



FREEDOM OF INFORMATION ACT

FOIA

29 Del. C. §§ 10001-10007

DISCLAIMERS

- The legislature specifically provided that this presentation is NOT to be construed as legal advice
- The information that follows summarizes the law
 - We cannot cover every situation
 - We cannot address fact-specific questions
- If you have a question . . .
 - Contact your legal counsel
 - Review the Department of Justice’s Policy Manual for FOIA Coordinators, which is available at:
<https://attorneygeneral.delaware.gov/executive/open-government/>

Legislative Declaration

“It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.”

29 Del. C. § 10001

Purposes of FOIA

- Promote governmental transparency and accountability
- Inform citizens
- Allow citizens to observe and monitor the performance of public officials

FOIA Manual

- Created by Department of Justice to assist FOIA Coordinators
- Last published November 14, 2019 to the Department of Justice Open Government webpage
- Intended as an “easy reference” for FOIA
- Updated biennially

Training for FOIA Coordinators

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

What This Presentation Will Cover

- FOIA Coordinators' duties and responsibilities
- Deadlines associated with requests to inspect and copy public records
- Fees that may be charged by a public body responding to a FOIA request
- FOIA Petitions to the Attorney General
- Open meetings/executive sessions
- A panel discussion with FOIA Coordinators on best practices
- Judicial and AG Opinions re: FOIA for the last two years
- Questions & answers

FOIA Coordinators

- All public bodies must designate a FOIA Coordinator and:
 - Provide the Department of Justice the FOIA Coordinator's name and contact information
 - OpenGovernment@delaware.gov
 - Identify FOIA Coordinator on the public body's website
 - If changed, inform the Department of Justice and update the public body's website within 20 working days 29 *Del. C.* § 10003(g)(1)

FOIA Coordinators

- Responsible for coordinating and processing FOIA requests
- Required to:
 - Coordinate public body's responses to FOIA requests
 - Assist requesting party in identifying records sought
 - Assist public body in locating & providing records
 - Foster cooperation with requesting party
 - Maintain a document that tracks all FOIA requests

FOIA tracking sheet must include:

- Requesting party's contact information
- Date public body received FOIA request
- Public body's response deadline
- Date of public body's response (including the reasons for an extension)
- Names, contact information & dates of correspondence of those contacted in connection with a FOIA request
- Dates of review of documents responsive to request
- Names of individuals who conducted review
- Whether documents were produced
- Amount of administrative & copying fees assessed
- Date of final disposition of FOIA request

Statute Requires Policies Governing:

- Form of FOIA requests (in person, by U.S. mail, fax, or online)
- Roles and duties of FOIA Coordinator
- How a public body should respond to:
 - a FOIA request generally
 - a FOIA request for emails
 - a FOIA request for non-custodial records

Statute Provides Policies Governing:

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

RESPONDING TO REQUESTS FOR RECORDS

FOIA Policy

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

Important Deadlines

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

29 Del. C. § 10003(h)

Additional Time

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

Requests for Emails

- FOIA requires each public body to attempt to fulfill requests using its own staff, from its own records
- Only after exhausting an internal search should an agency seek assistance from a third-party technology service provider
 - Delaware's Division of Technology and Information (DTI) may charge an hourly rate to retrieve emails

Suggested Steps to Provide Responsive Emails

- Identify employee(s) most likely to have access to the emails identified in the request
- Request that the employee(s) search for responsive documents
- If an employee cannot be identified or cannot conduct the search, work with internal IT personnel to fulfill the request
- If the public body cannot fulfill the request from internal records, contact third-party service provider to assist with the search

Denials

- Must include the reason a request (or any part thereof) is denied
- No obligation to provide an index or other listing of the records that were withheld 29 *Del. C. § 10003(h)(2)*

Permitted Fees

- The statute expressly permits a public body to charge certain kinds of fees
 - There are limits to what may be charged
 - Fees should be minimized to greatest extent possible
 - Bodies may adopt an alternative fee schedule in the Delaware Code or their county or municipal codes

29 Del. C. § 10003(m)

Photocopy Fees

- Standard copies
 - First 20 pages are FREE
 - After 20 pages, each copy is \$0.10 per sheet or \$0.20 for a double-sided sheet
- Oversized copies (greater than 11" x 17")
 - 18" x 22" - \$2.00 per sheet
 - 24" x 36" - \$3.00 per sheet
 - Larger than 24" x 36" - \$1.00 per square foot
- Color Copies
 - Additional charge of \$1.00 per sheet for standard copies
 - Additional charge of \$1.50 per sheet for larger copies

