

# **DELAWARE FREEDOM OF INFORMATION ACT**

**POLICY MANUAL FOR FOIA COORDINATORS**

**As of November 1, 2017**

## ***DISCLAIMER***

The Delaware Department of Justice (“DOJ”) strives to ensure the dissemination of timely, accurate public information. The information contained in this manual is provided for your use and convenience. It is subject to change without notice. FOIA opinions issued by the DOJ and court decisions that interpret FOIA are frequently issued and at times, those authorities may contradict statements contained in this manual.

**This guide is NOT intended to address every possible FOIA scenario or to eliminate the need to consult with the deputy attorney general who represents a State agency or with other Delaware counsel with respect to the FOIA requests a public body may encounter.** The guide does not displace the statute, does not have the force of law or a court ruling, and is not binding on the DOJ, as every factual scenario will vary.

We will update this manual no less frequently than biennially to reflect changes in the FOIA statute, court decisions, and additions to the digest of FOIA opinions. The DOJ does not favor any one group over another, and the use of any link to an organization’s website herein does not constitute an endorsement of that organization. The DOJ disclaims responsibility for the content of any site referenced in this manual.

# ***TABLE OF CONTENTS***

Introduction.....	1
Section 1: What are the Duties & Responsibilities of a FOIA Coordinator? .....	2
Section 2: What are the Important Deadlines for FOIA Records Requests? .....	4
Section 3: What Fees May an Agency Collect in Connection with Public Records Requests? .....	5
Section 4: An Overview of FOIA .....	10
A. What is a Public Body? .....	10
B. What are Public Records? .....	15
C. Which Records are Exempt from Public Disclosure? .....	19
Section 5: Open Meetings.....	23
A. General Requirements.....	23
B. Requirements for Meetings Held in Executive Session.....	30
Section 6: Selected Definitions.....	35
Appendix A: Delaware Code Provisions and Rules Affecting Public Access to Government Records and Proceedings	
Appendix B: Opinion Summaries for Prior Two Years	

# ***INTRODUCTION***

Delaware's Freedom of Information Act, also known as "FOIA" (29 *Del. C.* §§ 10001-10007), promotes governmental transparency, informs voters, and acknowledges that the government should not be solely responsible for determining what the public has a right to know.<sup>1</sup> It also underscores the importance of each citizen's ability to observe and monitor decision-making by public officials in a democratic society.

This manual is intended to be an "easy reference" guide to assist public body FOIA coordinators. It is intended to help FOIA coordinators and others to navigate the basic requirements of FOIA and to develop policies and protocols that will permit State agencies and public bodies to more easily respond to FOIA requests in a timely manner. This guide is NOT intended to address every possible FOIA scenario. The guide does not displace the statute and does not have the force of law of a court ruling. FOIA coordinators should continue to rely on their attorneys in order to ensure compliance with FOIA.

This manual will (i) explain the role of the FOIA coordinator, (ii) identify important deadlines, (iii) explain the fees a public body is permitted to collect in connection with FOIA records requests, (iv) define and discuss what constitutes a public body, (v) define and discuss what constitutes a public record, and (vi) outline the requirements for a public meeting. There are three appendices that provide links to useful samples such as request forms, response templates, a spreadsheet to track FOIA requests, helpful definitions from FOIA and summaries of Attorney General opinions,<sup>2</sup> judicial opinions, and other legal authorities from the past two years.

This manual and other FOIA resources from the Department of Justice are available at <https://attorneygeneral.delaware.gov/executive/open-government/>. FOIA opinions are available at <http://opinions.attorneygeneral.delaware.gov/>.

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<sup>1</sup> See *Delaware Solid Waste Authority v. The News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984).

<sup>2</sup> The Attorney General opinions included herein reflect our administrative review of FOIA petitions for determination is different from an opinion of a court. Although we may rely on these opinions as persuasive authority, previous opinions are not binding precedent that the Department of Justice must follow in future determinations.

## ***SECTION 1. WHAT ARE THE DUTIES & RESPONSIBILITIES OF A FOIA COORDINATOR?***

FOIA defines “FOIA coordinator” as the person designated by the public body to receive and process FOIA requests.<sup>3</sup> Each public body is required to designate a FOIA coordinator, and various duties are delegated to the coordinator. The FOIA coordinator’s name and contact information must be published on the public body’s website and shared with the Attorney General, and the FOIA coordinator is permitted to delegate specific duties and functions to other public body employees.<sup>4</sup>

The FOIA coordinator is required to take the actions listed below.

- 1) Serve as the point of contact for FOIA requests
- 2) Coordinate the public body’s responses to FOIA requests
- 3) Assist the requesting party in identifying the records sought
- 4) Assist the public body in locating and providing the requested records
- 5) Work to foster cooperation between the public body and requesting party
- 6) Maintain a document that tracks all FOIA requests,<sup>5</sup> which includes the following minimum information:
  - a) The requesting party’s contact information
  - b) The date the public body received the FOIA request
  - c) The public body’s response deadline
  - d) The date of the public body’s response (including the reasons for any extension)
  - e) The names, contact information and dates of correspondence with individuals contacted in connection with the FOIA requests
  - f) The dates of review by the public body

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<sup>3</sup> See 29 Del. C. § 10002(d).

<sup>4</sup> See 29 Del. C. § 10003(g)(1).

<sup>5</sup> See *Del. Op. Att’y Gen.* 17-IB33 (July 26, 2017) (noting that, despite the agency’s assertion it was engaging in ongoing verbal communication with the requestor during that time, the agency provided no evidence of such communications such as a FOIA log).

- g) The names of individuals who conducted such reviews
- h) Whether documents were produced in response to the FOIA request
- i) The amount of copying and administrative fees assessed
- j) The date of final disposition<sup>6</sup>

FOIA coordinators should also become familiar with the policies governing the examination, copying, and disclosure of public records. Those provisions, included at FOIA Sections 10003(a)-(m), include procedures that govern:

- 1) The form of FOIA requests;
- 2) The specific roles and duties of the FOIA coordinator;
- 3) A public body's response to FOIA requests;
- 4) A public body's response to a request for emails;
- 5) A public body's response to requests for noncustodial records;
- 6) A public body's review of records requested to determine whether records are exempt from disclosure pursuant to Section 10002(l);
- 7) The access a public body must provide for review of records; and
- 8) The fees applicable to searching, copying and producing public records (including photocopying rates, administrative fees, fees relating to microfilm and or/microfiche printouts and electronically generated records).

Finally, FOIA coordinators may be responsible for drafting the responses from their respective organizations to the Attorney General's Office should a citizen appeal the denial of a FOIA request or complain that a public body violated the open meeting requirements of FOIA Section 10004. FOIA coordinators should therefore familiarize themselves with the enforcement provisions of Section 10005(a)-(e) and be prepared to respond to and cooperate with requests for further information issued by the Attorney General's Office.

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<sup>6</sup> See 29 Del. C. §§ 10003(g)(1)-(3).

## ***SECTION 2. WHAT ARE THE IMPORTANT DEADLINES FOR FOIA RECORDS REQUESTS?***

FOIA Section 10003(h) sets specific deadlines for public bodies' responses to FOIA requests:

- 1) Public bodies must respond to FOIA requests as soon as possible, but no later than 15 business days (i.e., excluding weekends, holidays and other days that State offices are closed) after the receipt of the request.
- 2) The public body's response must indicate one of the following:
  - a) The public body is providing the records requested.
  - b) Additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.
    - i) Note: If the public body states that additional time is needed to respond to the FOIA request, it must cite one of these reasons as to why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.
  - c) The FOIA request is denied. If a FOIA request is denied in whole or in part, the public body must include a reason for the denial. However, the public body is not required to provide an index or any other compilation listing each record or part of a record that was denied.

## ***SECTION 3. WHAT FEES MAY AN AGENCY COLLECT IN CONNECTION WITH PUBLIC RECORDS REQUESTS?***

FOIA permits public bodies to defray the costs of complying with a records request by collecting certain fees, but it places limits on the amounts that may be charged, the circumstances under which they may be charged and the manner in which they may be collected. There are few exceptions.<sup>7</sup> The rules regarding the various charges permitted by FOIA are summarized below.

### **A. Photocopying Fees**

Section 10003(m) of FOIA sets forth the following rules respecting photocopies:

*Standard-sized, black and white copies:* Public bodies may not charge citizens for the first 20 pages of standard-sized, black and white copies. The charge for copying standard sized, black and white public records for copies over and above 20 are: \$0.10 per sheet (\$0.20 for a double-sided sheet). This charge applies to copies on the following standard paper sizes: 8.5" x 11", 8.5" x 14", and 11" x 17".

*Oversized copies/printouts:* The charge for copying oversized public records is as follows: 18" x 22", \$2.00 per sheet; 24" x 36", \$3.00 per sheet; documents larger than 24" x 36", \$1.00 per square foot.

*Color copies/printouts:* An additional charge of \$1.00 per sheet is to be assessed for all color copies or printouts for standard-sized copies (8.5" x 11", 8.5" x 14", and 11" x 17") and \$1.50 per sheet for larger copies.

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<sup>7</sup> The General Assembly may establish different rules respecting fees in the Delaware Code, and counties and municipalities may establish different rules in their respective codes. *See 29 Del. C. § 10003(m)*. In addition, administrative fees may be waived pursuant to the public body's statutorily-mandated FOIA policy. *See Section B. and n.8.*

## B. Administrative Fees

Although FOIA appears to require a public body to charge so-called administrative fees under certain circumstances,<sup>8</sup> the statute allows agencies to waive those fees.<sup>9</sup> FOIA prohibits collection of administrative fees for requests requiring less than one hour of staff time to process.<sup>10</sup>

If a public body chooses to charge administrative fees, it must attempt to minimize those fees and assess only those fees that are reasonably required to process a request.<sup>11</sup> Administrative fees may include staff time associated with processing FOIA requests, including, without limitation (a) identifying records, (b) monitoring file reviews, and (c) generating computer records (electronic or paper print-outs).<sup>12</sup>

Public bodies may not charge fees associated with the “legal review” of records to determine whether any of FOIA’s listed exemptions, or any other exemptions, apply.<sup>13</sup> **The statute does not expressly limit “legal review” to reviews conducted by an attorney.** This is an important note for public bodies that do not routinely rely on counsel to determine whether any of the FOIA exemptions apply. Where any person reviewing records conducts an independent legal analysis, it may be deemed to be a legal review.

Administrative fees must be billed per quarter hour and **they must be billed at the hourly pay grade of the lowest-paid employee capable of performing the service.**<sup>14</sup>

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<sup>8</sup> See 29 Del. C. § 10003(m)(2).

<sup>9</sup> The policy mandated by Section 10003(b) “may include provisions for the waiver of some or all of the above administrative fees; provided that such waiver shall apply equally to a particular class of persons (i.e., nonprofit organizations).” *Id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* (“Administrative fees shall not include any cost associated with the public body’s legal review of whether any portion of the requested records is exempt from FOIA.”).

<sup>14</sup> See *id.*

## **(1) Working with Third-Party Technology Service Providers to Fulfill a Request for Email Records**

Consistent with FOIA's general mandate that charges for fulfilling document requests be reasonable, Section 10003(i)(1) requires that the public body fulfill requests for email records using its own staff and from its own records, if it can do so with reasonable effort. To the extent that the public body cannot do so, it must seek assistance from its information and technology personnel or custodians. Thus, in most circumstances, a third-party provider should NOT be a public body's first point of contact for email records. Failing to conduct a reasonable in-house search for the records might be deemed "not reasonable" by the DOJ and prevent the public body from defraying its costs.

For most State agencies, Delaware Department of Technology and Information ("DTI"), which provides third-party computer hosting services, will constitute an appropriate technology custodian. DTI currently charges \$100 per hour to conduct email searches for State public bodies.

FOIA coordinators should take the following steps to comply with Section 10003(i) and maximize the approval of charges for email searches and collection if challenged.

- 1) Identify the public employee most likely to have access to the email records identified in the FOIA request.
- 2) Request the employee to search email records for responsive documents.
- 3) If such an employee cannot be identified or is otherwise not able to conduct the search, work with the public body's information technology personnel to obtain the email records.
- 4) If the public body cannot obtain the email records requested from its own records with reasonable effort, contact the public body's third-party service provider to assist with the search.

### **C. Other Charges**

Section 10003(m)(3) sets forth the following rules respecting materials on microfilm and microfiche:

*Microfilm and/or microfiche printouts:* Public bodies may not charge citizens for the first 20 pages of standard-sized, black and white material copied from microfilm and/or

microfiche. The charge for microfilm and/or microfiche printouts over and above 20 is \$0.15 per sheet.

Section 10003(m)(4) permits the following charges for providing electronically generated records:

*Electronically generated records:* Charges for copying records maintained in an electronic format will be calculated by the material costs involved in generating the copies (including but not limited to DVD, CD, or other electronic storage costs) and administrative costs.

Section 10003(j) permits a public body to recover the costs of obtaining its records from other custodians to the extent that the public body cannot fulfill a request from the records in its possession.

#### **D. Estimates**

In most cases, before a public body may impose charges on a requesting party in connection with a records request, the public body must first “provide an itemized written cost estimate to the requesting party, listing all charges expected to be incurred.”<sup>15</sup> The requesting party may choose to revise, narrow or abandon its request in response to the estimate. Public bodies may not prepare an estimate of any charges in bad faith – either too high (to discourage the request) or too low (with the expectation of pursuing a later collection action). Failure to comply with the cost estimate requirement may result in a finding by the DOJ that the agency violated FOIA and is not entitled to collect fees.

#### **E. Advance Payment**

A public body may require some or all of the charges permitted under Section 10003 to be paid prior to any service being performed.<sup>16</sup>

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<sup>15</sup> See 29 Del. C. § 10003(i)(2) (email search); (j)(2) (noncustodial records search); (m)(2) (administrative fees).

<sup>16</sup> See 29 Del. C. § 10003(m)(5).

## HOW SHOULD YOU ESTABLISH FEES?

### **SUGGESTED APPROACH:**

FOIA COORDINATORS SHOULD VERIFY THAT THEIR AGENCY'S FEE COLLECTION PRACTICES COMPLY WITH THE STATUTE AND ANY POLICIES PREVIOUSLY ADOPTED AND THAT ANY FEES ASSESSED MEET THE REASONABLENESS STANDARDS SET FORTH IN FOIA.

## ***SECTION 4. AN OVERVIEW OF FOIA***

### ***A. WHAT IS A PUBLIC BODY?***

It is important to know what types of agencies or organizations constitute public bodies upon which FOIA imposes duties. Most public bodies are required to comply with open meeting<sup>17</sup> and public records<sup>18</sup> requirements.

#### **A. Statutory Definition**

FOIA defines a “public body” as:

any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, 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 established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

- (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.<sup>19</sup>

#### **B. Discussion**

How do you determine whether your organization is a public body? In most instances, the answer is clear. If you do not know whether the organization is a public body, however, consider the following information.

First, the organization must be a body of a type enumerated in the statute.

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<sup>17</sup> See Section 5 for a discussion of open meeting requirements and exemptions.

<sup>18</sup> See Sections 4.B. and 4.C. for a discussion of public records requirements and exemptions.

<sup>19</sup> 29 *Del. C.* § 10002(h).

Second, it must have been created or otherwise empowered by an agency of the government. Finally, it must either (i) be supported with public funds; or (ii) expend or disburse public funds; or (iii) be charged by a public official, body, or agency to advise or to make reports, investigations or recommendations.

To be a **public body**, it must be an organization that falls within this list:

regulatory, administrative, advisory, executive, appointive, or legislative bodies of the State; all political subdivisions of the State; and all other State boards, bureaus, commissions, departments, agencies, committees, ad hoc committees, special committees, temporary committees, advisory boards and committees, subcommittees, legislative committees, associations, groups, panels, and councils

If the organization is one of the types of bodies listed above, look at **how the organization was created**. Specifically, consider whether the organization (a) was established by an act of the Delaware General Assembly; (b) was established by a body that was established by the General Assembly; (c) was appointed by a body of, or public official of, the State; or (d) was “otherwise empowered” by any state governmental entity. If the entity was established, appointed, or otherwise empowered by a governmental entity, then consider the funding and purpose of the organization to determine whether it is a public body subject to FOIA.

