

DELAWARE FREEDOM OF INFORMATION ACT

POLICY MANUAL FOR FOIA COORDINATORS

As of November 14, 2019

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 issued frequently. 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.

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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.¹ 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 or address every Attorney General Opinion or judicial opinion interpreting FOIA. 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 duties and responsibilities 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 and explain the reasons for calling an executive session. There are two appendices: 1) a sample spreadsheet to track FOIA requests and 2) summaries of Attorney General opinions² and judicial opinions 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://attorneygeneral.delaware.gov/opinions>.

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

² 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 a court or 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. Each public body is required to designate a FOIA coordinator, and various duties are delegated to the coordinator.³ The FOIA coordinator’s name and contact information must be published on the public body’s website and shared with the Attorney General. Updates must be made within twenty days of any change. The FOIA coordinator is permitted to delegate specific duties and functions to other public body employees.⁴

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 party⁵
- 6) Maintain a document that tracks all FOIA requests,⁶ which includes the following minimum information:

³ See 29 Del. C. § 10002(d).

⁴ See 29 Del. C. § 10003(g)(1).

⁵ See Del. Op. Att’y Gen. 19-IB43 (July 22, 2019) (“Cooperation requires both parties to participate in good faith.”)

⁶ 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).

- 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
- 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 disposition⁷

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 See 29 Del. C. §§ 10003(g)(1)-(3).

- 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 DOJ should a citizen appeal the denial of a FOIA request, complain that a public body violated the open meeting requirements, or otherwise allege that a public body violated FOIA. FOIA coordinators therefore may want to familiarize themselves with the enforcement provisions of Section 10005(a)-(e) and the Delaware Department of Justice Rules of Procedure for FOIA Petitions and Determinations found at <https://attorneygeneral.delaware.gov/executive/open-government/> in order to be prepared to respond to and cooperate with requests for further information issued by the DOJ.

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. A FOIA request is considered received by the public body when the designated FOIA Coordinator receives the request.⁸
- 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's response is that it needs additional time, the public body must also include the permissible reason additional 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.

⁸ A request misdirected to another employee in the public body does not constitute a public body's receipt of the request. *See Del. Op. Att'y Gen.* 19-IB06 (Feb. 13, 2019). If the public body misses the deadline, it is within its best interest to provide a response as soon as possible even if a petition has been filed with the AG's office. *See Del. Op. Att'y Gen.* 17-IB65 (Dec. 29, 2017).

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.⁹ 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.

⁹ 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)*. If the General Assembly, a county, or a municipality adopts legislation for different fee rules in its code, the DOJ does not review this fee structure to determine if the fees are reasonable; the General Assembly, through its 2012 legislative changes, intended to confine the determination of reasonableness of any such fees to the local or state political process. *Del. Op. Att’y Gen. 19-IB14* (Mar. 11, 2019). In addition, administrative fees may be waived pursuant to the public body’s statutorily-mandated FOIA policy.

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.

B. Administrative Fees

Although FOIA appears to require a public body to charge administrative fees under certain circumstances,¹⁰ the statute allows agencies to waive those fees.¹¹ FOIA prohibits collection of administrative fees for requests requiring less than one hour of staff time to process.¹²

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.¹³ 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).¹⁴

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.¹⁵ **“Legal review” is not limited to reviews conducted by an attorney.** This is an important note for public bodies that do not routinely rely on

¹⁰ See 29 Del. C. § 10003(m)(2).

¹¹ 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.*

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ 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.”).

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.**¹⁶

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

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.

For most State agencies, Delaware Department of Technology and Information ("DTI"), which provides third-party computer hosting services, will constitute an appropriate technology custodian.

In most instances, FOIA coordinators should take the following steps to comply with Section 10003(i)..

- 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

¹⁶ See 29 Del. C. § 10003(m)(2).

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.”¹⁷ The requesting party may choose to proceed with the request or 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

¹⁷ See 29 Del. C. § 10003(i)(2) (email search); (j)(2) (noncustodial records search); (m)(2) (administrative fees).

the request) or too low (with the expectation of pursuing a later collection action).

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.¹⁸

HOW SHOULD YOU ESTABLISH FEES?

SUGGESTED APPROACH:

FOIA COORDINATORS SHOULD VERIFY THAT THEIR AGENCY'S FEE COLLECTION PRACTICES COMPLY WITH THE FOIA STATUTE AND ANY APPLICABLE POLICIES OF THE AGENCY.

¹⁸ See 29 Del. C. § 10003(m)(5); *Del. Op. Att'y Gen.* 19-IB51 (Sept. 16, 2019).

SECTION 4. AN OVERVIEW OF FOIA

I. WHAT IS A PUBLIC BODY?

It is important to know what types of agencies or organizations constitute public bodies. Only agencies or organizations that are public bodies are required to comply with FOIA. Most public bodies are required to comply with open meeting¹⁹ and public records²⁰ requirements. FOIA recognizes that an individual may be considered a public body of one member.²¹

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

¹⁹ See Section 5 for a discussion of open meeting requirements and exemptions.

²⁰ See Sections 4.B. and 4.C. for a discussion of public records requirements and exemptions.

²¹ 29 *Del. C.* § 10004(h)(6) (excluding public bodies with a single member from Section 10004).

recommendations.²²

B. Discussion

How do you determine whether your organization is a public body?

The statutory requirements which must all be present for your organization to be considered a public body are as follows: First, the organization must be a body of a type enumerated in the statute.

In addition, the body 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.

Below are the steps to analyze whether your organization meets the statutory requirements.

First, to be a **public body**, an organization must be one of the following:

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 which is 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.

In this first step, consider the type of organization and 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.

²² 29 Del. C. § 10002(h).

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, investigate, 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.²³

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

²³ 29 *Del. C.* § 10002(h).

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 may otherwise qualify as a public body. These exemptions are listed at 29 *Del. C.* § 10002(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 of these universities.²⁴

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.

The Delaware courts, the arms of any Delaware court, and agencies directly supporting the courts are not considered public bodies.²⁵ Additionally, there are also subsets of public bodies that have been found not to be public bodies, including:

²⁴ See 29 *Del. C.* §10002(h),(i).

²⁵ 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 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]....”).

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

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.

II. WHAT ARE PUBLIC RECORDS?

A. 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.²⁶ 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.²⁷ 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.

B. What Is a Public Record?

The definition of “public record” under FOIA is very broad.²⁸ 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

²⁶ See 29 Del. C. § 10003(a).

²⁷ 29 Del. C. §§ 501-526. 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.

²⁸ The definition of “public record” is subject to certain statutory and common law exemptions that will be discussed in greater detail in subsection C.

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 a public body.**²⁹ 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.

C. 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. Consultation with counsel is advisable if the public body’s obligations are unclear.

D. 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 FOIA statutory exemption or exclusion applies. For example, Section 10002(1)(6) exempts those records exempted from disclosure by statute; thus, 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.” 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.

²⁹ See 29 Del. C. § 10002(1).

E. 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...”³⁰ 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. The public body does not need to create a document that does not already exist.

F. How Should The Material Be Provided? Would Allowing Public Inspection 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,³¹ 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.”³² 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.

G. Does a Public Body Have to Create Reports or Records 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 are encouraged to be reasonably accommodating to requests when they do not impose an undue administrative burden

³⁰ 29 *Del. C.* § 10002(1).

³¹ “FOIA does not require public bodies to send records in response to a request.” *Del. Att’y Gen.* 17-IB58 (Nov. 15, 2017). “FOIA does not require a public body to provide immediate in-person access to records.” *Del. Att’y Gen.* 18-IB01 (Jan. 2, 2018).

³² 29 *Del. C.* § 10003(a).

on the agency.

H. What Is a Public Body’s Obligation to Search Its 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. The public body may need to work with its IT professionals to locate email records.³³

I. May a Public Body Charge to Search Its 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.³⁴

³³ See 29 Del. C. § 10003(i)(1)-(2).

³⁴ 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.

III. 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(1)(1)-(19), describes most records exempted from disclosure by FOIA:

- **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.
- **Medical files:** Files containing any individual's medical information, if disclosure would constitute an invasion of personal privacy.
- **Pupil files:** Records containing protected student information, if disclosure would constitute an invasion of personal privacy.
- **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.
- **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.
- **Investigatory files (civil or criminal):** Files relating to pending or completed civil or criminal law-enforcement investigations, including, but not limited to, pretrial and presentence investigations, and child custody/adoption files.³⁵

³⁵ This Office has interpreted this exemption to include information contained in call logs of various agencies. *See Del. Op. Att'y Gen.* 18-IB02 (Jan. 10, 2018) (finding call log for Animal Control with personal information on the caller and details of the call redacted did not violate FOIA because redactions were appropriate under the investigatory exemption). *See Del. Op. Att'y Gen.* 19-IB36 (July 5, 2019) (finding call log of Auditor of Accounts' "hotline" was appropriately redacted under investigatory

- **Criminal files and criminal records:** Files containing an individual’s criminal records or history, if release would constitute an invasion of privacy.
- **Intelligence files compiled for law enforcement purposes:** Information assembled for a law enforcement purpose that could cause risk to public safety if released.
- **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.³⁶
- **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.**
- **Records involving labor negotiations or collective bargaining.**
- **Records pertaining to pending or potential litigation that are not records of any Court.** This exemption only applies to potential litigation against the public body asked for the records or a closely affiliated person or entity.³⁷
- **Any records of discussions held in executive session pursuant to FOIA Sections 10004(b) and (c).**
- **Records that disclose the identity or address of any person holding a permit to carry a concealed deadly weapon.**

exemption.). This Office has also interpreted the investigatory records exemption to extend to complaints against Delaware State Police law-enforcement officers. *Del. Op. Att’y Gen.* 18-IB48 (Oct. 8, 2018).

³⁶ A public body does not have to produce a privilege log to support a denial of documents under either the attorney-client privilege or attorney work product privilege. *Del. Op. Att’y Gen.* 18-IB10 (Feb. 2, 2018).

³⁷ See *Del. Op. Att’y Gen.* 18-IB10; *Del. Op. Att’y Gen.* 19-IB13 (Mar. 1, 2019); *ACLU v. Danberg*, 2007 WL 901592 (Del. Super. Mar. 15, 2007).

