

# FREEDOM OF INFORMATION ACT

ALSO KNOWN AS FOIA

*29 Del. C. §§ 10001-10007*

# WARNING

- The legislature specifically provided that this presentation is NOT to be construed as legal advice
- The information that follows summarizes the law
  - We cannot cover every situation
  - We cannot address fact-specific questions
- If you have a question . . .
  - Contact your legal counsel
  - <http://attorneygeneral.delaware.gov>

# Legislative Declaration

“It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.”

*29 Del. C. § 10001*

# Purpose of FOIA

- Promote governmental transparency
- Inform voters
- Highlights the importance of citizens' rights
- Makes it possible for citizens to observe and monitor public officials

# FOIA Manual

- Created by Department of Justice to assist FOIA Coordinators
- Circulated last week
- Intended as an “easy reference” for FOIA
- Will be updated every other year
- Available on Department of Justice website

# FOIA Training

- To be presented annually
- Provides guidance for FOIA coordinators and others involved in responding to FOIA requests for a public body
- We will discuss the FOIA statute, as well as prior cases and Attorney General opinions that have been issued

# What This Presentation Will Cover

- FOIA Coordinators' duties and responsibilities
- Applicable time frames
- Fees that may be charged
- What is a public body?
- What is a public record?
- How should open meetings work?
- Questions & answers

# FOIA Coordinators

- Designated by a public body
- Responsible for receiving & processing FOIA requests
- What does this mean?

# FOIA Coordinators

- Required to:
  - Coordinate public body's responses to FOIA requests
  - Assist requesting party to identify records sought
  - Assist public body to locate & provide records
  - Work to foster cooperation with the requesting party
  - Maintain a document that tracks all FOIA requests

# FOIA tracking sheet must include:

- Requesting party's contact information
- Date public body received FOIA request
- Public body's response deadline
- Date of public body's response
- Names, contact information & dates of correspondence of those contacted in connection with a FOIA request
- Dates of review of documents responsive to request
- Names of individuals who conducted review
- Whether documents were produced
- Amount of administrative & copying fees assessed
- Date of final disposition of FOIA request



# Statute Provides Policies Governing:

- Form of FOIA requests (standard form)
- Roles & duties of FOIA Coordinator
- How a public body should respond to
  - a FOIA request
  - a request for emails
  - a request for non-custodial records

# Statute Provides Policies Governing:

- How a public body should review records to identify exemptions from disclosure
- Access that must be provided for review of records
- Fees applicable to searching, copying & producing records

# Appeals

- A FOIA Coordinator should be aware of what happens when a denial is appealed
  - Know the enforcement provisions of the statute
  - Be ready to draft a response to the Attorney General's office
  - Be prepared to respond to and cooperate with requests for additional information

# Important Deadlines

- Established in 29 *Del. C.* § 10003(h)
- Initial response required as soon as possible, but no later than 15 business days from date of request that indicates one of the following:
  - The records are being provided
  - Additional time is needed because
  - The FOIA request is denied

# Extension Requests

- Must indicate one of the following:
  - The records sought are voluminous
  - The public body requires legal advice in connection with the request
  - Records are in storage or archived
- No other statutory basis for an extension request

# Denials

- Must include the reason a request is denied
- No obligation to provide an index or other listing of the records that were withheld
- Requestor has 60 days to file a petition with the Department of Justice to challenge the denial
- If an appeal is filed, the CDAG will ask you to explain your position regarding disclosure of the records

# Permitted Fees

- The statute expressly permits a public body to charge fees
  - There are limits to what may be charged
  - Fees should be minimized to greatest extent possible

# Photocopy Fees

- Standard copies
  - First 20 pages are FREE
  - After 20 pages, each copy is \$0.10 per sheet or \$0.20 for a double-sided sheet
- Oversized copies (greater than 11" x 17")
  - 18" x 22" - \$2.00 per sheet
  - 24" x 36" - \$3.00 per sheet
  - Larger than 24" x 36" - \$1.00 per square foot
- Color Copies
  - Additional charge of \$1.00 per sheet for standard copies
  - Additional charge of \$1.50 per sheet for larger copies

