

FREEDOM OF INFORMATION ACT

ALSO KNOWN AS FOIA

29 *Del. C.* §§ 10001-10007

DISCLAIMERS

- 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
 - Review the Department of Justice’s Policy Manual for FOIA Coordinators, which is available at:
<http://attorneygeneral.delaware.gov/executive/opengov.shtml>

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

Purposes of FOIA

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

FOIA Manual

- Created by Department of Justice to assist FOIA Coordinators
- Published October 30, 2015 to the Department of Justice Open Government webpage
- Intended as an “easy reference” for FOIA
- Will be updated no less than every other year

FOIA Training

- Will be presented annually
- Provides guidance for FOIA Coordinators and others involved in responding to FOIA requests to a public body
- Will discuss the FOIA statute, cases, and Attorney General opinions that interpret the statute

What This Presentation Will Cover

- FOIA Coordinators' duties and responsibilities
- FOIA Petitions to the Attorney General
- Deadlines associated with requests to inspect and copy public records
- Fees that may be charged by a public body responding to a FOIA request
- What is a public body?
- What is a public record?
- How should open meetings work?
- Judicial and AG Opinions re: FOIA for 2015-2016.
- Questions & answers

FOIA Coordinators

- All public bodies must designate a FOIA Coordinator and:
 - Provide the Department of Justice the FOIA Coordinator's name and contact information
 - OpenGovernment@state.de.us
 - Post this information to the public body's website
 - Inform the Department of Justice and update the website within 20 working days of any change

29 Del. C. § 10003(g)(1)

FOIA Coordinators

- Responsible for coordinating and processing FOIA requests
- Required to:
 - Coordinate public body's responses to FOIA requests
 - Assist requesting party in identifying records sought
 - Assist public body in locating & providing records
 - Work to foster cooperation with 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 (in person, by U.S. mail, fax, or online)
- Roles and duties of FOIA Coordinator
- How a public body should respond to:
 - a FOIA request
 - a FOIA request for emails
 - a FOIA request for non-custodial records

Statute Provides Policies Governing:

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

Petitions to the Attorney General

- A FOIA Coordinator should be aware of what happens when a response (or lack thereof) to a FOIA request is challenged through a petition to the Attorney General
 - Know the enforcement provisions of the statute
 - Be ready to draft (or have your counsel draft) a response to the Attorney General
 - Be prepared to respond to and cooperate with requests for additional information

RESPONDING TO REQUESTS FOR RECORDS

FOIA Policy

- The statute requires that all public bodies adopt a policy to address FOIA requests
- The policy may not violate the statute
- A FOIA request conforming to the policy may not be denied solely because the body's form is not used.
- A FOIA policy may include provisions that allow for the waiver of some or all of the administrative fees, which must apply equally to a particular class of persons (e.g., the press, non-profit agencies)

Important Deadlines

- Initial response to a FOIA request required as soon as possible, but no later than 15 business days from date of receipt of request
- Response must indicate one of the following:
 - The records are being provided; or
 - The FOIA request is denied (in whole or in part), including the basis for the denial; or
 - Additional time is needed (see next slide for limitations regarding when additional time permitted) and a good faith estimate of how much time

29 Del. C. § 10003(h)

Additional Time

- If the response indicates that additional time is required, it must indicate one of the following (there is no other statutory basis for an extension):
 - The records sought are voluminous ,or
 - The public body requires legal advice in connection with the request, or
 - Records are in storage or archived
- Must include a good faith estimate of how much additional time is needed
 - ASAP or “soon” not sufficient

Denials

- Must include the reason a request (or part thereof) is denied
- No obligation to provide an index or other listing of the records that were withheld
- Requestor has 60 days from the date of the denial to submit a petition to the Attorney General
- If a petition is submitted, the Attorney General may ask that you 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
 - Bodies may adopt an alternative fee schedule in their county or municipal codes

29 Del. C. § 10003(m)

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
 - With very few exceptions any review that considers whether FOIA exemptions apply is a legal review for these purposes
 - Subject matter review is the one exception
- Fee waivers must comply with FOIA policy and 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
- Requestor may elect to proceed with, narrow, or cancel its request in response to the 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

Fees - Summary

- Ensure fee collection practices comply with the statute and any internal FOIA policy
- Ensure that fees that are assessed are reasonable under FOIA

PUBLIC BODIES

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

PUBLIC BODIES

Job #1: Become 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

- and 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; or*

PUBLIC BODIES

- 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; or*

PUBLIC BODIES

- 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; or*

PUBLIC BODIES

- 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, and 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.”

