means a person seeking access to a public record, whether it is for inspection or duplication.

"TPRA" means public records laws compiled in T.C.A. Title 10, Chapter 7, Part 5, often referred to as the Tennessee Public Records Act.

(3) Requesting Access to Public Records

(a) Except as described in this subparagraph, public records requests shall be submitted to the PRRC to ensure the requests are routed to the appropriate records custodian and fulfilled in a timely manner. Public records requests may be submitted to the PRRC using the contact information set forth in part (4)(a)3 of this rule. However, if a requestor submits a public records request directly to a records custodian, the records custodian may fulfill the request without submitting the request, response, or records through the PRRC if:

1. Responding will not incur charges under this rule or the Schedule of Reasonable Charges issued by the OORC; and

2. The records custodian is reasonably certain that the information or records are not confidential.

(b) Requests for inspection only may be made orally to a records custodian or the PRRC or submitted in writing using the Public Records Request Form, found in paragraph (8) of this rule, or a substantially similar form provided by the Department, completed in accordance with the instructions, and submitted to the PRRC. If the request is made orally, as a best practice, the PRRC should request a mailing or electronic mailing address from the requestor for providing any written communication required under the TPRA.

(c) Requests for copies, or requests for inspection and copies, shall be made in writing using the Public Records Request Form, found in paragraph (8) of this rule, or substantially similar form, completed in accordance with the instructions therein, and submitted to the PRRC.

(d) The Department may require any person making a request to view or make a copy of a public record to present a government-issued photo identification, if the person possesses photo identification, that includes the person's address. If a person does not possess photo identification, the Department may require other forms of identification acceptable to the Department.

(e) The Department is not required to sort through files to compile information or to create or recreate a record that does not exist. Any request for inspection or copying of a public record shall be sufficiently detailed to enable the Department to identify the specific records to be provided for inspection and copying. A potential requestor who is uncertain of either how to sufficiently identify records or if certain records exist may contact the PRRC or other appropriate Department personnel for assistance prior to submitting a records request. The Office of General Counsel represents the Department in matters related to public records requests.

(4) Responding to Public Records Requests

(a) Public Records Request Coordinator

1. The PRRC, or a records custodian fulfilling a request in accordance with subparagraph (3)(a) of this rule, shall review public record requests and make an initial determination of the following:

(i) If the requestor identified himself or herself as a Tennessee citizen;

(ii) If the records requested are described with sufficient detail to enable the Department to identify the specific records that are to be provided; and

(iii) If the Department is the custodian of the records.

2. The PRRC shall acknowledge receipt of the request and take any of the following appropriate action(s):

(i) Advise the requestor of the requirements of this rule for obtaining public records, if the requirements have not been met.

(ii) Deny the request in writing using the Public Records Request Response Form developed by the OORC (the "Response Form"), or a substantially similar form, providing the appropriate ground, including but not limited to the following:

(I) The requestor is not, or has not presented evidence of being, a Tennessee citizen.

(II) The request lacks sufficient detail to identify the specific records to be provided for inspection or copying.

(III) An exemption or other law makes the record not subject to disclosure under the TPRA. The specific exemption or other law will be provided to the requestor in accordance with the TPRA.

(IV) The Department is not the custodian of the requested records.

(V) The records do not exist.

(iii) Contact the requestor to discuss modification or clarification of the request.

(iv) Forward the records request to the appropriate records custodian in the Department.

(v) If requested records are in the custody of a different governmental entity, and the PRRC knows the correct governmental entity, advise the requestor of the correct governmental entity and PRRC for that entity if known.

3. (i) The title of the PRRC is "Tennessee Department of Environment and Conservation, Public Records Request Coordinator." The PRRC's contact information is:

Tennessee Department of Environment and Conservation
312 Rosa L. Parks Ave., 2nd floor
Nashville, TN 37243
615-532-0109
TDEC.Public.Records.Request@tn.gov
https://www.tn.gov/environment/contacts/public-records-request.html

(ii) Any changes to the contact information will be posted on the Department's website.

(b) Records Custodian

1. Upon receiving a public records request for inspection or copies, a records custodian shall promptly make the requested public records available in accordance with T.C.A. § 10-7-503. If the records custodian is uncertain as to whether an applicable exemption or other law would apply to make requested records confidential, the records custodian shall consult with the PRRC.

2. If it is not practicable for the records custodian to promptly provide the requested records because additional time is necessary to determine whether the requested records exist; to search for, retrieve, or otherwise gain access to records; to determine whether the records are subject to confidentiality requirements; to redact records; or for other similar

reasons, then a records custodian shall contact the PRRC to discuss the reason(s). The PRRC shall send the requestor a completed Response Form within seven business days from the date the Department received the request and provide the reason(s) additional time is needed to respond to the request.

3. If the Department intends to deny a public record request, the records custodian shall coordinate with the PRRC. If the PRRC determines that grounds for denial exist, the PRRC shall deny the request in writing as provided in subpart (a)(2)(ii) of this paragraph using the Response Form.

4. If a records custodian reasonably determines production of records should be segmented because the records request is for a large volume of records, or additional time is necessary to prepare the records for access, the Department shall use the Response Form, to notify the requestor that production of the records will be in segments and that a records production schedule will be provided as expeditiously as practicable. If the Department deems it appropriate, the PRRC may contact the requestor to see if the request can be narrowed.

5. If a records custodian discovers records that existed at or before the time of the records request and that are responsive to the records request but were omitted from the Department's response to the records request, the Department shall contact the PRRC to explain the omission, and the PRRC shall contact the requestor concerning the omission and produce the records as quickly as practicable.

(c) Confidential Records and Redaction

1. Records that are designated by law as confidential, including but not limited to records designated as confidential under T.C.A. § 10-7-504, shall not be open for public inspection.

2. In accordance with T.C.A. § 10-7-504(a)(21)(A)(i), the following records, and any other records determined by the Department to ~~be described by such subdivision~~ allow a person to identify areas of structural or operational vulnerability of a utility service provider or permit unlawful disruption to, or interference with, the services provided by a utility service provider, shall be treated as confidential and shall not be open for public inspection:

~~(a)~~(i) The latitude and longitude coordinates of public water system wells, intakes, water mains, water tanks, valves and GIS analyses derived from these data;

~~(b)~~(ii) Records pertaining to the delineation of source water protection areas; and

~~(c)~~(iii) Records pertaining to well head protection areas and inventories of significant potential contaminant sources.

3. If a record contains confidential information or information that is not open for public inspection, the Department shall prepare a redacted copy prior to providing access to the record. However, if the entire record is confidential, then it shall not be deemed a public record and shall not be produced. Whenever a redacted record is provided, the PRRC should provide the requestor with the basis for redaction, which shall be general in nature and not disclose confidential information. The redaction of confidential information shall not constitute the creation of a new record. Costs associated with redacting records, including the cost of copies and staff time to provide redacted copies, shall be borne as provided by law.

(5) Inspection of Records

(a) The Department will not charge for inspection of the Department's public records.

(b) The PRRC or records custodian shall promptly respond to a public records request for inspection.

The time and location for inspection of records within the offices of the Department should be coordinated with the PRRC or records custodian.

(6) Copies of Records

(a) The PRRC or records custodian shall promptly respond to a public records request for copies.

(b) Copies will be available for pickup at a location specified by the records custodian or PRRC.

(c) If records are available in electronic form and the requestor agrees, the Department may provide such records via electronic mail, a web-based sharing platform, or other means to reduce costs and delivery time. Otherwise, copies will be shipped to the requestor's address.

(d) A requestor may make copies of public records with personal equipment, if the equipment does not require contact with the record. However, the Requestor shall not connect any personal equipment directly to a Department computer, including, but not limited to, utilizing a flash drive, in order to make copies of public records.

(7) Fees and Charges and Procedures for Billing and Payment

~~(1)~~(a) Production Costs

Upon a request for records under ~~Tennessee's Public Records Act, T.C.A. §§ 10-7-501, et seq.,~~ the TPRA, the Department shall charge the ~~requesting party~~ requestor a reasonable charge for production costs, including labor, duplication, and delivery, based on the most current Schedule of Reasonable Charges issued by the ~~Office of Open Records Counsel~~ OORC, available at the website of the OORC ~~Open Records Counsel in the Comptroller's Office~~. If a public record has commercial value as that term is described by T.C.A. § 10-7-506(c), the Department shall charge the requestor an additional fee in accordance with the procedure set out in Rule 0400-40-01-.02.