# Administrative Fees

- Statute suggests that administrative fees are required, but allows agencies to adopt policies that waive the fees
- Permitted only for requests that take more than one hour of staff time to process
- A public body must attempt to minimize administrative fees and charge only those that are reasonably required

# Administrative Fees

- May include staff time associated with processing request, including:
  - Identifying records
  - Monitoring file reviews
  - Generating computer records (whether electronic or paper)
- Must be billed per quarter hour at hourly pay grade of **lowest-paid employee** capable of performing the service

# Administrative Fees

- FEES MAY NOT BE CHARGED FOR THE LEGAL REVIEW OF THE RESPONSE
  - This is NOT limited to review by lawyers
  - Any review that considers whether FOIA exemptions apply is a legal review for these purposes

# FOIA Policy

- The statute requires that all public bodies adopt a policy to address FOIA requests
- A FOIA policy may include provisions that allow for the waiver of some or all of the administrative fees
- Waiver provisions must apply equally to a particular class of persons (e.g., the press, non-profits agencies)
- Policy must be applied consistently

# Other Charges

- Microfilm/microfiche
  - First 20 pages free
  - After 20 pages, \$0.15 per page
- Electronic records
  - Costs calculated by the material costs involved in generating the copies (i.e., the cost of the CD or DVD) as well as administrative fees
- Third-party custodian fees

# Estimates

- “Itemized written cost estimate”
  - Provide to requesting party
  - List all charges expected to be incurred
- Requesting party may elect to revise, narrow, or abandon its request in response to estimate
- Estimate must be prepared in good faith
  - Not too high – to discourage request
  - Not too low – to later pursue a collection action

# Advance Payments

- May require payment of some or all of the estimated costs prior to providing records
- If estimate exceeds actual cost, required to refund the difference
- If estimate is less than actual cost, permitted to bill the requesting party for the difference

# Fees - Summary

- Ensure fee collection practices comply with the statute or any previously-adopted policy
- Ensure that fees that are assessed are reasonable under FOIA

# Requests for Emails

- FOIA requires each public body to attempt to fulfill requests using its own staff, from its own records
- Only after exhausting an internal search should an agency seek assistance from a third-party technology service provider
  - DTI charges \$100 per hour to pull emails
  - DTI only maintains emails for one year

# Suggested Steps to Provide Responsive Emails

- Identify employee most likely to have access to the emails identified in the request
- Request that the employee search for responsive documents
- If an employee cannot be identified or cannot conduct the search, work with internal IT personnel to fulfill the request
- If the public body cannot fulfill the request from internal records, contact third-party service provider to assist with the search

# **PUBLIC BODIES**

**OR WHAT *ISN'T* A PUBLIC BODY, AND  
HOW DO I TELL THE DIFFERENCE?**

# PUBLIC BODIES

Job #1: Get familiar with the manner in which your organization was created.

The determination whether your organization is a “public body” depends almost entirely upon the manner in which it was created.

# PUBLIC BODIES

"Public body" means, unless specifically excluded:

- any regulatory, administrative, advisory, executive, appointive, or legislative body of the State;
- any regulatory, administrative, advisory, executive, appointive, or legislative body of any political subdivision of the State;

# PUBLIC BODIES

- includes, any board, bureau, commission, department, agency, committee, *ad hoc* committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council, or any other entity or body established by an act of the General Assembly of the State;

# PUBLIC BODIES

- includes any board, bureau, commission, department, agency, committee, *ad hoc* committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council, or any other entity or body *established by a body* established by the General Assembly of the State;

# PUBLIC BODIES

- includes any board, bureau, commission, department, agency, committee, *ad hoc* committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council, or any other entity or body *appointed by any body or public official of the State*;

# PUBLIC BODIES

- includes any board, bureau, commission, department, agency, committee, *ad hoc* committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council, or any other entity or body *otherwise empowered by any state governmental entity, which:*

# PUBLIC BODIES

- (1) Is supported in whole or in part by any *public funds*; *or*
- (2) Expends or disburses any *public funds*, including grants, gifts or other similar disbursements and distributions; *or*
- (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.