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
 - Delaware's Division of Technology and Information (DTI) charges an hourly rate to retrieve emails
 - DTI only maintains some emails for one year

Suggested Steps to Provide Responsive Emails

- Identify employee(s) most likely to have access to the emails identified in the request
- Request that the employee(s) 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

Important Exemptions and Examples

Certain personnel files, medical files, 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 privacy, under this legislation or under any State or federal law...”
- With respect to medical information, the exemption will likely be broad given state and federal statutes that protect health information.

29 Del. C. § 10002(l)(1)

Financial information

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

29 Del. C. § 10002(l)(2)

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 (June 9, 2009)
- Even after the investigation is closed, the records need not be disclosed. *News-Journal Co. v. Billingsley*, No. 5774, 1980 WL 3043 (Del. Ch. Nov. 20, 1980)
29 Del. C. § 10002(l)(3)

Records specifically exempted from public disclosure by statute or common law

- Statutory basis for the exemption
- Examples:
 - DHIN: Medical records in the DHIN's custody
 - Attorney-client privilege
 - Tax records
 - Family Educational Rights and Privacy Act

29 Del. C. § 10002(l)(6)

Labor Negotiations & 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 Del. Op. Att'y Gen. 10-IB03* (March 10, 2003); *Del. Op. Att'y Gen. 06-IB15* (July 24, 2006).
- However: Public employers must produce to unions all information needed for effective collective bargaining.
- Therefore: 29 *Del. C.* § 10002(l)(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* (Aug. 9, 2010).

29 *Del. C.* § 10002(l)(8)

Pending or Potential Litigation

- Pending
 - “Prevents one party from circumventing the normal rules of discovery.” *Del. Op. Att’y Gen.* 03-IB10 (May 6, 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 (e.g., written demand letter, previous or preexisting litigation concerning similar claims between same parties, retained counsel and expressed intent to sue)
 - There must be a clear nexus between the litigation and the requested documents

29 *Del. C.* § 10002(l)(9)

Department of Correction

- Records in DOC's possession are exempt from release to an inmate in DOC's custody.
- In general, an inmate may not use an attorney or another third party to circumvent the exception.
- However, the Attorney General's Office has found that when the ACLU requested records from the DOC, the ACLU was not acting as a surrogate for the inmate and the records should be released.
Del. Op. Att'y Gen. 13-IB08 (Nov. 26, 2013)
29 Del. C. § 10002(I)(13)