**Does the organization receive or disburse public funds, or advise a governmental entity?** Once it is determined that the group is a body of one of the types listed above, created by one of the specified government actions, consider whether it meets one of the other three requirements: Is the group supported, in whole or in part, by public funds; or does it expend or disburse public funds (including gifts and grants); or was it impliedly or specifically charged by any public official, body, or agency to advise or make reports or recommendations. If the organization meets any of these requirements, it is a public body and must comply with FOIA, as long as it does not fall within an exemption.

### **C. Does the Group’s Enabling Statute Subject the Group to FOIA?**

There are some groups that may not qualify as a public body as discussed above, but instead are subject to FOIA simply because the law by which they were created made them so. As a result, look at the Delaware law that authorized or created the group to determine whether it subjects the group to FOIA. For example, some entities that are expressly subject to FOIA because of their enabling statutes

are the Delaware Transportation Authority, the Agricultural Commodity Advisory Board, the Appalachia States Low-Level Radioactive Waste Commission, and the Health Resource Board. While not included in the enabling statute, those authorities established in by Chapter 14 of Title 16 are subject to FOIA in the FOIA statute<sup>20</sup>.

#### **D. Organizations Previously Found to be Public Bodies**

The following agencies and organizations have been found to be public bodies in previous FOIA opinions and rulings:

School boards, Delaware Solid Waste Authority, Delaware Association of Professional Engineers, Council on Banking, Thoroughbred Racing Commission, Governor’s Council on Equal Employment Opportunity, General Assembly (except when caucusing), Charter School Reform Working Group, Kent County Society for the Prevention of Cruelty to Animals, Camden-Wyoming Sewer & Water Authority, and the Trustees of New Castle Commons.

Additionally, subsets of bodies *may* also be public bodies, including, for example, an advisory board created by order of the Governor, or a town manager, or a mayor, or a cabinet secretary, or a “joint” meeting of various public bodies.

#### **E. Does the Group Fall Within an Exception to the Definition of Public Body?**

There are certain groups that are specifically excluded from the definition of public body, even though they would otherwise qualify as a public body. Three specific exclusions apply if the group is: (a) a caucus of the House or Senate (“Caucus” means members of the House of Representatives or Senate, of the same political party), who assemble to discuss matters of public business; or (b) part of the University of Delaware or Delaware State University, but not the Board of Trustees;<sup>21</sup> or (c) a court or an arm of a court, such as the Board of Bar Examiners, or an agency that exists to support a court, such as the Administrative Office of the Courts or the Court on the Judiciary.<sup>22</sup>

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<sup>20</sup> *See id.*

<sup>21</sup> *See 29 Del. C. § 10002(i).*

<sup>22</sup> This Office has determined that (i) the courts are not public bodies for purposes of FOIA, *Del. Op. Att’y Gen. 94-IO11* (Mar. 7, 1994), (ii) FOIA does not apply to the Board of Bar Examiners, because it is an “arm” of the Delaware Supreme Court, *Del. Op. Att’y Gen. 95-IB01* (Jan. 18, 1995), (iii) the public records provisions of FOIA do not apply to the database maintained by the Administrative Office of the Courts to assist the clerks of the Delaware courts, notwithstanding that it is an agency created by act of the General Assembly, *Del. Op. Att’y Gen. 94-IO11*, and (iv) FOIA does not apply to

## **F. Organizations Previously Found Not to be Public Bodies**

In addition to those groups that are specifically exempt from FOIA as more fully discussed above, the following groups are statutorily exempt or have been found not to be public bodies based on previous FOIA opinions and rulings:

Local Chapter of National Honor Society; and Cape Henlopen Senior Center.

There are also subsets of public bodies that have been found not to be public bodies, including:

Administrative staff meetings, “joint” meetings between various executive branch officials and consultants to review technical proposals, a chief administrative officer’s meetings with department heads to develop budget, a county attorney’s meetings with board of elections chair and consultant to draft redistricting ordinance, meetings between city finance director and stakeholders to discuss electric rate structure

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the Court on the Judiciary, *Del. Op. Att’y Gen.* 95-IB02 (Jan. 24, 1995). *See also* Att’y Gen. Op. 96-IB03 (Jan. 2, 1996) (“The courts are not public bodies within the meaning of [FOIA]. . .”).

DO YOU THINK YOU MIGHT NOT BE A PUBLIC BODY?

**SUGGESTED APPROACH:**

IF YOU ARE NOT SURE WHETHER YOU ARE A PUBLIC BODY, OR WHETHER YOU MIGHT BE EXEMPT FROM FOIA'S REQUIREMENTS, ERR ON THE SIDE OF CAUTION AND CONSULT A DELAWARE ATTORNEY. FOIA IS TO BE LIBERALLY CONSTRUED AND ANY STATUTORY EXCEPTIONS ARE STRICTLY INTERPRETED.

## B. *WHAT ARE PUBLIC RECORDS?*

### *WHY IS IT IMPORTANT TO KNOW IF A PUBLIC BODY HAS CREATED OR POSSESSES A PUBLIC RECORD?*

FOIA requires a public body to permit the inspection of or to provide copies of public records upon request.<sup>23</sup> Public bodies must be able to identify documents and electronically stored information that constitute public records to comply with their statutory obligations under FOIA. In addition, every public official and employee of state or local government has important legal obligations under the Delaware Public Records Law.<sup>24</sup> State and local government officials and employees must adequately document the transaction of public business, retain and protect all public records in their custody, and destroy or otherwise dispose of public documents only in accordance with retention and disposal schedules approved by Delaware Public Archives. Unlike FOIA violations, which have no criminal penalty, violations of the Delaware Public Records Law are deemed unclassified misdemeanors, the penalties for which include fines of up to \$500, up to three (3) months imprisonment, or both.

### *WHAT IS A PUBLIC RECORD?*

The definition of “public record” under FOIA is very broad.<sup>25</sup> It includes all information contained in or on physical documents (typically paper), as well as information stored in electronic format (such as Word, Excel, etc.) or databases, relating in any way to public business, or in any way of public interest, or in any way related to public purposes. **Thus, as a practical matter, FOIA’s concept of “public record” covers, at least initially, almost every conceivable type of physical or electronic record that may be created, maintained or possessed by**

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<sup>23</sup> See 29 Del. C. § 10003(a).

<sup>24</sup> A thorough description of the additional and independent requirements of the Delaware Public Records Law is beyond the scope of this manual. Questions should be directed to the employee(s) charged with overseeing the agency’s or public body’s compliance with the Public Records Law, the Deputy Attorney General assigned to represent the agency or public body, or other counsel retained to assist the agency or public body. The Department of Justice is only authorized to provide legal advice and guidance to agencies and public bodies as described in Title 29, Chapter 25 of the Delaware Code.

<sup>25</sup> The definition of “public record” is subject to certain statutory and common law exemptions that will be discussed in greater detail in subsection C, below.

**a public body.** The concept of a “public record” under FOIA is not limited to information relating to a particular matter of “public business” that may be up for consideration or discussion during a meeting of a public body. Instead, the definition expressly encompasses any information that may be a matter of “public interest,” or which relates in any way to “public purposes.” These expansive concepts (“public interest” and “public purposes”) are not defined in FOIA and have not been explained or refined by the courts.

***ASSUMING NO EXEMPTIONS OR EXCLUSIONS APPLY, MUST A PUBLIC BODY PRODUCE A RECORD THAT IT POSSESSES EVEN IF THE RECORD WAS CREATED BY ANOTHER PUBLIC BODY OR A PRIVATE PERSON OR ENTITY?***

Yes. FOIA’s definition of “public record” covers information retained, received, compiled or collected by any public body.<sup>26</sup> Thus, if no exemptions apply, records **may** need to be disclosed in response to a FOIA request regardless of whether the information is owned or was made, used, produced, composed or drafted by the public body receiving the FOIA request. Consultation with counsel is advisable if the public body’s obligations are unclear.

***WHAT IF THE PUBLIC BODY THAT RECEIVED THE FOIA REQUEST IS NOT THE SAME PUBLIC BODY THAT CREATED OR MAINTAINS THE INFORMATION?***

If the public body does not have the information, the public body should notify the requestor that the body receiving the request does not maintain the information, notify the public body that maintains the information of the request, and if necessary, provide a copy of the FOIA request to the other public body. If, however, the public body has a copy of the information, the public body may be required to disclose records in its possession even if it did not create those records. Consultation with counsel is advisable if the public body’s obligations are unclear.

***WHAT IF SOME OF THE RECORDS IDENTIFIED IN RESPONSE TO A FOIA REQUEST WERE RECEIVED FROM ANOTHER PUBLIC BODY IN AN EMAIL OR ENVELOPE DESIGNATED “CONFIDENTIAL,” “PRIVATE,” OR “PRIVILEGED”?***

The public body will need to produce the information unless a statutory

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<sup>26</sup> See 29 Del. C. § 10002(l).

exemption or exclusion applies, whether that exemption or exclusion is found in Delaware’s FOIA or elsewhere. For example, protected health information under the federal HIPAA or other state or federal privacy laws, FERPA records maintained by schools, and other information protected under state or federal law is confidential and not subject to disclosure regardless of whether the correspondence is marked “confidential.”<sup>27</sup> The public body will need to determine whether and to what extent a particular record may be withheld under an exemption or exclusion. The public body may consult with the public body or private person or entity designating the information as “confidential,” “private,” or “privileged” to help make this determination. Consultation with counsel is advisable if the public body’s obligations are unclear.

***DOES THE FORMAT IN WHICH THE ORIGINAL DOCUMENT IS MAINTAINED MATTER FOR PURPOSES OF RESPONDING TO A FOIA REQUEST? WHAT IF THE MATERIAL IS IN A DATABASE?***

No, the format of the records maintained by the public body does not matter. A “public record” is defined as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected...”<sup>28</sup> Therefore, it is clear that the underlying information is what is subject to FOIA. However, a request for an electronic record is not the same as a request for copies, and a public body must produce records in electronic format upon request if they already exist in electronic format.

***HOW SHOULD THE MATERIAL BE PROVIDED? WOULD ALLOWING PUBLIC INSPECTION BY THE REQUESTING PARTY SATISFY THE REQUEST IN LIEU OF PROVIDING PHYSICAL COPIES?***

FOIA only requires that the public be provided reasonable access to and reasonable facilities for copying of records, and that “[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body.”<sup>29</sup> However, if a request for records can be accommodated with reasonable effort by providing those records in the format requested, the public body is encouraged to do so.

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<sup>27</sup> A non-exhaustive list of records exempted by Delaware statute or rule are is included at Appendix A.

<sup>28</sup> 29 Del. C. § 10002(1).

<sup>29</sup> 29 Del. C. § 10003(a).

***DOES A PUBLIC BODY HAVE TO CREATE REPORTS IN RESPONSE TO A FOIA REQUEST?***

No. A public body does not have to create new reports or records in order to respond to a FOIA request, but agencies should be reasonably accommodating to requests when they do not impose an undue administrative burden on the agency.

***WHAT IS MY OBLIGATION TO SEARCH MY FILES TO IDENTIFY PUBLIC RECORDS IN RESPONSE TO A FOIA REQUEST?***

A public body is obligated to conduct a reasonable search to determine whether it has any responsive documents in its possession. For example, and as discussed on page 7 above, the public body may need to work with its IT professionals to locate older email records in order to satisfy FOIA's "reasonableness" requirement.<sup>30</sup> DTI retains most emails for no longer than 12 months.<sup>31</sup>

***MAY I CHARGE TO SEARCH MY FILES TO IDENTIFY PUBLIC RECORDS? IF SO, WHAT IS THE PERMITTED CHARGE?***

Yes. The General Assembly has made clear that, beyond a limited threshold, the costs of producing records may be shifted to the requestor.<sup>32</sup>

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<sup>30</sup> See 29 Del. C. § 10003(i)(1)-(2).

<sup>31</sup> See DTI "Disclosure of Individual User e-Resource Records" policy, available at <http://dti.delaware.gov/pdfs/pp/eRecordsRequestPolicy.pdf>.

<sup>32</sup> See 29 Del. C. § 10003(m) and Section 3 of this Manual for a discussion of fees and other costs that may be charged in connection with fulfilling a FOIA request.

## ***C. WHAT RECORDS ARE EXEMPT FROM PUBLIC DISCLOSURE?***

FOIA exempts several categories of records from disclosure, and there are other statutory exemptions that may apply as well. Unless a specific statutory exemption applies, public records must be disclosed. If you have questions regarding whether a specific exemption applies to a FOIA request, consult the attorney for your agency or organization.

The following list, based on Sections 10002(l)(1)-(19), describes most records exempted from disclosure by FOIA:

- 1) **Personnel files:** Files created as a condition of an employee's employment with a public body or relating to the employee's status and performance as an employee, if disclosure would constitute an invasion of personal privacy.
- 2) **Medical files:** Files containing any individual's medical information, if disclosure would constitute an invasion of personal privacy.
- 3) **Pupil files:** Records containing protected student information, if disclosure would constitute an invasion of personal privacy.
- 4) **Trade secrets:** Information that derives economic or commercial value from the fact that it is not generally known to or obtainable by others who could use the information for economic or commercial gain.
- 5) **Confidential commercial or financial information:** Commercial or financial information obtained from a person that is kept confidential by that person in order to maintain its economic or commercial value.
- 6) **Investigatory files (civil or criminal):** Files relating to pending or completed investigations, including pretrial and presentence investigations, and child custody/adoption files.
- 7) **Criminal files and criminal records:** Files containing an individual's criminal records or history, if release would constitute an invasion of privacy.
- 8) **Intelligence files compiled for law enforcement purposes:** Information assembled for a law enforcement purpose that could cause risk to public safety if released.
- 9) **Records specifically exempted by statute or common law:** This category includes records protected from disclosure by a specific statute or a

recognized common law doctrine, such as the attorney-client privilege, the attorney work-product doctrine, and privacy. A non-exhaustive list of records exempted by Delaware statute is included at Appendix A.

**10) Records which disclose the identity of the contributor of a bona fide and lawful charitable contribution where public anonymity has been requested by the contributor.**

**11) Records involving labor negotiations or collective bargaining.**

**12) Records pertaining to pending or potential litigation that are not records of any Court.**

**13) Any records of discussions held in executive session pursuant to FOIA Sections 10004(b) and (c).**

**14) Records that disclose the identity or address of any person holding a permit to carry a concealed deadly weapon.**

**15) Records of a public library which contain the identity of a user and the books, documents, films, recordings or other property of the library which a patron has used.**

**16) Records in the possession of the Department of Correction, if disclosure is sought by an inmate in custody of the Department of Correction.**

**17) Investigative files compiled or maintained by the Victim's Compensation Assistance Program.**

**18) Photographs, video records or audio recordings of a postmortem examination in the possession of the Division of Forensic Science.**

**19) Emails received or sent by members of the Delaware General Assembly or their staff.**

**20) Various records which, if copied or inspected, could jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual.**

**21) Military service discharge document or documents, a discharge, separation notice, certificate of service, report of transfer or discharge, or any other document which is evidence of severance or transfer from military service and which contains a service record from the armed forces of the United States.**

**22) Any communications between a member of the General Assembly**

**and that member's constituent, or communications between members of the General Assembly.**

As noted above, there may be other applicable exemptions that do not appear in FOIA. For example, this Office has opined that a draft document will not be a public record, unless it is circulated to a public body. Similarly, personal notes will not constitute public records provided that they are created for convenience of an individual, and are not circulated or maintained in the public body's files. Finally, if there is another statutory provision that prevents disclosure, the documents will not constitute public records under FOIA.

**DO YOU THINK A FOIA REQUEST SEEKS DOCUMENTS  
THAT MAY NOT BE PUBLIC RECORDS?**

## **SUGGESTED APPROACH:**

IF YOU ARE NOT SURE WHETHER THE INFORMATION IS A PUBLIC RECORD, OR WHETHER DISCLOSURE MIGHT BE EXEMPT FROM FOIA'S REQUIREMENTS, CONSULT AN ATTORNEY.