~~(2)~~(b) Payment of Production Costs

The Department shall provide the ~~requesting party~~ requestor an estimate of the production costs, including labor, duplication, and delivery, before the initial production of the requested records ~~documents~~. The Department shall require the ~~requesting party~~ requestor to provide full payment of the production costs, including postage if applicable, before copies of the requested records are delivered or otherwise made available.

~~(3)~~(c) Waiver of Production Costs.

~~(a)~~1. The Department shall waive the production cost if the total production cost, including labor, duplication, and delivery, is less than ~~ten dollars ($10)~~ $50.

~~(b)~~2. When the ~~requesting party~~ requestor is a federal, state, or local government agency, the Department may ~~provide~~ produce the requested copies of public records without charge if the Commissioner determines that ~~such reduction~~ the production is in the best interest of the public. A request made by a federal, state, or local government agency on behalf of a citizen under the ~~Tennessee Public Records Act~~ TPRA shall be treated as a request by a citizen and charged accordingly.

3. The Department will not charge for the first hour of labor for each request unless the requests are aggregated as provided in subparagraph (e) of this paragraph.

~~(4)~~(d) Reduction of Fees.

The Commissioner may reduce any part of the fees calculated under these rules upon ~~a~~ the Commissioner's determination that ~~such~~ the reduction is in the best interest of the public.

(e) Aggregation of Frequent and Multiple Requests

1. The Department will aggregate requests for inspection or copies of records in accordance with the Reasonable Charges for Frequent and Multiple Request Policy promulgated by the OORC when four or more requests are received within a calendar month either from a single individual or from a group of individuals deemed by the Department to be working in concert.

2. Records requests will be aggregated at the Department level.

3. The PRRC is responsible for making the determination that a group of individuals is working in concert. The PRRC or the records custodian will inform the individuals that they have been deemed to be working in concert and that they have the right to seek review from the OORC.

4. Public records requests involving routinely released and readily accessible records may be excluded from aggregation. However, a requestor will be encouraged to search for such records online prior to submitting a public records request.

5. Once a requestor makes four or more requests in a calendar month, the Department is no longer required to deduct one hour from the labor cost. The Department will deduct one hour of labor cost for each of the first three requests in a calendar month.

(8) Public Records Request Form

PUBLIC RECORDS REQUEST

The Tennessee Public Records Act (TPRA) grants Tennessee citizens the right to access records made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity that exist at the time of the request. The TPRA does not require records custodians to compile information or create or recreate records that do not exist.

Many of the Department's public records are available via online data viewers or public notice web pages. Potential requestors are encouraged to check these online sources for the availability of desired public records before submitting a public records request.

To: Public Records Request Coordinator, Tennessee Department of Environment and Conservation, 312 Rosa L. Parks Ave., 2nd floor, Nashville, TN 37243 or email to: TDEC.Public.Records.Request@tn.gov

From: _____

Requestor's Name and Contact Information

Is the requestor a Tennessee citizen? ☐ Yes ☐ No

Request: ☐ Inspection

☐ Copy/Duplicate

If costs for copies are assessed, the requestor has a right to receive an estimate. Do you wish to waive your right to an estimate and agree to pay copying and production costs in an amount not to exceed $_____? If so, initial here: _____.

Delivery preference: ☐ On-Site Pick-Up ☐ USPS First-Class Mail
☐ Electronic ☐ Other: _____

Records Requested:

Provide a detailed description of the record(s) requested, including: (1) type of record; (2) timeframe or dates for the records sought; and (3) subject matter or key words related to the records. Under the TPRA, record requests must be sufficiently detailed to enable a governmental entity to identify the specific records sought. As such, your record request must provide enough detail to enable the records custodian responding to the request to identify

the specific records you are seeking.

_____

_____

_____

_____

_____
Signature of Requestor and Date Submitted
CN-[ ]

Authority: T.C.A. §§ 4-5-201, et seq., 10-7-503; 10-7-504(a)(21); 11-1-101; 11-1-108; and 68-203-103.