General Assembly

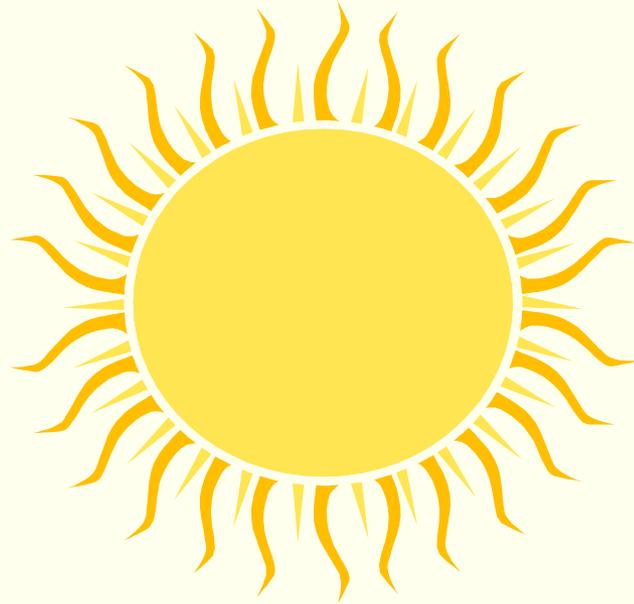
Emails/Communications

- Two exemptions, both of which are broadly worded:
 - “Emails received or sent by members of the Delaware General Assembly or their staff” (29 *Del. C.* § 10002(I)(16))
 - “Any communications between a member of the General Assembly and that member's constituent, or communications by a member of the General Assembly on behalf of that member's constituent, or communications between members of the General Assembly” (29 *Del. C.* § 10002(I)(19))

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-IB05 (Apr. 1, 2011)*
- Nature of the request, not the requestor, is what matters. *Del. Op. Att'y Gen. 11-IB05*
- Exempted under this subsection:
 - Badge records of employees that track when the employee comes and goes. *Del. Op. Att'y Gen. 11-IB05*
 - 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 (Aug. 1, 2005)*
- New protections for IT systems added in 2016

Delaware's Open Meeting Law



The Freedom of Information Act

29 *Del. C.* § 10004

Open Meetings

General Provisions

- All meetings in which public bodies meet to deliberate must be open to the public.
- FOIA provides an exception for an “executive session,” which may be private.
- No meeting – even an emergency meeting – is proper under FOIA without proper notice.
- Electronic communications such as teleconferencing, text messaging and e-mail, cannot be used to circumvent open meeting requirements.

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, a quorum is a majority of the **statutory or total number** of members.
 - Odd number of total members; $1/2$, rounded up
 - Even number of total 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.

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 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 an explanation for delayed posting*
- May be subject to change at the meeting
- Must include Executive Sessions if they are to be held

-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
- Must make a reasonable number of such notices available at the meeting
- In addition, for public bodies in the executive branch, must make an electronic posting on a designated State of Delaware website

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 made in public view.
- 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 may enter executive session, *all* votes must be conducted during open session.

During the Meeting

Minutes

- Every meeting, including executive session
- Record the members present, each vote taken and each action agreed upon
- Unless vote is unanimous, minutes must state how each member voted and note abstentions and recusals
- 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 (Example – real estate acquisition)

- 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

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 their own employees. Does not apply to any Title 24 Board when discussing applications.

Note: No discussion of salaries, compensation or other “job benefits” may be held in an executive session.

29 Del. C. § 10004(b)(1)

Executive Session -- Reasons

- Preliminary discussions on site acquisitions for any publically funded capital improvement 29 *Del. C.* § 10004(b)(2)
- Law enforcement agency's efforts to collect information leading to criminal apprehension 29 *Del. C.* § 10004(b)(3)
- Discussions of identifiable, lawful, charitable contributors when anonymity has been requested 29 *Del. C.* § 10004(b)(5)
- Student disciplinary cases 29 *Del. C.* § 10004(b)(7)
- Employee disciplinary cases or dismissal cases, *unless the individual requests that it be open* 29 *Del. C.* § 10004(b)(8)
- Personnel matters, when the names, competency and abilities of individual employees or students will be discussed. 29 *Del. C.* § 10004(b)(9)

Note – This is a narrow exemption

Executive Session -- Reasons

- Strategy sessions, including seeking legal advice, but only if open discussion would have an adverse effect on the public body's collective bargaining or litigation position

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.

29 Del. C. § 10004(b)(4)

- Discussion of Non-Public Documents

29 Del. C. § 10004(b)(6)

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. . . .” *Del. Op. Att’y Gen. 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.
- All public bodies in the executive branch that meet less than monthly must post draft minutes.

29 *Del. C.* § 10004(f)

Court Challenges to Action Taken

- Any action taken in violation of FOIA's open meeting provisions may be voidable by the Court of Chancery
- Any citizen may challenge by filing suit within 60 days of learning of such action, but in no event later than 6 months after the date of the action

29 Del. C. § 10005(a)

Petitions to the Attorney General

- Any citizen may petition the Attorney General to determine whether a FOIA violation has occurred or is about to occur
- Generally, such petitions must be submitted within 6 months to be considered timely
- The public body generally bears the burden to demonstrate that it did not (or will not) violate FOIA

Summaries of Opinions Issued in the Last Two Years Relating to FOIA

Judicial Opinions

Re: Ridgewood Manor II, Inc. v. The Delaware Manufactured Home Relocation Authority, C.A. No. 8528-VCN, 2014 WL 7453275 (Del. Ch. Dec. 31, 2014)

Plaintiffs filed complaint in the Court of Chancery on May 6, 2013 regarding monthly assessments collected by the defendants under the Manufactured Home Owners and Community Owners Act. Among other things, the plaintiffs alleged that the Delaware Manufactured Home Relocation Authority (“DMHRA”) Board of Directors violated FOIA’s open meeting requirements in January 2006. With respect to the FOIA allegations, the court noted that, while the Board is indeed subject to FOIA pursuant to 25 *Del. C.* §7011(b)(4), “FOIA claims are barred by a six-month statute of limitations.” *Id.* at *6.

Judicial Opinions

Lechliter v. Delaware Department of Natural Resources and Environmental Control, et al., C.A. No. 10430-VCG, 2015 WL 7720277 (Del. Ch. Nov. 30, 2015)

Plaintiff filed a complaint in the Court of Chancery on January 20, 2015 in connection with the construction of a dog park in the City of Lewes. Among other things, the Plaintiff alleged multiple open meetings violations. The court reiterated its prior bench ruling that, with one exception, Plaintiff's FOIA claims were dismissed as time-barred, as the Plaintiff failed to contest the alleged infractions within 6 months. The court denied defendant's motion to dismiss with respect to the allegation concerning an October 6, 2014 meeting. However, on June 1, 2016, the litigation was stayed pending resolution of another matter, *Lechliter v. Becker, C.A. No. 12358-VCG*.

Judicial Opinions

Lechliter v. Delaware Department of Natural Resources and Environmental Control, et al., C.A. No. 7939-VCG, 2015 WL 9591587 (Del. Ch. Dec. 31, 2015)

Plaintiff filed a complaint in the Court of Chancery on October 11, 2012 against multiple defendants in connection with the construction of a windmill in the City of Lewes. Among other things, the Plaintiff alleged that the City of Lewes City Council violated the open meetings provisions of FOIA in connection with a January 2010 City Council meeting. The court granted summary judgment in favor of defendants, thereby dismissing the claim, on the basis that the litigation was time-barred. Specifically, the Court noted that 29 *Del. C.* § 10004 required Plaintiff to contest the alleged violations within 60 days of learning of such action, but in no event later than 6 months after the date of the action.

Judicial Opinions

Grimaldi v. New Castle County, et al., C.A. No. 15C-12-096, 2016 WL 4411329 (Del. Super. Aug. 18, 2016)

One day after his termination from the County, the Plaintiff submitted a FOIA request for a copy of a County employee's resume, which the County denied. The Superior Court stated that, as a general matter, disclosure of a successful applicant's resume would not constitute an invasion of personal privacy. Thus, 29 *Del. C.* §10002(l)(1) does not apply. However, because the County employee and her resume are part of one of Plaintiff's claims, the resume is not a public record pursuant to 29 *Del. C.* §10002(l)(9), which exempts from the definition of "public record" "[a]ny records pertaining to pending or potential litigation which are not records of any court."

Attorney General Opinion 15-IB01

The petitioner alleged the Appoquinimink School Board (“the Board”) committed multiple violations of the Freedom of Information Act (“FOIA”); specifically, it was alleged to have voted on a superintendent contract (“the Contract”) while in executive session, not provided sufficient notice that the contract would be discussed in agendas for two dates, and corrected an agenda to reflect the discussion after the meeting had been held.

Decided: The Board violated FOIA’s open meetings requirements when it (i) discussed the Contract in executive session at the June 2014 Board meeting for purposes not authorized by FOIA; (ii) failed to specifically list the consideration of the Contract in the June 2014 Meeting agendas; and (iii) failed to specifically list the discussion of the Contract in the December 2014 Meeting agenda.

Attorney General Opinion 15-IB02

The petitioner alleged that the Kent County Recorder of Deeds violated FOIA by not providing requested documents in a format that could be stored on external media.

Decided: Because FOIA only requires a public body to provide “reasonable access” to the public records, and two alternatives for reasonable access were offered to the Petitioner (inspection and copying during business hours or a paid subscription service), there was no FOIA violation.

Attorney General Opinion 15-IB03

The petitioner requested a determination of whether the Department of Education (“the Department”) had violated the Freedom of Information Act (“FOIA”) by withholding requested documents until he paid \$6,568.86 for their procurement, an amount he believed to be overestimated in order to discourage the request.

Decided: A FOIA violation occurred because the fees were not reasonable and were reduced by the Department of Justice to a maximum of \$1,725.04, but there was no basis to conclude that the original estimate was intended to discourage the petitioner’s request. It was not a FOIA violation for the Department to require payment of some of all of the fees in advance.

Attorney General Opinion 15-IB05

The petitioner alleged that the Cape Henlopen Senior Center (“CHSC”) was required to produce certain records as a “public body” subject to the Freedom of Information Act (“FOIA”).

Decided: CHSC is not a public body because it is not a “regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State” and it was not established by governmental act or entity as described in FOIA. The mere fact that CHSC receives a large portion of its funding from the State and Sussex County is not sufficient to subject it to FOIA because it does not fall within the first statutory requirement.

Attorney General Opinion 15-IB06

The petitioners made 8 allegations of Freedom of Information Act (“FOIA”) violations by the Town of Dewey Beach (“the Town”) including holding discussion of a potential property purchase by email, holding a special meeting inconsistent with regular meeting day and time, posting insufficient or inaccurate agendas for two meetings, failing to meet the 15 business day deadline to provide requested records, and by failing to keep minutes of executive sessions.

Decided: The emails regarding property purchase did not constitute a “serial meeting” because there was not a quorum of commissioners participating. Meeting notices, agendas, and use of executive sessions complied with FOIA. The public body did not violate FOIA by holding a meeting on a different day and at a different time than usual; the meeting was properly noticed. The Town violated FOIA when it missed the 15 day deadline to provide requested records and failed to create minutes of the meeting of January 2, 2015 in a timely manner.

Attorney General Opinion 15-IB08

The petitioner requested a determination that the Data Service Center (“DSC”) is a public body obligated to produce the requested public records in their custody.

Decided: The DSC is a “public body” within the meaning of 29 *Del. C.* § 10002(h). The DSC is also a custodian of the records requested. The DSC should work with the various school districts to promptly produce all public records in accordance with the terms of the statute. This determination should not be interpreted to mean that a public body is required to create records or reports that do not exist, or produce records subject to an exemption to FOIA under 29 *Del. C.* §10002(l).

Attorney General Opinion 15-IB10

The petitioner alleged that the Christina School Board (“CSB”) violated FOIA by discussing the superintendent’s competency and abilities in executive session, by holding a vote in executive session and by not making public a copy of the superintendent’s contract more than six hours before meeting to vote on it.

Decided: The CSB did not violate FOIA when it discussed the district superintendent’s competency and abilities in executive session at the August 2015 board meeting. The CSB did violate FOIA when it held a vote in executive session at the August meeting. However, the executive session vote did not affect substantial public rights because no law then required executive sessions to be audio recorded. The CSB did not violate FOIA’s meeting notice requirements when it circulated a copy of the superintendent’s contract less than six hours prior to the September 2015 board meeting.

Attorney General Opinion 15-IB11

The petitioner alleged that the Brandywine School Board (the “Board”) violated FOIA by not making a public decision on whether to expunge a student’s record.

Decided: The Board action regarding a student’s request to expunge a record during executive session at the July 2015 Board Meeting violated FOIA. The Board denied that request by a vote or by consensus achieved while in executive session or in some other non-public forum. The Board was directed to either ratify the aforementioned decision in a public, regular session or formally reconsider the request for expungement and vote upon it in a manner consistent with the conclusions and determinations set forth.

