

DELAWARE FREEDOM OF INFORMATION ACT

POLICY MANUAL FOR FOIA COORDINATORS

As of October 27, 2021

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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 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 <https://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.⁴ The FOIA coordinator is permitted to delegate specific duties and functions to other public body employees.⁵

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

- 1) Serve as the point of contact for FOIA requests;
- 2) Coordinate the public body’s responses to FOIA requests;
- 3) Assist the requesting party in identifying the records sought;
- 4) Assist the public body in locating and providing the requested records;
- 5) Work to foster cooperation between the public body and requesting party;⁶
- 6) Maintain a document that tracks all FOIA requests, which includes the following minimum information:
 - a) The requesting party’s contact information;

³ See 29 Del. C. § 10002(g).

⁴ See 29 Del. C. § 10003(g)(1).

⁵ *Id.*

⁶ See Del. Op. Att’y Gen. 19-IB43 (July 22, 2019) (“Cooperation requires both parties to participate in good faith.”)

- 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; and
- j) The date of final disposition.⁷

FOIA coordinators should also become familiar with the policies governing the examination, copying, and disclosure of public records located within FOIA Sections 10003(a)-(m). These provisions 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;

⁷ See 29 Del. C. §§ 10003(g)(1)-(3).

- 6) A public body's review of records requested to determine whether records are exempt from disclosure pursuant to Section 10002(o);
- 7) The access a public body must provide for review of records; and
- 8) The applicable fees.

Finally, FOIA coordinators may want to familiarize themselves with the 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/>.

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 granting access to 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 Attorney General'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 specifies the types of fees 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".

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.

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

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

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).

Public bodies may not charge fees associated with the “legal review” of records. Determining whether a record or portion thereof may or must be withheld based on one of FOIA’s exemptions, is considered “legal review” regardless of whether the review was conducted by an attorney or not.¹⁴ This is an important note

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.* (“Administrative fees shall not include any cost associated with the

for public bodies that do not routinely rely on counsel to determine whether any of the FOIA exemptions apply.

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.**¹⁵

(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.

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.

public body's legal review of whether any portion of the requested records is exempt from FOIA.").

¹⁵ See 29 Del. C. § 10003(m)(2).

- 4) If the public body cannot obtain the email records requested from its own records with reasonable effort, contact the public body's third-party service provider to assist with the search.
- 5) If any fees are assessed for retrieving the email records, the public body must provide an itemized written cost estimate listing all charges expected to be incurred in retrieving the records prior to retrieving those records.

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 non-custodial 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.”¹⁶ Since administrative fees must be billed at the “current hourly pay grade (prorated for quarter hour increments) of the lowest paid employee capable of performing the service,”¹⁷ public bodies are encouraged to include the hourly rate and reviewing employee’s position in its cost estimates.¹⁸ Upon receiving the estimate, 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 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.¹⁹

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.

¹⁶ See 29 Del. C. § 10003(i)(2) (email search); (j)(2) (noncustodial records search); (m)(2) (administrative fees).

¹⁷ See 29 Del. C. § 10003(m)(2).

¹⁸ Del. Op. Att’y Gen. 21-IB22 (Sept. 29, 2021).

¹⁹ 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 meeting²⁰ and public records²¹ requirements. FOIA recognizes that an individual may be considered a public body of one member.²²

A. Statutory Definition

FOIA defines a “public body” as follows:

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**

²⁰ See Section 5 for a discussion of open meeting requirements and exemptions.

²¹ See Sections 4.B. and 4.C. for a discussion of public records requirements and exemptions.

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

(3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.²³

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

The determination of whether an entity is a public body is a two-part test. Both parts must be met for an entity to be considered a public body subject to FOIA.

Part One: Look at the type of entity and how it was created. Is the entity a regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, **which includes** any board, department, agency, committee, or any type of group or entity 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?

Part Two: Look at how the entity is supported and its function. Is the entity supported in whole or in part by any public funds, or does it expend **or** disburse any public funds, **or** “is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports investigations or recommendations?” “Public funds” are defined as funds derived from the State or any political subdivision of the State.²⁴

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 creating or authorizing the group made them so. As a result, look at the Delaware law that authorized or created the group (its enabling statute) 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.

²³ 29 Del. C. § 10002(k).

²⁴ 29 Del. C. § 10002(m).

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

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

E. Does the Group Fall Within an Exemption 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(k): 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 those authorities established in by Chapter 14 of Title 16. Section 10002(l): also states that the University of Delaware or Delaware State University are not public bodies except each meeting of the full Board of Trustees of these universities are considered "meetings" under FOIA and university documents relating to the expenditure of public funds are "public records."

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, some groups are statutorily exempt or have been found not to be public bodies based on previous FOIA opinions and rulings.

For example, 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:

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

Bi-state entities like the Delaware River and Bay Authority. Bi-state entities are a collaboration of two states and the Federal government; therefore, they are not subject to either state’s laws unless there is an express statement made by the states that they intend to abide by a particular state law.²⁶

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 EXEMPTIONS ARE STRICTLY INTERPRETED.

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]....”).

²⁶ *See Del. Op. Att’y Gen.* 20-IB08.

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.²⁷ 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.²⁸ 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.²⁹ It includes all information contained in or on physical documents (typically paper), as well as information stored in electronic format (such as E-mails, Word, Excel, etc.) or databases, relating in any way to public business, or in any way of public interest, or

²⁷ See 29 Del. C. § 10003(a).

²⁸ 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.

²⁹ The definition of “public record” is subject to certain statutory and common law exemptions that will be discussed in greater detail in section III.

in any way related to public purposes. **Thus, as a practical matter, FOIA’s concept of “public record” covers, at least initially, almost every conceivable type of physical or electronic record that may be created, maintained or possessed by a public body.**³⁰ 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. Who may request a Public Record?