THE EXEMPTIONS LISTED IN FOIA ARE TO BE NARROWLY CONSTRUED AND ANY STATUTORY EXCEPTIONS ARE STRICTLY INTERPRETED.<sup>33</sup>

## ***SECTION 5. OPEN MEETINGS***

### ***A. GENERAL REQUIREMENTS***

FOIA generally mandates that “[e]very meeting of *all* public bodies shall be

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<sup>33</sup> See *Am. Civil Liberties Union of Delaware v. Danberg*, 2007 WL 901592, at \*3 (Del. Super. Mar. 15, 2007) (“The enumerated statutory exceptions to FOIA, including the ‘pending or potential litigation’ exception, pose a barrier to the public's right to access and are, therefore, narrowly construed.”).

open to the public” unless expressly exempted by statute.<sup>34</sup> FOIA also contains requirements respecting notice of the meeting, the agenda for the meeting, the preparation of meeting minutes, and other matters described below.

## A. “Meeting” Defined

A “meeting” is a 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.<sup>35</sup>

Several examples of meetings that a public body might hold and that may fall within FOIA’s open meeting requirements are listed below.

- 1) Breakfast meetings: Breakfast meetings of at least a quorum of a public body that include the discussion of public business are subject to the open meeting law.
- 2) Informal meetings: Informal meetings of members of city council and meetings of school board members in advance of public meetings or in informal locations such as restaurants have been subject to FOIA’s open meeting requirements.<sup>36</sup> Informal meetings can be subject to FOIA’s open meeting requirements even if no formal decision about the public business discussed is reached.<sup>37</sup>
- 3) Workshops: Workshops held by public bodies that discuss public business

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<sup>34</sup> 29 *Del. C.* § 10004(a) (emphasis supplied). Among those public bodies that are exempt from open meeting requirements, are, for example, public bodies with only one member, such as the Governor, a town’s mayor, or a county administrator. Determining whether a public body is exempt from open meeting requirements is a fact-specific determination and should not be made without consulting legal counsel. Also exempt from open meeting requirements are jury deliberations, court deliberations, and meetings and deliberations of the Board of Pardons and Parole. See 29 *Del. C.* § 10004(h) for the list of exceptions to FOIA’s open meeting requirements.

<sup>35</sup> 29 *Del. C.* § 10002(g) (emphasis supplied).

<sup>36</sup> In contrast, in *Del. Op. Att’y Gen.* 95-IB20 (June 15, 1995), this Office found no FOIA violation where the school board held administrative staff meetings attended by less than a quorum of the board, and the board members who attended did not make “any formal or informal, express or implied recommendations” to the full board based upon what was discussed at the administrative staff meetings.

<sup>37</sup> See *Levy v. Board of Education of Cape Henlopen School District*, 1990 WL 154147, at \*6 (Del. Ch. Oct. 1, 1990) (“Because informal gatherings or workshops are part of the decision-making process they too must be conducted openly.”).

are subject to FOIA’s open meeting requirements.<sup>38</sup>

- 4) Non-public activities: Non-public activities of a quorum of members, such as a tour, may be viewed with suspicion by the public and the courts. Consult with counsel if you are unsure whether such activity might be a public meeting.
- 5) Joint meetings of agencies: Whether FOIA applies to joint meetings attended by less than a quorum of the members of each agency represented must be assessed on a case-by-case basis.
- 6) Teleconferences: FOIA does not permit public bodies to convene a meeting via teleconference. While a member of the public body may participate in a meeting by telephone, his or her attendance is not counted for quorum purposes.<sup>39</sup>
- 7) Electronic meetings: Group emails may amount to a meeting of the public body, in violation of FOIA under certain circumstances.<sup>40</sup>

## **B. Meetings of Committees**

Section 10002(h) of FOIA broadly defines “public body” to include committees.

## **C. Meeting Location**

Section 10004(g) limits the permissible locations for public body meetings. For example, every regularly scheduled meeting of a public body must be held within the geographic jurisdiction of that public body.<sup>41</sup> Additionally, if the public body serves a political subdivision of the State (including any city, town or school district), that public body must hold all meetings within its jurisdiction or within the county in which its principal office is located.<sup>42</sup>

FOIA includes a limited exception to this requirement for “any emergency

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<sup>38</sup> *See id.*

<sup>39</sup> *See Del. Op. Att’y Gen.* 04-IB13 (June 1, 2004) (finding that participation by one board member telephonically was permitted so long as a quorum was present in person and the member participating telephonically is “clearly audible” to those in the audience.)

<sup>40</sup> *See Del. Op. Att’y Gen.* 17-IB09 (April 25, 2017); *Del. Op. Att’y Gen.* 03-IB11 (May 19, 2003);

<sup>41</sup> 29 *Del. C.* § 10004(g). A “regularly scheduled meeting” is defined as any meeting of a public body held on a periodic basis. *Id.* at 10004(g)(2).

<sup>42</sup> *Id.* at 10004(g)(1). There is an exception for certain school board training sessions. *Id.*

meeting which is necessary for the immediate preservation of the public peace, health or safety, or to a meeting held by a public body outside of its jurisdiction which is necessary for the immediate preservation of the public financial welfare.”<sup>43</sup>

#### **D. The “Open” Requirement**

For a public meeting to be truly “open,” it must be held in a place where anyone who wishes to attend can be accommodated. Holding a public meeting in a facility that is inadequate or too small to accommodate all the people who may wish to attend may violate FOIA. Although not covered in the FOIA statute, public bodies should also be aware of federal and state laws relating to the accommodations of persons with disabilities when selecting public meeting locations.

#### **E. Public Attendance and Participation**

FOIA does not require that any member of the public attend a public meeting; it requires only that citizens have timely notice of public meetings so that they can attend and observe their government if they so choose.

FOIA requires that citizens be permitted to observe, but it provides them no express right to participate in a public meeting.<sup>44</sup> If a public body chooses to permit public participation, the public body may restrict the opportunity for public comments to a designated time on the agenda.<sup>45</sup> Additionally, FOIA authorizes “the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.”<sup>46</sup>

#### **F. Exempt Bodies or Proceedings**

Unless a public body or specific portion of its procedure is exempted from the requirements by FOIA or another statute, FOIA’s open meeting provisions will be liberally construed in favor of application to the public body. Section

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<sup>43</sup> 29 Del. C. § 10004(g)(3).

<sup>44</sup> See *Reeder v. Delaware Dept. of Ins.*, 2006 WL 510067, at \*12 (Del. Ch. Feb. 24, 2006) (“There is nothing in the text of the declaration of policy or the open meeting provision requiring public comment or guaranteeing the public the right to participate by questioning or commenting during meetings. What is provided by FOIA generally, and by the open meetings provision in particular, is public access to attend and listen to meetings.” (citations omitted)) *aff’d sub nom. Reeder v. Delaware Dept. of Ins.*, 931 A.2d 1007 (Del. 2006); *Del. Op. Att’y Gen.* 03-IB06 (Feb. 11, 2003).

<sup>45</sup> See *id.*

<sup>46</sup> 29 Del. C. § 10004(d).

10004(h)(7) provides that the open meeting requirements do not apply to the proceedings of the following groups/boards/commissions:

- 1) Grand juries;
- 2) Petit juries;
- 3) Special juries;
- 4) The deliberations of any court;
- 5) The Board of Pardons and Parole;
- 6) Public bodies having only one (1) member; or
- 7) Certain public bodies within the legislative branch of the State that are not specified in the Delaware Code, such as standing ethics committees. (But the full House and Senate, their standing committees and committees and task forces created by legislative resolution are subject to open meeting requirements.)<sup>47</sup>

Section 10004(h)(9) provides that the deliberations in case decisions of Delaware's Industrial Accident Board, Human Relations Commission, Victims Compensation Appeal Board and Tax Appeals Board are exempt from the open meeting requirements.

## G. Notice Requirements

Regular Meetings: A "regular meeting" is one that is held on a periodic basis.<sup>48</sup> Section 10004(e)(2) of FOIA mandates that all public bodies provide the public with notice of their regular meetings and, if applicable, of their intent to hold

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<sup>47</sup> The final entry paraphrases the statute. The "public bodies within the legislative branch" that are listed follow the phrase "other than," which means that they *are* subject to the open meeting requirements (with the exception of "ethics committees").

The enumerated legislative bodies that *are expressly subject to the open meeting requirement* are "the House of Representatives, the Senate, the Joint Finance Committee, the Joint Committee on Capital Improvement, the Joint Sunset Committee, Legislative Council, committees ... specifically enumerated and created by Resolution of the House of Representatives and/or Senate or task forces specifically enumerated and created by Resolution of the House of Representatives and/or Senate." *Id.*

<sup>48</sup> See 29 Del. C. § 10004(g)(2).

an executive session closed to the public. Notice of a regular meeting must be provided at least seven (7) days in advance of the date of the meeting.

Special Meetings: A “special meeting” is a meeting “to be held less than seven (7) days after the scheduling decision.”<sup>49</sup> Section 10004(e)(3) of FOIA requires that special meetings be noticed as soon as is reasonable, and no less than twenty-four (24) hours before the meeting. The notice of a special meeting must contain an explanation why the public body could not provide at least seven (7) days’ notice.

Section 10004(e) also requires the following in connection with notices of all open meetings:

- 1) The notice must include the meeting agenda (discussed on page 26).
- 2) The notice must include the date, time, and place of the meeting, including whether the meeting will be conducted by video conference.
- 3) A reasonable number of copies of the notice must be made available at the meeting.
- 4) The notice must be posted.
  - a) All public bodies must post conspicuously 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.
  - b) All non-county and non-municipal public bodies must also post the notice electronically on a designated State of Delaware website that has been approved by the Registrar of Regulations by May 1, 2013. A calendar of events and hearing notices for these public bodies is available \_\_\_\_\_ online \_\_\_\_\_ at <http://regulations.delaware.gov/services/register.shtml>.
  - c) In addition, public bodies in the executive branch of state government that are subject to FOIA, must post the notice electronically on the designated State of Delaware website approved by the Secretary of State. Notices of public meetings for

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<sup>49</sup> 29 *Del. C.* § 10004(e)(3).

public bodies in the executive branch of Delaware State government are available online at <https://publicmeetings.delaware.gov/>.

## **H. Agenda Requirements**

Section 10002(a) requires that the agenda for an open meeting include a general statement of the major issues expected to be discussed at the meeting. If the public body intends to hold an executive session, it must be stated in the agenda, along with the specific grounds for the executive session.<sup>50</sup>

FOIA permits some flexibility regarding the contents of the agenda to allow the public body to discuss items that arise during the meeting. Thus, Section 10004(e)(2) of FOIA provides: “the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body’s meeting.”

Additionally, Section 10004(e)(5) of FOIA recognizes that there may be rare and exceptional circumstances in which a public body may not be able to post the meeting agenda at the time it posts the meeting notice. In such circumstances, the agenda must be posted at least six (6) hours in advance of the public meeting, and the reasons for the delayed posting must be set forth briefly in the agenda.

## **I. Meeting Minutes**

Section 10004(f) of FOIA provides that public bodies must keep minutes of all public meetings, including executive sessions.<sup>51</sup> The minutes must include a record of members present and a record, by individual member, of each vote taken and each action agreed upon. The minutes must be made available for public inspection and copying as a public record, but they may be temporarily withheld from public disclosure for so long as public disclosure would defeat the lawful purpose for the executive session.

## **J. Cancelling or Rescheduling a Public Meeting**

FOIA does not prohibit the cancellation of a public meeting, and a public body may decline to reschedule the meeting if it is no longer needed. If the meeting

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<sup>50</sup> 29 *Del. C.* § 10002(a).

<sup>51</sup> FOIA does not require a public body to transcribe or tape record the entirety of its meetings.

will be rescheduled, the public body must provide another notice.

FOIA allows a public body to hold a “rescheduled” meeting within seven (7) days of the original meeting date. In that case, the public body must give notice of the meeting “as soon as reasonably possible,” but no later than 24 hours before such meeting. In addition, the notice must include an explanation as to why the seven-day notice required by Section 10003(e)(2) could not be provided.<sup>52</sup>

If a meeting is scheduled more than seven (7) days after the original meeting date noticed, FOIA does not consider the meeting to be a “rescheduled” meeting. Rather, this is a new meeting, and the ordinary notice provisions apply.

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<sup>52</sup> See 29 *Del. C.* § 10004(e)(3).

## ***B. MEETING IN EXECUTIVE SESSION***

FOIA requires that “[e]very meeting of all public bodies . . . be open to the public except those closed pursuant to subsections (b), (c), (d) and (h)” of 29 *Del. C.* § 10004.<sup>53</sup> In limited circumstances, a public body is permitted to hold all or a portion of its meeting without public attendees, or in “executive session.”

### **A. When is an Executive Session Permitted?**

Unless otherwise permitted by the public body’s enabling statute,<sup>54</sup> the circumstances listed in FOIA “**are exclusive and form the only basis for entering into closed session.**”<sup>55</sup> Section 10004(b) provides that a public body may hold meetings in executive session only when discussing the following topics:

- 1) Individual’s qualifications to hold job or pursue training (unless the individual requests that the meeting be open). This exemption does not apply “to the discussion by a licensing board or commission subject to [29 *Del. C.* § 8375], of an individual citizen’s qualifications to pursue any profession or occupation for which a license must be issued by a public body in accordance with Delaware law.”<sup>56</sup>
- 2) Preliminary discussions of site acquisitions for any publicly funded capital improvements or sales or leases of real property. This basis for executive session exists “to ‘protect the government when it enters the marketplace to purchase real property as an ordinary commercial buyer or seller.’”<sup>57</sup>
- 3) Activities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension.
- 4) Strategy sessions with respect to collective bargaining or pending or potential litigation. This exception only covers a public body’s

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<sup>53</sup> 29 *Del. C.* § 10004(a).

<sup>54</sup> See Section 4.C., above, for examples of public bodies that are permitted to meet in executive session by their enabling statute.

<sup>55</sup> See *Del. Op. Att’y Gen.* 12-IIB09 (July 13, 2012) (quoting *Del. Op. Att’y Gen.* 80-FOI3 (Aug. 30, 1980)).

<sup>56</sup> 29 *Del. C.* § 10004(b)(1).

<sup>57</sup> *Del. Op. Att’y Gen.* 05-IB24 (Aug. 18, 2005) (quoting *Del. Op. Att’y Gen.* 02-IB27 (Nov. 4, 2002)).

discussion with its attorney *if* the discussion involves pending or potential litigation, and *only* when an open meeting would have the adverse effect on the bargaining or litigation position of the public body.<sup>58</sup>

- 5) Discussions which would disclose the identity of a lawful/bona fide contributor of a charitable contribution to a public body when public anonymity has been requested.
- 6) Discussion of the content of documents excluded from the definition of “public record.” The definition of “public record” is set forth in Section 4.B., above.
- 7) Student Disciplinary Cases (unless the student requests an open public hearing). Employee disciplinary or dismissal cases (unless the employee requests an open public hearing).
- 8) Personnel or student matters in which the names, competency and abilities of individual employees or students are discussed (unless the employee or student requests an open public meeting).<sup>59</sup>

## **B. Requirements for Meeting in Executive Session**

A public body must satisfy the following requirements in connection with meetings in executive session:

- 1) Advance Notice: The intent to convene in executive session must be announced in the notice of the meeting, whether it is a “regular” meeting or a “special or rescheduled” meeting.<sup>60</sup> Likewise, a brief statement of the reasons for convening in executive session must be set forth in the agenda for the meeting.<sup>61</sup> While the public body must

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<sup>58</sup> See 29 Del. C. § 10004(b)(4); *see also* *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, 1994 WL 274295, at \*11 (May 19, 1994).

<sup>59</sup> *Del. Op. Att’y Gen.* 17-IB20 (July 12, 2017) (noting that the agenda need not identify the names of the individual to be discussed and contains no mandate that the public body notify the individual that he/she is the subject of the executive session or to affirmatively present the individual the option to have the discussion occur in open session).

<sup>60</sup> See 29 Del. C. §§ 10004(e)(2), (e)(3). Notwithstanding the fact that FOIA requires public notice of a public body’s intent to convene an executive session, FOIA recognizes that in limited circumstances, a public body shall be permitted to amend its agenda to add or delete an executive session for matters “that arise at the time of the public body’s meeting.” 29 Del. C. § 10004(e)(2).

<sup>61</sup> See 29 Del. C. § 10004(c).

disclose the purpose of the executive sessions in the agenda, it does not have to specify what legal, personnel, or other subjects will be discussed in executive session.<sup>62</sup>

- 2) **Public Body Vote:** The public body must approve the decision to enter executive session by a majority vote at the meeting, during the open portion of the meeting. If the matter discussed in executive session is one upon which the public body must vote, the vote may not be taken in executive session. The public body must return to the public session to take the vote.<sup>63</sup>
- 3) **Limited Discussion:** The public body must limit the discussion during the closed session to public business that falls within one of the purposes allowed by Section 10004(b) for such meetings.
- 4) **Prepare Minutes:** The public body must prepare minutes of any closed session and make them available as public records for public inspection, except that the minutes may be temporarily withheld from public disclosure for so long as disclosure would defeat the lawful purpose for holding the executive session.<sup>64</sup> The minutes must also reflect who was present.<sup>65</sup>

The foregoing requirements must be met even when a public body is meeting to discuss only matters that are authorized for executive session.

### **C. Permitted Attendees at an Executive Session**

It is clear from the language of FOIA that executive sessions are generally closed to non-members of a public body. The public body may not invite non-member observers.

However, the statute implicitly permits the attendance of certain non-members necessary to conduct the proceedings expressly authorized to be held in executive session. For example, a public body may invite persons to present testimony or opinions limited to the purpose of the session, provided that such

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<sup>62</sup> See *Common Cause of Del. v. Red Clay Consol. Sch. Dist.*, 1995 WL 733401, at \*4 (Del. Ch. Dec. 5, 1995).

<sup>63</sup> See 29 Del. C. § 10004(c).

<sup>64</sup> See *Levy*, 1990 WL 154147, at \*3; 29 Del. C. § 10004(f).

<sup>65</sup> See 29 Del. C. § 10004(f).

attendance is limited to the portion of the discussion in connection with which such testimony or opinion is needed. The exceptions also implicitly permit the presence of attorneys to discuss litigation strategy, or teachers and school administrators in student discipline cases. There may be other limited circumstances in which FOIA may permit a public body to invite individuals to attend an executive session to provide subject matter expertise relating to the subject for which the executive session is authorized.

Even if a public body properly calls a meeting in executive session, **all voting must take place in open session and the results of that vote must be made public.**

## SHOULD A PUBLIC BODY MEET IN EXECUTIVE SESSION?

### **SUGGESTED APPROACH:**

IT IS IMPORTANT THAT THE PUBLIC BODY INCLUDE NOTICE OF ITS INTENTION TO MEET IN EXECUTIVE SESSION ON THE NOTICED AGENDA OF ITS MEETING. THE AGENDA MUST ALSO INCLUDE A BRIEF, NONSPECIFIC DESCRIPTION OF THE REASONS FOR CALLING THE EXECUTIVE SESSION. DO NOT MEET IN EXECUTIVE SESSION UNLESS YOU ARE CERTAIN ONE OF THE PERMITTED REASONS FOR MEETING IN EXECUTIVE SESSION IS APPLICABLE. OTHERWISE, ANY ACTION TAKEN BY THE PUBLIC BODY MAY BE STRUCK DOWN AS VOID BY THE DELAWARE COURTS.

## ***SECTION 6. SELECTED DEFINITIONS***

**“Agenda” shall include but is not limited to a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor[] under subsection (b) of Section 10004 of this title.**

“An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.”<sup>66</sup> The statutory language only requires the agenda to include a “general statement” of the topic to be discussed by the public body. The agenda should be worded “in plain and comprehensible language.”<sup>67</sup> But, if the public body knows that the subject is important to the community, “it satisfies neither the spirit nor the letter of the [Act] to state it in broad generalities so as to fail to draw the public’s attention.”<sup>68</sup>

- **The adequacy of an agenda will be judged in light of the factual circumstances pertaining to each case.<sup>69</sup> This Office has found public meeting agendas to be deficient for a variety of reasons, but the most common is inadequate disclosure. Following the suggested approach below will minimize the risk of committing a disclosure violation:** The agenda must alert the public to the major issues expected to be discussed at the meeting.<sup>70</sup>
- It is not enough to identify “most” of the major issues to be discussed at the meeting. The failure to disclose even one or two matters of public business expected to be discussed in the public meeting is a FOIA

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<sup>66</sup> *Del. Op. Att’y Gen.* 97-IB20 (Oct. 20, 1997).

<sup>67</sup> *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, 1994 WL 274295, at \*8 (Del. Ch. May 19, 1994); *see also Del. Op. Att’y Gen.* 08-IB08 (May 23, 2008).

<sup>68</sup> *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at \*5 (Del. Ch. Aug. 29, 1986); *see also Del. Op. Att’y Gen.* 01-IB10 (June 12, 2001); *Del. Op. Att’y Gen.* 02-IB20 (Aug. 30, 2002); *Del. Op. Att’y Gen.* 07-IB01 (Jan. 25, 2007); *Del. Op. Att’y Gen.* 07-IB03 (Feb. 23, 2007).

<sup>69</sup> *See Del. Op. Att’y Gen.* 12-IB04 (Mar. 27, 2012) (finding the posting of a “tentative agenda” to be misleading under the circumstances of the case).

<sup>70</sup> *See Del. Op. Att’y Gen.* 97-IB13 (June 2, 1997).

violation;<sup>71</sup>

- Noting that the agenda “is subject to change” will not excuse the failure to provide public notice of matters of public business expected to be discussed at the public meeting.<sup>72</sup>
- The matters to be discussed should be described with enough specificity to provide fair notice to the public.<sup>73</sup>

**“Public business” means any matter over which the public body has supervision, control, jurisdiction or advisory power.**

FOIA places the burden of proving the purpose of the gathering of a public body on the public body.<sup>74</sup> The public body is required to include in its agenda or notice the public business to be discussed at a meeting, so that the public has an opportunity to decide whether to attend and observe the discussion.<sup>75</sup>

It is not always clear what constitutes “supervision, control, jurisdiction or advisory power.” For example, in Attorney General Opinion 01-IB13, this Office considered a matter involving a discussion by the City of Dover’s Safety Advisory Committee (“SAC”) of a proposed conditional permit that would allow the expansion of a municipal waste transfer facility.<sup>76</sup> Neither the City of Dover nor the SAC had the power to issue or deny the permit; that power rested with the Kent County Levy Court.

The SAC discussed the potential for expansion at a meeting without having provided notice of the discussion on the public meeting agenda.<sup>77</sup> Moreover, at the meeting, the SAC issued a proclamation opposing the permit. This Office found that SAC did not merely conduct an academic discussion that “would have no effect upon the City.”<sup>78</sup> The purpose of the Council’s proclamation was ‘to persuade’ the Levy

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<sup>71</sup> See *Del. Op. Att’y Gen.* 97-IB17 (Aug. 28, 1997) (failure to disclose even one or two subjects constitutes FOIA violation). See also *Del. Op. Att’y Gen.* 05-IB24 (Aug. 18, 2005); *Del. Op. Att’y Gen.* 06-IB15 (July 24, 2006); *Del. Op. Att’y Gen.* 11-IB12 (Aug. 18, 2011).

<sup>72</sup> See *Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003).

<sup>73</sup> See *Del. Op. Att’y Gen.* 03-IB17 (July 31, 2003); see also *Del. Op. Att’y Gen.* 05-IB05 (Feb. 22, 2005); *Del. Op. Att’y Gen.* 05-IB26 (Aug. 29, 2005); *Del. Op. Att’y Gen.* (Sept. 05, 2006).

<sup>74</sup> See *Del. Op. Att’y Gen.* 96-IB02 (Jan. 2, 1996).

<sup>75</sup> See *Del. Op. Att’y Gen.* 08-IB07 (May 5, 2008) (determining that the presentation of bylaws is public business and should follow open meeting requirements).

<sup>76</sup> See *Del. Op. Att’y Gen.* 01-IB13 (Aug. 9, 2001).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quoting *The News-Journal Co. v. McLaughlin*, 377 A.2d 358, 360 (Del. Ch. 1977) (holding that the City Council gathering was not merely an academic discussion, but rather a call for possible action by the Levy Court)).

Court not to grant . . . a conditional use permit.”<sup>79</sup> The DOJ determined that “[t]he decision by the Levy Court will have an impact on waste removal in . . . Dover, a matter ‘over which the City Council clearly had control, supervision and jurisdiction.’ Therefore, the DOJ found the discussion of the permit to be a matter of “public business” that should have been disclosed before the meeting.

Meetings of a quorum of a public body need not be open to the public if there will be no public business discussed. For example, in Attorney General Opinion 96-IB32, the DOJ determined that a school board did not violate FOIA by holding a non-public meeting, where the board members were only asked to comment on the proposed transfer of teachers. The authority to transfer was vested in the school superintendent, not the board; the transfer did not need to be approved by the board.<sup>80</sup> Because the matter was presented to the board only as a courtesy and the board lacked “supervision, control, jurisdiction or advisory power,” the DOJ found that the meeting did not involve “public business.”<sup>81</sup>

**“Public funds” are those funds derived from the State or any political subdivision<sup>82</sup> of the State.<sup>83</sup>**

An organization that receives, expends or disburses any public funds is likely a public body for purposes of FOIA.<sup>84</sup> The statutory definition of “public funds” is broad, and Delaware courts have adopted a liberal interpretation of the statute.<sup>85</sup>

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<sup>79</sup> *Id.* at p. 3 (quoting *McLaughlin*, 377 A.2d at 360) (internal citations omitted).

<sup>80</sup> *See Del. Op. Att’y Gen.* 96-IB32 (Oct. 10, 1996).

<sup>81</sup> *Id.*

<sup>82</sup> The term “political subdivision” (also referred to by Delaware courts as “governmental subdivision”) is not defined in FOIA. However, the Delaware Superior Court has stated: “Governmental subdivisions are sometimes referred to as political subdivisions and they have historically been recognized as creatures of the State with their authority and jurisdiction limited to local issues and areas. They are frequently elected bodies such as counties or authorities with appointed boards, which exercise their powers separate from the State.” *Malinoski v. Kent Conservation Dist.*, 1998 WL 960757, at \*1 (Del. Super. Jul. 15, 1998).

<sup>83</sup> 29 *Del. C.* § 10002(k).

<sup>84</sup> *See* 29 *Del. C.* § 10002(h)(1) (“‘Public body’ means . . . [an entity or body], which (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.”).

<sup>85</sup> *See Delaware Solid Waste Authority v. News-Journal Co.*, 480 A.2d 628, 633 (Del. 1984) (regular budget allocations to the DSWA were “public funds” even if the allocations were *de minimis*); *The News-Journal Co. v. Billingsley*, 1980 WL 10016, at \*2 (Del. Ch. Jan. 29, 1980) (licensing fees collected by the Delaware Association of Professional Engineering are “public

# APPENDIX A

## Delaware Code Provisions and Rules Affecting Public Access to Government Records and Proceedings

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funds” for purposes of FOIA because “they must be paid before one may engage in the practice of engineering in Delaware”).

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

Delaware Code			
Title	Section	Sub-§	
2	1328	(b)	Certain employee records provided by employers to the Department of Transportation
2	2003	(c)(3)	Proprietary information submitted to the Department of Transportation, form proposals not selected for demonstration projects, and records of negotiations in progress
3	1908		Business operations of persons paying liming inspection fees
3	2106	(d)	Business operations of persons paying fertilizer inspection fees
3	2247	(c)	Animal waste management plans, nutrient management plans and records of implementation (such as soil test results, records of nutrient application, crops planted, etc) are exempt but may be disclosed as prescribed by Section 2248..
3	2260		Identity of persons complaining of violations of chapter, if requested
3	2290	(b)(2)	Reports to the Delaware Nutrient Management Commission
3	3201		information received by Commission and employees per Section 15 of Northeast Interstate Dairy Compact
3	10208	b	License applicants' criminal history information received by Compact Committee (Interstate Compact for Uniform Licensure of Participants)
5	122		Bank examiner's report to State Escheator
5	124	(a)	Bank examinations
5	125		Information obtained by State Bank Commissioner in supervising financial institutions
5	145		Information obtained by State Bank Commissioner in supervising financial institutions
5	940	(a)(4)	"Compliance review" documents of depository institutions
5	1113		Tax returns and tax information
5	1807		Tax returns and tax information
6	2005		Trade secrets and litigation
6	2106	(i)	Investigatory materials of the Attorney General regarding possible antitrust violations
6	7716		Alternative Dispute Resolution proceedings and submissions
6	9-504A		UCC-1's may reference confidential information re: collateral without disclosing details
6	2203		Consumer's credit report information relating to healthcare receivables
7	903	(i)	Identity of person or vessel from whom fishery information is collected
7	1312	c	Wildlife Theft Prevention Special Fund; informants' identification confidential
7	5314		Archaeological locations
7	6014	(d)	Information submitted to the Department of Natural Resources and Environmental Control
7	6104	c	Minerals in Submerged Lands. Permit applications which include complete information with respect to the area or areas of proposed operations, type of exploration and a schedule showing the period or periods during which such explorations will be conducted. Such information shall be treated as confidential unless released by the permittee.
7	6105		Certain drilling records submitted to the Department of Natural Resources and Environmental Control
7	6106		Exploration logs and results submitted to Department of Natural Resources and Environmental Control

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

7	6304	(c)	Information submitted to the Department of Natural Resources and Environmental Control and determined by the Secretary to be trade secrets
7	7107	3	Trade secrets obtained while investigating noise or other compliance with regulations of DNREC
7	7408	(a)(1)	Records pertaining to underground storage tanks for storing regulated substances- reference to criminal state re nondisclosure: 18 USC
7	7507B	d	Land preservation negotiations; data collected that does not result in permanent protection of land are not public records
7	7710	(b)	Trade secrets in inspection reports regarding extremely hazardous substances risk management (otherwise subject to FOIA)
7	7805		Trade secrets obtained by Department of Natural Resources and Environmental Control and determined by the Secretary to be trade secrets
7	7903	(b)	Trade secrets and personal privacy matters contained in environmental permit applications
7	8001	(A)(5)(b)	Appalachian States Low-Level Radioactive Waste Compact. Commission may enter executive session to discuss legally privileged or proprietary information.
7	9116		Information submitted to the Department of Natural Resources and Environmental Control and determined by the Secretary to be trade secrets
7	7408A	(b)	Information submitted about above ground storage tanks (designated secret, privileged or confidential data)
8	389	(c)	Documents submitted to Secretary of State relating to temporary transfer of corporate domicile
9	1184	(a)	County records that would invade individual privacy rights, hinder law enforcement, endanger public safety, breach a recognized duty of confidence, that are legally privileged or which were prepared by the County Attorney for litigation
9	1408	c	County Auditor not to disclose confidential information and information not to be disclosed pursuant to Sec. 1405
10	346	(a)	Court of Chancery mediation proceedings
10	347	(a)	Court of Chancery mediation proceedings
10	348	(a)(3)	Court of Chancery mediation proceedings
10	1027		Expunged criminal records
10	1063		ALL criminal proceedings vs. child (except 12-17 year olds for felonies and class A misdemeanors), including arrest, convictions and acquittals
10	1077	(b)	Mandatory HIV tests on sex offenders
10	4323		Reporters' sources-qualified privilege
10	4513		Names of persons summoned for jury service may be disclosed, but not records used in the juror selection process
10	7123		Non-law enforcement witnesses in nuisance cases
11	925		Identities of persons renting or purchasing videos
11	935		Private computer data- hackers not to hack or disclose
11	1273		Grand jury testimony and proceedings
11	1335		Criminal violation of privacy
11	1902		No official record of two hour detention when no arrest
11	2402		Illegally intercepted electronic communications
11	2402		Existence of a legal wiretap
11	2409		Illegally intercepted electronic communications civil liability
11	2422		Disclosure of electronic communications by service provider
11	3511		Videotaped deposition of child subject to protective order

