



# 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
- Make it possible for citizens to observe and monitor the performance of public officials

# FOIA Manual

- Created by Department of Justice to assist FOIA Coordinators
- Published November 2017 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 the last two years.
- 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](mailto: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 (including the reasons for an extension)
- 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 generally
  - 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 to a FOIA request (or lack thereof) 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 by the date requested
  - 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 needed, it must indicate one of the following (there is no other statutory basis for an extension):
  - The records sought are voluminous ,or
  - The request 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
  - Our office has determined that ASAP or “soon” will not likely withstand scrutiny

# 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

# 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

- The statute permits public bodies to charge administrative fees and may adopt policies that waive 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 Office has interpreted this provision as follows:
    - 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

# 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 Department 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

# **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 entity satisfying the following two-part test:



# PUBLIC BODIES

**Step One** – The entity must be:

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

# PUBLIC BODIES

This *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.*

# PUBLIC BODIES

Step Two – The entity must also:

(1) be supported in whole or in part by any *public funds; or*

(2) expend or disburse any *public funds*, including grants, gifts or other similar disbursements and distributions; *or*

(3) be 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 (water and sewer authorities).

# PUBLIC BODIES

## So What is NOT 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**

# 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, courts have held that 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
  - Work-product doctrine
  - 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. 06-IB15* (July 24, 2006); *Del. Op. Att'y Gen. 10-IB03* (Mar. 10, 2003).
- 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)
  - The Attorney General’s Office has determined that the public body does not have to be a party to the pending litigation to invoke this exemption. *Del. Op. Att’y Gen. 17-IB24* (July 14, 2017) (request clearly sought records related to pending litigation).
- 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(I)(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

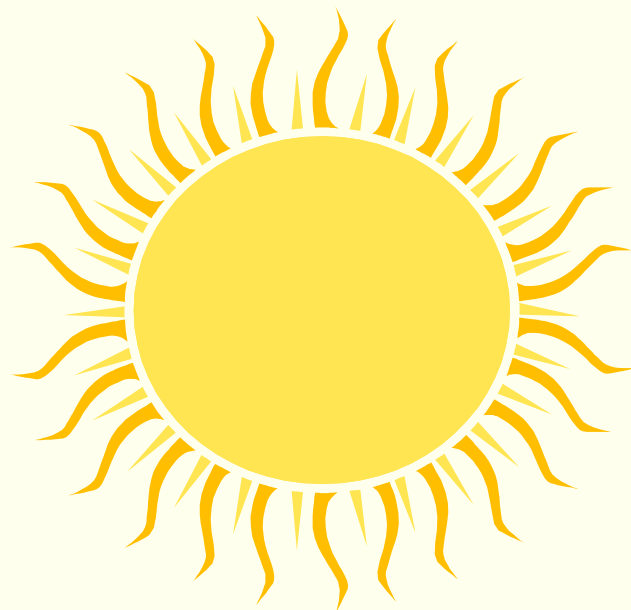
## Emails/Communications

- 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))
- \*\*A case involving the scope of Section 10002(I)(16), *Flowers v. Office of the Governor*, is currently before the Delaware Supreme Court.\*\*

# 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)
- For example:
  - 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 is proper under FOIA without proper notice, except emergency meetings which are rare.
- 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
- Staff meetings

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

- 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

## 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 only 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

See *Chemical Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*10-11 (Del. Ch. May 19, 1994) for a discussion of the scope of this provision.

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 4 or fewer times per year 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 violation of FOIA's open meetings provisions has occurred or is about to occur
- In light of the deadlines imposed by the courts, such petitions should 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