

310 CMR 3.00: ACCESS TO AND CONFIDENTIALITY OF DEPARTMENT RECORDS AND FILES

- 3.01: Purpose, Authority and Applicability
- 3.02: Severability
- 3.03: Effective Date
- 3.04: Computation of Time
- 3.05: Definitions
- 3.10: Availability Of Public Records To The General Public
- 3.11: Processing Requests For Disclosure Of Public Records
- 3.12: Presumption Of Availability
- 3.13: Determinations To Be Made By The Commissioner ~~of Director~~
- 3.14: Effect Of Requests For Confidentiality
- 3.15: Postponing Denial Of Confidentiality Pending Appeal
- 3.16: Separability Of Records
- 3.20: Protecting The Confidentiality of Trade Secrets
- 3.21: When Trade Secrets May Be Disclosed By The Department
- 3.22: Trade Secrets Subject To Confidentiality
- 3.23: Criteria For Determining A Trade Secret
- 3.24: Requests For Protecting The Confidentiality Of Trade Secrets
- 3.25: Procedure For Acting On Requests For Protecting The Confidentiality of Trade Secrets
- 3.26: Reconsidering Confidentiality Determinations
- 3.27: Notice In Department Orders And Forms
- 3.29: Transition Provisions Governing Trade Secrets
- 3.30: Special Provisions for Trade Secret Claims Pursuant to M.G.L. c. 21I
- 3.31: Purpose, Authority, and Applicability
- 3.32: Definitions
- 3.33: General Provisions for Making Trade Secret Claims
- 3.34: Procedures for Determination of Trade Secret
- 3.35: Procedures to be Followed During Pendency of Trade Secret Claim
- 3.36: Penalties

3.01: Purpose, Authority and Applicability

310 CMR 3.00 are promulgated by the Department pursuant to the authority granted by M.G.L. c. 21A, § 2(28); M.G.L. c. 21, § 27(12); M.G.L. c. 21C, § 4; M.G.L. c. 21E, § 3(c); M.G.L. c. 21I, §§ 3 and 20; and M.G.L. c. 111, §§ 142B and 142D. 310 CMR 3.00 are intended to assure that public access to and, to the extent authorized or required by law, the confidentiality of records and files obtained or made by the Department are in conformity with M.G.L. c. 21, § 27(7); M.G.L. c. 21C, § 12; M.G.L. c. 21E, § 12; M.G.L. c. 66, § 10; M.G.L. c. 111, §§ 142B and 142D, M.G.L. c. 21I; and all other applicable statutes and regulations.

3.02: Severability

It is hereby declared that the provisions of 310 CMR 3.00 are severable, and if any provision hereof or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions hereof or applications thereof which can be given effect without the invalid provision or application.

3.03: Effective Date

310 CMR 3.00 shall take effect on publication by the Secretary of the Commonwealth in the Massachusetts Register.

3.04: Computation of Time

Unless otherwise specifically provided by law, 310 CMR 3.00, or any determination issued pursuant to 310 CMR 3.00, any time period prescribed or referred to in 310 CMR 3.00 or in any determination issued pursuant to 310 CMR 3.00 shall begin with the first day following the act which initiates the running of the time period, and shall include every calendar day, including the last day of the time period so computed. If the last day is a Saturday, Sunday, legal holiday, or any other day in which the offices of the Department are closed, the deadline shall run until the end of the next business day. If the time period

prescribed or referred to is less than seven days, only days when the offices of the Department are open shall be included in the computation.

3.05: Definitions

As used throughout 310 CMR 3.00, the following terms shall have the following meanings, unless the context clearly indicates otherwise:

Commissioner means the Commissioner, ~~or~~ Acting Commissioner of the Department, or the Commissioner's designee.

Department means the Massachusetts Department of Environmental ~~Protection~~ Quality Engineering.

~~Director means the Director or Deputy Director of the Department's Division of Water Pollution Control.~~

Person means any agency or political subdivision of the Federal government or the Commonwealth, or any state, public or private corporation or authority, any individual, trust, firm, joint stock company, partnership, association, or other entity, and any officer, employee or agency of said person, and any group of said persons.

Public record means any record made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth, or of any authority established by the General Court to serve a public purpose, and which is a public record pursuant to M.G.L. c. 4, § 7, cl. 26, as may be amended from time to time.

Record means a book, paper, map, photograph, recorded tape, financial statement, statistical tabulation, or any other documentary material or data, regardless of physical form or characteristics.

Trade secret means anything tangible which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production, manufacturing, or management information, design, process, procedure, formula, invention, method or improvement. Without limiting the generality of the foregoing, this definition shall include anything which is a trade secret pursuant to M.G.L. c. 266, § 30(4), as may be amended from time to time. This definition shall not include:

- (1) anything which is "personal data" pursuant to M.G.L. c. 66A, § 1, as may be amended from time to time.
- (2) anything which is "criminal offender record information" pursuant to M.G.L. c. 6, § 167, as may be amended from time to time.
- (3) anything which is "evaluative information" pursuant to M.G.L. c. 6, § 167, as may be amended from time to time.
- (4) anything which is "intelligence information" pursuant to M.G.L. c. 6, § 167, as may be amended from time to time.

3.10: Availability of Public Records to the General Public

All records made or received by any officer or employee of the Department shall be public records and shall be available for disclosure to the general public on request pursuant to 310 CMR 3.10 through 3.19, except the following:

- (1) all records specifically excluded from the definition of "public record" pursuant to M.G.L. c. 4, § 7, cl. 26.
- (2) all trade secrets the disclosure of which would not be in compliance with M.G.L. c. 21, § 27(7); c. 21C, § 12; M.G.L. c. 21I, § 20; M.G.L. c. 21E, § 12; M.G.L. c. 111, §§ 142B and 142D, c. 21I, § 20; or 310 CMR 3.20 through 3.39.
- (3) all records which are "criminal offender record information", "evaluative information", or "intelligence information" pursuant to M.G.L. c. 6, § 167, ~~as may be amended from time to time,~~ the disclosure of which would not be in compliance with M.G.L. c. 6, §§ 167 through 178, ~~as may be amended from time to time.~~
- (4) all records which are "personal data" pursuant to M.G.L. c. 66A, § 1, ~~as may be amended from time to time,~~ the disclosure of which would not be in compliance with M.G.L. c. 66A, ~~as may be amended from time to time.~~

(5) all records specifically or by necessary implication exempted from disclosure by any other statute.

3.11: Processing Requests for Disclosure of Public Records

In compliance with M.G.L. c. 66, § 10, the Department shall, at reasonable times and without unreasonable delay, permit any person, under the supervision of Department personnel, to inspect and examine any public record which is in the custody of the Department and not described in 310 CMR 3.10(1) through (5); and the Department shall furnish one copy of such record on request and on payment of a reasonable fee. Every person for whom a search of public records is made shall pay the actual expense of such search. Unless more time is reasonably required to properly determine whether the records in question are subject to disclosure as public records or exempt from disclosure, the Department shall comply with a written request to inspect or copy a public record within ten days after the Department actually receives the request. Whenever a cost or fee is established or determined by the Commissioner of Administration, said cost or fee shall be paid to the Department.

3.12: Presumption of Availability

Whenever there is a doubt, question or dispute about whether particular records are subject to disclosure as public records or exempt from disclosure, there shall be a presumption that the records in question are public records. This presumption may be overcome upon a specific showing by the person requesting confidentiality that the records in question are trade secrets, or are otherwise exempt from disclosure.

3.13: Determinations to be Made by the Commissioner or Director

Whenever there is a doubt, question or dispute about whether any particular record is subject to disclosure as a public record or exempt from disclosure, and whenever any person requests that any particular record be deemed a trade secret or otherwise be deemed confidential and exempt from disclosure, the Department shall be deemed to have resolved such doubt, question or dispute, and such request shall be granted or denied, only in accordance with a written determination signed by—

~~(1) the Commissioner in the case of a record made by or submitted to the Department pursuant to any Massachusetts statute including a record made by or submitted to the Department pursuant to other than M.G.L. c. 21, §§ 26 through 53, or~~

~~(2) the Director, in the case of a record made by or submitted to the Department pursuant to M.G.L. c. 21, §§ 26 through 53.~~

Formatted: Normal, Indent: Left: 0", Line spacing: single

3.14: Effect of Requests for Confidentiality

Whenever any person requests in writing that particular records be deemed trade secrets or otherwise be deemed confidential and exempt from disclosure, such records shall be treated as confidential and shall not be deemed public records until the Department has approved or denied the request pursuant to 310 CMR 3.00.

3.15: Postponing Denial of Confidentiality Pending Appeal

Whenever the Department denies a request to deem records confidential and not public records, such denial shall take effect only ten days after the date thereof so that any person aggrieved by said denial may appeal to another State agency with jurisdiction over the subject matter thereof, or to a court. During this ten-day period, the records in question shall be treated as confidential and shall not be deemed public records. This ten-day period may be extended by the Department in extraordinary situations. Any extension shall be in writing and signed pursuant to 310 CMR 3.13. 310 CMR 3.15 shall not apply to trade secret claims made pursuant to M.G.L. c. 21I and 310 CMR 3.30 through 3.39.

3.16: Separability of Records

Whenever parts of records are trade secrets or otherwise exempt from disclosure, the Department shall make every reasonable effort to separate the parts that are exempt from disclosure from the parts that

are public records so that the parts which are public records can be disclosed without prejudicing the confidentiality of the parts which are exempt from disclosure.

3.20: Protecting the Confidentiality of Trade Secrets

Anything which the Department determines to be a trade secret shall not be deemed to be a public record and shall be exempt from disclosure to the general public on request. Such determinations shall be subject to 310 CMR 3.12, 3.13, and 3.20 through 3.39.

3.21: When Trade Secrets May be Disclosed by the Department

Notwithstanding any provision of 310 CMR 3.20 or 3.30 to the contrary, a trade secret shall always be subject to disclosure by the Department

- (1) to the extent necessary to comply with the Federal Solid Waste Disposal Act, as revised by the Resource Conservation and Recovery Act, as may be amended from time to time.
- (2) to the extent necessary to comply with M.G.L. c. 21, § 27(7) and the Federal Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*
- (3) to the extent necessary to comply with M.G.L. c. 21E, § 12 and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*
- (4) to the extent necessary to comply with M.G.L. c. 111, §§ 142B and 142D.
- (5) to the extent necessary for any enforcement action, whether criminal or civil, judicial or administrative.

3.22: Trade Secrets Subject to Confidentiality

A trade secret may be treated as confidential and not as a public record only if it was submitted to the Department

- (1) because such submittal was required to
 - (a) comply with a statute, regulation, or order, or
 - (b) to obtain a license, permit, or other required approval, or
 - (c) obtain a government contract, financial aid, or other benefit, or
- (2) for use in developing governmental policy and upon a promise of confidentiality and not for any of the reasons set forth in 310 CMR 3.22(1). No promise of confidentiality shall be deemed to have been made by the Department pursuant to M.G.L. c. 4, § 7, cl. 26(g) or 310 CMR 3.22(2) unless made in writing and signed by the Commissioner pursuant to 310 CMR 3.13(1) or by the Director pursuant to 310 CMR 3.13(2).

3.23: Criteria for Determining a Trade Secret

In determining whether a record is a trade secret, the Department shall apply the following criteria:

- (1) The extent to which the trade secret is known by persons other than the person submitting the record in question.
- (2) The extent to which the trade secret is known by employees of the person submitting the record in question, and others involved in that person's business.
- (3) The extent to which measures are taken by the person submitting the record in question to guard the secrecy of the trade secret.
- (4) The value of the trade secret to the person submitting the record in question and to that person's competitors.
- (5) The amount of effort in developing the trade secret.
- (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

3.24: Requests for Protecting the Confidentiality of Trade Secrets

No record shall be deemed a trade secret unless a person requests the Department in writing to take such action. The request shall be made and substantiated as follows:

(1) Each record containing information which is the subject of a confidentiality request shall be clearly marked "CONFIDENTIAL". To assist the Department in complying with 310 CMR 3.16, persons shall separately submit confidential portions of otherwise non-confidential records. If submitted separately, the record which is the subject of a confidentiality request shall be clearly marked "CONFIDENTIAL".

(2) The request for confidentiality shall be supported with the following information, which shall be treated as a public record:

- (a) The time period for which confidential treatment is desired.
- (b) The reason the record was provided to the Department, and the date of submittal.
- (c) Everything the person has done to meet the criteria in 310 CMR 3.23.
- (d) The extent to which the person requesting that the record be kept confidential has disclosed the contents of that record to other persons.
- (e) A list of all other Federal, State and local agencies to which the same record or contents thereof has been submitted, which of them have been requested to keep that record confidential, the status of the requests, and a copy of the responses by said agencies or the courts to the requests.
- (f) How making the record a public record would harm the person requesting confidentiality and why such harm should be deemed substantial.
- (g) If the record was submitted voluntarily and not in compliance with a regulation or order of the Department or a court, whether and if so why making the record a public record would tend to lessen the availability to the Department of similar records in the future.

(3) Any toxics user that is required, pursuant to M.G.L. c. 211 or 310 CMR 50.00, to submit to the Department a report, plan summary or other document, who believes that disclosing information in that document will reveal a trade secret, may submit to the Department, in writing, a trade secret claim in accordance with M.G.L. c. 211 and 310 CMR 3.30.

3.25: Procedure for Acting on Requests for Protecting the Confidentiality of Trade Secrets

The Department shall act on a confidentiality request subject to the following provisions:

(1) If the Department has received a request to inspect or copy a record which is the subject of a confidentiality request on which the Department has not made a final decision, the Department shall notify

- (a) the person who made the request to inspect or copy the record that the record in question is the subject of a pending confidentiality request, and therefore not a public record, the request to inspect or copy is initially denied, and a final decision will be made when the Department determines whether the record in question is entitled to confidentiality as a trade secret.
- (b) the person who requested that the record be kept confidential of the request to inspect or copy the record.

(2) The Department shall determine whether the record would be voluntarily submitted within the meaning of 310 CMR 3.22(2) and whether the record, if made public, would divulge a trade secret. The Department shall give notice of its determination(s) to the person who requested confidentiality and all persons who requested to inspect or copy the record.

(3) If the Department determines that a record would, if made public, divulge a trade secret, the record in question shall be deemed confidential and shall not be deemed a public record for such length of time, and subject to such terms, conditions and limitations, as the Department may include in the determination. The Department shall so notify the person who submitted the record to the Department and all persons making a request to inspect or copy the record in question.

(4) All notices given pursuant to 310 CMR 3.25 shall be in writing, shall be delivered either by hand or by certified mail, return receipt requested, and shall include:

- (a) ~~the~~ reasons for the determination,
- (b) notice that the determination constitutes a final decision of the Department,
- (c) notice that the determination may be subject to review by one or more other State agencies or by the courts,

(d) if the determination is that the record in question, if made public, would not divulge a trade secret, notice that, pursuant to 310 CMR 3.15, the record in question shall become a public record ten days after the date of the Department's determination unless, within that time, another State agency with jurisdiction over the subject matter thereof, or a court, orders otherwise, and this ten-day period may be extended only in extraordinary situations, and that such extensions must be in writing and signed by the Commissioner pursuant to 310 CMR 3.13(1) or by the Director pursuant to 310 CMR 3.13(2).