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

11	3913		Mandatory HIV tests on sex offenders
11	4113	(e)	Records pertaining to special law enforcement assistance fund
11	8501		Right of individuals to be free from improper and unwarranted intrusions into their privacy
11	8601		Right of individuals to be free from improper and unwarranted intrusions into their privacy
11	8904		Information furnished to the Statistical Analysis Center
11	4115		Accounting records of special law enforcement assistance fund disbursements
11	4322		Presentence reports and case records of the department of corrections
11	4358		Records exempted by the Interstate Commission for Adult Offender Supervision in order to protect individual privacy or proprietary information
11	4374		Expunged criminal records
11	8505	(d)	State Bureau of Investigation criminal history record information
11	8513	(d)	State Bureau of Investigation criminal history record information
11	8521		State Bureau of Investigation criminal history record information
11	8527	<b>d</b>	Criminal History Record Information (FBI) Recipients confidentiality obligation
11	8564	(e)	Adult abuse registry
11	8571	(b)	Criminal history of school employment applicant
11	9200	(c)(12)	Records of disciplinary investigations involving law enforcement officers
11	9403	(c)	Information concerning victims of certain crimes
11	9503		Records of Victim-Offender Mediation Committee
11	9601		Witness relocation information
11	9602		Identity and location of person in witness protection program
11	1448 A	(d)(1)	Criminal history record checks for firearms licenses
11	854 A	(d)	Application for an identity theft passport
12	1141		Abandoned property values in possession of State Escheator and certain information about owners
12	3819		Information of Statutory Trust kept confidential by trustees
13	724	(b)	Professional advice to Family Court regarding custody of a child
13	906	<b>(c)(9)</b>	Adoption petition
13	923		Pre-adoption birth certificates
13	924		Adoption records of Family Court
13	1112		Termination of parental rights records in Family Court
13	1516		Divorce hearings and trials closed to the public
13	2105	(h)	Investigation records of fatal domestic violence of Domestic Violence Coordinating Council
13	2206		Division of Child Support Enforcement: all files and records of services provided under Title IV-D of the Social Security Act, including information related to a custodial parent, noncustodial parent, child, and an alleged, putative, or presumed father.
13	2212	(d)	Financial institution data received by Division of Child Support Enforcement on non-custodial parent
13	8-412		Paternity registry of Office of Vital Statistics
14	172		Test materials, answers, etc. for DSTP tests
14	2735	(d)(2)	Expunged truancy records
14	4111		Student educational records

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

14	4112	(g)	Confidential list of young student offenders
14	4112B		Pupil records held by School Criminal Offense Ombudsperson
15	1303		Voter's address (upon request to superior court)
15	5123		Disclosure of manner in which any person has voted
15	5510(7)		Disclosure of absentee vote tally before polls close
16	123	(f)	Individual records submitted to Division of Professional Regulation from the following Delaware State agencies: Board of Medical Practice, Delaware State Board of Dental Examiners, Delaware State Board of Nursing, Delaware State Board of Professional Counselors, Delaware State Board of Examiners of Psychologists, Delaware State Board of Clinical Social Work Examiners, Delaware State Board of Podiatry, Delaware State Board of Chiropractic, Delaware State Board of Occupational Therapy Practice, Delaware State Board of Examiners in Optometry, Delaware State Board of Pharmacy, Delaware State Examining Board of Physical Therapists and Athletic Trainers, Delaware State Board of Examiners of Speech/Language Pathologists, Audiologists and Hearing Aid Dispensers, Delaware State Board of Examiners of Nursing Home Administrators, and Delaware State Committee of Dietetics/Nutrition
16	204		Identity of person or family to which birth defect information relates
16	224		Diagnosis of autism report
16	531		Records of division of public health relating to known or suspected cases of tuberculosis
16	702		Reports of sexually transmitted diseases to Division of Public Health
16	704		Hearings in J.P. Court regarding enforcement of STD-related orders of Division of Public Health
16	705		Hearings in J.P. Court regarding enforcement of STD-related orders of Division of Public Health
16	710		STD-related examinations and treatment of minors by healthcare professional
16	711		Records of division of public health relating to known or suspected cases of sexually transmitted diseases
16	906	c(2)	Child abuse information received by Division of Family Services
16	909		No privileged from reporting child abuse, except priest/penitent and attorney/client
16	1012		Hospital reports and license applications made to Department of Health and Social Services
16	1121	-6	Patient records from nursing facilities
16	1141	(g)	Criminal history information of applicant for nursing home employment
16	1145	(h)	Criminal history information of applicant for home healthcare employment
16	1153		Patient record of Long-Term Care Ombudsperson
16	1203		Retention exemptions for genetic information and samples
16	1205	(a)	Genetic test information; conditions for disclosure
16	1208		Genetic test information; penalties for disclosure
16	1212	(a)	"Protected health information" not disclosable, including autopsy information
16	1206 A		HIV-related test information
16	1207 A		Notification to emergency medical providers of exposure to certain communicable diseases
16	2005		Cancer Incident Data
16	2006		Individuals' health data in state health information database maintained by Division of Public Health
16	2220		Patient records of substance abuse care and treatment
16	2416		Trade Secrets in material safety data sheets
16	3110		Records and data of the Office of Vital Statistics

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

16	3126		Original birth certificates of adopted children
16	3133		Reports of abortions made to Delaware Health Statistics Center of Bureau of Health Planning and Resources Management
16	3205		Cancer test (positive negative) reports made to Department of Health and Social Services
16	4783		Identities of medical patients and research subjects
16	4798	(w)(2)	PMP Advisory Committee's documents and meetings not subject to open record laws
16	4799D	(a)	Confidentiality of records and immunity of suit (Drug Overdose Fatality Review Commission)
16	5006		Involuntary mentally ill commitment record and proceedings
16	5161	(b)(13)	Records of patients in mental health hospital and other facilities
16	5402		Release of confidentiality for mental health patient communication posing explicit threat of serious harm
16	6308		Certain emergency management information
16	6616		Information of State Fire Marshall received from State's Juvenile Fire Setter Intervention Program
16	6712		Criminal history reports on applicants for certification as EMT's
16	6717	(b)	Records of ambulance Incident Review Committee of the State Fire Prevention Commission
16	9707		Records of quality management proceedings relating to emergency medical service systems
16	10010		Information relating to E-911 services and uses
16	3004C		Automated external defibrillator review or audit by State EMS Medical Director
16	810 A		Data regarding newborn hearing screening submitted to Division of Public Health
16	9809 A		Criminal history reports on applicants for certification as paramedics (P-EMT's)
18	316	(c)	Information received from other state, federal, international regulatory agencies, NAIC, IAIS
18	321		Insurance Examiner's reports.
18	526	(f)	Financial analysis ratios and examination synopses submitted by NAIC Regulatory Information System
18	535		Information not to be disclosed pursuant to the Gramm-Leach-Bliley Act of 1999
18	1111		Insurance reserve valuation opinions and memoranda
18	1113	(a)(4)(H), (a)(4)(J)	Insurance reserve valuation opinions and memoranda
18	1124		Life Insurance reserve opinions and memos, examination papers, company internal control documents, PBR reports, experience data
11	1133		Property and Casualty Actuarial Opinion report, work papers, opinion summaries, etc.
18	1603	(e)	Reports of Insurance Commissioner regarding refusal to issue reinsurance license
18	1716	(f)	Documents furnished to DOI in connection with producer termination-for-cause investigations
18	1754		Proprietary information in records submitted by insurance adjusters to Insurance Commissioner
18	2406		Insurance Fraud investigation information
18	2516		Information submitted to insurance rating organizations
18	2525		Experienced reports filed by insurer with Insurance Commissioner
18	3339	(e)	Professional profiling data compiled by health insurer, subject to administrative review
18	3819		Dentists' contracts with dental plans and consultants, et al
18	3820		Patient information of enrollees in dental health plans
18	4343		Documents furnished to DOI in connection with bail agent termination-for-cause investigations
18	4412		Requests for examination on insolvent insurer prior to public release of examination report

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

18	4414		Records of the Delaware Life and Health Insurance Guaranty Association liquidating, rehabilitating, or conserving impaired insurer, before conclusion of activity
18	4913		Minutes of directors meetings of domestic mutual insurer
18	5003	(a)	Confidential notice of proposed divestiture of control of domestic insurer
18	5003	(b)(2)	Identity of lender to acquirer of domestic insurer
18	5003	(a)	Identity of lender to acquirer of domestic insurer
18	5003A	(c)	Pre-acquisition notification information of other insurers
18	5007		Insurers' registration and examination information received by Insurance Commissioner
18	5808		Proprietary information in Risk Based Capital reports filed by insurers with Insurance Commissioner
18	5827		Risk Based Capital reports and plans filed by health organizations with Insurance Commissioner
18	5944		Insurer seizure orders' by Insurance Commissioner summary proceedings in Chancery Court
18	6412		Patient information of enrollees received by managed care organizations
18	6417	(c)(4)e	Patient medical records received by an Independent Utilization Review Organization conducting coverage appeals
18	6820	(b)	Settlements of medical malpractice claims by insurers
18	6853	(a)(1)	Affidavit of Merit filed in a healthcare negligence lawsuit
18	6920		License applications and reports of captive insurers
18	7217	(d)	Rating practices and renewal underwriting practices of small employer carriers
18	7404		Disclosure of positive HIV tests by insurer
18	7405		Notification to DHSS re results of HIV tests
18	7506	(a)	Viatical settlement provider annual statement information disclosing personal, financial or health information of insured or viator
18	7506	(b)	Viators' identities, except to effect settlement of claim
18	7507	(e)	Viators' identities in examination by Insurance Commissioner; examination reports, working papers and other examination/investigation documents
18	7514	(e)	Documents obtained by or provided to Insurance Commissioner in an investigation of suspected or actual fraudulent viatical settlement acts
18	7514	(g)(2)c.	Anti-fraud plans submitted under Viatical Settlement Act
19	708		Required disclosures of child care employment history
19	3125	(a)(1)	Certain employer records of the Department of Labor regarding unemployment claims
21	305		Driving history and license records restricted disclosures
21	313	(b)	Traffic accident reports prepared by a police department
21	2714	(c)	Results of certain special examinations for continuation of driving privileges
21	2723		Identities of Medical Advisory Board to Secretary of Safety and Homeland Security
24	904		Sales records of firearm dealers
24	1191		Records and proceedings of the Board of Dental Examiners
24	1334		Security guard information obtained in course of employment
24	1713		Board of Medical Practice authority to designate certain records confidential
24	1731		Violation of patient confidences as unprofessional conduct
24	1763		Motorists subject to loss of consciousness reports by physicians to Division of Motor Vehicles

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

24	1768	(b)	Records and proceedings of the Board of Medical Practice and the Medical Society of Delaware and certain other entities as described in Sec. 1768(a)
24	2828	(b)	Certain records of the Council of Delaware Association of Professional engineers
24	3017		Confidential communications between patient and mental health and chemical dependency of professionals
24	3042		Counselor confidentiality of licensed chemical dependency professional
24	3913		Confidential communications between patients and licensed clinical social workers
25	7021A	(j)	Lot rental assistance information received by manufactured community operator
26	201	(d)6	Public utility books and records received by Public Service Commission
26	224		Proprietary information of exempt electric cooperative received by Public Service Commission
28	1567	(e)(1)	Criminal history records of applicants for licenses to hold No Limit Hold'em Poker tournaments
29	1003		Legislative Ethics Committees' advisory opinions
29	2718		Local government accounts in local government investment pools
29	4713		DNA analyses in custody of Medical Examiner
29	4805	(a)(22)	Information submitted by lottery licensees to the Department of Finance
29	4807A	(b)	Information submitted by lottery licensees to the Department of Finance
29	5099		Application for investment submitted to Del. Economic Development Authority and Council on Development Finance
29	5805	(e)	Prohibiting unauthorized disclosure of information Public Integrity Commission is required to keep confidential
29	5806		State officer disclosures to Public Integrity Commission
29	5807	(b), (d)	State officer disclosures to Public Integrity Commission
29	5809	(5)	Maintaining confidentiality of files of Public Integrity Commission
29	5810	(h)	Proceedings of State Public Integrity Commission Criminal sanctions
29	5948		Certain records of the Merit Employee Review Board
29	6103		Tax receipts received by state's designated depository or its third party vendor
29	6923		Trade secrets in public contracts bids
29	6924		Trade secrets in public contracts bids
29	7962		Resident records of congregate housing facility
29	7980		Confidential educational and consultation services for public sector employers and employees
29	7996	(b)	Information that would identify participants in needle exchange program
29	8308	(d)	Pension Eligibility records of Board or Office of Pension Trustees
29	9017		Release of confidential information regarding children, parents, custodians, and guardians
29	10002		FOIA exclusions from "public record" definition, not subject to disclosure
29	10112	(b)(4)	Agencies may decline to make public internal procedure/personnel manuals or investigatory, confidential, or otherwise exempt documents
29	9006A		Records of the Office of Child Advocate pertaining to the care and treatment
29	9020C		Users of state agency web sites personal information
29	9021C		Exceptions to 9020C for performance by agency statutory duties
30	327		Records sealed by the Tax Appeal Board so as not to disclose the identity of the taxable
30	368		State Taxpayer information
30	581		Tax returns and tax information

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

30	2035	Records for Travelink program
31	324	Records of Child Death Review Commission
31	1101	Public Assistance records
31	3608	Records of Court-Appointed Special Advocate
31	3816	Records of the Child Placement Review Board regarding children and their families
31	3912	Records of Adult Protective Services
31	5203	Interstate Commission for Juveniles may exempt from public disclosure records that "would adversely affect personal privacy rights or proprietary interests"
<b>18 U.S.C. § 1905. Disclosure of confidential information</b>		
<b>EO 4 issued 3/26/09</b>	The confidential records of the Judicial Nominating Commission which are submitted to the Governor to aid in selection of judges are protected by the Constitutional and common law doctrine of executive privilege	
<b>Const. art IV, § 37</b>	All hearings and other proceedings of the Court on the Judiciary	
<b>Ch. Ct. R. 5.1</b>	Documents filed under seal	
<b>Ch. Ct. R. 26</b>	Protective orders may issue for trade secret or other confidential research, development, or commercial information	
<b>Ch. Ct. R. 45</b>	Subpoena may be quashed or modified if it requires disclosure of privileged or other protected matter or disclosure of a trade secret or other confidential research, development, or commercial information	
<b>Ch. Ct. R. 94</b>	Any petition for mediation and any supporting documents; the Register in Chancery will not include the petition as part of the public docketing system	
<b>Ch. Ct. R. 95</b>	Any communication made in or in connection with the mediation that relates to the controversy being mediate, whether made to the Mediator or a party, or to any person if made at a mediation conference	
<b>Ch. Ct. R. 174</b>	Mediation conferences, all memoranda, work product, and other materials contained in the case files of a mediator, any communication made in or in connection with the mediation that relates to the controversy being mediated, whether made to the mediator by a party, or to any person made at a mediation conference	
<b>Ch. Ct. R. 174</b>	Mediation Agreement, if the parties choose to keep the terms of the agreement confidential	
<b>Super. Ct. Civ. R. 26</b>	Trade secrets or other confidential research, development, or commercial information subject to protective orders	
<b>Super. Ct. Civ. R. 45</b>	Subpoena may be quashed or modified if it requires disclosure of privileged or other protected matter or disclosure of a trade secret or other confidential research, development, or commercial information	
<b>Super. Ct. Crim. R. 16</b>	Certain reports, memoranda, or other internal state documents made by the attorney general or other state agents in connection with the investigation or prosecution of the case, or of statements by state witnesses or prospective state witnesses	
<b>Super. Ct. Crim. R. 32</b>	Final recommendations of sentence in presentence reports	
<b>Com. P. Ct. Civ. R. 5</b>	Court Record or portion thereof placed under seal	
<b>Com. P. Ct. Civ. R. 16.8</b>	Each ADR Practitioner shall remain bound by any confidentiality agreement signed by the parties and the ADR Practitioner as part of the ADR, and ADR practitioners may not be called as a witness in any aspect of the litigation or in any proceeding relating to the litigation in which the ADR Practitioner served.	
<b>Com. P. Ct. Civ. R. 26</b>	Trade secrets or other confidential research, development, or commercial information subject to protective orders	

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

<b>Fam. Ct. Civ. R. 26</b>	Trade secrets or other confidential research, development, or commercial information subject to protective orders
<b>Fam. Ct. Civ. R. 45</b>	Subpoena may be quashed or modified if it requires disclosure of privileged or other protected matter or disclosure of a trade secret or other confidential research, development, or commercial information
<b>Fam. Ct. Civ. R. 90.1(a)</b>	Complaints, summons, any other paper commencing action-- before return of service on all designated parties
<b>Fam. Ct. Civ. R. 90.1(c)</b>	All records of proceedings before the Court, except to court personnel and "persons specifically approved" with "legitimate interest in the records" subject to disclosure statute or other rule for disclosure
<b>Fam. Ct. Civ. R. 90.2</b>	Sealed legal and social files, records of the Court and any private or confidential records of a party, in the best interest of the party or person affected
<b>Fam. Ct. Civ. R. 303</b>	Certain child support sensitive identifying and confidential information
<b>Fam. Ct. Crim. R. 62(a)</b>	Complaints, summons, any other paper commencing action-- before return of service on all designated parties
<b>Fam. Ct. Crim. R. 63</b>	Sealed legal and social files, records of the Court and any private or confidential records of a party, in the best interest of the party or person affected
<b>D.R.E. 502</b>	Attorney-client privilege
<b>D.R.E. 503</b>	Mental health provider, physician, and psychotherapist-patient privilege
<b>D.R.E. 504</b>	Husband-wife privilege
<b>D.R.E. 505</b>	Religious privilege
<b>D.R.E. 506</b>	How one voted
<b>D.R.E. 507</b>	Trade secrets
<b>D.R.E. 508</b>	State secrets or executive privilege
<b>D.R.E. 509</b>	Informer identity
<b>Sup. Ct. R. 9</b>	Record sealed below to remain sealed on appeal
<b>Sup. Ct. R. 10.2</b>	Technical requirements for documents eFiled under seal; public access restricted
<b>Sup. Ct. IOP R. II</b>	Lists of the current case load of each justice
<b>Jud. Ct. R. 17</b>	All records and proceedings of the Panels of the Preliminary Investigatory Committee; all hearings and proceedings of the Board and the Court shall be private and all records, except a final order of suspension, removal, or retirement
<b>Jud. Ct. R. 18</b>	Opinions issued by the Judicial Ethics Advisory Committee are confidential and not public information
<b>Jud. Ct. Exhibit A</b>	Summons of the Board of Examining Officers of the Court on the Judiciary
<b>Jud. Ct. Exhibit B</b>	Subpoena by the Board of Examining Officers of the Court on the Judiciary
<b>Prof. Cond. R. 1.6</b>	Client information
<b>Prof. Cond. R. 1.9</b>	Former client information
<b>Prof. Cond. R. 1.11</b>	Confidential government information acquired whilst a public officer
<b>Prof. Cond. R. 1.15 (e)</b>	Examination of lawyer's books and records
<b>Code Cond. Law Clerks</b>	Information received by clerk in performance of duties
<b>Unauth. Ct. Rep. Prac.</b>	Certain information and proceedings of the Unauthorized Practice of Law Review Board and the Board
<b>Bd. Unauth. Prac. Law</b>	Certain information and proceedings of the Court, the Board, or Disciplinary Counsel
<b>CLE R. 10</b>	Files, records, and proceedings of the Commission, as they relate to or arise out of any failure of any Attorney to satisfy the requirements of these Rules
<b>Bar Ex. B 52</b>	Information, documents and Board meetings or hearings concerning persons who apply for admission to the Bar
<b>Disc. Proc. R. 12</b>	Subpoenas issued by the ODC or by the Clerk of the Supreme Court

**DELAWARE CODE PROVISIONS AND COURT RULES RESTRICTING PUBLIC ACCESS TO GOVERNMENT RECORDS**

<b>Disc. Proc. R. 13</b>	Disciplinary and disability proceedings and the official record, prior to the Hearing Panel's submission to the Court if its final report.
<b>Disc. Proc. R. 16</b>	The ODC's filing of a petition for interim suspension, and all subsequent proceedings
<b>Disc. Proc. R. 20</b>	Terms of probation, in connection with a private sanction
<b>Disc. Proc. R. 24</b>	Any receiver of a law practice appointed under these Rules shall maintain the confidentiality of information contained in client files
<b>Disc. Proc. R. 25</b>	All records and proceedings not resulting in a public sanction
<b>Law. Fund Client Prot.</b>	Claims, proceedings and reports involving claims for reimbursement, until the Trustees authorize reimbursement to the claimant.

# APPENDIX B

## Opinion Summaries for Prior Two Years

## **APPENDIX B- Opinion Summaries**

### **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.

***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.

***White v. Ribbons & Bows Daycare, Inc., 2016 WL 4394726 (Del. Super. Aug. 12, 2016)***

Plaintiffs filed a survival and wrongful death lawsuit in 2009 against a daycare for a child's death occurring in 2007. The criminal investigation remained suspended but not closed. In 2015, the AG's Office released the Medical Examiner's autopsy report to the parties, even though they are protected from disclosure pursuant to 29 Del. C. § 4707(e). Plaintiffs filed a motion to compel the AG's Office to release any and all related records. The Court noted that qualified law-enforcement/prosecutorial common law privilege exists in Delaware. The court also noted that 29 Del. C. § 10002(1)(3) excludes criminal and civil law-enforcement investigatory files from the definition of "public record." The court denied the motion to compel. Note - This case is about civil litigants' right of access and not disclosure pursuant to FOIA (a civil litigants' right of access is not the same as the general public's right of access).

***Grimaldi v. New Castle County, et al., 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(1)(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(1)(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."

***Rudenberg v. Chief Deputy Attorney General, 2016 WL 7494900 (Del. Super Dec. 30, 2016)***

Plaintiff filed an "on the record" appeal from a Chief Deputy FOIA determination, which concluded that plaintiff was not entitled to certain information the Delaware State Police regarding its use of cell-site simulators. Specifically, the Chief Deputy determined that the information either did not exist or was protected by a non-disclosure agreement ("NDA"), but that the NDA itself was a public record. The U.S. Department of Justice filed a "Statement of Interest" in the case, which included facts not in the record below. The court determined that it was not appropriate to consider new facts, but it would consider policy arguments made in the Statement of Interest. The court requested that the parties brief certain remaining issues. Ultimately, the issues were not decided, as the parties executed a settlement agreement. The court is currently only considering whether, and to what extent, the plaintiff is entitled to fees and costs.

***Lechliter v. Becker, 2017 WL 117596 (Del. Ch. Jan. 12, 2017)***

Nearby landowner opposed the use of land in the City of Lewes ("City") for a dog park. At a regularly-scheduled January 11, 2016 meeting, the City Council unanimously approved an amended to the sublease of the land from the City to the dog park owner, which added a sliver of land to the sublease for an access road. Plaintiff argued that the notice on the agenda that the Council would "consider" an amendment was not sufficient to put the public on notice that it might vote, that a vote on a ratification provision was improperly executed because the Council did not approve it and, if the Council did approve the ratification, the public received insufficient notice thereof. Plaintiff sought a declaratory judgment that the City Council violated FOIA and asked that the court nullify the votes.

The court noted that the purpose of FOIA is to ensure that public business is done in the open so that citizens can hold public officials accountable and "not to provide a series of hyper-technical requirements that serve as snares for public officials, and frustrate their ability to do the public's business, without adding meaningfully to the citizens' rights to monitor that public business." *Id.* at \*2. The court concluded that the purpose of the Council's consideration was obviously to inform a vote, and that it would have been impractical to notice a vote, as nothing in FOIA requires a public body to notice every alternative. The court also concluded that the notice was sufficient with respect to the ratification. The court noted that it would not invalidate the action even if it

found a FOIA violation, as it would only apply if the violation “worked a substantial detriment to the public weal.” The court granted defendants’ motion to dismiss.

**Newborn v. Christiana Psychiatric Services, P.A., 2017 WL 394096 (Del. Super. Jan. 25, 2017)**

Wrongful death and medical malpractice action in connection with a suicide. As part of the inquiry into the death, the Division of Forensic Science, the Board of Medical Licensure and Discipline, the Division of Professional Regulation (“DPR”), and the Department of Justice (“DOJ”) participated in an investigation into the individual’s personal and professional relationship with a doctor. Plaintiff issued a subpoena to DPR and DOJ for DPR’s investigative file, which was inadvertently forwarded to Plaintiff’s counsel. The State and DPR then filed motions to quash and for protective order. The court concluded that the records were protected by the peer review privilege contained in 24 Del. C. § 1768(b). In recognizing the privileges enjoyed by the Board of Medical Licensure and Discipline, the court recognized that the Board’s records are exempt from FOIA pursuant to 24 Del. C. § 1737 and 29 Del. C. § 10002(1)(3). The Court granted the motion to reconsider prior order which permitted access to some of DPR’s investigative file. Note - This case is about litigants’ rights to access certain information.

**Lechliter v. Delaware Dep’t of Natural Resources, 2017 WL 2687690 (Del. Ch. June 22, 2017)**

Nearby landowner opposed the use of land in the City of Lewes (“City”) for a dog park. The plaintiff alleged that a meeting agenda was insufficient. The court noted that the purpose of agenda requirement is to alert members of the public with an intense interest in a matter that it will be taken up by the Council. It provides an informational right to allow public involvement in government. If that interest is complied with, FOIA is satisfied. “[I]t is not a tool for use by those who disagree with the actions of their government to have those actions set aside, after the fact, on hyper-technical grounds. Such a result would be as inimical to the open exercise of democracy as failure of the informational right itself.” *Id.* at \*2. The agenda’s notice of “[p]resentation and consideration of a sublease with Lewes Unleased for land off of Park Road, to be developed . . . for a dog park” was sufficient to put members of the public very interested in the dog park on notice that they should attend the meeting. Failure to include consideration of the location did not violate FOIA, as that would result in the imposition of hyper-technical requirements that serve as snares for public officials. The court granted defendant’s motion for summary judgment, but noted that it would not shift fees to the plaintiff.

**Flowers v. Office of the Governor, 2017 WL 3425674 (Del. Super. Aug. 22, 2017)**

Plaintiff filed an “on the record” appeal (and defendant filed a cross-appeal) from a Chief Deputy FOIA determination, wherein the Chief Deputy determined that the Office of the Governor (“OGov”) did not violate FOIA when it withheld records pursuant to 29 Del. C. § 10002(1)(6), but

was unable to determine whether records were properly withheld under 29 Del. C. § 10002(l)(16) (the legislative email exemption). The Chief Deputy requested that OGov review the content and context of the emails withheld pursuant to the legislative exemption. The court reviewed the matter de novo. The court noted that FOIA only requires a public body to provide the “reasons” for a denial and not an index or privilege log. The court noted that the Chief Deputy petition process was added in 2010 to address an inequity in which the citizen’s ability to have the Attorney General’s Office bring suit on the citizen’s behalf depended on whether the public body was one that the Attorney General’s Office was obligated to represent. The court then noted that the rules of statutory construction require the court to first determine whether the statute is ambiguous. If it is unambiguous, then there is no room for judicial interpretation and the plain meaning governs. However, if the statute is ambiguous – subject to two or more reasonable interpretations – then the court must consider the statute as a whole to give effect to the intent of the legislature.

The court concluded that the legislative email exemption is unambiguous and does not depend on the content or context of the email. The court stated that the Chief Deputy may not narrow the plain language to make an exemption seem more consistent with the language of the Declaration of Policy, Section 10001. As to the privilege exemption, the court noted that the Delaware General Assembly appears to have consciously decided not to require a public body to produce a Vaughn index, which would have been helpful to the Chief Deputy and the court. The court stated that a public body must be able to meet its burden of proof without the production of an index of each document withheld. The court concluded that an affidavit, along with a detailed written submission indicating the reasons for the denial may be sufficient to satisfy the public body’s burden. The court determined that OGov applied three well-recognized privileges (the attorney-client privilege, draft documents, and executive privilege) with a clear understanding of those privileges when it applied them. The court concluded that OGov did not violate FOIA. \*\*This matter is currently on appeal to the Delaware Supreme Court.\*\*

## **Attorney General Opinions**

### **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 Delaware 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.

*\*was appealed to Superior Court*

### **Attorney General Opinion 16-IB01**

Petitioner raised several questions related to Sussex County: (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 violation.

### **Attorney General Opinion 16-IB02**

Petitioner requested from the Town of Bethany Beach (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: 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.

\*was appealed 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: 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 (the "Board") 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. Neither side conversation 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, the Superior Court found no FOIA violation. Currently on appeal to the Supreme 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: No FOIA violation. 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: No FOIA violation. 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 (the “Town”) 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 recommended 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 (the “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: No FOIA violation. 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: No FOIA violation. The minutes are not materially misleading. 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.”

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.

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.

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.

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.

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: No FOIA violation. 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 (the “Board”) 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.

### **Attorney General Opinion 16-IB22**

Petitioner requested campaign finance reports from the Office of the State Elections Commissioner (the “SEC”), which directed Petitioner to a website for the information. Petitioner alleged that this constituted a denial of records because he has no access to a computer. The SEC, after learning the Petitioner had no access to a computer, offered Petitioner printed records for a fee.

Decided: No FOIA violation. A public body is permitted to charge fees in advance for printing or copying records, and the fees the SEC proposes for printed copies of the requested documents appear to be consistent with the statute.

### **Attorney General Opinion 16-IB23**

Petitioner alleged that a meeting of the Pathways to Prosperity Committee (the “Committee”) met without providing public notice.

Decided: The Committee acknowledged that it had violated FOIA by failing to provide public notice of its first meeting. As no action was taken at the meeting, minutes were made publicly available, and the Committee expressed that its oversight would not be repeated, this Office determined that no additional remediation was warranted.

### **Attorney General Opinion 16-IB24**

Petitioner alleged that notice of a meeting of the Newark Planning Commission (the “Commission”) was insufficient based on its placement along a roadway.

Decided: No FOIA violation. The Commission complied with the FOIA’s requirement of “conspicuous posting” at their primary place of business, which is also where the meeting was held. It also made multiple notices of the meeting available through online and print means.

### **Attorney General Opinion 16-IB25**

Petitioners alleged that the Christina School District Board of Education (the “Board”) had violated the open meetings provisions of FOIA by discussing items in executive session that are required to be publicly discussed.

Decided: The Board violated FOIA by convening an executive session to discuss interview questions and next steps in the search process for the Christina School District Superintendent Position. To remediate this violation, this Office requested that the Board discuss anew the matters discussed in executive session at its December 13, 2016 board meeting.

### **Attorney General Opinion 16-IB26**

Petitioners alleged that the University of Delaware Board of Trustees (the “Board”) violated the open meetings provisions of FOIA by not adequately describing in the agenda for a May 17, 2016 meeting a bylaws change which the Board expected to discuss.

Decided: The Board violated FOIA by failing to include proposed revisions to Article 3 of the University’s bylaws – a major issue expected to be discussed – in its agenda for its May 17, 2016 meeting. Because the Board has indicated an intent to reconsider the issue and ratify the vote at its December 13, 2016 meeting, this Office requested no additional remediation, but requested that the Board engage in meaningful public discussion on the matter prior to its December 13, 2016 vote.

### **Attorney General Opinion 16-IB27**

In May 2016, Petitioner alleged that the City of Seaford (the “City”) had not given timely notice of its April 4, 2016 meeting.

Decided: The City violated FOIA by providing 5 days’ public notice instead of the required 7.

In June 2016, the Petitioner alleged that the City’s Electric Committee failed to provide public notice of its May 16, 2016 meeting and the Economic Development Committee failed to post notice of its March 22, 2016 meeting.

Decided: These committees are public bodies and these meetings were each attended by a quorum of members. Thus the City violated FOIA by not noticing these meetings. However, the City has agreed that future activities of these bodies will comply with FOIA.

In July 2016, Petitioner alleged that the City held meetings closed to the public between May 17, 2016 and June 14, 2016 in order to finalize and balance the fiscal year 2017 budget.

Decided: No FOIA violation.

In November 2016, Petitioner alleged that the Electric Committee failed to publicly post or publish the minutes of its August 3, 2016 meeting and that sometime in the summer of 2016, the Council held meetings closed to the public.

Decided: No FOIA violation.

### **Attorney General Opinion 17-IB01**

Petitioner alleged that the City of Dover (“City”) violated FOIA by denying their request for a copy of a settlement agreement. The City was a party to the settlement agreement, but argued it was not subject to disclosure because it was not (1) a “public record” under because the parties agreed to keep the terms of the resolution confidential and (2) the City did not have possession of the settlement agreement. The City argued that their insurance company controlled the legal defense and the City was not involved in the settlement negotiations.

Decided: The City violated FOIA because 1) the City had constructive possession or had administrative control over the agreement and (2) a confidentiality provision in a settlement agreement does not exempt it from disclosure under FOIA. The settlement agreement is a public record.

### **Attorney General Opinion 17-IB02**

Petitioner filed five FOIA petitions in connection with requests directed to the Red Clay Consolidated School District the (“District”). The first petitions requested “information showing all the stipends, purpose of stipend...and all other benefits, purpose and amount.” The District provided memo regarding employee use of District resources, contracts of custodians and nutritional services and other similar documents. The District by way of further responses informed petitioner that the District did not have documents that would respond to the request and FOIA did not require it to create new public records. The remaining petitions related to the District’s adherence with FOIA’s mandate that public bodies respond to FOIA requests within 15 business days.

Decided: The District violated FOIA by failing to respond to the petitioner within 15 business days. A timeliness violation is not cured or mooted by the subsequent provision of responsive documents or because the public body later determines that no responsive document existed. A public body does not violate FOIA when requests for tentative information, are “tabled” until such information is confirmed and the public body timely provides a response.

### **Attorney General Opinion 17-IB03**

The petitioner alleged Delaware Technical & Community College (“College”) failed to comply with FOIA by providing an itemized written cost estimate that included the lowest-paid employee capable of performing responding to the petitioner’s request. The petitioner requested “[a]ll

emails pertaining to any proposed changes regarding the Academic Challenge program sent to or originated from” certain individuals, including the College’s legal counsel. The College sent a timely response to the petitioner by providing an itemized written cost estimate. The College stated due to the unrelated sensitive and confidential information sought, the lowest level employee who could review the information was a Senior Systems Specialist. In addition the responsive information would be compiled into a printable output file that would prevent alteration for manipulation, as a result the lowest paid employee to perform the task was the Director of Systems. The College provided an affidavit from its Associate Vice President for Information and Instructional Technology attesting to the College’s contention that the cost estimate was based upon the lowest paid employee capable of performing the task.

Decided: No FOIA violation. The College provided an itemized written cost estimate, billed at the current hourly pay grade of the lowest paid employees capable of performing the task.

#### **Attorney General Opinion 17-IB04**

Petitioner alleged that the Town of Middletown (the “Town”) violated FOIA when could not provide complete records pertaining to a real estate transaction from 2002 and when it did not provide answers to specific questions pertaining to that transaction.

Decided: No FOIA violation. FOIA does not require a public body to answer questions or to create records that do not exist. The Town provided certain records that it deemed responsive to Petitioner’s request. The Town also performed an adequate search of its own records for anything responsive to Petitioner’s request and there was no evidence that a third party custodian controlled any responsive records.

#### **Attorney General Opinion 17-IB05**

Petitioner alleged that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated FOIA by denying his request for emails sent to and from public officials concerning a possible violation of a DNREC order as well as his request for the name of the attorney involved in the matter. DNREC argued that the documents in question were exempt from disclosure due to the common law exemption of attorney client privilege, and in a later response, claimed they were exempt as investigatory documents.

Decided: No FOIA violation. FOIA does not require a public body to answer questions, so there was no obligation for DNREC to provide Petitioner with the name of the attorney involved with the matter and the investigatory exemption attaches as soon as an agency is made aware of a potential issue.

### **Attorney General Opinion 17-IB06**

Petitioner alleged that the Department of Safety and Homeland Security (“DSHS”) and Delaware State Police (“DSP”) violated FOIA when they provided him with redacted documents pertaining to the purchase of cell-site simulators and stated that other documents pertaining to communications with the manufacturer of the cell-site simulators did not exist. DSHS and DSP argued that the materials were exempt from disclosure as trade secrets and intelligence files that would be a security risk if disclosed.

Decided: The public bodies were ordered to review the inconsistent redaction of certain information and provide unredacted documents or a basis for the redactions. We also noted that in a previous opinion (see Del. Op. Att’y Gen. 16-IB03) we had determined that DSHS and DSP had made an acceptable search for responsive documents and certified that those documents did not exist.

### **Attorney General Opinion 17-IB07**

Petitioner alleged that the Sussex County Board of Adjustment (the “Board”) violated the open meetings provisions of FOIA by including “public comment” as an agenda item but then not allowing public comments.

Decided: The Board committed a “technical” violation of FOIA by including an item on the agenda in error or by failing to subsequently remove the item from the agenda, but the Board did not violate FOIA by not allowing public comment, as FOIA does not require a public body to allow members of the public to speak during a public meeting.

### **Attorney General Opinion 17-IB08**

Petitioner alleged that Red Clay Consolidated School District (“Board”) violated FOIA’s open meeting provisions by holding a secret meeting or, in the alternative, engaging in an inappropriate series of email or telephone communications.

Decided: No FOIA violation. However, although no FOIA violation was found, we recognized that the Board President’s statement did raise legitimate concerns and in the future, the Board should avoid representations that imply a meeting has occurred.

### **Attorney General Opinion 17-IB09**

Petitioner alleges that the Buzz Ware Village Center Committee (the “Committee”) violated FOIA’s open meeting provisions by engaging in public business over a series of emails rather than in an open public meeting.

Decided: The Committee violated FOIA. The question was not whether Ms. Bovard’s inquiry was something that needed to be brought to the Committee or instead handled by staff members, but

rather were emails between Committee members qualified as a meeting subject to FOIA's open meeting requirements. The answer was yes. The record showed an "interactive discussion" involving a majority of the Committee members regarding whether to allow Ms. Bovard's request and not, as the Committee urges, a decision made by the Committee sole staff person. This Office did not recommend remediation because the Committee reversed its action and granted Ms. Bovard's request.

#### **Attorney General Opinion 17-IB10**

Petitioner alleged that Sussex County Council and the Planning and Zoning Commission of Sussex County held focus groups without appropriate notice to the public or were otherwise not compliant with FOIA's open meetings provisions. Sussex County Council hired a contractor to assist with a new comprehensive land use plan. The contractor convened three focus groups to gather information from community stakeholders.

Decided: No FOIA violation. Neither the private contractor nor the focus groups are public bodies subject to FOIA.

#### **Attorney General Opinion 17-IB11**

Petitioner alleged that the State Lottery Office violated FOIA by denying his request for records

Decided: No FOIA violation, as responsive records do not exist and FOIA does not require a public body to create records in order to respond to FOIA request.

#### **Attorney General Opinion 17-IB12**

Petitioner alleged that the Wilmington City Council's "Council Leadership Team" was meeting privately in violation of FOIA.

Decided: The "Council Leadership Team," which meets bi-weekly with the Mayor and his team, is indeed a public body subject to FOIA notwithstanding the fact that it was comprised of one less than a quorum of the Council and was not an officially-designated committee. To the extent that it has failed to adhere to FOIA's open meetings provisions in connections with its meetings, it has violated FOIA.

#### **Attorney General Opinion 17-IB13**

Petitioner alleged that the Delaware Association of Professional Engineers violated FOIA by not providing a record that included the requested email addresses of all licensed Delaware engineers and by not providing the record in the format requested by Petitioner.

Decided: No FOIA violation. Under the specific circumstances of this case, the email addresses of private citizens are not considered to be public records. Further, FOIA does not require a public body to create a new record in response to FOIA requests, which would have been required to provide the requested format.

#### **Attorney General Opinion 17-IB14**

Petitioner alleged that New Castle County improperly denied his request for records because he is not a Delaware citizen.

Decided: No FOIA violation. The statute does not prohibit a public body from denying a request on the basis that the requesting party is not a Delaware citizen.

#### **Attorney General Opinion 17-IB15**

Petitioner alleged that the Milford School District Board of Directors (the “Board”) violated FOIA by: 1) adding an action item to the agenda as an addendum the day of its June 20, 2016 meeting, 2) failing to include a reason for the delay in posting this item, and 3) failing to properly identify the item as a tax rate change on the agenda. Petitioner further alleged that the Citizens Budget Oversight Committee (“CBOC”) violated FOIA by failing to post an agenda in advance of its June 14, 2016 meeting that included its intent to discuss the Fiscal Year 2017 tax rate increase.

Decided: The CBOC violated FOIA by failing to provide sufficient notice of its intent to discuss the Fiscal Year 2017 tax rate proposal at its June 14, 2016 meeting. The Board also violated FOIA by failing to provide sufficient notice of its intent to discuss and vote upon the matter at its June 20, 2016 meeting. This Office does not have the statutory authority to invalidate the CBOC or Board’s actions as requested by Petitioner, but encouraged the CBOC and Board to pursue FOIA training and review the educational materials DOJ publishes online for FOIA Coordinators.

#### **Attorney General Opinion 17-IB16**

Petitioner alleged that Early College High School (“ECHS”) violated the open meetings provisions of FOIA. This allegation was based on complaints to the Petitioner that the door to the building where the meeting was held was locked before or at the beginning of meetings.

Decided: This Office is unable to consider the allegation without more information, such as dates on which the alleged conduct occurred, which the Petitioner may submit in a new petition.

Petitioner further alleged that ECHS’s Citizens Budget Oversight Committee violated the open meetings provisions of FOIA by not posting a notice for their Spring 2017 meeting to its website.

Decided: No FOIA violation, as FOIA does not include a requirement that a charter school post notice online.

Petitioner alleged that ECHS's public comment policy "is unnecessarily vague and is also obtrusive to the spirit of the public's ability to speak to a public body untethered."

Decided: The allegation does not provide any information on whether or how the policy may have been applied in a manner that would violate FOIA. The Petitioner may submit a new petition with facts that support such an allegation.

### **Attorney General Opinion 17-IB17**

Petitioner alleged in February 2017 that the Seaford City Council ("Council") violated FOIA's open meetings provisions because the agenda for its 2017 Planning Session/City Planning Session was not provided with the notice for the meeting and further omitted major items of public business discussed during the meeting. Petitioner filed a new petition in April 2017 alleged that the Council violated FOIA's open meetings provisions by failing to provide complete public notice of the planning sessions conducted by the Council in the years 2007 through 2016. Council considered this meeting to be a retreat and thus not a meeting subject to FOIA.

Decided: At the 2017 Planning Session, the Council engaged in fact-gathering and broad discussions about issues currently or expected to come before them, which is sufficient to constitute a meeting subject to the open meetings provisions of FOIA. Because the lack of a timely agenda and omissions from that agenda are not contested, the City violated FOIA. This Office declined to consider the allegations related to the 2007-2016 meetings because they are outside the six month window within which we would generally consider petitions.

### **Attorney General Opinion 17-IB18**

Petitioner alleged that the Department of Insurance ("DOI") did not reply to his request for records within the 15 business days allotted by FOIA. DOI responded that it had not received the mailed request, but discovered that the emailed request had been deleted.

Decided: DOI violated FOIA by failing to respond to a requestor in the manner required by FOIA. However, because DOI has since responded and has further instituted new procedures for handling such requests by email, no remediation is recommended.

### **Attorney General Opinion 17-IB19**

Petitioner alleged that the City of Wilmington violated FOIA when it denied his request for firearms qualifications records of sworn Fire Department members.

Decided: Firearms qualifications records "training records" and are not exempt as personnel files, the release of which would violate personal privacy, and are further not exempt under the Law

Enforcement Officers' Bill of Rights. This Office requested that the City provide the responsive documents within 10 calendar days of its opinion.

### **Attorney General Opinion 17-IB20**

Petitioner alleged that the Town of South Bethany's Town Council (the "Council") violated FOIA by: 1) failing to provide seven days' notice of its January 9, 2017 meeting, 2) failing to include an explanation in its January 6, 2017 meeting notice as to why seven days' notice could not be given, 3) failing to timely notify the Petitioner that the meeting was to discuss their employment, 4) failing to provide the Petitioner an option to have an open public meeting, and 5) voting or otherwise deciding to terminate Petitioner's employment prior to the January 9, 2017 meeting.

Decided: The Council violated FOIA by failing to provide notice of the January 9th meeting in the required timeframe. Even in the event the special meeting was justified, the Council failed to explain in its January 6th notice why the meeting must be held without seven days' notice and thus would still be found in violation. In response to the third and fourth allegations, this Office determined that FOIA does not entitle an employee to be notified that a public meeting will include discussion of them or to explicitly provide the employee the opportunity to have that discussion heard in open session. In response to the fifth allegation, the Office determined that there was not sufficient evidence to support the allegation that the Council decided in advance of the public meeting to terminate the Petitioner's employment.

### **Attorney General Opinion 17-IB21**

Petitioner alleged that the Department of Natural Resources and Environmental Control ("DNREC") and Sussex Conservation District (the "SCD") violated FOIA by not providing all documents related to a proposed development project.

Decided: These documents are part of a regulatory rather than investigatory process which would ultimately be public, and courts have not agreed with the argument that revealing such documents would chill an applicant's ability to bring their drafts into regulatory compliance. The records are therefore "public records." This Office recommended that DNREC and the SCD provide all public records, subject to the redaction of nonpublic information, to the requester within 15 days of its opinion and that they review and revise the SCD FOIA policy as needed to come into compliance.

### **Attorney General Opinion 17-IB22**

Petitioner alleged that the Department of Justice (the "DOJ") had improperly denied his request for the DOJ's internal memorandum on "the New Habitual Statute- SS1 for SB 163." The DOJ responded that no such document exists. In his Petition to the CDAG, the Petitioner alleged that the DOJ improperly denied his request, but cited his request as much broader than his original request.

Decided: No FOIA violation. The records referred to in the petition were not sought in the original request. The DOJ should treat the petition as a new request for records as of the date of the opinion.

### **Attorney General Opinion 17-IB23**

Petitioner filed two complaints regarding the Division of Public Health (“DPH”) and information the Petitioner sought from DPH regarding seized dogs.

On February 9, 2017, the Petitioner alleged that DPH violated the public records provisions of FOIA by 1) not providing the records of where the dogs were located, whether they were alive, and the dates of transfer to facilities and 2) not indicating whether DPH had requested them from the Brandywine Valley SPCA (BVSPCA), which took custody of the dogs and which the Petitioner considered a public body.

Decided: No FOIA violation. DPH did not have possession or control over the records sought because the dogs were in the custody of BVSPCA, which controlled the records. BVSPCA is not a public body and FOIA does not require, as Petitioner asserts, a public body to request records from a private entity in order to produce them.

On March 21, Petitioner alleged that DPH violated the public records provisions of FOIA by 1) denying the Petitioner’s request for the medical records of dogs seized from a property and 2) taking too much time to respond.

Decided: No FOIA violation. The request was properly denied, as any responsive records would be investigatory files. The fact that the defendant in the criminal proceeding may access them does not make the records public. DPH also complied with Section 10003(h)(1) and there is no evidence that the estimate was in bad faith.

### **Attorney General Opinion 17-IB24**

Petitioner alleged that the Department of Natural Resources and Environmental Control (“DNREC”) improperly applied the FOIA exemption for pending or potential litigation to his request for records.

Decided: No FOIA violation. The Petitioner made this request while in active litigation with the Federal Emergency Management Agency over a matter to which the records are specifically related and the plain language of the statute does not require that the public body be a party to the litigation for the exemption to apply. Delaware courts have held that FOIA may not be used in place of court procedures to obtain documents to advance their litigation position, which was the only reason given for the Petitioner’s attempt to obtain these records, and DNREC has expressed willingness to comply with discovery in the current litigation.

### **Attorney General Opinion 17-IB25**

Petitioner twice alleged that the Department of Correction (“DOC”) violated FOIA by asserting that it would require 45 days and 60 days for legal review of his two requests for certain records. Petitioner further alleged that DOC violated FOIA by ultimately denying his request.

Decided: There is no evidence of bad faith in the estimates of additional time needed for legal review, and thus there was no FOIA violation with respect to the first and second allegations. With respect to the third allegation, DOC’s claims of exemption were sufficient for all records requested, except for their denial of “[r]ecords of the types and amounts of all contraband seized at JTVCC since Jan. 1, 2014.” DOC is thus asked to provide a more precise response to the Petitioner regarding those records within 20 business days.

### **Attorney General Opinion 17-IB26**

Petitioner alleged that the Wilmington Housing Authority (“WHA”) violated FOIA at its February 27, 2017 Board meeting by: (1) first posting notice on February 22, 2017, (2) originally noticing an executive session to begin at 3:30 PM and the open public meeting to begin at 6:00 PM, and (3) amending the agenda that was posted in the lobby of the building where the meeting occurred on the day of the meeting.