- **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.**
- **Records in the possession of the Department of Correction, if disclosure is sought by an inmate in custody of the Department of Correction.**
- **Investigative files compiled or maintained by the Victim's Compensation Assistance Program.**
- **Photographs, video records or audio recordings of a postmortem examination in the possession of the Division of Forensic Science.**
- **Emails received or sent by members of the Delaware General Assembly or their staff.³⁸**
- **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.**
- **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.**
- **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.

³⁸ See *Flowers v. Office of the Governor*, 167 A.3d 530, 543-46 (Del. Super. 2017).

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

SUGGESTED APPROACH:

IF YOU ARE NOT SURE WHETHER THE INFORMATION REQUESTED 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.³⁹

³⁹ 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.").

SECTION 5. OPEN MEETINGS

I. GENERAL REQUIREMENTS

FOIA generally mandates that "[e]very meeting of all public bodies shall be open to the public" unless expressly exempted by statute.⁴⁰ 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.⁴¹

A gathering does not become an open meeting simply because the public body is considering a matter of public interest.⁴² 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 a public body in advance of public meetings or in informal locations such as restaurants

⁴⁰ 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.

⁴¹ 29 *Del. C.* § 10002(g) (emphasis supplied).

⁴² *Del. Op. Att'y Gen.* 18-IB49 (October 9, 2018).

- have been subject to FOIA's open meeting requirements.⁴³ Informal meetings can be subject to FOIA's open meeting requirements even if no formal decision about the public business discussed is reached.⁴⁴
- 3) Workshops: Workshops held by public bodies that discuss public business are subject to FOIA's open meeting requirements.⁴⁵
 - 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.⁴⁶
 - 7) Electronic meetings: Group emails may amount to a meeting of the public body, in violation of FOIA under certain circumstances.⁴⁷

⁴³ 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.

⁴⁴ 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.").

⁴⁵ See *id.*

⁴⁶ 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.)

B. Meetings of Committees

Section 10002(h) of FOIA broadly defines “public body” to include committees, including ad hoc or temporary 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.⁴⁸ 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.⁴⁹

FOIA includes a limited exception to this requirement for “any emergency 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.”⁵⁰

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

⁴⁷ See *Del. Op. Att’y Gen.* 17-IB09 (April 25, 2017); *Del. Op. Att’y Gen.* 03-IB11 (May 19, 2003).

⁴⁸ 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).

⁴⁹ 29 *Del. C.* § 10004(g)(1). There is an exception for certain school board training sessions. *Id.*

⁵⁰ 29 *Del. C.* § 10004(g)(3).

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.⁵¹ 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.⁵² Additionally, FOIA authorizes “the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.”⁵³

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 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;

⁵¹ 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).

⁵² See *id.*

⁵³ 29 *Del. C.* § 10004(d).

- 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.)⁵⁴

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.⁵⁵ 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 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.

⁵⁴ 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."

⁵⁵ See 29 Del. C. § 10004(g)(2).

Special Meetings: A “special meeting” is a meeting “to be held less than seven (7) days after the scheduling decision.”⁵⁶ 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.
- 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 notice 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

⁵⁶ 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

An “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 therefore under subsection (b) of Section 10004 of this title.⁵⁷

“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.”⁵⁸ 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”⁵⁹ so that those members of the public with an “intense interest” in a subject will know what it is being discussed.⁶⁰ 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.”⁶¹

⁵⁷ 29 Del. C. § 10002(a).

⁵⁸ Del. Op. Att’y Gen. 97-IB20 (Oct. 20, 1997).

⁵⁹ *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).

⁶⁰ *Lechliter v. Delaware Dep’t of Env’tl. Control and Natural Res.*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017); Del. Op. Att’y Gen. 19-IB55 (Sep. 30, 2019).

⁶¹ *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).

1. **The adequacy of an agenda will be judged in light of the factual circumstances pertaining to each case.⁶² 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.⁶³
2. 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 Violation.⁶⁴
3. 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.⁶⁵
4. The matters to be discussed should be described with enough specificity to provide fair notice to the public.⁶⁶

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

⁶² 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).

⁶³ See *Del. Op. Att’y Gen.* 97-IB13 (June 2, 1997).

⁶⁴ 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).

⁶⁵ See *Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003).

⁶⁶ 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).

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.⁶⁷ The minutes must include a record of members present and a record, by individual member, of each vote taken and each action agreed upon. Minutes may contain more than the required information but must be written in a way that accurately reflects the votes and actions taken by the public body during the meeting. The minutes must be made available for public inspection and copying as a public record. Executive session minutes 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 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.⁶⁸

⁶⁷ FOIA does not require a public body to transcribe or tape record the entirety of its meetings.

⁶⁸ *See 29 Del. C. § 10004(e)(3).*

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.

II. 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.* § 10004.⁶⁹ 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,⁷⁰ the circumstances listed in FOIA “**are exclusive and form the only basis for entering into closed session.**”⁷¹ Section 10004(b) provides that a public body may, but is NOT required to, hold meetings in executive session 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.”⁷²
- 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.’”⁷³

⁶⁹ 29 *Del. C.* § 10004(a).

⁷⁰ See Section 4.C., above, for examples of public bodies that are permitted to meet in executive session by their enabling statute.

⁷¹ See *Del. Op. Att’y Gen.* 12-IIB09 (July 13, 2012) (quoting *Del. Op. Att’y Gen.* 80-FOI3 (Aug. 30, 1980)).

⁷² 29 *Del. C.* § 10004(b)(1).

⁷³ *Del. Op. Att’y Gen.* 05-IB24 (Aug. 18, 2005) (quoting *Del. Op. Att’y Gen.* 02-IB27 (Nov. 4, 2002)).

- 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 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.⁷⁴
- 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. This exemption does not permit discussions of legal advice contained in attorney-client privileged or work product documents in executive session; any discussion of legal advice must meet the requirements of 29 *Del. C.* 10004(b)(4).⁷⁵
- 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).⁷⁶

⁷⁴ 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).

⁷⁵ See *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, 1994 WL 274295, at *11 (May 19, 1994); *Del. Op. Att'y Gen.* 19-IB16 (Mar. 22, 2019); *Del. Op. Att'y Gen.* 19-IB07 (Feb. 15, 2019).

⁷⁶ *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

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.⁷⁷ Likewise, a brief statement of the reasons for convening in executive session must be set forth in the agenda for the meeting.⁷⁸ While the public body must 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.⁷⁹ However, any discussions or actions anticipated to follow the executive session may require additional elaboration to meet the notice requirements for open session items.⁸⁰ Circumstances will vary; consultation with counsel is advised if the public body’s obligations are unclear.
- 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.⁸¹

session).

⁷⁷ 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).

⁷⁸ See 29 Del. C. § 10004(c).

⁷⁹ See *Common Cause of Del. v. Red Clay Consol. Sch. Dist.*, 1995 WL 733401, at *4 (Del. Ch. Dec. 5, 1995).

⁸⁰ See *Del. Op. Att’y Gen.* 19-IB31 (June 24, 2019).

⁸¹ See 29 Del. C. § 10004(c).

- 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, but no longer.⁸² The minutes must also reflect who was present.⁸³

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 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.

Conversely, if a member of the public body recuses themselves from whatever

⁸² See Levy, 1990 WL 154147, at *3; 29 Del. C. § 10004(f); and Att’y Gen. Op. 17-IB59 (Nov. 20, 2017).

⁸³ See 29 Del. C. § 10004(f).

the subject of the executive session is, the member should remove themselves from the executive session.

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 BRIEFDESCRIPTION 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.: DELAWARE DEPARTMENT OF JUSTICE RULES OF PROCEDURE FOR FOIA PETITIONS AND DETERMINATIONS

FOIA allows any citizen to petition the Attorney General for a determination as to whether a violation of FOIA has occurred or is about to occur.⁸⁴ Attorney General determinations are limited to the issue of whether a FOIA violation has occurred or is about to occur and will not address ancillary legal questions.

In 2019, the Delaware Department of Justice adopted a set of procedures for the petition process. The procedures may be found at <https://attorneygeneral.delaware.gov/executive/open-government/>

A. Overall Process

The process begins when a citizen files a petition with the Department of Justice FOIA Coordinator. A petition is considered received by the FOIA Coordinator on the date of electronic or fax submission or physical delivery by postal carrier or other means; provided that if the submission or delivery occurs on a weekend, a State-recognized holiday or after 3:00 pm on any weekday, the date of the receipt of the petition shall be the first business day following the submission or delivery. All petitions must be prominently marked to the attention of the DOJ FOIA Coordinator.

Once received, the FOIA Office will review the petition for completeness and complete an initial examination. The petition must describe how FOIA was violated or will be violated and include all evidence available to the petitioner. Formal citation to the statute is not required. For petitions alleging an improper response to a records request, the petition must include, at a minimum, a copy of the original request (if available) and the public body's response.

Next, the FOIA Office will send a letter to the petitioner and the respondent notifying the parties of the petition. In most situations, the letter will also request a response from the respondent. This response will be due within six (6) business days and must be sent to both the FOIA Office and the petitioner.

⁸⁴ 29 *Del. C.* § 10005.

The FOIA Office will review the submissions and issue an opinion as either an Attorney General Opinion and posted on the Open Government website: <https://attorneygeneral.delaware.gov/opinions/> or a letter sent to the parties. Determinations will be released to the parties by email whenever possible.

B. Time Limitations on Filing a Petition

Petitions alleging an improper denial of records by a State agency, department, or board must be received by the Department of Justice within sixty (60) days of the denial. All other petitions, must be received by the Department of Justice within six (6) months from the date of the alleged violation.

APPENDIX A

Opinion Summaries for Prior Two Years



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Attorney General Opinions Issued Since November 2017

The full opinions can be found at www.attorneygeneral.delaware.gov/opinions.

Attorney General Opinion No. 17-IB58

Issued to Mr. Peter Kostyshyn re: the New Castle County Register of Wills on 11/15/2017

Petitioner alleged that the New Castle County Register of Wills (Register of Wills) violated FOIA by sending its response to the Petitioner's FOIA request to his prior prison address, rather than his current prison address, and by failing to provide a timely response.

DECIDED: The Register of Wills provided a timely response to the Petitioner's FOIA request and committed, at most, a technical violation by not sending the response to the most current address as indicated on the request. However, no remediation was recommended, as the record demonstrated that the Petitioner had received the response. To the extent the Petitioner alleged that the Register of Wills violated FOIA by failing to send hard copies of the request records, the opinion noted that FOIA only requires a public body to make records available for inspection and copying, but does not require the public body to send hard copies.