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Commissioner on 12/27/2018, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: *(10/01/18)*

Rulemaking Hearing(s) Conducted on: (add more dates). *(11/28/18)*

Date: December 27, 2018

Signature: _____

Name of Officer: Shari Meghreblian, PhD

Title of Officer: Commissioner

Subscribed and sworn to before me on: _____

Notary Public Signature: _____

My commission expires on: _____

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Agency/Board/Commission: Commissioner of the Tennessee Department of Environment and Conservation

Rule Chapter Number(s): 0400-01-01

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

_____
Herbert H. Slatery III
Attorney General and Reporter

_____
Date

**Department of State Use Only**

Filed with the Department of State on: _____

Effective on: _____

_____
Tre Hargett
Secretary of State

**Public Hearing Comments**

One copy of a document that satisfies T.C.A. § 4-5-222 must accompany the filing.

**Comment**: Please extend the comment period to January 2019 and convene a committee of experts to advise the Department on this rulemaking.

**Response**: The Department has a statutory deadline to promulgate these rules "[n]o later than January 1, 2019." Tenn. Code Ann. § 10-7-503. Accordingly, there is neither time to extend the deadline nor time to form an advisory committee reflecting the full spectrum of public records requestors.

The Department complied with the statutory rulemaking hearing timeframe and took extra efforts to ensure that interested persons were aware of the rulemaking in a timely manner. In particular, the Department notified the commenter via electronic mail on October 10, 2018, at the outset of the rulemaking process, and the commenter submitted 27 pages of detailed written comments, indicating that it had sufficient time to comment. The Department has carefully reviewed and considered the comments submitted for this rulemaking, including the commenter's. The Department is also open to dialogue with the stakeholders relative to public records issues in the future.

**Comment:** Some commenters requested in writing prior to the hearing, and orally at the hearing, that the Commissioner be present at the rulemaking hearing.

**Response:** Because this is a large department with many duties and responsibilities, the Commissioner conducts business primarily through her designated staff. This rulemaking is being undertaken by the Office of General Counsel. The Department's General Counsel, who has personally advised the Commissioner on this rulemaking, was present at the hearing and heard the testimony presented. The Department's General Counsel also met with representatives of the commenters.

**Comment:** The Department should include language in the rule that addresses retention of emails.

**Response**: The Department currently employs 2,796 (as of December 6, 2018) staff, most of whom send and/or receive dozens of electronic mail messages each day. In order to manage this enormous volume of data, the State has a 90-day email retention policy, after which emails are deleted unless retained under a litigation hold. The commenter did not specify the manner in which email retention should be addressed in these rules, and the Department believes the issue is adequately addressed through existing practice.

**Comment:** The public records request form omits discussion of helping a requestor and does not address the fee waiver.

**Response**: The request form developed by the Office of Open Records Counsel (OORC) is the form required by Tenn. Code Ann. § 10-7-503(a). The Department can make this information available on the Department's website.

**Paragraph (1) Purpose**

**Comment:** The Department must state that the Act is to be interpreted broadly to ensure disclosure of public records and its records are "presumed open for inspection."

**Response:** This provision has been added to paragraph (1) of the rule.

**Comment:** Please delete "confidentiality" from the list of items that must be protected in paragraph (1) of the rule. *See generally* Tenn. Code Ann. § 10-7-504.

**Response:** The requested change will not be made because the Department is obligated to protect the confidentiality of documents that are exempt from disclosure.

**Paragraph (3) Requesting Access to Public Records**

**Comment:** Allowing the Department to require proof of citizenship to inspect and receive copies of records shuts down access and discourages citizens to request records, because they have to prove something. The commenter recommends not requiring proof of citizenship unless there is a plausible reason to think the person is not a citizen and then only for large requests. The commenter also suggests adding a rule that states the Department will not deny records to journalists who work for a Tennessee news organization.

**Response:** The Department has amended the final rule so that proof of citizenship is not mandatory but rather may be required as provided under Tennessee law. The Department generally waives proof of citizenship for most media requests and for out-of-state requestors researching the environmental status of property in Tennessee.

**Comment:** The proposed rule creates a "vetting" process that would precede a formal public records request and exist outside of the procedures and policies established by the Act. This allows the Department to control the contents of a citizen's request. The commenter proposes the following language:

> The Department is not required to sort through files to compile information or to create or recreate a record that does not exist. Any request for inspection or copying of a public record shall be sufficiently detailed to enable the department to identify the specific records to be provided for inspection and copying. [] To the extent a request submitted to the Department is not sufficiently detailed, Department staff will work with the requestor to clarify the request.

