



# Welcome to DOJ's Annual FOIA Coordinator Training

**We will begin at 9:30am.**

Please note that today's presentation, Q&A, and chat are open to the public and are being recorded for viewing at the DOJ website until the 2021 training.



# FREEDOM OF INFORMATION ACT

ALSO KNOWN AS FOIA

29 *Del. C.* §§ 10001-10007

## Participating in Today's Webinar

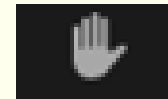
Attendees are in “Listen & View Only Mode” and will not be able to activate their webcam or their microphone. The chat will not be monitored.

Attendees can:

Type a question – in the Q & A section



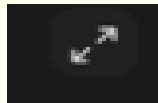
- Please type your name and public body before your question.
- Callers offline may “raise their hand” to give the moderator a question for the Q&A



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# **Introduction**

**Presented by: Deputy Attorney General**

**Lauren Maguire**

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

# FOIA Manual

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



# FOIA Training

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

# What This Presentation Will Cover

- FOIA Coordinators' duties and responsibilities  
Presented by DOJ Coordinator Kim Siegel
- FOIA Petitions to the Attorney General  
Presented by Deputy Attorney General Dorey Cole
- Requests to inspect and copy public records  
Presented by Deputy Attorney General Jameson Tweedie
- Fees that may be charged by a public body responding to a FOIA request  
Presented by Deputy Attorney General Joe Handlon
- Open meetings/executive sessions  
Presented by Deputy Attorney General Carla Jarosz
- Coronavirus & FOIA  
Presented by Deputy State Solicitor Patty Davis
- Judicial and AG Opinions re: FOIA for the last two years
- Questions & answers

# **FOIA Coordinators' Duties and Responsibilities**

**Presented by Delaware Department of Justice  
FOIA Coordinator Kim Siegel**

# 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](mailto:OpenGovernment@delaware.gov)
  - Post this information to the public body's website
  - Inform the Department of Justice and update the website within 20 working days of any change

*29 Del. C. § 10003(g)(1)*

# FOIA Coordinators

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

# FOIA tracking sheet must include:

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

# Statute Provides Policies Governing:

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

# Statute Provides Policies Governing:

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



# **Petitions to the Attorney General**

**Presented by Deputy Attorney General**

**Dorey Cole**

# 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.”

# DOJ Procedures

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

- Click on: “FOIA Petition Rules of Procedure”

Delaware.gov

## ATTORNEY GENERAL KATHY JENNINGS

### Open Government

#### Freedom of Information Act

Attorney General Kathy Jennings is committed to open and accessible government. In 1977, the General Assembly passed Delaware's Freedom of Information Act (FOIA) to ensure that government be open and accountable to the people.

#### Statewide FOIA Coordinator Trainings

The 2020 FOIA Coordinator training [will be held on October 8 at 9:30 a.m. and is open to the public to observe. More information is available here.](#)

The 2019 FOIA Coordinator training was held on November 14. A video of the presentation is available [here](#), and slides of the presentation are available in PDF format [here](#).

#### Related Information:

- FOIA Request Form
- FOIA Brochure [\(Information on Open Government & FOIA\)](#)
- FOIA Petition Rules of Procedure [\(Updated November 2019\)](#)
- Policy Manual For FOIA Coordinators [\(Updated November 2019\)](#)
- Attorney General Opinions

# Petitions to the Attorney General

- Citizen files a petition with the DOJ FOIA Coordinator
- FOIA Office will review the petition for completeness

# Sample Petition

## Records Request Sample

To: [opengovernment@delaware.gov](mailto: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](mailto: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

# Petitions to the Attorney General

- 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

- 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

- 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

# **Responding to Requests For Records**

**Presented by Deputy Attorney General  
Jameson Tweedie**

# FOIA Policy

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

# Important Deadlines

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

*29 Del. C. § 10003(h)*

# Additional Time

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

# 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) charges an hourly rate to retrieve emails
  - DTI only maintains some emails for one year