Attorney General Opinion 15-IB12

Petitioner alleged two public records and an open meetings violation by the Department of Education (DOE), and an open meetings violation by the State Board of Education.

Decided: As long as a public body searches internal records first, it does not violate FOIA for a public body to request that the Department of Technology and Information perform a second search for email records. But when the body has already found no responsive records in its own search, it should so advise the requestor.

Further decided: There is no evidence that the State Board of Education withheld information it would have shared with the public in the petitioner's absence.

Further decided: The September 17 and September 23 Academic Framework Working Group meeting notices and agendas did not comply with FOIA because they were posted less than seven days in advance of the meetings.

Attorney General Opinion 15-IB13

Petitioner alleged that the Delaware Division of Forensic Science (DDFS) violated FOIA by not providing a decedent's manner of death.

Decided: The Medical Examiner's investigation and determination were part of DDFS' investigative files and were not public records for purposes of FOIA.

Attorney General Opinion 15-IB14*

Petitioner requested certain records regarding the use of cell site simulators. The State Police agreed to provide responsive records, except for a nondisclosure agreement with the FBI.

Decided: the Agreement between the State Police and the FBI was a public record subject to disclosure under Delaware's FOIA and was required to be provided within 10 calendar days of the determination.

**on appeal to Superior Court*

Attorney General Opinion 16-IB01

Petitioner raised several questions: (1) whether the County Administrator presented the new pay grades and job descriptions to the County Council (“Council”) for approval;(2) why discussion of pay grades and job descriptions was conducted in executive session; (3) why pay grades and job descriptions were not discussed in public at the May 12, 2015 Council meeting when they had been discussed at the March 30, 2015 Board meeting; (4) whether Council could vote on pay grades and job descriptions at the June 16, 2015 meeting when they were not specifically listed in the budget; (5) whether the executive session minutes for the May 5, 2015 and May 12, 2015 Council meetings were public documents under FOIA; and (6) whether the March 30, 2015 Board meeting was properly noticed.

Decided: No FOIA violations occurred.

Attorney General Opinion 16-IB02

Petitioner requested from the Town “copies of Bethany Beach Police Department’s policies and procedures related to internal affairs investigations, discipline and code of standards or conduct and the completed internal affairs investigations statistical summaries for the years 2011 through 2014.” The Town produced the policies and procedures, but denied the request for the internal affairs investigations statistical summaries, claiming to provide such summaries would violate the Law Enforcement Officers’ Bill of Rights (LEOBOR) due to the police force’s small size.

Decided: There is no FOIA violation. Town policy that would otherwise make such records available to the public is subordinate to the state LEOBOR statute, which protects records of internal affairs investigations from disclosure.

Attorney General Opinion 16-IB03*

Petitioners appealed the redactions of a document that was produced pursuant to Attorney General Opinion 15-IB14 as improper under FOIA.

Decided: The State Police are directed to review the redactions to determine whether an error was made. The State Police should thereafter promptly provide to Petitioner either (i) a new copy of the documents without the redactions, if it is determined that they were erroneous, or (ii) the basis for the redactions, if it is determined that the redactions were intentional.

**on appeal to Superior Court*

Attorney General Opinion 16-IB04

The Department of Finance denied Petitioner's request for the applications of several companies for exemption from corporate income tax.

Decided: There was no FOIA violation. The applications were considered a "report or return" that is required by 30 *Del. C.* § 368, which prohibits the disclosure of the information contained in such reports or returns. FOIA exempts from disclosure records that are confidential under other statutes.

Attorney General Opinion 16-IB05

Petitioner alleged that at the State Board of Education meeting held on January 21, 2016, the following constituted violations of FOIA: side conversations between a staff member and counsel and between the Board president and counsel, denial of a request by a member of the public to make public comment, and permitting a Board staff member to speak during Board discussion.

Decided: No FOIA violation was found regarding the side conversations because neither involved a quorum of board members. FOIA does not require public meetings to include public comment. FOIA does not prohibit Board staff from speaking during meetings.