**Response:** It appears that the commenter may misunderstand the intent of the draft rule. The Department did not create a vetting process, but was instead offering to assist people in developing records requests. The proposed rule states that the requestor "may" seek such assistance before submitting a request. Nonetheless, the Department will clarify in the final rule that the purpose of this provision is to assist potential requestors. The final sentence refers to what should be done after a public records request is made, and is addressed in subpart (4)(a)2(iii) of this rule.

**Comment:** Two commenters stated the proposed changes hamper the rights of citizens "acting as attorneys" by restricting their communication with records custodians and Department staff. Such conduct is already governed by the Tennessee Rules of Professional Conduct. The proposed rule imposes additional restrictions on speech between attorneys and Department staff based on their occupation.

**Response:** The rule has been amended to notify attorneys that the Office of General Counsel represents the Department in matters related to public records requests. We expect that attorneys will comply with their ethical obligations under RPC 4.2, which provides, in relevant part:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

## Paragraph (4) Responding to Public Records Requests

**Comment:** The Act obligates the Department to assist a requestor in appropriately narrowing their request. The rule must be amended to indicate that the Department will assist requestors to clarify their requests if they are not sufficiently specific.

**Response:** This comment overlooks subpart (4)(a)(2)(iii), which includes a provision for narrowing requests after submission. This subpart has been further amended to indicate that the PRRC will contact requestors for "clarification" of their requests if appropriate.

**Comment:** Where a public records request seeks documents stored electronically, the Department almost never would be required to sort through its files. Instead, the Department need only work with the requestor to tailor appropriate search terms that would produce the responsive records.

**Response:** It appears that the commenter may not be aware of the Department's burden of gathering and reviewing electronic records. The Department has many separate local and shared drives across the state where data are stored. Moreover, not all electronic records are searchable, particularly if documents have been scanned. Electronic mail is retained in individual Outlook folders for each Department staff member. Electronic mail searches are slow and cumbersome, and almost always require review for privileged or confidential information. Searches for emails that are more than 90-days old require the Department to determine whether the record custodian was on a litigation hold, and if so, the Department must then retrieve emails that are older than 90 days from a separate State agency before they can be searched. While search terms are certainly appreciated, if such search terms are required, this may indicate that the requestor has failed to provide sufficient detail to enable the Department to identify the specific records for inspection of copying as required under Tenn. Code Ann. § 10-7-503(a)(4).

**Comment:** The Department should clarify why there are outward and inward facing databases.

**Response:** This comment does not appear to be related to the public records rule. The Department is not required to maintain online public databases; however, in the interest of transparency the Department does so to promote public access to records of significant public interest. Nearly all of the records the Department uploads to its online databases are accessible by the public. Department staff routinely upload final documents such as NOVs, notices of deficiency, permit applications, draft permits for public comment, public comments, final permits, correspondence with regulated entities, inspection reports, monitoring reports, and more to its public online databases. Documents in the online databases that are not readily accessible to the public may be confidential, draft records, internal communications, or routine documents that are not likely to have significant public interest. Otherwise, public records are accessible through the procedures outlined in this rulemaking.

**Comment**: Commenters addressed Rule 0400-01-01-.01(4)(c)(2). They stated that the rule conflicts with federal environmental laws by restricting disclosure provisions and limiting public access to records, expands the confidentiality exemptions beyond those assigned to the Department, and burdens local governments who provide stormwater infrastructure information.

**Response**: This is not a proposed rule, but instead an existing rule that has previously undergone public notice and comment, review by the Office of the Attorney General, and review by the General Assembly. The rule was promulgated in response to enactment of Tenn. Code Ann. § 10-7-504(a)(21).

This rule applies to Department records, not to local government records.

**Comment**: Rule 0400-01-01-.01(4)(c) is overbroad and unduly restricts public access to important state records. Please omit 0400-01-01-.01(4)(c)(1) or, in the alternative, list each source of confidentiality.

**Response**: The Department is prohibited from providing public access to records designated as confidential by law. *See generally* Tenn. Code Ann. § 10-7-504. Repeating this prohibition in the rules does not broaden this prohibition, but helps to ensure that Department records custodians and requestors are reminded of this requirement. The primary statutory citation for confidentiality is already referenced in the rule and will be retained. Both judicial opinions and opinions of the OORC have added other bases for confidentiality, particularly attorney-client privilege. These sources of law are available to members of the public and will not be added to the rule.

**Comment:** Please add the Model Policy provision which states, "Whenever a redacted record is provided, a records custodian should provide the requestor with the basis for redaction. The basis given for redaction shall be general in nature and not disclose confidential information."

**Response:** The Department agrees, and has changed the final rule accordingly. The Department does not interpret this requirement as imposing a level of detail approaching what would be expected in a privilege log in litigation discovery.

**Comment**: The Department should include language in the rule that addresses retention of confidential and redacted records. The commenter proposes the following language as part of Proposed Rule 0400-01-01-.01(4)(c):

> If a record is not produced or is redacted prior to public inspection, the Department will maintain a copy of the record until the period for judicial review has ended. This duty to preserve materials withheld by the Department shall override a document retention schedule that would otherwise apply, unless the preservation period is longer.

**Response**: There is no requirement in the model policy to retain confidential and redacted records. The Department thinks there is ample protection under the law for records that may be related to a claim or controversy. Moreover, the mere withholding of records or redaction of public records does not create a reasonable anticipation of litigation. These records will continue to be preserved under the applicable RDAs.

**Comment:** Charging for inspection when a copy of a record is made in order to redact confidential information conflicts with the Tennessee Law 10-7-503(a)(7)(A)(i) that states a governmental entity may not charge to view a public record. The Department should bear the cost of printing copies for redaction if they choose not to use electronic redaction technology.

**Response**: The rule has been amended to reflect statutory language regarding this matter.

**Paragraph (6) Copies of Records**

**Comment**: Several comments insisted that the Department should allow requestors to use personal equipment, particularly cell phones, to take pictures of records or otherwise makes copies. One commenter proposed that the Department use the following language, "A requestor will be allowed to make copies of records with personal equipment so long as the use of personal equipment would not damage the records."

**Response**: The Department has changed the final rule to allow people inspecting records to take pictures with their cell phones and other devices. However, in order to protect the integrity of Department documents, the Department will not allow the use of personal equipment such as scanners and portable copiers that require physical contact with the record to make a copy.

The Department has relatively few records inspections because key documents are posted online. Moreover, the Department continues to increase efforts to create, receive, and maintain records in electronic form. Accordingly, inspections may be conducted on a Department computer. Although the rule will allow inspectors to take pictures of the computer screen, it will prohibit the insertion of devices into the computer to avoid the risk of infection. Also, copying records onto a disk or jump drive constitutes making a copy of records, not merely inspecting the records, so charges for production costs might apply.

**Paragraph (7) Fees and Charges and Procedures for Billing and Payment**

**Comment:** The Department must include a fee waiver provision that is consistent with the Model Policy and in the public interest. The commenter proposes the following language:

...

2. Upon written request, the Department may provide the requested copies of public records without charge if the Commissioner determines that the reduction is for the public good.

**Response:** There is no legal requirement to include a public interest waiver, and the rules already include an option to reduce "any part of the fees calculated under these rules" if doing so is in the public interest. This public interest fee reduction will be retained as proposed and the requested change will not be made.

The Department places a large volume of its public records online in multiple databases, including a Department-wide enforcement database, water permits dataviewer, water resources mapviewer (water quality assessment), groundwater protection (septic) dataviewer, air pollution control & inspections dataviewer, certified asbestos professionals, Exceptional Tennessee Waters, solid waste management dataviewer, rare species dataviewer, and the hydrologic determinations mapviewer. See https://www.tn.gov/environment/about-tdec/tdec-dataviewers.html. The Department has expended significant effort to develop and maintain these databases to provide timely, effective, and free access to records of significant public interest.

The Department receives more than 1,500 records requests each year and expends significant staff resources responding to multiple and extensive public records requests. Many such requests are submitted by organizations who assert they are acting in the public interest, including those who are seeking records for litigation purposes. Those organizations may also have segments of the public that oppose their interest. Accordingly, in most cases the Department will assess costs associated with records requests; however, the Department will consider a reduction of costs for those requests that appear to be in the overall public interest.