# PUBLIC BODIES

"*Public funds*" are those funds derived from the State or any political subdivision of the State.

"**Public body**" also includes any authority created under Chapter 14 of Title 16.

# PUBLIC BODIES

## So What *Isn't* Included in “Public Bodies”?

- any caucus of the House of Representatives or Senate of the State.
- University of Delaware and Delaware State University, *except* that the Board of Trustees of both universities shall be "public bodies."
- A court, an arm of a court, or an agency that exists to support a court

# What is a public record?

29 *Del. C.* § 10002(I)

# Definition

- “[I]nformation of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.”

# **Important Exemptions and Examples**

# Personnel, medical or pupil files

- The primary issue here is what the statute means when it qualifies this list of files by “the disclosure of which would constitute an invasion of personal property, under this legislation or under any State or federal law...”
- With respect to medical information, the exemption will be broad: HIPAA and state statutes make clear that most health information should not be disclosed.

# Financial information

- In a situation where the information is *required* to be provided to the government entity, the government would have the burden of showing that the disclosure of the information either would
  - (i) make it difficult for the government to obtain the information in the future, or
  - (ii) would be likely to cause “substantial harm to the competitive position of the person from whom the information was obtained.”
- In general: profit and loss statements are not type of record that courts (or the Attorney General’s office) have found to be likely to lead to competitive harm when disclosed.

# Investigatory Files

- Policy: “[t]his protection is necessary to avoid ‘a chilling effect on those who might bring pertinent information to the attention of’ law enforcement. This chilling effect would occur whether the public body chose to investigate the complaint or to ignore it.” Del. Op. Att'y Gen. 09-IB06 (2009)
- Even after the investigation is closed, the complaints must remain confidential. News-Journal Co. v. Billingsley, No. 5774, 1980 WL 3043 (Del. Ch. Nov. 20, 1980)

# Records specifically exempted from public disclosure

- Statutory basis for the exemption
- Examples:
  - DHIN: Medical records in the DHIN's custody
  - DOC: various types of information related to prisoners

# Labor Negotiations and Collective Bargaining

- Policy: A public body should not be forced to formulate publicly its strategy for negotiating employment contracts because doing so would impair the public body's ability to obtain the most favorable terms. See Att'y Gen. Op. 10-IB03; Att'y Gen. Op. 06-IB15.
- HOWEVER: public employers must produce to unions all information needed for effective collective bargaining.
- Therefore: § 10002(g)(8) excludes from the definition of public record only records that could be excluded from the duty to provide information in collective bargaining. Del. Op. Att'y Gen. 10-IB07 (2010).
- Combines with open meeting exception (29 Del. C. 10004(b)(4) and (b)(6)).

# Pending or Potential Litigation

- Pending
  - “Prevents one party from circumventing the normal rules of discovery.” Del. Op. Att'y Gen. 03-IB10 (2003)
  - “[W]hen parties to pending litigation against a public body seek information from that public body relating to the litigation, they are doing so not to advance ‘the public's right to know,’ but rather to advance their own personal stake in the litigation.” Mell v. New Castle Cnty., 835 A.2d 141, 147 (Del. Super. 2003)
- Potential
  - Litigation must be likely or reasonably foreseeable
    - Look for objective signs that litigation is coming
  - There must be a clear nexus between the litigation and the requested documents

# Department of Corrections

- In general, an inmate may not use an attorney or another third party to circumvent the exception.
- However, the Attorney General has held that when the ACLU requested records from the DOC, the Attorney General found that the ACLU was not acting as a surrogate for the inmates and the records should be released. Del. Op. Att'y Gen. 13-IB08 (2013)