Attorney General Opinion No. 17-IB59

Issued to Mr. Daniel Kramer re: Sussex County Council on 11/20/2017

Petitioner alleged that the Sussex County Council improperly redacted executive session minutes pursuant to Section 10004(b)(2) on the basis that real estate negotiations remain ongoing and releasing the redacted information would defeat the lawful purpose of the executive session.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 17-IB60

Issued to Mr. Craig O'Donnell re: the Delaware Department of Transportation on 11/21/2017

Petitioner alleged that DelDOT violated FOIA by redacting contact information for individuals who submitted electronic Road Condition Reports pursuant to Section 10002(1)(3).

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 17-IB61

Issued to Mr. Craig O'Donnell re: the Delaware Emergency Management Agency on 12/5/2017

Petitioner alleged that DEMA withheld records showing the inventory of military equipment held by the Dewey Beach Police Department that the Petitioner had requested. DEMA responded that inventory records are only kept on a real-time third-party database and that it had provided all records responsive to the request in DEMA's possession.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 17-IB62

Issued to Mr. Frank "Dan" Cannon re: the City of Seaford on 12/15/17

Petitioner alleged that the Seaford City Council violated FOIA by failing to provide sufficient notice of an agenda item. Specifically, the Council quoted the name of an ordinance but did not include the language "right to work" in the agenda item.

DECIDED: This Office found no FOIA violation. The agenda item met the minimum standard of a "general statement of the major issues expected to be discussed." The possibility that more descriptive language could have been used instead does not constitute a violation.

Attorney General Opinion No. 17-IB63

Issued to Ms. Sarah Bucic re: the Delaware Department of Natural Resources and Environmental Control on 12/20/2017

Petitioner requested a determination of whether the Climate Change Conference held by DNREC was required to adhere to FOIA's open meetings provisions.

DECIDED: No FOIA violation was found. This Office determined that the conference was not a meeting of a public body subject to FOIA's open meetings provisions.

Attorney General Opinion No. 17-IB65

Issued to Mr. George Flowers re: the City of Wilmington 12/29/2017

Petitioner alleged that the City of Wilmington failed to respond to his FOIA request.

DECIDED: The City violated FOIA by not responding within 15 business days. However, as the City has since responded, no remediation was recommended.

Attorney General Opinion No. 17-IB66

Issued to Mr. Dan Kramer re: Sussex County Council on 12/29/2017

Petitioner alleged that his request for a copy of a motion made at a Sussex County Planning & Zoning Commission meeting was improperly denied.

DECIDED: No FOIA violation was found. Under the circumstances specific to this case, the document used by the speaker to make the motion (which was captured in audio and video recordings that were provided to Petitioner pursuant to a separate FOIA request) were appropriately considered to be personal notes and not a public record under FOIA.

Attorney General Opinion No. 18-IB01

Issued to Mr. La Mar Gunn re: the Department of Insurance on 1/2/2018

Petitioner alleged that the Department of Insurance violated FOIA by not providing a copy of its employee manual when Petitioner hand-delivered a written request for the document that same day.

DECIDED: No FOIA violation was found. This Office does not interpret FOIA to require a public body to provide immediate in-person access to records upon receipt of a written request.

Attorney General Opinion No. 18-IB02

Issued to Ms. Shannon Marvel and Mr. Craig O'Donnell re: the Division of Public Health on 1/10/2018

Petitioners alleged that the Division of Public Health violated FOIA by withholding certain categories of information from the Office of Animal Welfare call log. During the pendency of the petition, DPH provided certain additional categories of information, but maintained that the remaining redactions were proper pursuant to the investigatory exemption.

DECIDED: As DPH ultimately provided certain categories of information, DPH violated FOIA by not providing those categories in the first instance or, in the alternative, indicating that additional time was needed. However, no remediation was recommended because the information had already been provided. DPH did not violate FOIA by redacting the remaining categories of information pursuant to the investigatory files exemption.

Attorney General Opinion No. 18-IB03

Issued to Mr. Thomas Fowler re: the Department of Natural Resources and Environmental Control on 1/10/2018

Petitioner alleged that DNREC violated FOIA by denying his request for a legal opinion provided by a Deputy Attorney General to its client, DNREC on the basis that the record was exempted pursuant to the attorney-client privilege.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 18-IB04

Issued to Mr. George Flowers re: the City of Wilmington on 1/23/2018

Petitioner alleged the City of Wilmington improperly withheld documents created by a contractor – which included evaluations of employees – in response to a FOIA request for the documents.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 18-IB05

Issued to Mr. La Mar Gunn re: the City of Dover Ethics Commission on 1/30/2018

Petitioner alleged multiple open meetings violations by the City of Dover Ethics Commission regarding the handling of an ethics complaint that Petitioner had filed with the Commission.

DECIDED: The December 7, 2017 meeting was properly noticed, the Commission noticed a permissible purpose for its November 14 and December 7, 2017 executive sessions, and the executive session discussions were permissible under FOIA. This Office was unable to determine whether the Commission conducted public votes to convene the executive sessions or whether the Commission's December 7, 2017 vote to dismiss Petitioner's complaint was publicly held as required by FOIA.

Attorney General Opinion No. 18-IB06

Issued to Mr. Richard McVey re: the Town of Laurel on 2/7/2018

Petitioner alleged that the Laurel Police Department violated FOIA by failing to provide a specific response regarding two of the three items he had requested in a single FOIA request. The Department sent him a letter subsequent to its receipt of the petition explaining that the other two records did not exist.

DECIDED: No FOIA violation was found because there was no denial of access to records.

Attorney General Opinion No. 18-IB07

Issued to Mr. Frank "Dan" Cannon re: the City of Seaford on 2/9/2018

Petitioner alleged that a press conference constituted a meeting as defined by FOIA and was not properly noticed in accordance with FOIA.

DECIDED: The press conference attended by a quorum of the Council, but during which there was no discussion among the Council members regarding public business, did not constitute a meeting of the Council. No FOIA violation was found.

Attorney General Opinion No. 18-IB08

Issued to Mr. Albert Porach re: the City of Newark on 2/12/2018

Petitioner alleged that a meeting and intended future meetings among University of Delaware staff and City of Newark staff, including the City Manager, constituted a meeting as defined by FOIA which was not properly noticed in accordance with FOIA.

DECIDED: The gathering did not constitute a meeting of a public body. No FOIA violation was found.

Attorney General Opinion No. 18-IB09

Issued to Mr. Craig O'Donnell and Ms. Shannon Marvel re: the Town of Dewey Beach on 2/12/2018

Petitioners alleged that the Town of Dewey Beach agendas for February 2 and 9, 2018 failed to properly notice matters to be discussed in executive sessions.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 18-IB10

Issued to Mr. Vincent D'Anna re: New Castle County Council on 2/20/2018

Petitioner alleged that the County improperly denied his requests for records regarding the creation of a position.

DECIDED: No FOIA violation for failing to provide an index of records withheld. The DOJ was unable to determine whether the records are exempted from FOIA's definition from public records, as the matter is best addressed by a court of competent jurisdiction.

Attorney General Opinion No. 18-IB11

Issued to Mr. Richard McVey re: the Town of Laurel on 2/22/2018

Petitioner alleged that the Laurel Police Department did not provide a timely response to his FOIA request.

DECIDED: No FOIA violation, as the response was hand-delivered within 15 business days.

Attorney General Opinion No. 18-IB12

Issued to Mr. John Flaherty re: the Delaware Transit Corporation on 3/2/2018

Petitioner alleged that Delaware Transit Corporation did not provide a timely response to his FOIA request.

DECIDED: No FOIA violation found, as DelDOT responded on behalf of itself and DTC, a division of DelDOT.

Attorney General Opinion No. 18-IB13

Issued to Ms. Fleur McKendell re: the Department of Insurance on 3/6/2018

Petitioner alleged that the Department of Insurance violated FOIA by denying her request for certain records relating to her employment.

DECIDED: No FOIA violation, as the records are personnel records and therefore not public records as defined by FOIA. Any entitlement that Petitioner might have in the requested records would be outside the scope of FOIA.

Attorney General Opinion No. 18-IB14

Issued to Mr. Jeffrey Smith re: the Town of Dewey Beach on 3/9/2018

Petitioner alleged that the Town of Dewey Beach violated FOIA by failing to provide certain policy changes in response to a FOIA request for the Town's current insurance policy. The Town responded that it had inadvertently omitted certain policy changes and provided a copy of the changes in response to the petition.

DECIDED: The petition was deemed to be moot.

Attorney General Opinion No. 18-IB15

Issued to Ms. Kyle Gay on behalf of Residents for a Livable City re: the Trustees of the New Castle Common on 3/12/2018

Petitioner alleged that the Trustees of the New Castle Commons violated FOIA by denying its FOIA request on the basis that the Trustees believes that it is not a public body subject to FOIA.

DECIDED: This Office believes that the Trustees is a public body subject to FOIA and thus violated FOIA by failing to respond as required by FOIA.

Attorney General Opinion No. 18-IB16

Issued to Mr. Kushal Shah re: the Wilmington Police Department on 3/12/2018

Petitioner alleged that the Wilmington Police Department failed to provide a response to what petitioner referred to as his FOIA request. The City responded that it had not received the request.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 18-IB17

Issued to Ms. Shannon McNaught re: the Town of Dewey Beach on 4/2/2018

Petitioner alleged that the Town of Dewey Beach had violated FOIA by failing to provide an amendment to an insurance policy in response to a FOIA request for the policy.

DECIDED: The petition was determined to be moot because the Town provided the requested record after receiving notice of the petition and locating the policy amendment at issue.

Attorney General Opinion No. 18-IB18

Issued to Mr. Bernard Garbo re: the Office of the State Bank Commissioner on 4/6/2018

Petitioner alleged that the State Bank Commissioner violated FOIA by denying his request for records on the basis that neither he nor the company on whose behalf he requested the records is a citizen of Delaware.

DECIDED: No FOIA violation was found, as Delaware's FOIA does not prohibit a public body from denying a FOIA request on the basis that the requesting party is not a Delaware citizen.

Attorney General Opinion No. 18-IB19

Issued to Mr. John Young re: the Christina School District on 4/10/2018

Petitioner alleged that Christina School District's violated FOIA in connection with an itemized written cost estimate.

DECIDED: The petition was determined to be moot because the Petitioner subsequently emphasized that his original intent was to request a smaller subset of records than those included in the cost estimate.

Attorney General Opinion No. 18-IB20

Issued to Mr. Randall Chase re: the Department of Correction on 4/23/2018

Petitioner alleged that the Department of Corrections violated FOIA by redacting the names and positions of employees who have take-home vehicles. Petitioner also challenged DOC's itemized written cost estimate.

DECIDED: The names and positions of employees who have take-home vehicles are a matter of public record because the vehicles may constitute a form of compensation. No FOIA violation found in connection with the itemized written cost estimate.

Attorney General Opinion No. 18-IB21

Issued to Mr. Frank "Dan" Cannon re: the City of Seaford on 4/27/2018

Petitioner alleged that Seaford's Benefits Committee failed to post notice or an agenda for its March 13, 2018 meeting. The City argued that the Committee is not a public body.

DECIDED: The failure to notice the meeting or provide an agenda constituted a violation of FOIA, as the Committee qualifies as a public body.

Attorney General Opinion No. 18-IB22

Issued to FOIA Opinion Letter to Mr. Randall Chase re: the Office of Defense Services 5/1/2018

Petitioner alleged that the Office of Defense Services violated FOIA by withholding requested information on the costs of a defense in current litigation.

DECIDED: The wholesale denial of the request violated FOIA.

Attorney General Opinion No. 18-IB23

FOIA Opinion Letter to Ms. Amy Roe re: the City of Newark 5/4/2018

Petitioner alleged that Newark City Council members' individual private meetings with a consultant constituted a serial quorum in violation of FOIA.

DECIDED: Because the meetings did not involve discussion among a quorum of the council, no FOIA violation was found.

Attorney General Opinion No. 18-IB24

Issued to Mr. Atnre Alleyne re: the Department of Education on 5/4/2018

Petitioner alleged that the Department of Education violated FOIA by citing the pending litigation exemption to justify withholding requested emails.

DECIDED: The litigation exemption may apply, but DOE has not reviewed the individual emails to determine whether any may not be exempt. By failing to do so and instead broadly denying the entire request, DOE violated FOIA.

Attorney General Opinion No. 18-IB25

Issued to Mr. Eric Keebler re: the City of Newark on 5/15/2018

Petitioner alleged that the City of Newark violated FOIA by not responding to his request for records within the required timeframe.

DECIDED: Because the City provided a response, the petition is moot.

Attorney General Opinion No. 18-IB26

Issued to Ms. Jennifer Hill re: the Office of Management and Budget on 5/25/2018

Petitioner alleged that the Office of Management and Budget violated FOIA by denying her request for the proposals received by OMB from companies seeking to sell voting systems to the State and denying public access to vendor demonstrations of the systems to an evaluation team. At the time of publication, the procurement decision is pending.

DECIDED: It is a violation of FOIA to deny in whole a request made for bids received during the procurement process. A public body may provide such records, subject to review and redaction as permitted by FOIA. A vendor demonstration does not constitute a meeting of a public body, and therefore it was not a FOIA violation to close the demonstrations to the public.

Attorney General Opinion No. 18-IB27

Issued to Mr. John Wells re: the Red Clay Consolidated School District on 5/31/2018

Petitioner alleged that Red Clay Consolidated School District did not provide a timely response.

DECIDED: The District responded within the 15 business days required by FOIA.

Attorney General Opinion No. 18-IB28

Issued to Mr. Warren Rosenkranz re: the Arden Trust on 6/1/2018

Petitioner alleged that Arden Trust violated FOIA by denying request for documents. The Trust countered that they are not a public body and thus not subject to FOIA.

DECIDED: The Arden Trust is not a public body and thus not subject to FOIA.

Attorney General Opinion No. 18-IB29

Issued to Mr. Courtney French re: the City of Wilmington on 6/6/2018

Petitioner alleged the City of Wilmington had withheld documents responsive to their FOIA request.

DECIDED: City provided an affidavit explaining why responsive records did not exist. No FOIA violation found.

Attorney General Opinion No. 18-IB30

Issued to Mr. John Flaherty re: the Office of the Governor on 6/7/2018

Petitioner alleged that the Office of the Governor had violated FOIA due to the time taken to respond to a FOIA request for records.

DECIDED: Petition is moot as documents have been provided and OGov provided written extensions on permitted bases.

Attorney General Opinion No. 18-IB31

Issued to Mr. Chris Dufresne re: the Camden-Wyoming Fire Company on 6/28/2018

Petitioner alleged that Camden-Wyoming Fire Company failed to respond to his FOIA request.

DECIDED: Camden-Wyoming Fire Company is not a public body and thus not subject to FOIA.

Attorney General Opinion No. 18-IB32

Issued to Mr. Charles Sanders re: the Department of Justice on 7/5/2018

Petitioner alleged that the Department of Justice had withheld a document that he believed it must have.

DECIDED: There was no FOIA violation because the document requested did not exist.

Attorney General Opinion No. 18-IB33

Issued to Mr. Charles Sanders re: the Department of Justice on 7/17/2018

Petitioner contested the Department of Justice's claim that policies and procedures governing exculpatory evidence are considered attorney work product and thus exempt from FOIA.

DECIDED: The exemption for attorney work product was appropriately applied.

Attorney General Opinion No. 18-IB34

Issued to Mr. Peter Kostyshyn re: the Department of Insurance on 7/20/2018

Petitioner alleged he was inappropriately denied requested records regarding a Department of Insurance employee.

DECIDED: Certain requested records were appropriately withheld as exempt or were sufficiently provided by reference to where such information could be found in the Delaware Code. DOI violated FOIA by not providing a redacted copy of the employee's résumé and this Office recommended it be provided within 10 business days of this opinion's issuance.

Attorney General Opinion No. 18-IB35

Issued to Mr. Courtney French re: the Wilmington Housing Partnership on 8/7/2018

Petitioner alleged they were improperly denied records of the Wilmington Housing Partnership, which were also in the City of Wilmington's possession. WHP responded that it is not a public body subject to FOIA and that they had not been asked for records. Additionally, they argued that the records were not public records that the City of Wilmington could disclose.

DECIDED: WHP is determined to be a public body. This office recommended that they respond to Petitioner's request in the time required by FOIA.

Attorney General Opinion No. 18-IB36

Issued to Mr. John Flaherty re: the Office of the Governor on 8/10/2018

Petitioner alleged that the Office of the Governor claimed executive privilege too broadly in redacting requested records.

DECIDED: The Office of the Governor met the existing legal standard to justify its use of executive privilege. No FOIA violation was found.

Attorney General Opinion No. 18-IB37

Issued to Mr. Herman Holloway, Jr. re: the Wilmington Housing Authority on 8/14/2018

Petitioner alleged two FOIA violations against the Wilmington Housing Authority: that a vote to approve a topic discussed in executive session gave insufficient notice of the topic to the public and that it was not properly noticed in the agenda.

DECIDED: First, it was incorrect to label the purpose of the executive session as “personnel” in the agenda. This Office determined that WHA committed a technical violation which required no remediation. Second, no FOIA violation was found for the allegation of insufficient notice with regard to the vote.

Attorney General Opinion No. 18-IB38

Issued to Mr. Daniel Kramer re: Sussex County Council on 8/16/2018

Petitioner alleged that Sussex County Council violated FOIA by not including sufficient detail in the executive session minutes or its motion to during a public meeting and by allowing a councilmember to take part in the executive session discussing the land acquisition despite recusal.

DECIDED: The executive session minutes were sufficiently detailed and therefore complied with FOIA. The motion was sufficiently detailed due to the need for maintaining confidentiality of the site acquisition price. Although no violation was found, Council should have publicly disclosed the price at a later public meeting. No FOIA violation was found with regard to the councilmember’s recusal from executive session since he departed upon recognizing the need for recusal.

Attorney General Opinion No. 18-IB39

Issued to Ms. Sue Murphy Ogden re: the Christina School District on 8/16/2018

Petitioner alleged that Christina School District withheld requested information.

DECIDED: No FOIA violation was found, as the District asserted it did not have records meeting the parameters of the petitioner’s request and FOIA does not require a public body to create a new record.

Attorney General Opinion No. 18-IB40

Issued to Ms. Vicki Carmean, Ms. Julie Lee, and Mr. Roy Williams re: the Town of Fenwick Island on 8/24/2018

Petitioners alleged that the Town violated FOIA in two ways: 1) five individuals associated with the Town privately communicated about a building permit outside of a public meeting; and 2) the Building Committee improperly approved a building permit without a public meeting and vote.

DECIDED: The five individuals are not a public body, and thus, their communications did not violate FOIA. The Building Committee violated FOIA by not holding a public meeting to approve the permit. It is recommended that the Building Committee conduct a public meeting to formally vote on the permit application. A supplemental opinion is to follow.

Attorney General Opinion No. 18-IB41

Issued to Mr. Craig O'Donnell and Ms. Shannon McNaught re: the Dewey Beach Town Council on 8/28/2018

Petitioners alleged that the Dewey Beach Town Council held a meeting that was not noticed to the public when a majority of the Town Council attended a meeting of the Audit Committee.

DECIDED: Because there was no allegation that the Councilmembers discussed or deliberated public business among themselves, held a vote, or reached a consensus, their presence at another body's meeting did not constitute a meeting of the Town Council. No FOIA violation was found.

Attorney General Opinion 18-IB42

Issued to Mr. Dan Kramer re: the Frankford Town Council on 8/30/2018

Petitioner alleged that the Frankford Town Council improperly met in executive session and held a vote to fire their solicitor.

DECIDED: No vote was held in executive session. Further, this Office determined that the executive session was properly held to discuss an individual's competencies and abilities. No FOIA violation was found.

Attorney General Opinion No. 18-IB43

Issued to Ms. Melony Anderson re: the Division of Revenue on 9/6/2018

Petitioner alleged the Division of Revenue improperly withheld records.

DECIDED: The records requested were not considered public records under FOIA since they are specifically exempted from public disclosure by 30 Del. C. § 368, which prohibits the disclosure of information contained in tax records. No FOIA violation was found.

Attorney General Opinion No. 18-IB44

Issued to Mr. Kevin Ohlandt re: the Auditor of Accounts on 9/24/2018

Petitioner alleged that the Auditor of Accounts did not respond to his request for records within the time required by FOIA and did not respond to questions.

DECIDED: AOA violated FOIA by not responding within 15 business days. However, because the documents were since provided, no remediation recommended. FOIA does not require a public body to respond to questions.

Attorney General Opinion No. 18-IB45

Issued to Mr. Craig O'Donnell re: the Town of Dewey Beach on 10/5/2018

Petitioner alleged that the Town of Dewey Beach improperly cited the exemption for investigatory materials in denying his request for a video.

DECIDED: The video is part of an investigative file. Thus the exemption was properly applied.

Attorney General Opinion No. 18-IB46

Issued to Mr. Paul Reiger re: the Sussex County Board of Adjustment on 10/5/2018

Petitioner alleged that a meeting agenda for the Sussex County Board of Adjustment did not describe an agenda item in sufficient detail.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 18-IB47

Issued to Mr. David Moskowitz re: the Town of Dewey Beach on 10/8/2018

Petitioner alleged that a meeting of the Dewey Beach Town Manager, Audit Committee chair, accountants, and auditor constituted a meeting of a public body that did not meet open meeting requirements. Petitioner further alleged that certain legal authority and the public interest in the meeting topic required the meeting to be subject to open meeting requirements.

DECIDED: No FOIA violation was found. Questions of municipal law are outside the scope of FOIA.

Attorney General Opinion No. 18-IB48

Issued to Ms. Jennifer Kye re: the Delaware State Police on 10/8/2018

Petitioner alleged that the Delaware State Police (“DSP”) improperly withheld records under the Law Enforcement Officers’ Bill of Rights (“LEOBOR”) and a confidentiality order.

DECIDED: Complaints against law enforcement officers were properly withheld as records specifically exempted from public disclosure under LEOBOR. There was insufficient information from the parties to determine if other records responsive to the request for litigation documents exist. This Office recommended that the petitioner file a new request with any available information to assist DSP in locating possibly responsive records and DSP respond to the request as required by FOIA.

Attorney General Opinion No. 18-IB49

Issued to Mr. David Moskowitz re: the Town of Dewey Beach on 10/9/2018

Petitioner alleged that the Town Manager and Police Chief lacked the authority to execute certain documents, that the Town Manager and Police Chief are a public body that must hold open meetings, and that the public interest in these documents must trigger open meeting requirements.

DECIDED: No FOIA violation was found. Questions of municipal law are outside the scope of FOIA.

Attorney General Opinion No. 18-IB50

Issued to Casey H. Nelson re: the Department of Insurance on 10/12/2018

Petitioner alleged that he was entitled to receive Delaware Department of Insurance (“DOI”) records because DOI denied records in bad faith, was required to provide records to non-citizens of Delaware, and was required to provide the records pursuant to another Delaware statute.

DECIDED: DOI did not violate FOIA as alleged.

Attorney General Opinion No. 18-IB51

Issued to David Carter re: the Department of Natural Resources and Environmental Control on 11/20/2018

Petitioner alleged that DNREC improperly withheld database records and did not provide sufficient assistance in identifying and locating responsive records.

DECIDED: DNREC is not required by FOIA to create a new record to provide the information sought and that DNREC sufficiently provided reasonable assistance to identify and locate the information sought.

Attorney General Opinion No. 18-IB52

Issued to Ms. Andrea Green re: FOIA Complaint Concerning the Department of Natural Resources and Environmental Control on 11/29/2018

Petitioner alleged that DNREC improperly denied records request for several reasons: 1) the denial was in violation of another Delaware statute; 2) DNREC provided insufficient justification for the denial; and 3) the exemptions for pending or potential litigation and investigatory records did not apply to the requested records.

DECIDED: This Office does not have the authority under the FOIA statute to determine whether another statute was violated. DNREC provided sufficient justification for its denial. DNREC appropriately cited the pending litigation exemption because the individual requesting records is a member of the entity that is actively involved in a pending administrative appeal with DNREC.

Attorney General Opinion No. 18-IB53

Issued to Mr. Courtney French re: FOIA Complaint Concerning the City of Wilmington on 12/3/2018

Petitioner alleged that several estimated charges for production of the requested records were unreasonable under FOIA.

DECIDED: The City provided sufficient evidence that they had complied with FOIA's requirements to support their final estimated fees.

Attorney General Opinion No. 18-IB54

Issued to Johann Gaebler re: FOIA Complaint Concerning the Delaware Criminal Justice Information System on 12/5/2018

Petitioner alleged that DELJIS improperly withheld information from a database. DECIDED: As Petitioner is not a citizen of Delaware, DELJIS properly asserted in the denial that it was not required to fulfill the request.

Attorney General Opinion No. 19-IB01

Issued to Mr. Christopher Coggins re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 1/23/2019

The petitioner requested records regarding a site which was the subject of an environmental enforcement action. DNREC denied the request pursuant to pending or potential litigation exemption, and the petitioner alleged that DNREC improperly withheld records under this exemption.

DECIDED: No FOIA violation was found, as the requested records related to the subject matter of pending litigation between the petitioner's clients and DNREC.

Attorney General Opinion No. 19-IB02

Issued to Ms. Christina Jedra re: FOIA Complaint Concerning the City of Wilmington on 2/11/2019

The Petitioner alleged that the City of Wilmington's decision to use an outside vendor to perform the search and production of emails was unreasonable and that the fee estimate was unreasonably high.

DECIDED: No FOIA violation was found. The City presented affidavits supporting that the use of a vendor was reasonably required. Also, it was determined that the City adequately demonstrated that the outside vendor's fee estimate did not violate FOIA.

Attorney General Opinion No. 19-IB03

Issued to Mr. Mustafa Musawwir re: FOIA Complaint Concerning the Division of Corporations on 2/11/2019

The Petitioner alleged the Division of Corporation's fees for certain business records violated FOIA by exceeding the fee scale outlined in FOIA.

DECIDED: No FOIA violation was found. A separate statute establishes the fees for the requested records and specifically exempts them from FOIA's fee provisions.

Attorney General Opinion No. 19-IB04

Issued to Ms. Jan Konesey and Mr. Sam Cooper re: FOIA Complaint Concerning the City of Rehoboth Beach on 2/11/2019

The Petitioners alleged that a wastewater working group established by the City of Rehoboth was meeting privately and without public notice.

DECIDED: The working group is a public body subject to the open meetings provisions of FOIA and therefore violated FOIA. This Office recommended the group meet publicly in accordance with FOIA's open meeting requirements going forward and make existing minutes (if any) of past meetings available to the public. If meetings minutes do not exist but the meeting was recorded, the City is recommended to recreate those minutes and make them publicly available.

Attorney General Opinion No. 19-IB05

Issued to Mr. Christopher Coggins re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 2/12/2019

Petitioner alleged that 1) DNREC improperly withheld records, as he did not state a request for records; and 2) DNREC improperly withheld records which were confidential legal advice.

DECIDED: No FOIA violation was found. FOIA does not require a public body to answer questions or compile information, and the requests for attorney client privileged and work product materials was appropriately denied.

Attorney General Opinion No. 19-IB06

Issued to Mr. Craig O'Donnell re: FOIA Complaint Concerning the New Castle County Police Department on 2/13/2019

This Office was asked to determine whether the New Castle County Police Department provided a timely response to the Petitioner's FOIA request and whether the Police Department had provided sufficient assistance to the Petitioner in fulfilling their request.

DECIDED: No FOIA violation was found. NCCPD provided a response within the timeframes permitted by FOIA. There was no evidence that the Petitioner had requested further assistance or that the Police Department needed to clarify the request to locate the documents.

Attorney General Opinion No. 19-IB07

Issued to Mr. Doug Spelman and Mr. John Hurlock re: FOIA Complaint Concerning the City of Lewes on 2/15/2019

The Petitioner alleged that the public had insufficient notice about a zoning classification under consideration. This Office was asked to determine: 1) whether the agenda for the January 7, 2019 executive session adequately provided notice to the public; 2) whether the executive session was held for a proper purpose under FOIA; and 3) whether the agenda for the open session items adequately provided notice to the public of the matters for discussion.

DECIDED: The City has not violated FOIA by citing to its reason for the executive session in the January 7, 2019 meeting agenda. However, it was determined that the City violated FOIA by providing an insufficient agenda of the open session items and by failing to meet its burden to show that the executive session was for a proper purpose under 29 Del. C. § 10004(b)(4).

Attorney General Opinion No. 19-IB08

Issued to Mr. Richard Abbott re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 2/18/2019

This Office was asked to determine whether DNREC properly applied the pending or potential litigation exemption in response to a request for records.

DECIDED: The records request should not have been denied in its entirety. Insofar as DNREC may have withheld any records which do not pertain to the pending case that were not otherwise exempt, DNREC would be in violation of FOIA.

Attorney General Opinion No. 19-IB09

Issued to Mr. Sam Cooper re: FOIA Complaint Concerning the City of Rehoboth Beach on 2/22/2019

The primary issues were whether the Rehoboth Beach City Council properly discussed an attorney-client memorandum prepared by their attorney in executive session; whether the Council properly discussed the sale of wastewater treatment plant in executive session; and whether the City's Personnel Committee violated FOIA by failing to follow open meeting requirements for its January 3, 2019 meeting.

DECIDED: Discussion of an attorney-client privileged memorandum is not a proper purpose for executive session under FOIA. Because this portion of the executive session discussions did not otherwise meet the requirements of 29 *Del. C.* 10004(b)(4), the executive session violated FOIA. The discussion of the sale of the treatment plant property was appropriate for executive session under 29 *Del. C.* 10004(b)(2).

FURTHER DECIDED: The City's Personnel Committee is a public body subject to FOIA and therefore violated FOIA by failing to comply with the open meeting requirements for its January 3, 2019 meeting. As remediation, this Office recommends that any existing meeting minutes are made available in compliance with FOIA. If the meeting was recorded or otherwise preserved, this Office recommends that the City recreate meeting minutes from those records. If neither minutes nor records preserving the substance of the meeting exist, this Office need not recommend any further remediation, as the City has stated in its Response that it intends to operate the Personnel Committee in accordance with FOIA's open meeting requirements in the future.

Attorney General Opinion No. 19-IB10

Issued to Mr. Christopher Coggins re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 2/22/2019

The petitioner requested records regarding an individual and the individual's company. DNREC denied the request pursuant to the pending or potential litigation exemption, and the petitioner alleged that DNREC improperly withheld records under this exemption.

DECIDED: No FOIA violation was found, as DNREC asserted the requested records were related to an expert witness in pending litigation between the petitioner's clients and DNREC.

Attorney General Opinion No. 19-IB11

Issued to Mr. Billy Bonbright re: FOIA Complaint Concerning the Town of South Bethany on 2/25/2019

Several violations were alleged with respect to two executive sessions and a vote, including: 1) whether the Town of South Bethany improperly cited potential litigation as justification for two executive sessions; 2) whether the review of non-public records in executive session was appropriate, and 3) whether a vote after one executive session had sufficiently stated the subject matter.

DECIDED: The discussion of two matters under the "pending and potential litigation" exemption at the November 8, 2018 executive session violated FOIA, as there was insufficient objective indicia of a tangible threat of litigation in either matter. With regard to the first matter, this Office recommended an open session be scheduled for discussion. This Office determined that the second matter was properly discussed in executive session, though not under the justification cited, because it involved personnel actions. No remediation for that portion of the executive session was recommended. An executive session held on January 29, 2019 was justified by the evidence of potential for litigation. The discussion of certain non-public records was found appropriate under 29 *Del. C.* 10004(b)(6).

Attorney General Opinion No. 19-IB12

Issued to Ms. Christina Jedra re: FOIA Complaint Concerning the Office of the Governor on 2/27/2019

This Office was asked to determine whether OGov properly applied executive privilege when redacting records.

DECIDED: No FOIA violation was found. Consistent with existing precedent, this Office accepted the written submission indicating that OGov applied the privilege with a clear understanding when it performed the review and the affidavit of legal counsel that the redactions were reviewed and appropriate.

Attorney General Opinion No. 19-IB13

Issued to Mr. Paul Enterline re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 3/1/2019

This Office was asked to determine whether DNREC properly applied the pending or potential litigation exemption in response to a request for records.

DECIDED: As the only litigation cited was between two private parties and the requestor sought them only for litigation against a private party, DNREC violated FOIA by citing the exemption for pending or potential litigation. This Office recommended that DNREC produce the remaining responsive records, subject to any other exemptions permitted by FOIA.

Attorney General Opinion No. 19-IB14

Issued to Mr. Craig O'Donnell re: FOIA Complaint Concerning the Town of Dewey Beach on 3/11/2019

The primary issues for determination were whether the fees listed in 29 Del. C. 10003(m) were the maximum permissible copying charges, and if not, whether the Town's new copying fees were reasonable.

DECIDED: 29 Del. C. § 10003(m) only requires a municipality to use the fees listed therein unless a municipality has adopted different fees in its municipal code. This Office no longer has the authority under the FOIA statute to conduct an independent review of the reasonableness of those fees that a municipality adopted in its code.

Attorney General Opinion No. 19-IB15

Issued to Mr. Peter Kostyshyn re: FOIA Complaint Concerning the City of Wilmington on 3/20/2019

Petitioner alleged that they did not receive 20 free pages when the City of Wilmington responded to their FOIA request with an estimate of the cost to fulfill it.

DECIDED: No FOIA violation was found. The City properly provided an estimate to fulfill the entire request, and that estimate allowed 20 free pages.

Opinion No. 19-IB16

Issued to Mr. Doug Spelman and Mr. John Hurlock re: FOIA Complaint Concerning the City of Lewes on 3/22/2019

This Office was asked to determine whether the City of Lewes improperly cited to two exemptions for executive session: 1) documents protected by the FOIA records provisions; and 2) potential litigation. The City responded that the agenda item was sufficient, but the issue was moot as no action was taken. The City further argued the executive session was proper because they discussed documents subject to attorney-client privilege and protected as attorney work product.

DECIDED: This Office found that the City violated FOIA because a discussion of attorney-client privileged or work production materials was an insufficient reason for the executive session. The City must meet the standards of 29 *Del. C.* 10004(b)(4). However, because the FOIA petition constituted pending litigation and the discussions related thereto would adversely affect the City's litigation position, this Office found that executive session was proper for that purpose. Thus, the citation to the other improper purpose was determined to be a technical violation for which no remediation was recommended.

Attorney General Opinion No. 19-IB17

Issued to Mr. Jeffrey Smith re: FOIA Complaint Concerning the Town of Dewey Beach on 3/25/2019

Petitioner made a number of allegations that Dewey Beach violated the open meetings provisions of FOIA with regard to the Mayor's reference to a FOIA request Petitioner filed, raising the following three questions for consideration: 1) whether the individuals asked by the Mayor to "look into that FOIA" violated open meeting requirements; 2) whether the agenda provided sufficient notice of the Mayor's announcement with respect to this request; and 3) whether the Town Council improperly discussed the FOIA matter in executive session.

DECIDED: No FOIA violation was found. This Office found no evidence that the individuals asked to look into the FOIA request met or planned to meet. In addition, this Office further found that this topic was not a "major issue to be discussed" that must be included on an agenda because Council did not consider or discuss the substance of this topic and that a preliminary request for research or review of a matter of public business does not constitute a "major issue to be discussed." Also, the Town's attorney confirmed that the FOIA matter was not discussed in the executive session.

Attorney General Opinion No. 19-IB18

Issued to Mr. Christopher Teacher re: FOIA Complaint Concerning the Delaware Department of Correction on 4/2/2019

Petitioner alleged that DOC improperly denied their request for presentence investigations of sixteen inmates who had been executed by the State of Delaware. DOC responded that investigatory files are exempt from FOIA and that another statute specifically prohibited releasing the records to anyone but specified agencies without a qualifying order.

DECIDED: No FOIA violation was found as the records are exempt from the definition of public record as investigatory files and as records statutorily prohibited from public disclosure.

Attorney General Opinion No. 19-IB19

Issued to FOIA Opinion Letter to Ms. Fleur McKendell re: FOIA Complaint Concerning the Delaware Department of Safety and Homeland Security on 4/3/2019

Petitioner alleged that the Delaware Department of Safety and Homeland Security did not respond to their FOIA request within 15 business days in the manner required by FOIA.

DECIDED: As DSHS provided a response, the matter was found to be moot.

Attorney General Opinion No. 19-IB20

FOIA Opinion Letter to Mr. John Wells re: FOIA Complaint Concerning the Delaware Auditor of Accounts on 4/15/2019

Petitioner alleged that the Delaware Auditor of Accounts did not respond to their FOIA request within 15 business days in the manner required by FOIA.

DECIDED: As AOA provided a response, the matter was found to be moot.

Attorney General Opinion No. 19-IB21

Issued to Mr. Mark Betchkal re: FOIA Complaint Concerning the City of Rehoboth Beach on 4/23/2019

This Office was asked to determine whether the City of Rehoboth appropriately denied a records request for the agenda and minutes for two City meetings.

DECIDED: No FOIA violation was found. The meeting attendees did not constitute a meeting of a public body nor did the meetings include a quorum of any existing public body. Thus, the City properly denied the request for records that did not exist, nor were these records required by FOIA to be created.

Attorney General Opinion No. 19-IB22

Issued to Ms. Jeanne Kuang re: FOIA Complaint Concerning the Delaware Department of Transportation on 4/26/2019

Petitioner challenged the Delaware Department of Transportation's denial of their request for data from the Crash Analysis Reporting System (CARS) database.

DECIDED: No FOIA violation was found. This Office found that the data was exempt from FOIA under 29 *Del. C.* 10002(1)(6) and 10002(1)(3).

Attorney General Opinion No. 19-IB23

Issued to FOIA Opinion Letter to Ms. Christina Jedra re: FOIA Complaint Concerning the Delaware Department of Correction on 4/26/2019

This Office was asked to determine whether the Delaware Department of Correction improperly denied Petitioner's request for quality assurance audits conducted by DOC.

DECIDED: No FOIA violation was found, as the records were statutorily prohibited from disclosure under 29 *Del. C.* 10002(1)(6). The quality assurance audits in DOC's possession constitute peer review materials, which are statutorily exempt from FOIA under 24 *Del. C.* § 1768 , and DOC attested that it did not create its own quality assurance audits.

Attorney General Opinion No. 19-IB24

Issued to FOIA Opinion Letter to Ms. Christina Jedra re: FOIA Complaint Concerning the Delaware Department of State on 4/29/2019

This Office was asked to determine whether the Department of State appropriately denied a request for an unredacted copy of video showing an inmate's death that was previously shown in a public disciplinary hearing of a nurse.

DECIDED: The Department of State's denial violated FOIA because the privacy rights invoked by the Department are not entitled to protection under 29 *Del. C.* 10002(1)(6) and 29 *Del. C.* 10002(1)4).

Attorney General Opinion No. 19-IB25

Issued to Ms. Christina Jedra re: FOIA Complaint Concerning the Delaware Department of Correction on 5/10/2019

Petitioner challenged the timeliness of the Department of Correction's response to its FOIA request for certain emails, alleging that DOC's good faith estimate and cost estimate for completing the request were not provided within fifteen business days.

DECIDED: As Petitioner received a response to her FOIA request since filing the Petition, the Petitioner's allegations were determined to be moot.

Attorney General Opinion No. 19-IB26

Issued to Ms. Darya Marchenkova re: FOIA Complaint Concerning the Delaware Department of Correction on 5/28/2019

Petitioner alleged that the Department of Correction improperly denied her request for information on pre-trial detainees.

DECIDED: No FOIA violation was found. The information requested is exempt from FOIA under 29 Del. C. § 10002(l)(6) which exempts any records prohibited from disclosure by statute. In these circumstances, it was determined that 11 Del. C. § 4322(a) and 11 Del. C. § 8513(d) precluded disclosure of the requested records.

Attorney General Opinion No. 19-IB27

Issued to Mr. John Wells re: FOIA Complaint Concerning the Delaware Auditor of Accounts on 5/29/2019

Petitioner alleged that a 2019 report to be provided on a website by the Auditor of Accounts when complete would not be responsive to his request for records because the Petitioner did not believe that this 2019 report would meet certain statutory parameters. The Petitioner's allegation was based on his review of the 2018 report that the Auditor of Accounts cited.

DECIDED: No FOIA violation was found. The Auditor of Accounts denies having any other responsive records, and this Office does not have the authority to determine whether any law other than FOIA has been violated through the FOIA petition process.

Attorney General Opinion No. 19-IB28

Issued to Ms. Sarah Mueller re: FOIA Complaint Concerning the City of Wilmington on 6/5/2019

Petitioner alleged that the City of Wilmington delayed more than five months in providing responsive records to her FOIA request.

DECIDED: The City has since provided a response to the petitioner's narrowed request, mooting the petition.

Attorney General Opinion No. 19-IB29

Issued to Mr. Ray Tomasetti re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 6/7/2019

Petitioner alleged that DNREC improperly denied his clients' records request pursuant to the pending or potential litigation exemption.

DECIDED: Because DNREC alleges the potential litigation would be between the two private parties and not against the public body from which records are sought or a closely affiliated person or entity, it was determined that denial of the records pursuant to the pending or potential litigation exemption violates FOIA.

Attorney General Opinion No. 19-IB30

Issued to Mr. Kenneth Kristl re: FOIA Complaint Concerning the Delaware Department of Agriculture on 6/20/2019

Petitioner alleged that the Delaware Department of Agriculture ("DDA") violated FOIA by not providing reasons for redacting certain information in the requested records in the response to DDA's records request.

DECIDED: DDA failed to include the reasons for redacting portions of the provided records in its response as required by FOIA. Because DDA had since provided those reasons, no additional measures were recommended, but DDA was respectfully cautioned to state its reasons for any redactions in future responses.

Attorney General Opinion No. 19-IB31

Issued to Mr. Gary Glass re: FOIA Complaint Concerning the City of Rehoboth Beach on 6/24/2019

Petitioner alleged that the City of Rehoboth violated open meetings requirements with regard to a City Commissioners' meeting. This Office addressed the following three issues: 1) whether the executive session was for an improper purpose, in light of your belief that the City planned to vote on a possible sale immediately following the executive session; 2) whether the open session item, described on the agenda as "discussion and consideration of vote on possible sale of City property," gave sufficient notice to the public whether the executive session was for an improper purpose, in light of your belief that the City planned to vote on a possible sale immediately following the executive session; and 3) whether the agenda required an explanation of why a "Special Meeting" was necessary.

DECIDED: No FOIA violation was found. First, the executive session was found to be held for a proper purpose under 29 *Del. C.* 10004(b)(2). Second, an open session item following a proper executive session under 29 *Del. C.* 10004(b)(2) is not required to identify the property specifically. Third, this Office found that the meeting was not a special meeting as defined by FOIA, so no additional explanation was required in the agenda.

Attorney General Opinion No. 19-IB32

Issued to Dr. Edward Montz re: FOIA Complaint Concerning the Delaware Department of Health and Social Services on 6/24/2019

Petitioner alleged that the Delaware Department of Health and Social Services improperly withheld records responsive to his request related to an infectious disease cluster at a health facility. Petitioner further alleged that only one division of DHSS, the Division of Public Health, responded to his request.

DECIDED: No FOIA violation was found. The records are exempt from FOIA under 29 *Del. C.* § 10002(1)(1), which exempts medical information that would constitute an invasion of privacy, and under 29 *Del. C.* § 10002(1)(6), which exempts information which is protected by other statutes, including those federal and state statutes which prohibit or restrict the release of health information.

Attorney General Opinion No. 19-IB33

Issued to Mr. Peter Kostyshyn re: FOIA Complaint Concerning the Delaware Department of Insurance on 7/1/2019

Petitioner alleged that the Delaware Department of Insurance improperly responded to his request by not returning a time-stamped copy of his request and the envelope it was mailed in and by asking the Petitioner for clarification regarding their remaining requests.

DECIDED: No FOIA violation was found. DOI asserted that it already provided a copy of the request and sent a copy in response to the Petition. FOIA requires a requester to provide sufficient information to enable a public body to locate the records with reasonable effort, and this Office determined that the remaining requests did not meet this standard. Thus, DOI did not violate FOIA by seeking clarification.

Attorney General Opinion No. 19-IB34

FOIA Opinion Letter to Mr. Peter Kostyshyn re: FOIA Complaint Concerning the Delaware Office of Defense Services on 7/1/2019

Petitioner alleged that the Office of Defense Services did not provide copies of five FOIA requests Petitioner filed, included duplicative charges in the estimated fees to fulfill the request, and did not respond to voicemails seeking assistance.

DECIDED: No FOIA violation found. FOIA permits a public body to withhold records until payment is received. ODS provided a sufficient justification of the estimated charges and evidence of responding to the Petitioner's requests for assistance.

Attorney General Opinion No. 19-IB35

Issued to Mr. Peter Kostyshyn re: FOIA Complaint Concerning the Delaware Auditor of Accounts on 7/2/2019

Petitioner alleged that the Office of the Auditor of Accounts' response to their FOIA request did not provide information on office closures by the current Auditor and did not enclose the policy related to timekeeping and office closures that AOA's response said was enclosed.

DECIDED: No FOIA violation found. AOA demonstrated it previously provided the requested policy and attested that it had no other responsive documents.

Attorney General Opinion No. 19-IB36

Issued to Ms. Sarah Gamard re: FOIA Complaint Concerning the Delaware Auditor of Accounts on 7/5/2019

Petitioner alleged the Auditor of Accounts improperly relied on the investigatory files exemption in redacting a log of complaints.

DECIDED: No FOIA violation was found. The functions of the AOA are to ensure public funds are legally used and responsive records are thus “compiled for civil or criminal law-enforcement purposes” and exempt from FOIA.

Attorney General Opinion No. 19-IB37

Issued to Mr. Jeffrey Clouser re: FOIA Complaint Concerning the Delaware State Police on 7/5/2019

Petitioner alleged that the Delaware State Police did not timely respond to their FOIA request for an unredacted copy of an Initial Crime Report.

DECIDED: DSP was unable to prove that it complied with FOIA’s deadline for responding to the Petitioner’s request. As it provided a response during the petition process, no remediation was recommended but DSP was encouraged to more carefully track requests.

Attorney General Opinion No. 19-IB38

Issued to Mr. Peter Kostyshyn re: FOIA Complaint Concerning the Town of Bellefonte on 7/8/2019

This Office was asked to address the following issues: 1) whether the Town of Bellefonte committed a FOIA violation by not providing records requested; 2) whether the Petitioner’s request for resulting records “it generates” was sufficiently specific under FOIA; and 3) whether the Town’s failure to send its response to the correct address was a violation of FOIA

DECIDED: No FOIA violations were found. The Town demonstrated that it did not have certain records requested and is not required to create them. The Town is permitted to request more specificity for requests that are vague. The addressing error was unintentional and not a violation.

Attorney General Opinion No. 19-IB39

Issued to Mr. Peter Kostyshyn re: FOIA Complaint Concerning the Delaware Department of Insurance on 7/15/2019

Petitioner alleged DOI's interim response advising that additional time was needed for legal review violated FOIA.

DECIDED: No FOIA violation found. FOIA expressly permits a public body to take additional time to respond to a request if legal advice is needed so long as a good faith estimate of the time needed is provided.

Attorney General Opinion No. 19-IB40

Issued to Mr. Peter Kostyshyn re: FOIA Complaint Concerning the Delaware Department of Elections on 7/15/2019

Petitioner alleged that an incorrect date on the Department of Elections' response to their request indicated a greater failure to comply with FOIA.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 19-IB41

Issued to Mr. Peter Kostyshyn re: FOIA Complaint Concerning the Delaware Department of Elections on 7/18/2019

Petitioner alleged that the Department of Elections improperly withheld 48 pages of records listing campaign donors of former Wilmington mayor and disputed the Department's claim that it had no other responsive records

DECIDED: No FOIA violation was found. The records sought were more than 20 years old and the Department's policy only called for 22 months' retention.

Attorney General Opinion No. 19-IB42

Issued to Mr. Peter Kostyshyn re: FOIA Complaint Concerning New Castle County on 7/18/2019

This Office was asked to address 1) whether New Castle County was required to provide time-stamped copies of the Petitioner's requests, the envelopes they were mailed in, and all records generated as a result of the request; and 2) whether the County properly asserted that the Petitioner's requests were too vague to require a response under FOIA.

DECIDED: The County violated FOIA by not specifically responding to the request for time-stamped copies of the requests and this Office recommended it make a reasonable search for responsive records and provide the Petitioner with a supplemental response. No other FOIA violation was found.

Attorney General Opinion No. 19-IB43

Issued to Mr. David Moskowitz re: FOIA Complaint Concerning The Town of Dewey Beach on 7/22/2019

Petitioner alleged that Dewey Beach provided records that were not responsive to their request for schedules of two Town employees.

DECIDED: No FOIA violation was found. The Petitioner indicated during the petition process that they were seeking a level of detail that was not contained in the original request to the Town, and the Town expressed a willingness to provide additional public records in response to a more detailed request.

Attorney General Opinion No. 19-IB44

Issued to Mr. Craig O'Donnell re: FOIA Complaint Concerning The Delaware State Police on 8/12/2019

This Office was asked to determine whether the Delaware State Police appropriately denied a request for raw data regarding traffic stops.

DECIDED: No FOIA violation was found. The requested information is exempt as investigatory files under 29 *Del. C.* § 10002(1)(3) and 12 *Del. C.* §313. Transferring the information from these reports into a digital format does not eliminate the exemptions for such information.

Attorney General Opinion No. 19-IB45

Issued to Mr. Shawn Tucker re: FOIA Complaint Concerning The City of Lewes on 8/26/2019

The City of Lewes responded to a FOIA request and provided records but refused to certify to the requestor that all records responsive to the request had been provided and refused to produce a duplicate copy of an email. This Office was asked to determine whether the City's response was appropriate under FOIA.

DECIDED: No FOIA violation was found. The FOIA statute does not require a public body granting access to records to certify that all responsive public documents have been provided to the requesting party, nor does it require that a public body produce multiple copies of identical public records.

Attorney General Opinion No. 19-IB46

Issued to Mr. Randall Chase re: FOIA Complaint Concerning the Delaware Auditor of Accounts on 8/27/2019

Petitioner alleged that the Auditor of Accounts must possess, but did not disclose, certain requested records in response to his request for communications regarding Odyssey Charter School.

DECIDED: No FOIA violation was found. When a public body provides an affidavit, under penalty of perjury, supporting its determination whether public records exist, this Office accepts the public body's sworn representations in reviewing this determination.

Attorney General Opinion No. 19-IB47

Issued to FOIA Opinion Letter to Mr. Dan Kramer re: FOIA Complaint Concerning Sussex County on 9/4/2019

This Office was asked to determine whether Sussex County Council violated FOIA by discussing potential purchases of development rights in executive session.

DECIDED: No FOIA violation was found. The purchase of an essential property right incident to the land is effectively an acquisition of land, which FOIA permits for discussion in executive session.