Administrative Fees

- Statute suggests that administrative fees are required, but allows agencies to adopt policies that waive the fees
- Permitted only for requests that take more than one hour of staff time to process
- A public body must attempt to minimize administrative fees and charge only those fees that are reasonably required to process the FOIA request

Administrative Fees

- May include staff time associated with processing request, including:
 - Identifying records
 - Monitoring file reviews
 - Generating computer records (whether electronic or paper)
- Must be billed per quarter hour at hourly pay grade of lowest-paid employee capable of performing the service

Administrative Fees

- Fees may not be charged for the legal review of the response
 - This Office has interpreted this provision as follows:
 - This is not limited to review by lawyers
 - With very few exceptions, any review that considers whether FOIA exemptions apply is a legal review for these purposes
 - Subject matter review is the one exception
- Fee waivers must comply with FOIA policy and be applied consistently

Other Charges

- Microfilm/microfiche
 - First 20 pages free
 - After 20 pages, \$0.15 per page
- Electronic records
 - Charges calculated by the material costs involved in generating the copies (i.e., the cost of the CD or DVD) as well as administrative fees
- Third-party custodian fees

Estimates

- “Itemized written cost estimate” for administrative fees
 - Provide to requesting party
 - List all charges expected to be incurred in retrieving such records
- Requestor may elect to proceed with, narrow, or cancel the request in response to the estimate
- Estimate must be prepared in good faith

Advance Payments

- May require payment of some or all of the estimated costs prior to providing records
- If estimate exceeds actual cost, required to refund the difference

Fees - Summary

- Ensure fee collection practices comply with the statute and any internal FOIA policy
- Ensure that fees that are estimated in good faith

**PETITIONS
TO THE
ATTORNEY GENERAL**

Petitions to the Attorney General

29 *Del. C.* § 10005: “Any citizen may petition the Attorney General to determine whether a violation of FOIA has occurred or is about to occur.”

Sample Petition

Records Request Sample

To: opengovernment@delaware.gov

Dear Delaware DOJ FOIA Coordinator,

This is my petition for a determination whether XYZ Town violated FOIA. I requested copies of the criminal investigatory records regarding XYZ Resident, who is alleged to have committed a burglary on June 1, 2019. The Town denied my request, claiming the records are exempt from FOIA as investigatory files. I believe that the denial was improper because the investigation was closed. I attached a copy of my original request and the Town's denial letter. I also attached an email I received last year advising me that the investigation is closed.

Sincerely,

Delaware Citizen

Delaware.Cit.1787@gmail.com

Sample Petition

Open Meetings Sample

To: opengovernment@delaware.gov

Dear Delaware DOJ FOIA Coordinator,

I believe that XYZ School District violated FOIA. The School Board discussed and voted on funding a new XYZ construction project costing \$10 million, but the agenda contains no notice of this topic. Copies of the agenda and the minutes are attached.

Sincerely,

Delaware Citizen

Delaware.Cit.1787@gmail.com

New DOJ Procedures

THE DOJ HAS RECENTLY ADOPTED A SET OF PROCEDURES FOR THE PETITION PROCESS

<https://attorneygeneral.delaware.gov/executive/open-government/>

- Click on: “FOIA Petition Rules of Procedure”

Petitions to the Attorney General

Overall Process

- Citizen files a petition with the DOJ FOIA Coordinator
- FOIA Office will review the petition for completeness
- In most situations, send letter to the petitioner and public body notifying the parties of the petition and stating the time in which the response from the public body will be due—six business days
- Public body prepares and sends its response to the FOIA Office
- Sends a copy to the petitioner

Petitions to the Attorney General

Overall Process (cont.)