(5) With respect to trade secret claims made pursuant to M.G.L. c. 21I and 310 CMR 3.30, the procedures set forth in 310 CMR 3.30 shall apply.

3.26: Reconsidering Confidentiality Determinations

If the Department determines that newly discovered information or changed circumstances make it appropriate for the Department to reconsider and possibly modify a prior grant of confidentiality, the Department shall so notify the person who submitted the record to the Department. The notice shall give the person a reasonable period of time to substantiate, pursuant to 310 CMR 3.24, keeping the record in question confidential. The amount of time originally established in the notice may be reasonably extended by the Department. After this time has passed, or after the Department has received a written response from the person requesting confidentiality, whichever occurs first, the Department shall make a new determination whether the record in question shall be deemed either confidential or a public record. 310 CMR 3.26 shall not apply to trade secret claims made pursuant to M.G.L. c. 21I and 310 CMR 3.30 through 3.39.

3.27: Notice in Department Orders and Forms

(1) Every order and every form issued by the Department pursuant to M.G.L. c. 21C or 310 CMR 30.000, shall include the language set out in 310 CMR 3.27(2). No order or form shall be deemed invalid because it does not include said language. This language need not be included in a manifest filled out pursuant to 310 CMR 30.000 or 314 CMR 8.07(2)(e).

(2) The language referred to in 310 CMR 3.27(1) shall be substantially as follows: You may request the Department to keep confidential part or all of any documentary material or data submitted to the Department if such material or data, if made public, would divulge a trade secret. If no such request accompanies the material or data at the time they are submitted to the Department, they shall be public records and shall be available for inspection and copying by the public without further notice to you. Information covered by such a request shall be disclosed by the Department to the extent authorized by applicable statutes and 310 CMR 3.00. You are advised to read 310 CMR 3.00 carefully before making such a request because only certain material or data may properly be the subject of such a request.

3.29: Transition Provisions Governing Trade Secrets

(1) Any record received by the Department pursuant to M.G.L. c. 21C on or before December 31, 1982 shall, after that date, be deemed a public record and not confidential, without further notice to any person, unless:

- (a) on or before December 31, 1982 the Commissioner has made a formal written determination that a record specifically identified in the determination shall be deemed confidential and not a public record, or
- (b) on or before December 31, 1982 the Department has received a written request to keep confidential records specifically identified in the request, and the request is still pending on that date.

(2) Other than records received pursuant to 310 CMR 3.29(1) any record received by the Department on or before December 31, 1983 shall, after that date, be deemed a public record and not confidential, without further notice to any person, unless:

- (a) on or before December 31, 1983, a formal written determination has been made, either by the Commissioner pursuant to 310 CMR 3.13(1) or by the Director pursuant to 310 CMR 3.13(2), that a record specifically identified in the determination shall be deemed confidential and not a public record, or

(b) on or before December 31, 1983 the Department has received a written request to keep confidential records specifically identified in the request, and the request is still pending on that date.

3.30: Special Provisions for Trade Secret Claims Pursuant to M.G.L. c. 21I

3.31: Purpose, Authority, and Applicability

310 CMR 3.30 through 3.39, cited collectively as 310 CMR 3.30, are promulgated pursuant to the authority granted to the Department by M.G.L. c. 21I, §§ 3 and 20. The purpose of 310 CMR 3.30 is to ensure that public access to, and the confidentiality of, documents submitted to the Department pursuant to M.G.L. c. 21I or 310 CMR 50.00, are in conformity with M.G.L. c. 21I and 310 CMR 50.00, and all other applicable statutes and regulations.

3.32: Definitions

As used in 310 CMR 3.30, the following terms shall have the following meanings, unless the context clearly indicates otherwise:

Commissioner means the Commissioner of the Department of Environmental Protection or his or her designee.

Toxic means any toxic as defined in M.G.L. c. 21I and 310 CMR 50.10.

Toxic or hazardous substance means any toxic or hazardous substance as defined in M.G.L. c. 21I and 310 CMR 50.10.

Toxics means toxics as defined in M.G.L. c. 21I and 310 CMR 50.10.

Toxics user means any toxics user as defined in M.G.L. c. 21I and 310 CMR 50.10.

Trade secret means any formula, plan, pattern, production data, device, information, or compilation of information which is used in a toxics user's business, and which gives said toxics user an opportunity to obtain an advantage over competitors who do not know or use it.

Trade secret claimant means any toxic user who makes a trade secret claim in accordance with M.G.L. c. 21I and 310 CMR 3.30.

3.33: General Provisions for Making Trade Secret Claims

(1) A toxics user making a trade secret claim shall submit two copies of the required documents to the Department, one with the information for which a trade secret claim is being made which conceals that information, and one in an envelope marked "Confidential" containing the information for which a trade secret claim is being made, which the department, during the pendency of the trade secret claim, shall keep in the secured storage area as referenced in 310 CMR 3.35. Any toxics user concealing the specific chemical identity of any toxic or hazardous substance shall, in the place on the non-confidential copy where the chemical identity would normally be included, include the generic class or category of the toxic or hazardous substance.

(2) No toxics user required to submit information under M.G.L. c. 21I or 310 CMR 50.00 may claim that the information is entitled to protection as a trade secret under 310 CMR 3.30 unless such toxics user shows each of the following:

(a) such toxics user has not disclosed the information to anyone else, other than a member of a local emergency planning committee as defined by EPCRA, an officer or employee of the United States or a state or local government, an employee of such toxics user, or anyone who is bound by a confidentiality agreement, and such toxics user has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures; and

(b) The information is not required to be disclosed, or otherwise made available to the public under any other federal or state law;

- (c) Disclosure of the information is likely to cause substantial harm to the competitive position of such toxics user; and
- (d) The Commissioner determines that the information constitutes a trade secret based on the criteria set forth in 310 CMR 3.23.

(3) A toxics user making a trade secret claim shall, together with the non-confidential copy of the document submitted pursuant to 310 CMR 3.33(1), submit a written request for confidentiality, and a written explanation of the reasons that the information claimed as a trade secret is a trade secret. The explanation shall contain the following information:

- (a) the information set forth in 310 CMR 3.24(2), and,
- (b) information that demonstrates each of the factors set forth in 310 CMR 3.33(2)(a)(b) and (c).

(4) Information certified by an appropriate official of the United States as necessarily kept secrets for national defense purposes shall be accorded the full protection against disclosure as specified by such officials in accordance with the Law of the United States.

(5) The provisions of 310 CMR 3.30 shall not apply to the disclosure of emissions data.

3.34: Procedures for Determination of Trade Secret

(1) Any resident of the Commonwealth may submit to the eCommissioner a written petition for the disclosure of any information which is claimed as a trade secret pursuant to M.G.L. c. 211 and 310 CMR 3.30. The petition shall specify the information sought to be disclosed. The Department shall notify the trade secret claimant of the petition.

(2) If the eCommissioner has reason to believe that the information claimed as a trade secret may not be a trade secret, the eCommissioner may, in the absence of a petition pursuant to 310 CMR 3.34(1), initiate a determination to be carried out in accordance with 310 CMR 3.34. The Department shall notify the trade secret claimant that the eCommissioner has initiated a determination as to whether the information claimed as a trade secret is a trade secret.

(3) Within 60 days after the date of receipt of a petition under 310 CMR 3.34(1), or upon the initiative of the eCommissioner pursuant to 310 CMR 3.34(2), the eCommissioner shall review the information submitted by the trade secret claimant pursuant to 310 CMR 3.33(3) and determine whether the explanation presents assertions which, if true, are sufficient to support a finding that the information claimed as a trade secret is a trade secret.