Attorney General Opinion No. 19-IB48

Issued to Ms. Kristin Gibbons re: FOIA Complaint Concerning Sussex Technical School District on 9/9/2019

Petitioner alleged that the Board of Education of the Sussex Vocational Technical School District violated FOIA as follows: 1) improperly discussing and voting at its May 13, 2019 meeting to end the hospitality program through a phase-out; 2) holding executive sessions at the outset of every regular meeting without proper public notice; and 3) improperly deciding to terminate the hospitality program at the August 12, 2019 meeting effective immediately without any public notice.

DECIDED: The Board violated FOIA at its May 13, 2019 meeting by voting to add the discussion and vote regarding the phase-out of the hospitality program at the outset of the meeting. When an agenda has not been amended at least six hours in advance of the meeting, FOIA only permits a new item be discussed if it arises out of a natural evolution of a publicly-noticed item on the agenda. A public body may not simply vote to adopt a new item on the agenda at the beginning of its meeting with no prior public notice.

No FOIA violation was found with respect to the August 12, 2019 meeting. No specific determination was made regarding the use of executive sessions, but this Office cautioned the Board to review its use of executive sessions.

Attorney General Opinion No. 19-IB49

Issued to Messrs. Raynor Johnson and John Seitz re: FOIA Complaint Concerning The Department of State 9/9/2019

Petitioners alleged that the Department of State (“DOS”) violated FOIA by not providing the requested incorporation records in response to a request.

DECIDED: No FOIA violation was found. This Office accepted DOS’s sworn statement that no information exists in a document format; instead, the only available documents are on a database application screen. A Delaware statute does not require the Division of Corporations to produce any bulk data or digital copies of records, only those records produced by photocopying or electronic image copying. In addition, the records sought are exempt from FOIA due to the Petitioners’ pending litigation regarding their incorporation.

Attorney General Opinion No. 19-IB50

Issued to FOIA Opinion Letter to Mr. Walter Gilefski re: FOIA Complaint Concerning The Sussex County Vocational Technical School District on 9/16/2019

Petitioner alleged that the Sussex Technical School District failed to include a consultant's contract on the publicly posted agenda for a meeting at which it discussed and voted to approve the contract.

DECIDED: The District violated FOIA by not adding the discussion item and vote to the agenda until the meeting itself, as the topic did not naturally evolve out of discussions related to a publicly-noticed item on the agenda. When an agenda has not been properly amended at least six hours in advance of the meeting, FOIA only permits a new item be discussed if it arises out of a natural evolution of a publicly-noticed item on the agenda. A public body may not simply vote to adopt a new item on the agenda at the beginning of its meeting with no prior public notice.

Attorney General Opinion No. 19-IB51

Issued to Mr. Kevin Madden re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 9/16/2019

Petitioner alleged that DNREC violated FOIA by requesting payment of its estimated fee in advance of a search and not providing sufficient assistance to help Petitioner reduce the costs or advising Petitioner of publicly available materials.

DECIDED: No FOIA violation was found. Public bodies are permitted by the FOIA statute to require payment in advance. The factual record does not support the claims that DNREC provided inadequate assistance.

Attorney General Opinion No. 19-IB52

Issued to Mr. Kevin Madden re: FOIA Complaint Concerning the Town of Dewey Beach on 9/17/2019

Petitioner alleged Dewey Beach violated FOIA in two ways: 1) failing to post the matter of Petitioner's position on the agenda; and 2) failing to reserve this personnel discussion for executive session.

DECIDED: No FOIA violation was found. The record demonstrated that no substantive discussion was held and FOIA does not prohibit discussing personnel topics in open session.

Attorney General Opinion No. 19-IB53

Issued to Mr. Craig O'Donnell re: FOIA Complaint Concerning The Department of Safety and Homeland Security 9/17/2019

Petitioner alleged that DSP violated FOIA in multiple ways: 1) failed to respond to his request in a timely manner after notifying Petitioner an extension was needed; 2) did not contact DSP for clarification; 3) did not provide a good faith estimate; 4) did not claim providing certain records would constitute creation of records, as DSHS had in the past; 5) failed to provide the records in the format requested; 6) failed to advise Petitioner the records would be in a different format; 7) did not explain by separate letter how the records provided related to your request; 8) did not provide responsive records; and 9) did not respond to your question about the request 24 hours.

DECIDED: No FOIA violation was found. As DSP provided a response, the allegations regarding timeliness were moot, though DSHS was recommended to provide more timely correspondence in the future. FOIA does not prohibit the disclosure of records but merely gives the public body the grounds to withhold records exempt from the definition of "public records." DSP's counsel represented that DSP produced the files responsive to the request in the only format available to DSP and "containing existing fields," and in accordance with past practice, our Office accepted this representation regarding the existence of records. FOIA does not require a public body to convert its existing files into other formats. FOIA does not require a public body to explain why the provided records are responsive, send a separate cover letter, or respond to emails received in its normal course of business within certain timeframes.

Attorney General Opinion No. 19-IB54

Issued to Mr. Keith Steck re: FOIA Complaint Concerning Sussex County on 9/26/2019

Petitioner alleged that Sussex County's Buffers and Wetlands Working Group was a public body and was required to meet the opening meeting requirements. He alleged the Working Group violated the open meeting requirements by posting the notices of its meetings at an inappropriate location, failing to include the votes to approve draft minutes in its agendas, and improperly excluding a meaningful recitation of the meetings' discussions and the affiliations or roles of the attendees in the minutes.

DECIDED: Although this Office found that the Working Group was a public body, no FOIA violation was found.

Attorney General Opinion No. 19-IB55

Issued to Mr. Tony Rapposelli re: FOIA Complaint Concerning The Delaware Interscholastic Athletic Association on 9/30/2019

Petitioner alleged that a DIAA Sportsmanship Committee agenda item, “Sportsmanship Complaint-Parent” was not sufficient to notify the public that a complaint regarding the Concord High School lacrosse team would be discussed.

DECIDED: The Committee violated FOIA by not providing sufficient notice to the public of the subject to be discussed. However, no further remediation was recommended.

Attorney General Opinion No. 19-IB56

Issued to Mr. Randall Chase re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 10/1/2019

Petitioner alleged that DNREC improperly withheld documents received from the US Air Force, claiming such records fell under the exemptions for investigatory files and the common law right of privacy.

DECIDED: This Office determined that DNREC did not meet its factual burden demonstrating that the investigatory file exemption is applicable to the records requested and that DNREC violated FOIA by declining to produce the records on this basis. This Office recommended DNREC, within fifteen business days of the date of this Opinion, produce a supplemental response to Petitioner’s FOIA request.

Attorney General Opinion No. 19-IB57

Issued to Mr. Daniel Kramer re: FOIA Complaint Concerning Sussex County Council on 10/24/2019

Petitioner alleged that Sussex County Council did not notice a meeting a full seven days in advance because the notice was posted after business hours one week before the meeting and further alleged that the Council did not provide a reason for amendments to the agenda.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 19-IB58

Issued to Mr. Dion Wilson re: FOIA Complaint Concerning the City of Wilmington on 10/24/2019

Petitioner alleged that the Wilmington City Council violated FOIA by prohibiting him from providing public comment at a public meeting. The City argued that the public comment period, which is a separate session preceding the Council meeting, is not subject to FOIA's open meetings provisions and further argued that Petitioner's conduct justified excluding him from participation.

DECIDED: The public comment period is subject to FOIA's open meeting requirements, and it was determined that the City violated FOIA by barring the petitioner from speaking in these circumstances.

Attorney General Opinion No. 19-IB59

Issued to Mr. Robert Lynch re: FOIA Complaint Concerning Sussex County on 10/28/2019

Petitioner alleged spouse's FOIA requests were improperly denied.

DECIDED: This Office declined to address the merits of the petition; only the individual whose request was denied has standing to file a petition to challenge that denial.

Attorney General Opinion No. 19-IB60

Issued to Ms. Holly Kirkland re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 10/28/2019

Petitioner alleged that DNREC's FOIA Coordinator violated FOIA by failing to provide adequate assistance by not responding to questions emailed on September 10, 2019 email and that the cost estimate was flawed because DNREC could use lower-paid employees to perform the search of electronic records; the nature of the work required was not included; and DNREC did not provide proof that it excluded fees necessary to perform a legal review of the responsive records.

DECIDED: No FOIA violation was found. DNREC's failure to respond to the petitioner's inquiries in these circumstances do not rise to the level of a FOIA violation. Based upon DNREC's sworn affidavit and the representations made in response, this Office did not find a FOIA violation in DNREC's preparation of this cost estimate.

Attorney General Opinion No. 19-IB61

Issued to Mr. Xerxes Wilson re: FOIA Complaint Concerning The Delaware Department of Safety and Homeland Security on 11/5/2019

Petitioner alleged that DSHS improperly denied their request for documents regarding expenditures of public funds on Newport police officers by citing the exemptions for investigatory files, criminal history records, and records pertaining to pending or potential litigation.

DECIDED: Based on the record presented to this Office, DSHS did not meet its burden to justify the denial of those records. This Office recommended that DSHS respond to the request in compliance with FOIA within 15 business days of this Opinion.

Attorney General Opinion No. 19-IB62

Issued to Mr. Xerxes Wilson re: FOIA Complaint Concerning The City of Wilmington on 11/6/2019

Petitioner alleged that the City of Wilmington improperly denied their request for records of activations of the City's gunshot detection system, ShotSpotter, by citing the exemptions for investigatory and intelligence files when the City had previously provided them and on occasion publicizes the information. The City responded that they began using such records for investigative purposes in April 2017.

DECIDED: No FOIA violation was found for asserting the investigatory file exemption for the requested records after April 2017, but this Office recommended the City review its records and provide a supplemental response for records generated before that time and for records used to publicize sets of the data requested.

Attorney General Opinion No. 19-IB63

19-IB63 11/8/2019 FOIA Opinion Letter to Mr. John Young re: FOIA Complaints Concerning The Christina School District

Petitioner alleged that the Christina School District Board's October 8, 2019 vote by secret ballot to fill a vacancy violated FOIA's open meeting requirements and that the Board must have improperly made the decision to conduct the vote by that method in executive session.

DECIDED: This Office determined that there were two violations of FOIA. A secret ballot violates FOIA's open meeting requirements. This Office also found that the Board provided no factual allegations upon which to determine whether a discussion of voting procedures actually occurred during the executive session or if the executive session was held for a proper purpose. Thus, the Board failed to meet its burden of justifying the October 8, 2019 executive session.

APPENDIX B

Sample FOIA Request Tracking Sheet