**Comment:** The Department's waiver of production costs under paragraph (7) states the department shall waive production costs that are under $10. This should be increased to $50 to reduce the burden on requestors.

**Response:** The Department has amended the fee waiver to reflect $50 as requested in the comment, and will maintain the waiver for the first hour of staff time.

The Department notes that the rule as originally proposed provided for both one free hour of staff time (which almost always exceeds $10) and $10 in production costs. Most records requests already fall within these two fee waivers because the Department attempts to provide documents electronically if possible. Consistent with this practice, paragraph (6) of the rule has been further clarified to specifically state that the Department will provide documents electronically to reduce costs and response time.

**Regulatory Flexibility Addendum**

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

(1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule.

The proposed rule is not likely to affect small businesses as it reflects the Department's current policy and practice regarding public records. The proposed rule will likely reduce the costs for citizens to obtain public records due to the proposed increase in the Department's fee waiver amount.

(2) The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

The proposed rule does not impose reporting, recordkeeping, or other administrative costs to small businesses.

(3) A statement of the probable effect on impacted small businesses and consumers.

The proposed rule is not likely to affect small businesses as it reflects the Department's current policy and practice regarding public records. The proposed rule will likely reduce the costs for citizens to obtain public records due to the proposed increase in the Department's fee waiver amount.

(4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business.

The proposed rule is not likely to affect small businesses as it reflects the department's current policy and practice regarding public records. The proposed rule will likely reduce the costs for citizens to obtain public records due to the proposed increase in the Department's fee waiver amount.

(5) A comparison of the proposed rule with any federal or state counterparts.

All State agencies are required to promulgate rules by January 1, 2019, regarding access to their public records. The Department's rules are based on the model open records policy of the Office of Open Records Counsel and existing Department policy.

This rule is comparable to federal agency rules implementing the Freedom of Information Act.

(6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

The proposed rule is not likely to affect small businesses as it reflects the department's current policy and practice regarding public records. The proposed rule will likely reduce the costs for citizens to obtain public records due to the proposed increase in the Department's fee waiver amount.

**Impact on Local Governments**

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

The Department anticipates that these amended rules will not have a financial impact on local governments.

**Additional Information Required by Joint Government Operations Committee**

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

**(A)** A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The purpose of this rulemaking is to broaden Rule 0400-01-01-.01 for managing public records to incorporate all of the elements required by Tennessee Code Annotated section 10-7-503(g). The Department had previously adopted a public records policy effective June 30, 2017. The proposed rule incorporates the required elements of the existing policy, and also addresses aggregation of multiple records requests, copying of records with personal equipment, and sufficient identification of records.

**(B)** A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

Tennessee Code Annotated section 10-7-503(g) provides that "[n]o later than January 1, 2019, state governmental entities shall promulgate rules regarding public records…."

**(C)** Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Tennessee citizens are most directly affected by this rule. Tennessee law requires the Tennessee Department of Environment and Conservation to adopt rules regarding public records.

**(D)** Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

While there are attorney general opinions interpreting various portions of the TPRA, the Department is not aware of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule.

**(E)** An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

The rulemaking will only affect the Department's revenues. The primary change that might affect the Department's budget is increasing the fee waiver from $10 to $50. Also, allowing people to make copies of records with personal equipment allows them to avoid paying fees for producing records. It is difficult to predict the fiscal impact of this change without knowing how requestors will respond to this rule change.

**(F)** Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Brian Clifford
Office of General Counsel
Tennessee Department of Environment and Conservation
(615) 532-0131
Brian.Clifford@tn.gov

**(G)** Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Mallorie Kerby
Assistant General Counsel
Office of General Counsel

**(H)** Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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| Office of General Counsel<br>Tennessee Department of Environment and Conservation<br>William R. Snodgrass Tennessee Tower<br>312 Rosa L. Parks Avenue, 2nd Floor<br>Nashville, Tennessee 37243<br>(615) 532-0108<br>Mallorie.Kerby@tn.gov |

**(I)** Any additional information relevant to the rule proposed for continuation that the committee requests.

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| The Department is not aware of any requests. |