The purpose of FOIA is to grant citizens of the state of Delaware access to public records. A public body may grant requests from non-citizens, but it may also deny them based on non-citizenship alone.³¹

D. What If Some of The Records Identified in Response to a FOIA Request are Designated as 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(o)(6) exempts those records exempted from disclosure by statute or common law; 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.

³⁰ See 29 Del. C. § 10002(o).

³¹ *McBurney v. Young*, 569 U.S. 221 (2013).

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...”³² Therefore, a public body may be required to produce electronic information in certain circumstances. However, the public body does not need to create a document that does not already exist.

F. How Should The Record 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,³³ 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.”³⁴ 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 on the agency.

³² 29 *Del. C.* § 10002(o).

³³ “FOIA does not require public bodies to send records in response to a request.” *Del. Op. Att’y Gen.* 17-IB58 (Nov. 15, 2017). “FOIA does not require a public body to provide immediate in-person access to records.” *Del. Op. Att’y Gen.* 18-IB01 (Jan. 2, 2018).

³⁴ 29 *Del. C.* § 10003(a).

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.³⁵

I. May a Public Body Charge to Search Its Files To Identify Public Records?

Yes. The General Assembly has made clear that, beyond a limited threshold, the costs of producing records may be shifted to the requestor.³⁶

³⁵ See 29 Del. C. § 10003(i)(1)-(2).

³⁶ 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 NOT PUBLIC RECORDS?

FOIA excludes several categories of records from its definition of public record, which are also known as FOIA exemptions. If an exemption applies, the public body is not obligated under FOIA to produce the exempt records but may choose to do so. FOIA exemptions do not create an affirmative right of nondisclosure and are not confidentiality provisions.³⁷ Before producing an exempt record, the public body must consider if there are other reasons why the public body is not permitted to or should not produce the records. For example, student records that would constitute an invasion of personal privacy are not public records under FOIA; however, public bodies may not produce these types of records under the Family Educational Rights and Privacy Act. The ultimate decision to produce exempt records or not rests with the public body.

FOIA is to be construed narrowly to further open access to records. 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(o)(1)-(19),³⁸ describes most records excluded from the definition of public record 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. A "personnel file" for purposes of FOIA is defined as a "file containing information that would, under ordinary circumstances, be used in determining whether an individual should be promoted, demoted, given a raise, transferred, reassigned, dismissed, or subject to such other traditional personnel actions."³⁹

³⁷ *Reeder v. Del. Dep't of Ins.*, 2006 WL 510067, at *11 (Del. Ch. Feb. 24, 2006) ("Although the exemptions limit public access in certain circumstances, they do not purport to create an affirmative right of non-disclosure.").

³⁸ In 2021, the Governor signed into law new FOIA legislation which shifted the definition of "public record" from Section 10002(l) to Section 10002(o).

³⁹ *Del. Op. Att'y Gen.* 17-IB19 (July 12, 2017).

- **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.⁴⁰
- **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.

⁴⁰ The FOIA Office has “broadly and properly interpreted [this exemption] to apply to a wide variety of criminal and civil investigative files.” *Del. Op. Att’y Gen.* 21-IB19 (Aug. 18, 2021) quoting *Del. Op. Att’y Gen.* 17-IB21, 2017 WL 3426261 at *1 (July 13, 2017). For example, the DOJ 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) and *Del. Op. Att’y Gen.* 19-IB36 (July 5, 2019). And, to extend to complaints against Delaware State Police law-enforcement officers. *Del. Op. Att’y Gen.* 18-IB48 (Oct. 8, 2018).

- **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.⁴¹
- **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.**⁴²

⁴¹ 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). However, “a public body may meet its burden by producing an affidavit signed by counsel attesting the records have been reviewed for certain privileges, along with an explanation of the privileges applied.” *Del. Op. Att’y Gen.* 21-IB15 (July 2, 2021). *See also, Flowers v. Office of the Governor*, 167 A.3d 530, 549 (Del. Super. 2017).

⁴² Potential litigation: This exemption only applies to potential litigation against the public body asked for the records or a closely affiliated person or entity. *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). The test for applying the exemption for potential litigation is as follows: “(1) litigation must be likely or reasonably foreseeable; and (2) there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.” Indicators of potential litigation “might include ‘previous or preexisting litigation between the parties or proof of ongoing litigation concerning similar claims or proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.’”³⁹ *Del. Op. Att’y Gen.* 20-IB09 *citing ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007).

Pending litigation: This exemption includes quasi-judicial proceedings like

- **Any records of discussions held in executive session pursuant to FOIA Sections 10004(b) and (c) only “so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.”⁴³**
- **Records that disclose the identity or address of any person holding a permit to carry a concealed deadly weapon.**
- **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.⁴⁴**
- **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.⁴⁵**
- **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.**

administrative appeals. *Del. Op. Att’y Gen.* 20-IB09.

⁴³ See 29 *Del. C.* § 10004(f).

⁴⁴ See *Del. Op. Att’y. Gen.* 21-IB10.

⁴⁵ See *Flowers v. Office of the Governor*, 167 A.3d 530, 543-46 (Del. Super. 2017).

- **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 certain drafts are not public records, including working drafts that the author is still revising prior to presentation to a public body and draft contracts under negotiation, in which the premature disclosure could harm the public body's competitive position.⁴⁶ 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.

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 EXEMPTIONS ARE STRICTLY INTERPRETED.⁴⁷

⁴⁶ *Del. Op. Att'y Gen. Op.* 21-IB15 (July 2, 2021).

⁴⁷ *See ACLU v. Danberg*, 2007 WL 901592, at *3 (Del. Super. