

**DELAWARE DEPARTMENT OF JUSTICE
RULES OF PROCEDURE
FOR FOIA PETITIONS AND DETERMINATIONS**

Original Issuance Date: September 26, 2019

- I. AUTHORITY:** *29 Del. C. § 10005.*
- II. PURPOSE:** To specify the procedures the Department of Justice (“Department”) FOIA Office will follow for a petition to determine whether a violation of FOIA has occurred or is about to occur (“Procedures”).
- III. APPLICABILITY:** Parties to a FOIA petition, the State of Delaware Department of Justice, and its employees.
- IV. POLICY:**
- A. DEFINITIONS.** Any definitions in the FOIA statute, *29 Del. C. §§ 10001-10007*, shall have the same meaning in these Procedures as described therein. The following terms shall have the meanings set forth below:
- 1. Determination.** The correspondence constituting the final decision of the DOJ regarding a petition.
 - 2. FOIA Office.** The staff of the DOJ responsible for processing and determining FOIA petitions.
 - 3. Petition.** A written request to the DOJ to determine whether a Delaware public body has violated FOIA.
 - 4. Petitioner.** The party who files a petition for a determination under *29 Del. C. § 10005*.
 - 5. Record.** The petition, response, and any other submission authorized by the FOIA Office, which constitute the basis upon which a determination is made.
 - 6. Respondent.** The party against whom a petition is asserted, who is, or is alleged to be, a public body.
- B. SUBMISSION OF PETITION.** Petitions must be sent to the DOJ FOIA Coordinator by email to opengovernment@delaware.gov; fax to (302) 577-5866; or mail to: Delaware Department of Justice, Attn: FOIA Coordinator, 820 N. French Street,

Wilmington, Delaware 19801. All petitions must be prominently marked to the attention of the DOJ FOIA Coordinator.

C. DATE OF PETITION'S RECEIPT. A petition is considered received by the FOIA Coordinator on the date of electronic or fax submission or physical delivery via postal carrier or other means; provided, however, that if submission or physical delivery to the FOIA Coordinator occurs on a weekend, on a State-recognized holiday, or after 3:00pm on any weekday, the date of receipt of the petition shall be the first business day following such submission or delivery.

D. TIME LIMITATIONS FOR FILING A PETITION. Any petition alleging a denial of access to public records by a State board, agency, or department, must be filed with all supporting documentation within sixty (60) days of the denial. All other petitions must be filed within six (6) months after the alleged violation occurred.

E. CONTENTS OF PETITION. A complete petition includes both items below:

- 1. Allegation(s).** The petitioner must assert how FOIA was violated or will be violated by an entity believed to be a public body and give a brief description of the nature of the violation. Formal citation to the statute is not required. The FOIA Office will solely consider allegations regarding the violation of the FOIA statute.
- 2. Evidence.** The petition should include all evidence available to the petitioner which supports the specific allegations. Examples of evidence include correspondence with the public body, meeting minutes, and meeting agendas. For records requests, petitions shall include a copy of the applicable FOIA request (if available) and the public body's response.

F. INITIAL EXAMINATION. The FOIA Office initially reviews the petition to determine the type of violation(s) alleged. All allegations against a public body represented by the DOJ will be directed to the Chief Deputy Attorney General. All allegations against a public body that is not represented by the DOJ and all allegations requiring a determination of whether an entity is a public body will be directed to the State Solicitor. The FOIA Office may request supplemental information from the petitioner regarding the nature of the violation before accepting the petition.

G. NOTICE TO PARTIES. Within ten days of the receipt of the petition, the FOIA Office will send a copy of the petition to the respondent and petitioner with a letter stating the timeline for the response. Once this letter is received, both parties shall copy the FOIA Office on any correspondence with each other regarding the alleged violation(s) and must avoid *ex parte* communications with the FOIA Office regarding

the merits during the pendency of the petition. *Ex parte* communications, other than those authorized by these Procedures, will be shared with the opposing party.

H. PARTIES' SUBMISSIONS.

1. **Timeframe for Responses.** The respondent will have six business days from the date of the letter to respond to the petitioner's allegations. No other submission will be accepted for consideration unless the FOIA Office otherwise designates.
2. **Public Release.** After the issuance of a determination, the petition and the public body's response, excluding any information accepted by the FOIA office for review *in camera*, may be released to any citizen who requests these records via FOIA request to the DOJ. All other records or documents associated with the FOIA petition shall not be released pursuant to the applicable FOIA exemptions.
3. **Affidavits.** The parties are encouraged to provide affidavits of individuals with relevant knowledge with their submissions.
4. **In Camera Submissions.** Respondents may submit materials *in camera* with the prior written approval of the FOIA Office. Any information that the FOIA Office thereafter determines is not appropriately subject to nondisclosure under FOIA may be disclosed in the Attorney General Opinion as reasonably necessary to issue the determination.
5. **Extensions.** Due to the statutory timeframe to issue a determination, the FOIA Office will not depart from the response deadline unless the parties reach an agreement to extend the submission deadline in writing. If the parties agree to extend the time to submit the response, the FOIA Office's time to issue a determination shall be concurrently extended for the same time period. Any extension granted under these Procedures does not toll the applicable time limitations for filing suit set forth in the FOIA statute.
6. **Summary Determination.** In the FOIA Office's discretion, a petition, or portion(s) thereof, may be decided without a response from the respondent, in which case the FOIA Office will notify the public body of receipt of the petition within ten days and issue a summary determination of those allegations as required by these Procedures. Any allegations remaining in the petition shall be processed in accordance with these Procedures.
7. **Non-party Submissions.** Responses or other submissions are not accepted from individuals or entities that are not parties to the petition.

8. Unauthorized Submissions. Any submission out of compliance with these Procedures shall be excluded from the record.

I. OTHER RESOLUTIONS.

1. Similar Pending Litigation. As courts are the final arbiters regarding questions of FOIA law, the FOIA Office shall dismiss a petition related to pending litigation between the parties involving the same or similar FOIA issues.

2. Independent resolution. If the parties resolve the subject violation(s), the petitioner should promptly notify the FOIA Office in writing that the petition is withdrawn. An independent resolution does not toll the applicable time limitations in the FOIA statute for filing suit, which continue to apply as set forth therein.

J. DETERMINATIONS. Absent an extension authorized by these Procedures or in circumstances requiring additional time, the FOIA Office shall issue determinations no later than twenty (20) business days after the receipt of the petition, as defined in these Procedures. Determinations will be issued as either Attorney General Opinions posted on the DOJ website or letters sent to the parties. The determination will be released to the parties by email whenever possible. A written copy will be mailed to a party that does not provide an email address or by request. If the expected date for issuance of an Attorney General Opinion or determination falls on a holiday or weekend, the opinion or determination shall be issued on the following business day.

K. FILING SUIT. The provisions for filing suit in court are contained in 29 *Del. C.* § 10005. Time limitations apply. Any amendment to the timeframe in which this Office has to issue a determination shall not toll the time limitations for filing suit in the FOIA statute. The FOIA statute is available at: <https://attorneygeneral.delaware.gov/executive/open-government/>.

L. SEVERABILITY. If any provision of these Procedures, or the application thereof to any person, entity, or circumstances is held invalid, such invalidity shall not affect the provisions or application of these Procedures that can be given effect without the invalid provisions or application, and to this end, the provisions of these Procedures are severable.

M. ADOPTION AND AMENDMENT. These Procedures are adopted pursuant to the approval of the Attorney General and are published on the DOJ website. These Procedures are exempt from the adoption requirements of the Delaware Administrative

Procedures Act, as rules of practice or procedure used by an agency. 29 *Del. C.* § 10113. The DOJ may amend these Procedures at any time in its discretion.