# Suggested Steps to Provide Responsive Emails

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

# Denials

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

# Fees

**Presented by Deputy Attorney General  
Joe Handlon**

# Permitted Fees

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

*29 Del. C. § 10003(m)*

# Photocopy Fees

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

# Administrative Fees

- 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 its request in response to the estimate
- Estimate must be prepared in good faith
  - Not too high – to discourage request
  - Not too low – to later pursue a collection action

# Advance Payments

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

# Fees - Summary

- Ensure fee collection practices comply with the statute and any internal FOIA policy
- Ensure that fees that are assessed are reasonable under FOIA

# **Executive Sessions**

**Presented by Deputy Attorney General  
Carla Jarosz**

# 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.
- Do 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)

# Minutes

- Every meeting, including executive sessions
- Record the members present, each vote taken and each action agreed upon
- Unless vote is unanimous, minutes must state how each member voted and note abstentions and recusals.
- Executive session minutes may be withheld from public disclosure only so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.

- 29 *Del. C.* § 10004(f)



# Calling an Executive Session

- Convene an open meeting
- Motion stating the reason for executive session
- 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 Title 24 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

- Strategy sessions, including seeking legal advice, but only if open discussion would have an adverse effect on the public body's collective bargaining or litigation position.

## *Proper Executive Session Discussions*

- Collective Bargaining Discussions
- Pending Litigation
- Potential Litigation

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.

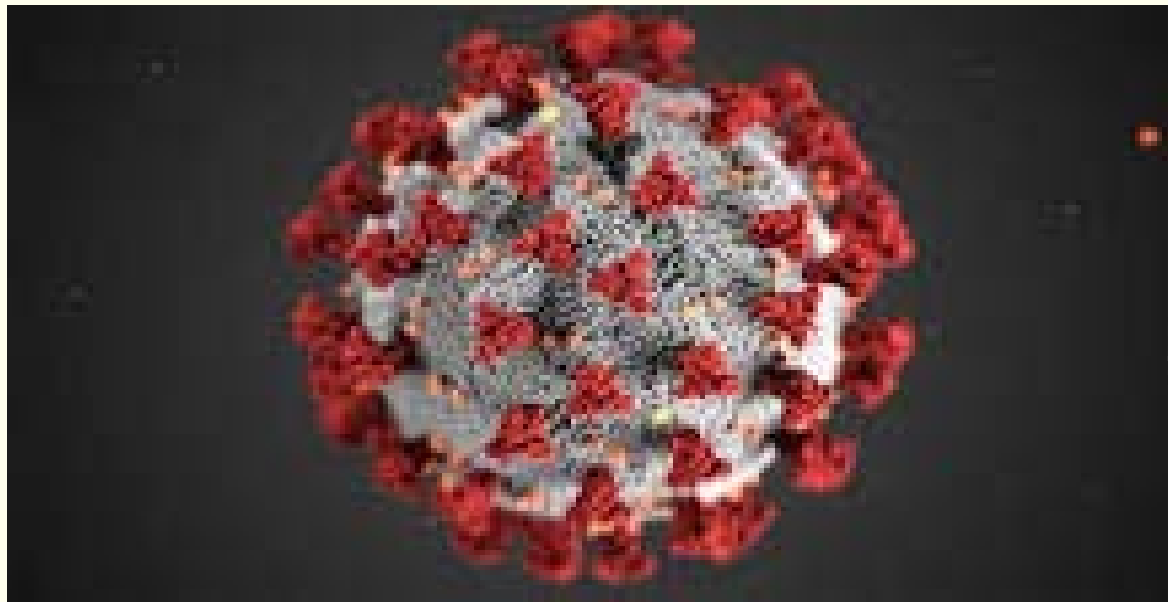
- Discussion of Non-Public Documents. 29 Del. C. § 10004(b)(6). *See* Del. Op. Att'y Gen. 18-IB05 (finding that the public body properly convened an executive session for the purpose of discussing a non-public record, or more specifically personnel records which would constitute an invasion of personal 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*.
- As a matter of good policy, if a member recuses themselves they should leave the executive session. *See, Del. Op. Att’y Gen. 18-IB38*.