(4) If the Commissioner determines, pursuant to 310 CMR 3.34(3), that the explanation presents assertions which, if true, are sufficient to support a finding that the information claimed as a trade secret is a trade secret, the Commissioner shall, by certified mail, notify the trade secret claimant that he or she has 30 days from the date of such notification to supplement the explanation with detailed information to support a finding that the information claimed as a trade secret is a trade secret.

(5) If the eCommissioner determines, after receipt of any supplemental supporting detailed information submitted pursuant to 310 CMR 3.34(4), that the information claimed as a trade secret is a trade secret, the eCommissioner shall, by certified mail, so notify the trade secret claimant and the petitioner, if any. The petitioner, if any, may, within 30 days of the date of such notification, seek judicial review of the determination in accordance with M.G.L. c. 30A, § 14. The Commissioner shall after final adjudication immediately return to the trade secret claimant all supplemental supporting detailed information submitted concerning the validity of the trade secret claim.

(6) All supplemental supporting detailed information submitted pursuant to 310 CMR 3.34(4) shall be kept in the secure storage area established and maintained in accordance with 310 CMR 3.00 while the claim is pending. The petitioner, if any, shall not be permitted to have access, except as approved by the court. In entering any order approving access by the petitioner, the court shall consider the need for the entry of an appropriate protective order restricting the use or further disclosure of the confidential information.

(7) If the eCommissioner determines, after receipt of any supplemental supporting detailed information submitted pursuant to 310 CMR 3.34(4), that the information claimed as a trade secret is not a trade secret, the eCommissioner shall, by certified mail, so notify the trade secret claimant. The trade secret claimant may, within 30 days of the date of such notification request an adjudicatory hearing on the eCommissioner's determination in accordance with M.G.L. c. 30A and 310 CMR 1.00. A timely request for an adjudicatory hearing pursuant to 310 CMR 3.34(7) shall act as an automatic stay of the eCommissioner's determination pending completion of the adjudicatory hearing. A trade secret claimant aggrieved by the eDepartment's final decision upon said adjudicatory hearing may, within 30 days of the date of the final decision, seek judicial review pursuant to M.G.L.c.30A, § 14. During judicial proceedings, if any, the information claimed as a trade secret shall remain confidential. Any court in considering a motion for a temporary restraining order or preliminary injunction to enjoin release of such information shall presume that release would cause irreparable harm to the trade secret claimant.

(8) If the eCommissioner determines, pursuant to 310 CMR 3.34(3), that the explanation presents insufficient assertions to support a finding that the information concealed is a trade secret, the eCommissioner shall, by certified mail, notify the trade secret claimant that he or she shall have 30 days from the date of such notification in which to request an adjudicatory hearing, or, upon a showing of good cause to amend the original explanation by providing supplemental assertions to support the trade secret claim. As used in 310 CMR 3.34(8), "good cause to amend" shall not include a claim that the explanation contains information which constitutes a trade secret pursuant to 310 CMR 3.00 through 310 CMR 3.39.

(9) If the eCommissioner does not reverse or modify his or her determination under 310 CMR 3.34(3) after an adjudicatory hearing or an examination of any supplemental assertions allowed under 310 CMR 3.34(8), the eCommissioner shall, by certified mail, so notify the trade secret claimant and the trade secret claimant shall have 30 days from the date of the decision or date of notification in which to file for judicial review of the determination in accordance with M.G.L. c. 30A, § 14. A trade secret claimant aggrieved by the eCommissioner's final decision may within 30 days of the date of the decision seek judicial review pursuant to M.G.L. c. 30A, § 14. The information claimed as a trade secret, and any supplemental supporting information submitted pursuant to 310 CMR 3.34(3), shall remain confidential during judicial proceedings, if any. Any court in considering a motion for a temporary restraining order or preliminary injunction to enjoin release of such information shall presume that release would cause irreparable harm to the trade secret claimant.

(10) If the eCommissioner reverses or modifies his or her determination under 310 CMR 3.34(3) after an appeal or an examination of any supplemental assertions under 310 CMR 3.34(8), the procedures set forth in 310 CMR 3.34(5) through (7).