Attorney General Opinion 16-IB06*

Petitioner appealed the withholding of certain requested emails that were determined by the Office of the Governor to be exempt from FOIA under Exemption 6 (privileged materials) and Exemption 16 (sent to or by a legislator or legislative staff).

Decided: Documents which are covered by common law privilege such as attorney-client privilege, executive privilege, and certain draft document privilege are exempt from FOIA. Documents may not be withheld pursuant to Exemption 16 solely on the basis that the sender or recipient is a member of the General Assembly or its staff and must therefore be examined to determine if the content or context indicates that they constitute communications with a constituent of the legislator or reflect the substance of such communications.

**on appeal to Superior Court*

Attorney General Opinion 16-IB07

Petitioner requested from the City of Rehoboth Beach “comparable sales for which fair market value was established” for certain properties for purposes of assessment.

Decided: The City violated FOIA when it failed to treat Petitioner’s request as a FOIA request and failed to respond within the timeframe required by FOIA. No remediation was required because Petitioner was later provided the opportunity to inspect responsive documents. The methods by which properties were valued are outside the scope of FOIA.

Attorney General Opinion 16-IB08

Petitioner alleged that the City of Rehoboth Beach refused to explain the sources and methods utilized in arriving at its assessment figures. The City had, however, provided records that Petitioner had requested.

Decided: The City was not required by FOIA to create records that did not exist. The methods by which properties were valued were outside the scope of FOIA.

Attorney General Opinion 16-IB09

Petitioner alleged that the City of New Castle violated FOIA by assessing fees for legal review of the police procedures manual.

Decided: The assessment did not violate FOIA because the review to determine whether disclosure of such information would present a safety risk to the police department or general public was an administrative, rather than legal, review. The City was reminded to ensure that the charge was based on the hourly rate of the lowest-paid individual capable of performing the work, provide an accounting to the Petitioner of the time spent on review, and refund any unspent balance of the prepaid charge.

Attorney General Opinion 16-IB10

Petitioner alleged that the Town of Little Creek violated FOIA by not publishing Town Council meeting minutes on its website and by requiring her to visit the private residence of a Town official to review public documents.

Decided: The Town is not required by FOIA to post meeting minutes online because that provision applies only to the executive branch of state government. The Town violated FOIA's requirement of "reasonable access" by requiring a citizen to visit a private residence for public documents. No remediation is required because the Town has since provided the documents by mail.

Attorney General Opinion 16-IB11

Petitioner alleged that the Department of Natural Resources and Environmental Control improperly denied requested documents.

Decided: There is no common law exemption for “settlement negotiations” that supports withholding public records under FOIA. Documents were properly withheld under potential litigation and common law exemptions (attorney-client privilege). Documents withheld as “working drafts” required further analysis. Because most documents withheld as “working drafts” were also withheld as related to potential litigation or attorney-client privilege, only a small number of records required additional review. If, consistent with this opinion’s guidance, such records are determined to not be exempt, those records should be provided to Mr. Carter’s organization.

Attorney General Opinion 16-IB12

Petitioner alleged that the Department of Natural Resources and Environmental Control (“DNREC”) did not respond to their request for documents within the time required by FOIA.

Decided: DNREC violated FOIA by failing to respond within 15 business days. However, no remediation was required because the documents requested were exempt as records relating to pending or potential litigation.

Attorney General Opinion 16-IB13

Petitioner alleged that the Sussex County Council violated open meetings laws by announcing an extra paid holiday (2014) and employee bonus (2015), which had not been publicly discussed and voted on, at an annual county employee luncheon that was not publicly noticed.

Decided: The decision to offer the benefits was made by the County Administrator rather than the Council. As the County Administrator is a body of one, the open meetings laws do not apply. An employee social event is not considered a public meeting under FOIA.

Attorney General Opinion 16-IB14

Petitioner alleged that various actions by Wilmington Housing Authority violated FOIA.