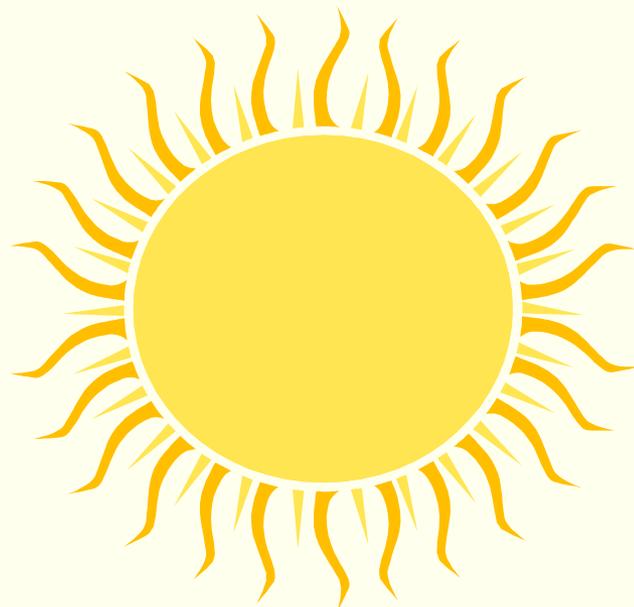
# General Assembly Emails/Communications

- This exemption is mentioned twice and is very broad.
- In searching through agency records and communications please note that anything with a member of the GA included may not need to be produced.

# Security/Safety

- Subsection 17 was added to FOIA after the terrorist attacks of September 11, 2001 and was intended to respond to public safety concerns raised by acts of terrorism — both foreign and domestic. Del. Op. Att'y Gen. 11-IIB05 (2011)
- Nature of the request, not the requestor, is what matters. Del. Op. Att'y Gen. 11-IIB05 (2011)
- Exempted under this subsection:
  - Badge records of employees that track when the employee comes and goes. Del. Op. Att'y Gen. 11-IIB05 (2011)
  - Law enforcement manuals to the extent they contain information that would disclose investigative techniques and procedures, or endanger the life and safety of citizens or law enforcement officers. Del. Op. Att'y Gen. 05-IB19 (2005)

# **Delaware's Open Meeting Law**



**The Freedom of Information Act**

**29 *Del. C.* c. 100**

# Simplified aspects of FOIA's Open Meeting Requirements

- All meetings in which governmental bodies meet to deliberate must be open to the public.
- Under FOIA, the only exception to an open meeting is an “executive session.”
- No meeting – even an emergency meeting – can be properly held under the FOIA without proper notice.
- Electronic communications, such as teleconferencing and e-mail, cannot be used to circumvent the requirements of FOIA.

# Important Definitions:

## Meeting – 29 Del. C. § 10002(g)

- Formal or informal gathering
- Of a quorum of the members of any public body
- For the purpose of discussing or taking action on public business
- Either in person or by video-conferencing.

# Important Definitions:

## Quorum

- Unless otherwise stated in the statute, quorum is a majority of the **statutory number** of Board members.
  - Odd number of total Board members;  $1/2$  , rounded up
  - Even number of total Board members;  $1/2 + 1$
- **Vacancies** do not impact the number necessary for quorum.
- If a member **abstains**, that member still counts.
- If a member **recuses**, that member does not count.
- If a quorum is lost at any point in the meeting, the meeting cannot continue.
- Less than a quorum of Board members should **never** discuss public business.

# Important Definitions:

## Public Business

“Any matter over which the public body has supervision, control, jurisdiction, or advisory power.” 29 *Del. C.* § 10002(j)

- Applications
- Regulations
- Disciplinary Matters
- Regulated Persons or Entities

## **Before the Meeting:**

### **GIVE NOTICE**

Generally, all public bodies subject to FOIA must give notice of their meetings.

# Notice Exceptions:

## Non-Meetings under the FOIA

- Social gatherings
- Conventions, training programs, professional association gatherings
- Juries, court deliberations
- Public bodies having only one member
- Certain public bodies within the legislative branch
- Gatherings of less than a quorum where public business will not be discussed

# Notice Must Contain

Time, date and place of meeting and whether video conferencing will be used

-29 *Del. C.* § 10004(e)(2)

## Preliminary Agenda

- Must be posted with notice, if available
- No later than 6 hours prior to meeting, with explanation for delayed posting
- May be subject to change at the meeting
- Must include Executive Sessions

-29 *Del. C.* §§ 10004(e)(2)&(e)(5)

# When Must Notice Be Posted?

## 7 Day Notice

All public bodies shall give public notice of their regular meetings and of their intent to hold executive session closed to the public at least seven days in advance thereof.

- 29 *Del. C.* § 10004(e)(2)

# When Must Notice Be Posted?

## 24 Hours Notice

Special, rescheduled, and emergency meetings (necessary for the immediate preservation of the public peace, health, or safety) must be noticed at least 24 hours in advance, and include an explanation as to why seven days' notice could not be given.

- 29 *Del. C.* §§ 10004(e)(1)&(e)(3)

# How must notice be given?

- Must be a conspicuous posting,
- At the principal office of the public body,
- Or if no such office exists, at the place where meetings of the public body are regularly held,
- Making a reasonable number of such notices available.
- Also, electronic posting on a designated State of Delaware website,
- Website must be approved by the Secretary of State for executive branch public bodies.

## During the Meeting

“Delawareans deserve to have as much information as possible about what their government is doing. In an open government, everyone wins. Sunshine is truly the best disinfectant.”

- *Governor Jack Markell*

# During the Meeting

## Voting

- All votes must be open.
- No Secret Ballots: Secret ballots are strictly forbidden. Minutes must reflect how each member voted. 29 *Del. C.* § 10004(f).
- No voting in executive session: Even if the body can enter executive session, *all* votes must be conducted during open session.

# During the Meeting

## Minutes

- Every meeting, including executive session
- Include a record of those members present and a record, by individual members, of each vote taken and action agreed upon
- Executive session minutes may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but no longer

- 29 Del. C. § 10004(f)

# **Executive Sessions**

# Executive Session

## Calling an Executive Session

- Convene an open meeting
- Motion stating the reason for executive session
- Limit discussion to the FOIA acceptable reason
- No voting until public session reconvenes

# Executive Session -- Reasons

## 1. Discussion of an individual citizen's qualifications to hold a job or pursue training

**Easy Rule:** Applies generally only to Boards with statutory authority to hire its own employees. Does not apply to any Title 24 Board when discussing applications.

**Note:** All discussion of salaries, compensation and other “job benefits” cannot be held in an executive session.

# Executive Session -- Reasons

2. Preliminary discussions on site acquisitions for any publically funded capital improvement;
3. Law enforcement agency's efforts to collect information leading to criminal apprehension;
4. Discussions of identifiable, lawful, charitable contributors when anonymity has been requested;
5. Student disciplinary cases;
6. Employee disciplinary cases or dismissal cases;
7. Personnel matters including the names, competency and abilities of individual employee or student are discussed.

# Executive Session -- Reasons

## 8. Strategy sessions, including seeking legal advice

### *Proper Executive Session Discussions*

- Collective Bargaining Discussions
- Pending Litigation
- Potential Litigation

### *Deliberation After Advice*

After receiving the advice, the body must reconvene and openly discuss the course of action to be taken.

## 9. Discussion of Non-Public Documents

# Executive Session – Additional Considerations

“[S]everal of the exceptions for executive session imply the presence of non-board members (such as attorneys to discuss litigation strategy, or teachers and school administrators in student discipline cases). We believe that FOIA allows a public body to invite individuals to attend an executive session to provide information related to the subject matter for which the executive session is authorized. But a public body cannot invite non-members as observers. . . .” Attn’y Gen. Op. 02-IB-17 (June 1, 2002).

# After The Meeting – FOIA Considerations

- Minutes of all meetings, including executive sessions, must be made available for public inspection and copying as a public record.
- All public bodies in the executive branch shall electronically post final approved minutes of open public meetings to the designated State of Delaware website approved by the Secretary of State within 5 working days of final approval of said minutes.
- Bodies that meet less than monthly must post draft minutes.