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**PUBLIC NOTICES**

**ENVIRONMENTAL PROTECTION  
OFFICE OF LEGAL AFFAIRS**

*42 N.J.R. 523(b)*

*N.J.A.C. 7:1*

**Notice of Action on Petition for Rulemaking**

**Department Organization**

**Request for Amendments Requiring Disclosure of Department Senior Staff Members' Scheduled Meetings with Non-Departmental Entities and Individuals, and Records Related to Such Meetings; and Repeal of Portions of Rule Describing Function of Department's Press Office**

Petitioner: Public Employees for Environmental Responsibility

**Take notice** that the Department of Environmental Protection (Department) has determined to deny the petition for rulemaking filed on July 27, 2009 by Jeff Ruch, Executive Director of the Public Employees for Environmental Responsibility (petitioner), seeking amendment of the Department Organization rules, *N.J.A.C. 7:1*. The petitioner identifies itself as "a national support group for professionals in state and federal agencies." A notice of receipt of the petition was published in the New Jersey Register on September 8, 2009. See *41 N.J.R. 3319(a)*. A notice of action deferring the petition for further deliberation was published in the New Jersey Register on November 2, 2009. See *41 N.J.R. 4127(a)*.

The petitioner requested that the Department promulgate rules requiring disclosure of certain Department senior staff members' scheduled meetings with non-Department governmental entities and individuals and records related to such meetings, and to make these records available through the OPRA process and on the Department's website. The petitioner further requested that the Department repeal the portion of the Department Organization rules at *N.J.A.C. 7:1-1.2(f)3* that describes the Press Office as the single point of contact between the Department and the media because the petitioner claims that it restricts the free flow of public information and chills free speech rights of Department employees.

In 2007, the Department received the identical rule petition from the New Jersey Public Employees for Environmental Responsibility. The Department, after careful consideration, determined to deny that petition. See *39 N.J.R. 2546(b)*; July 2, 2007 (notice of receipt) and *39 N.J.R. 3413(a)*; August 6, 2007 (notice of action). After careful consideration of the present petition, including review of the practicality and feasibility of implementing the requested disclosure and web posting in an accurate and timely way, the Department has determined to deny the petition. The Department's reasons for finding the requested rulemaking unnecessary and/or inappropriate are set forth below.

The request for rulemaking that would mandate disclosure of the meeting calendars of certain Department senior staff is denied on the basis that those documents are exempt from disclosure because they are [page=524] protected by both the executive privilege and the deliberative process privilege. See *Wilson v. Brown, et al.*, *404 N.J. Super. 557 (App. Div. 2009)*, *certif. denied*, *198 N.J. 473 (2009)* (containing a comprehensive discussion of executive privilege) and *Edu-*

*cation Law Center v. Burke, 198 N.J. 274 (2009)* (providing a comprehensive review of the deliberative process privilege.)

*N.J.S.A. 47:1A-9.a* provides that government records may be exempted from public access by Executive Order of the Governor. Executive Order No. 26 (2002) shields from disclosure under OPRA those documents that contain advisory, consultative or deliberative information or other records protected by a recognized privilege, which includes the executive privilege. *Jeffrey Smith v. NJ Department of Corrections*, Gov. Records Council Complaint No. 2005-84 (April 25, 2007). The deliberative process privilege is grounded in the common law principle of the need to protect governmental deliberative processes. *Smith*, supra, citing *In Re Liq. of Integrity Ins. Co., 165 N.J. 75, 83-85 2000*). See also *N.J.S.A. 47:1A-1.1*, which exempts from public access "advisory, consultative or deliberative material."

Rules that would mandate disclosure of senior staff calendars would have the potential to chill communications with the many constituencies with whom the Commissioner and other high level managers meet. *Nero v. Hyland, 76 N.J. 213, 226 (1978)*, quoting *United States v. Nixon, 418 U.S. 683, 708* (the point of executive privilege is to ensure that those assisting the executive freely explore alternatives in the shaping of policies and are permitted to do so "in a way many would be unwilling to express except privately"). The identity and the sequence of the persons with whom Department senior staff consult could reveal the substance or direction of the judgment or mental processes of the Commissioner and Department staff. See *Ian Shearn v. Office of the Governor*, Gov. Records Council Complaint No. 2003-53 (April 2003). Conversely, the frank discussions indispensable to the deliberative or policy-making process cannot occur if individuals shun meetings to avoid publicizing their presence with the Commissioner and Department staff.

Disclosure of the Commissioner's schedule and the schedules of Department staff also implicates privacy interests of the people with whom public officials meet. See *Smith*, supra, citing *Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (2005)* and *North Jersey Newspapers Company v. Passaic County Board of Freeholders, 127 N.J. 9, 16-18 (1992)* (the requested schedule of the Commissioner is exempt from public access on the basis that it implicates privacy interests of persons who meet with public officials and is protected by executive privilege).

During the 90-day further deliberation period, the Department concluded that the above-described policy and legal justifications for denying the disclosure parts of the petition are controlling. Even if the posting of calendars was technologically feasible and could be done in a sufficiently timely and accurate way, the policies set forth above do not support implementation of on-line posting. The Department communicates Departmental policy and requests public input into the formulation of that policy through several mechanisms. Examples include, but are not limited to, public notices the Department provides regarding public meetings and public hearings, notices concerning permit applications, settlements, etc., and notices convening meetings of stakeholder committees to aid in rulemaking and policy making initiatives. These notices are generally published in newspapers of general circulation, in the DEP Bulletin, in the New Jersey Register, on the Department's website, or through other means, and are designed to encourage public input in Departmental policy formulation.

The request for rulemaking that would repeal the portion of the Department Organization rules that describes the Department's Press Office functions (see *N.J.A.C. 7:1-1.2(f)3*) is also denied. The Commissioner is charged with formulating and implementing State statutes and rules and Statewide policies and procedures concerning the protection of the State's environment. The Commissioner has the authority to structure the Department in such a way as to most efficiently implement that mandate. The press office serves as the single point of contact between the Department and all representatives of the media to facilitate and coordinate the release of accurate and timely information to the press. In addition, the Department's organizational structure for handling press inquiries is similar to the structure of many other State agencies. This does not presuppose that employees are precluded from raising issues to their management and/or the Commissioner. Various Federal and State statutes protect employee whistle blowers. There is nothing about the organizational rule related to the Press Office's function that violates employees' professional ethical standards and duties to the public interest. An employee's work obligations and that employee's obligations to meet the ethical standards of a professional license are not mutually exclusive.

Accordingly, the petitioner's request for rulemaking is denied. A copy of this notice has been mailed to the petitioner as required by *N.J.A.C. 1:30-4.2*.