- FOIA Office will review the submissions, request additional information if needed, and issue an opinion.
- All parties receive a copy of the opinion. Determinations issued as Attorney General Opinions posted on the Open Government website :
<https://attorneygeneral.delaware.gov/opinions/>

Petitions to the Attorney General

Time Limitations on Filing a Petition:

- Petitions alleging an improper denial of records by a State agency, department, or board: 60 days from the denial
- For all other petitions: 6 months from the date of the alleged violation

Petitions to the Attorney General

Keep in mind:

- Public bodies have the burden of justifying its denial of access to records or a decision to meet in an executive session or any failure to comply with the FOIA statute
- It is better to provide more information than not enough
- Parties are encouraged to submit affidavits of individuals who have relevant knowledge

Petitions to the Attorney General

- This is a quick process - email is the preferred method of communication
- The determination will only address allegations regarding FOIA
- The Petition and Response will be available to a requesting party in response to a FOIA request
- Parties may reach an independent resolution - notify FOIA Office in writing

**Open Meetings
and
Executive Sessions**

Overview of Open Meetings

- All meetings of a public body must be open to the public unless specifically exempted in the FOIA statute. 29 *Del. C.* § 10004(b) – (d) & (h).
- *Meeting*: 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.
- Required to provide notice and maintain minutes of all meetings. 29 *Del. C.* § 10004(e) & (f).

Meeting Notice Must Contain

Time, date and place of meeting and whether video conferencing will be used.

-29 *Del. C. § 10004(e)(2)*

Preliminary Agenda

- Must include Executive Sessions if they are to be held.
- May not include a “catch-all category” which is not permissible. See *Chemical Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10-11 (Del. Ch. May 19, 1994).

-29 *Del. C. §§ 10004(e)(2)&(e)(5)*

Executive Session

Calling an Executive Session

- Convene an open meeting
- Motion stating the reason for executive session
- Take minutes and maintain them separately from open session minutes.
- Limit discussion to the FOIA acceptable reason
- No voting in executive session: Even if the body may enter executive session, *all* votes must be conducted during open session. *See Del. Op. Att’y Gen. 05-IB12 and Del. Op. Att’y Gen. 18-IB37.*

Executive Session -- Reasons

- An individual citizen's qualifications to hold a job or pursue training (Applies generally only to boards with statutory authority to hire their own employees. Does not apply to any board when discussing applications.) 29 Del. C. § 10004(b)(1)
- Preliminary discussions on site acquisitions for any publicly funded capital improvement or sales/leases of real property. 29 Del. C. § 10004(b)(2)
- Law enforcement agency's efforts to collect information leading to criminal apprehension. 29 Del. C. § 10004(b)(3)
- Discussions of identifiable, lawful, charitable contributors when anonymity has been requested. 29 Del. C. § 10004(b)(5)
- Student disciplinary cases, unless open meeting requested. 29 Del. C. § 10004(b)(7)
- Employee disciplinary cases or dismissal cases, *unless the individual requests that it be open.* 29 Del. C. § 10004(b)(8)
- Personnel matters, when the names, competency and abilities of individual employees or students will be discussed unless open meeting requested. 29 Del. C. § 10004(b)(9); *see also Del. Op. Att'y Gen. 18-IB42* (determining executive session related to Town Solicitor was proper purpose).

Executive Session – Reasons, cont.

- Strategy sessions, including seeking legal advice, but only if open discussion would have an adverse effect on the public body's collective bargaining or litigation position.
 - *Proper Executive Session Discussion*
 - Collective Bargaining Discussions
 - Pending Litigation
 - Potential Litigation
 - *See 29 Del. C. § 10004(b)(4)*
 - *See also Chemical Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10-11 (Del. Ch. May 19, 1994) for a discussion of the scope of this provision.
- Discussion of Non-Public Documents. 29 *Del. C.* § 10004(b)(6). *See also Del. Op. Att'y Gen.* 18-IB05 (finding that the public body properly convened an executive session for the purpose of discussing a non-public record, or more specifically personnel records which would constitute an invasion of personal privacy, as exempted from disclosure by 29 *Del. C.* §10002(l)(1)).

Executive Session – Attendees

“[S]everal of the exceptions for executive session imply the presence of non-board members (such as attorneys to discuss litigation strategy, or teachers and school administrators in student discipline cases). We believe that FOIA allows a public body to invite individuals to attend an executive session to provide information related to the subject matter for which the executive session is authorized. But a public body cannot invite non-members as observers. . . .” *Del. Op. Att’y Gen. 02-IB-17.*

FOIA COORDINATORS PANEL

MODERATORS: KATHLEEN MAKOWSKI
JAMESON TWEEDIE
DEPUTY ATTORNEYS GENERAL

PANELISTS: CHIP GUY
C.R. MCLEOD
DAN SHORTRIDGE
LEE SOBOCINSKI