# FOIA & COVID-19

Presented by Deputy State Solicitor Patty Davis



# FOIA & COV-19

- Declaration of a State of Emergency – see Governor’s Orders and modifications: <https://governor.delaware.gov/health-soe/>
- COVID-19 - social distancing
- Presented immediate challenges in responding to FOIA requests and conducting open meetings

# Subst. No. 1 to Senate Bill No. 243 signed July 23, 2020

- Expires on June 30, 2021
- Virtual meeting: public meeting of a public body where one or more members attend through the use of electronic means.

“Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

- Creates rules for using virtual meetings outside of a state of emergency; and rules for using virtual meetings during a state of emergency

# Holding a Virtual Meeting **at any time**

**1)** A public body **shall** allow a board member with a disability to attend a meeting through electronic means rather than in person as a reasonable accommodation.

- Expressly applies to “a public body whose members are all elected” unless doing so imposes an “undue burden” on that public body.

## **2) Advisory Bodies**

**Bonus:** A public body **may** allow the public “to monitor or provide public comment at a public meeting through electronic means.”



# Advisory Bodies

- Provides advice to another public body or public official, or makes recommendations. It's not a body that makes legal determinations regarding a specific person's rights.
- Advisory bodies can conduct virtual meetings with an **anchor location**.
  - An anchor location is within the geographic jurisdiction of the body; open to the public; includes one or more board member(s)

# Virtual Meetings During a State of Emergency

- Any public body can hold a virtual meeting during a state of emergency
- All board members can participate by electronic means
- No anchor location required
- Rules regarding conduct during the meetings and notice
- Additional rules for elected boards

# Virtual Meetings During a State of Emergency

- Same public notice requirements as in-person except you can skip the posting at the principal office or where the meetings are regularly held
- If the law requires you to keep a verbatim transcript, you still have to keep a verbatim transcript
- Only elected: A document used during the meeting by a member or witness that is accepted by the Chair must be immediately transmitted to each member or witness participating and the public must be able to view a recording of the meeting “within a reasonable time after” the meeting concludes

# Virtual Meetings Rules for Everyone

1. Member and witness identities must be “verified” and their actions “authenticated” to the satisfaction of the Chair.
2. Members and witnesses must be able to do **one of these**:
  - Hear the comments of each member or witness
  - Hear the comments of **and view** each member or witness
3. A document “accepted by the presiding officer or chair” must be provided to every member during the meeting and “made available to the public under Section 10003 of this title”

# Virtual Meetings Rules for Everyone

4. The public must be able to monitor the meeting through electronic means (except executive session)
5. The public must be able to provide public comment if required by law, or permitted by the board
6. When preparing the notice of meeting, include information on how the public can monitor or participate in the meeting
7. Minutes of the virtual meeting are still required with no variances for virtual meetings

# In Person Meetings During COVID

The 27<sup>th</sup> Modification to the State of Emergency (9/3/20)

All public meetings of “public bodies” may be conducted in person in public buildings, provided that (1) the total number of individuals permitted in a room at one time **shall not** exceed 60% of stated fire occupancy requirements; (2) a 6 foot radius around individuals is maintained, and (3) attendees wear face coverings. Public bodies are **encouraged** to conduct meetings electronically. Any in-person meeting **must** also provide a telephone or video conference option for any member or the public who does not wish to attend in person.

# Final Words on Virtual Meetings

- All actions taken during a virtual meeting have the same legal effect as if it was an in-person meeting
- Virtual participants count toward quorum
- Virtual participants are allowed to vote
- “A technological failure that prevents, or a technological limitation that limits, public access otherwise required under this chapter does not invalidate a virtual meeting or an action taken during a virtual meeting.”

# Records Requests

- Fourth Modification to the Governor's Declaration of a State of Emergency extended timeframe to respond to pending or new FOIA requests and FOIA petitions to 15 business days following termination of any active Declaration of a State of Emergency
- The September 25, 2020 *First Revision to the Twenty-Seventh Modification of the Declaration of a State Of Emergency* removed the language extending the deadline to respond to FOIA requests effective September 28, 2020. Public bodies should respond to all pending requests on or before **October 19, 2020**





## Question and Answer

Moderated by Delaware Department of Justice FOIA Coordinator Kim Siegel