3.35: Procedures to be Followed During Pendency of Trade Secret Claim

(1) With respect to concealed information for which a trade secret claim has been made but not finally denied, the Department may:

- (a) use such information, aggregated with other information in such a manner as to maintain the confidentiality of the information claimed as a trade secret, to carry out responsibilities under M.G.L. c. 21I or 310 CMR 50.00. The eDepartment may include such aggregated information in the publicly available database required by M.G.L. c. 21I;
- (b) disclose such information when the eDepartment is required to do so to comply with federal law or regulation, and so long as the eDepartment gives notice of the requirement to the toxics user prior to complying.

(2) The eDepartment shall establish and maintain a single secure storage area for confidential materials and information submitted pursuant to M.G.L. c. 21I or 310 CMR 50.00. Materials and information for which trade secret claims have been made and related supporting materials, and information for which such claims have been finally adjudicated in favor of the claimant, shall be kept in the secure storage area and may only be removed in accordance with

the provisions of 310 CMR 3.30. Materials and information for which such claims have been finally adjudicated against the claimant may be permanently removed from the secure storage area.

(3) A chief document control officer designated by the Commissioner shall be responsible for controlling access to the secure storage area and its contents. The Commissioner may designate no more than five Department personnel at any one time as document control officers who may have access to the secure storage area. Personnel and authorized agents of the Department who require information contained within the secure storage area for the effective performance of their duties may, upon request to a document control officer, examine documents containing such information within a secure area adjoining the secure storage area. Immediately upon completion of such examination, or at the close of the business day, whichever is first, such personnel shall return the documents to a document control officer for immediate return to the secure storage area. A hearing officer, administrative law judge, or Department counsel in an adjudicatory hearing in which such documents or information are at issue, or other Department personnel authorized in writing by the Commissioner to do so, may remove such documents from the secure storage area when necessary for preparation and conduct of such adjudicatory hearing or effective performance of their duties, provided that the hearing officer, administrative law judge, counsel, or other personnel shall at all times retain control of such documents and information through direct physical observation or deposit in a locked room, file, or other secured area. Immediately upon completion of the hearing or other required use, the documents shall be returned to a document control officer for immediate return to the secure storage area.

(4) No copies of such documents or information may be made except by a document control officer. Copies shall be considered equivalent to original documents for purposes of 310 CMR 3.35. Any notes concerning such information made by Department personnel shall be treated as confidential pursuant to 310 CMR 3.30.

(5) Department personnel or authorized agents who violate the procedures required by 310 CMR 3.35 shall be subject to disciplinary action.

3.36: Penalties

(1) Anyone who is not authorized to have access to, or who is not authorized to disclose information submitted to the Department under the authority of M.G.L. c. 21I, 310 CMR 50.00, or 310 CMR 3.30, but who knowingly and willfully uses, divulges or discloses to anyone else such information in a manner not authorized by M.G.L. c. 21I, 310 CMR 50.00, or 310 CMR 3.30, shall be in violation of M.G.L. c. 21I and 310,CMR 50.00, and shall be subject to the penalties established in M.G.L. c. 21I, § 21(B).

(2) If the Commissioner determines, pursuant to 310 CMR 3.34, the information claimed as a trade secret is not a trade secret, and that the trade secret claim is or was frivolous, then the trade secret claimant shall be subject to a civil penalty not to exceed \$25,000 per trade secret claim. The Commissioner may assess the penalty in accordance with M.G.L. c. 21A, § 16 or may request the attorney general to bring an action in any court of competent jurisdiction in the Commonwealth to assess and collect the penalty.

REGULATORY AUTHORITY

310 CMR 3.00: M.G.L. c. 21, § 27(12); M.G.L. c. 21A, § 2(28); M.G.L. c. 21C, §§ 4, 6 and 12; M.G.L. c. 21E, § 3C; M.G.L. c. 111, § 142B and 142D.