Decided: No FOIA violation. WHA provided evidence that notice was posted ten days in advance of the meeting and that the notice was amended to reflect that the 3:30 event would not be an executive session but a “briefing.” The amended agenda was also posted ten days in advance of the meeting. Further, WHA provided evidence that the 3:30 event described as a “briefing” was a social meet-and-greet at which public business was not discussed and thus would not implicate FOIA requirements.

### **Attorney General Opinion 17-IB27**

Petitioner questioned whether there was a legal basis for the City Council of the City of Seaford to have held an emergency meeting in executive session.

Decided: This Office determined that the personnel matter was an appropriate ground for an emergency meeting and executive session. Because the Council is not required by FOIA to give notice of an emergency meeting which is “necessary for the immediate preservation of the public peace, health or safety” under Section 10004(e)(1), its choice to notice the meeting a few hours before the meeting was held did not violate FOIA. The Council was also permitted to enter executive session to discuss personnel qualifications. However, the Council did violate FOIA by

failing to first convene a public meeting and then vote to go into executive session, and by failing to keep minutes of the admittedly short public portion of the meeting and the results of a vote. The Council was asked to prepare minutes of that meeting and provide them to the DOJ within 10 business days of their next regularly scheduled meeting.

#### **Attorney General Opinion 17-IB28**

Petitioner alleged that Sussex County Council's meeting agenda did not provide adequate notice to the public that it would vote on a succession plan for leadership at the Sussex County Planning and Zoning Office.

Decided: The Sussex County Council ("the Council") violated FOIA by failing to notice an intent to discuss an anticipated vacancy in the top position at the Planning and Zoning Office and a plan to fill that vacancy at the meeting. Under the circumstances, the general statement on the agenda that the Council may go into executive session to discuss personnel matters was not enough. This Office recommended that the Council publicly explain its reasons for choosing the successor for that position.

#### **Attorney General Opinion 17-IB29**

Petitioner alleged that the Delaware Agricultural Land Preservation Foundation ("DALPF") violated FOIA by: 1) providing an inadequate description of the Agreement granting a right-of-way easement to Delmarva on its agenda, and subsequently voting to sign the Agreement, 2) failing to indicate on the agenda that it intended to vote on the Agreement at the meeting, and 3) failing to address public comments in the order listed on the agenda.

Decided: No FOIA violation. The agenda and its attachment were sufficiently detailed to inform the public that the agreement of concern to the Petitioner would be discussed and possibly voted on, despite a typographical error in the attachment. Public comment is not required by FOIA, but the agenda did provide for public comment in which the Petitioner participated.

#### **Attorney General Opinion 17-IB30**

Petitioner alleged that the Wilmington Police Department ("WPD") violated FOIA by failing to respond his FOIA request within 15 business days. WPD acknowledged not meeting the deadline.

Decided: WPD violated FOIA, but no remediation was necessary as WPD has since responded to the request.

#### **Attorney General Opinion 17-IB31**

On June 8, 2017, Petitioner alleged that Delaware Technical Community College ("the College") violated FOIA with respect to an October 24, 2016 meeting. This Office determined that the allegation was untimely.

On June 13, Petitioner alleged that the College Board of Trustees violated FOIA by using the agenda heading “New Business” in its June 19, 2017 meeting agenda and that the Board of Trustees and the Personnel Committee violated FOIA by using the language “Personnel and Legal” in their June 19, 2017 meeting agendas as the bases for their respective executive session discussions.

Decided: No FOIA violation. The Board’s use of “New Business” rather than a more specific explanation in the agenda for the recognition of a long-serving employee did not violate FOIA because employee recognition is not a “major issue” under Section 10002(a). In addition, The Board’s and Personnel Committee’s use of “Personnel and Legal” did not violate FOIA because the Delaware Chancery Court has upheld the use of that language as long as it is not used as a general listing in a catch-all matter.

On June 17, Petitioner alleged that the Finance Committee violated FOIA by using the agenda heading “Other Business” in its June 19, 2017 meeting agenda.

Decided: No FOIA violation. “Other Business” as a heading does not per se violate FOIA for similar reasons used to determine that “New Business” does not.

### **Attorney General Opinion 17-IB32**

Petitioner alleged that the City of Wilmington (the “City”) violated FOIA by denying access to the following parking ticket data: license number, state, vehicle make, vehicle color, officer name, officer badge number, and the date the ticket was paid.

Decided: The City did not violate FOIA by denying vehicle license numbers, which are protected by the common law right of privacy, or officer names, which would require inputting new information into the database and thus creating a new record which FOIA does not require. However, the City did violate FOIA by failing to provide the data regarding the state, vehicle make, vehicle color, officer badge number, and date ticket was paid, which would only require exporting existing data. This Office recommended that the City provide this information, or an itemized written cost estimate pursuant to 29 Del. C. §§ 10003(m)(2) and (5), within fifteen business days.

### **Attorney General Opinion 17-IB33**

Petitioner alleged that the Department of Natural Resources and Environmental Control (“DNREC”) violated FOIA by taking ten months to provide a response to a FOIA request after payment was received.

Decided: DNREC failed to demonstrate compliance with 29 Del. C. § 10003(h)(1) . Although DNREC may have kept the requestor apprised of the reason for the delay, 29 Del. C. § 10003(g)(1) requires the FOIA coordinator to maintain dates of correspondence with individuals contacted in

connection with requests. However, no remediation is recommended because the Petitioner's client had since received a response.

#### **Attorney General Opinion 17-IB34**

Petitioner requested that this Office determine whether the Trustees of the New Castle Common (the "Trustees") is a public body subject to FOIA's open meeting and public record disclosure requirements.

Decided: The Trustees is a public body.

#### **Attorney General Opinion 17-IB35**

Petitioner alleged that the Office of the Governor (OGov) effectively denied his request for the Governor's calendar by providing printouts of the public schedule available on the OGov website. OGov subsequently provided a more detailed calendar with redactions.

Decided: Because the more detailed calendar was provided, the issue was determined to be moot. No determination was made as to the Executive Privilege or Security exemptions asserted by OGov.

#### **Attorney General Opinion 17-IB36**

Petitioner alleged that the Village of Arden (the "Village") failed to respond to her request for records.

Decided: FOIA coordinator provided a response one day late to an email address that the Village had on file for Petitioner. This Office determined that the one-day delay was a technical violation for which no remediation was warranted.

#### **Attorney General Opinion 17-IB37**

Petitioner alleged that the Office of the Governor ("OGov")'s Family Services Cabinet Council (the "Council") is a public body which violated the open meetings provisions of FOIA.

Decided: No FOIA violation. The Governor is a public body of one member and such public bodies are permitted to meet with their staff without triggering FOIA's open meetings provisions. Language of Executive Order creating the Family Services Cabinet Council means that its meetings are actually staff meetings for the Governor because of the closed nature of the meeting and the identity of the persons involved.

### **Attorney General Opinion 17-IB38**

Petitioner alleged that Wilmington City Council (the “Council”) violated FOIA by failing to publish an agenda for its April 6, 2017 meeting at least seven days in advance. Petitioner further alleged that the agenda was improperly amended. The Council’s practice was to once annually publish notice of hearing dates and thereafter post meeting agendas when they were finalized.

Decided: This Office determined that the Council violated the open meeting requirements when it failed to post a final agenda until the day before the council meeting, and recommended the City change its practice and to publish an agenda at least 7 days before meetings.

### **Attorney General Opinion 17-IB39**

Petitioner alleged that the Office of the State Treasurer violated FOIA by denying his request for public records on the basis that he is not a citizen of Delaware.

Decided: No FOIA violation. FOIA does not prohibit a public body from denying a FOIA request to a non-citizen of Delaware.

### **Attorney General Opinion 17-IB40**

Petitioner had requested exceptional incidents reports and other records from the Department of Correction (“DOC”) including records of types and amounts of contraband seized at James T. Vaughn Correctional Center since January 2017. In connection with a prior related FOIA petition, this Office recommended that DOC provide any cumulative records of seized contraband and the DOC informed the Petitioner that it had no responsive records. Petitioner challenged that representation.

Decided: The FOIA Coordinator was not aware that the responsive records existed. Those records were provided and the violation cured prior to issuance of the opinion, so this Office determined that no remediation was warranted.

### **Attorney General Opinion 17-IB41**

Petitioner alleged that a request to the Department of State for documents sent by a doctor regarding a defense medical examination related to a work related incident/injury was improperly denied.

Decided: The records were deemed not to be public records because investigatory records are not accessible under FOIA and need not be provided to non-Delaware citizens.

### **Attorney General Opinion 17-IB42**

Petitioner alleged violations of the open meetings provisions of FOIA with regard to meetings held in 2002 and 2016 by the Sussex County Planning and Zoning Commission and the Sussex County Council.

Decided: This Office determined that the petition was untimely. The requested review of the record did not unearth circumstances that this Office believed warranted a departure from the longstanding policy and practice not to opine on FOIA allegations regarding meetings that occurred more than six months prior to our receipt of the FOIA Petition.

### **Attorney General Opinion 17-IB43**

Petitioner alleged that the City of Seaford failed to present important public business, AG Opinion 17-IB17 and AG Opinion 17-IB27, to the public during the regular meetings of the City Council.

Decided: No FOIA violation. FOIA does not require a public body to share or discuss FOIA determinations at public meetings.

### **Attorney General Opinion 17-IB44**

Petitioner alleged Office of the Governor (“OGov”) improperly redacted information from the Governor’s calendar.

Decided: No FOIA violation. OGov provided an affidavit from its Chief Legal Counsel and its Deputy Legal Counsel with a detailed written submission indicating reasons for the denial of access to redacted information in the FOIA response. The Office found that well-recognized FOIA exemptions.

### **Attorney General Opinion 17-IB45**

Petitioner alleged that Department of Health and Social Services (“DHSS”) violated FOIA by denying his request for documents from Planned Parenthood to DHSS reporting any adverse events in its entirety rather than provide redacted versions of records responsive to his request.

Decided: No FOIA violation. The requested records are exempted by 24 Del. C. § 1768(c) as they are provided to a peer review organization as contemplated by that statute. The records are not public records, as they are exempted from disclosure by statute.

### **Attorney General Opinion 17-IB46**

Petitioner alleged that the Sussex County Planning and Zoning Commission (“Commission”) violated FOIA by (i) failing to share Complainants documents in opposition to an application to

amend a conditional use ordinance with the Sussex County Council (the “Council”) prior to the Council's final consideration of the matter at its August 29, 2017 meeting.

Decided: Assuming the facts presented by Petitioner are true, there is no basis to conclude that the Commission's actions amounted to a FOIA violation. This Office did not offer an opinion regarding whether the Commission's conduct comports with the Delaware State Employees', Officers' and Officials' Code of Conduct, the Commission's Rules of Procedures, Sussex County Code, or any other provision of law and any such determination would fall outside the scope of FOIA.

#### **Attorney General Opinion 17-IB47**

Petitioner alleged that the Delaware Department of Transportation (“DelDOT”) violated FOIA by improperly denying his July 28, 2017 request for records with the name, address, and “relevant information” about the individual who filed a complaint with DelDOT about Petitioner’s mailbox. DelDOT cited public records exemption for investigatory documents in denying the request as provided by 29 Del. C. § 10002(1)(3).

Decided: No FOIA violation. Complaints investigated by DelDOT are not public records, they are part of investigatory files, which remain confidential even after an investigation has concluded.

#### **Attorney General Opinion 17-IB48**

Petitioner alleged that the New Castle County Council Personnel Subcommittee violated FOIA by: 1) failing to provide notice on its meeting agenda of a potential for a vote on whether the subcommittee should direct its counsel to conduct legal research on a personnel matter discussed during an executive session, and 2) voting affirmatively on the matter.

Decided: The meeting agenda did not violate FOIA notice requirements because it properly noticed the subcommittee’s intent to discuss a “confidential personnel matter” while in session. The vote did not violate FOIA because the vote to direct counsel to conduct legal research on a personnel matter discussed in executive session was not a “major issue to be discussed” and therefore not required to be included on the agenda.

#### **Attorney General Opinion 17-IB49**

Petitioner alleged that: 1) the Town of Dewey Beach (the “Town”) violated FOIA by failing to post notice of three meetings at least seven days in advance, and 2) the noticed purposes for the executive sessions of those meetings were inadequate.

Decided: Two of the three meetings were cancelled. Therefore, any question regarding FOIA compliance with respect to the cancelled meetings is moot. As for the third meeting, notice was

posted six (6) days prior to the meeting and included an agenda that sufficiently noticed a permissible purpose for executive session, specifically the intent to discuss “the content of documents excluded from the definition of public record where such discussion may disclose the content of such document pursuant to 29 Del.C. § 10004(6) [sic].” The Town’s conduct with respect to timely notice of the meeting was, at most, a technical violation for which no remediation is warranted.

#### **Attorney General Opinion 17-IB50**

Petitioner alleged that the Town of Dewey Beach (the “Town”) violated FOIA by failing to post notice of certain meetings at least seven days in advance.

Decided: Any question regarding compliance with respect to cancelled meetings is moot. The September 13 agenda sufficiently noticed a permissible purpose for executive session. As we determined in Attorney General Opinion No. 17-49, the Town’s conduct with respect to timely notice of the September 13 meeting was, at most, a technical violation for which no remediation is warranted. Finally, the Town provided timely notice of its September 22 meeting.

#### **Attorney General Opinion 17-IB51**

Petitioner alleged that New Castle County Council (the “Council”) improperly denied her request for certain emails involving county business or to certain employees sent from the Council President’s personal email account.

Decided: This Office determined that the Council violated FOIA by providing by failing to provide a timely response to the request and by denying the request in its entirety. This Office recommended that the Council collect and review records consistent with this Office’s determination and provide all non-exempt records within 10 business days of the determination.

#### **Attorney General Opinion 17-IB52**

Petitioner requested that this Office determine whether certain Del Tech entities are public bodies subject to FOIA.

Decided: The Collegewide Criminal Justice Advisory Board (the “Board”) is a public body. This Office recommends minutes of its January 13, 2017 meeting be made available to the public and that the Board comply with the public records and open meetings requirements of FOIA going forward. The College Educational Foundation is not a public body; however, if a quorum of the Board of Trustees, as members of that Foundation, is present at a meeting and public business is discussed, such meetings should be considered a meeting of the Board of Trustees and must comply with FOIA. No other entity named in the petition was determined to be a public body.

### **Attorney General Opinion 17-IB53**

Petitioner alleged that the Department of Correction (“DOC”) improperly denied his request for the records of the background investigation performed pursuant to his employment application.

Decided: No FOIA violation. The requested records are investigatory files compiled for civil law-enforcement purposes, which are exempt from FOIA and thus not considered public records.

### **Attorney General Opinion 17-IB54**

Petitioner alleged that the City of Wilmington Council Organization Commission (the “Commission”) was a public body which failed to comply with the open meetings requirements of FOIA.

Decided: The Commission was a public body. As such, to the extent the Commission did not comply with FOIA’s open meetings requirements, it violated FOIA. This Office recommended as remediation that the Commission make minutes of all prior meetings available for inspection and copying. To the extent no meeting minutes exist, this Office recommended that the Commission create them.

### **Attorney General Opinion 17-IB55**

Petitioner alleged that the City of Newark City Council (the “Council”) violated FOIA by failing to provide seven days’ notice of its September 18, 2017 meeting and that a special meeting was unjustified.

Decided: No FOIA violation. The City met its notice obligations by providing an explanation as to why seven days’ notice could not be given and, to the extent FOIA requires exigency or compelling need to justify a special meeting, the City satisfied this burden.

### **Attorney General Opinion 17-IB56**

Petitioner alleged that the State Aid to Local Law Enforcement Grant Fund Committee (the “SALLE”) violated FOIA by noticing an intent to convene and executive session for an improper purpose. The SALLE invoked 29 Del. C. § 10004(b)(6) to discuss the contents of documents excluded from the definition of public records pursuant to 29 Del. C. § 10002(1)(3).

Decided: No FOIA violation. The SALLE noticed a proper purpose for an executive session and the executive session itself was proper.