Decided: Five of the allegations were no longer timely. Holding a meeting without a vote did not violate FOIA because there is no requirement that a public body vote to hold a meeting. Two other allegations could not be examined without additional information. Petitioner invited to submit additional information.

Attorney General Opinion 16-IB15

Petitioner alleged that he requested and did not receive documents from New Castle County.

Decided: The County violated FOIA by failing to a) cite a reason why additional time was needed to fulfill the request and b) provide the petitioner with a good faith estimate of how much additional time it required. Remediation was not required because the documents related to pending litigation and were therefore not “public records.”

Attorney General Opinion 16-IB16

Petitioner alleged that the Seaford City Council violated FOIA by omitting certain portions of his public comments in the summary provided in the minutes, rendering the minutes inaccurate.

Decided: The minutes are not materially misleading and thus there was no FOIA violation. The summary of comments in the minutes contained sufficient information to convey the Petitioner's subject, objections and conclusion, while other portions of the minutes reflected discussion of the policies that the Petitioner commented on and a record of the vote.

Attorney General Opinion 16-IB17

Petitioner alleged that the State Board of Education violated FOIA in connection with a February 18, 2016 meeting by not providing adequate space for the public to observe the meeting. Petitioner further alleged that individual board members violated FOIA by consulting with counsel during a break at the same meeting.

Decided: The Board violated FOIA by not providing adequate space and not attempting to accommodate the members of the public who were unable to view the proceedings due to space limitations. Because there was no evidence of a quorum of members speaking with counsel, individual conversations did not violate FOIA.

Attorney General Opinion 16-IB18

Petitioner alleged that the Newark City Council violated FOIA by denying her the opportunity to participate in public comment at a meeting, removing her from the meeting without justification and passing notes.

Decided: FOIA does not require an opportunity for public comment, but when offered, such opportunities must comport with the First Amendment. In this instance, the Council's actions and rule against "personal affronts" survived First Amendment scrutiny in the context of a "limited public forum."

Also decided: The passing of notes among the Mayor and her staff did not violate FOIA because those individuals were not Councilmembers, and the allegation that notes were previously passed to Council members in other meetings was too vague to warrant consideration.

Attorney General Opinion 16-IB19

Petitioner alleged that the Office of the State Treasurer had violated FOIA in the following ways: inflating estimates of legal review and printing charges for his initial request; improperly including photocopying charges in its estimate; failing to provide an estimate of administrative fees for a second request; asking Petitioner to perform an initial review of the records for exemptions; circumscribing access based on the belief that Petitioner had certain requested records already; and employing “obstinate tactics.”

Decided: OST violated FOIA by including a charge for legal review in its estimated administrative fees. OST was asked to remedy this violation by providing Petitioner with a revised itemized written estimate.

Attorney General Opinion 16-IB19

(cont...)

Further decided: Because the parties had an ongoing and unresolved discussion of the parameters of the request until shortly before the petition was filed, the failure to provide an estimate of administrative fees did not violate FOIA under the circumstances.

Further decided: OST offered Petitioner the opportunity to perform an initial review of records, but did not demand that he do so. This did not constitute a FOIA violation.

Further decided: OST did not circumscribe or deny Petitioner access to records based upon a belief that he has a copy of some or all of the requested records.

Further decided: The record demonstrates that the FOIA Coordinator did not fail to fulfill his FOIA obligations.

Attorney General Opinion 16-IB20

Petitioner alleged that the Office of the State Bank Commissioner violated FOIA by denying his request because he is not a citizen of Delaware.

Decided: FOIA permits but does not require public bodies to fulfill FOIA requests submitted by citizens of other states.

Attorney General Opinion 16-IB21

Petitioner requested a determination of whether Gateway Lab Charter School's Board of Directors had violated FOIA by voting in executive session.

Decided: Evidence demonstrated that there was an error in the minutes, which were subsequently revised, and that the vote took place during the public session. Thus, the Board did not violate FOIA by voting in executive session. However, the Board did violate FOIA by failing to maintain minutes that accurately reflected the votes taken and actions agreed upon at the April 4th meeting.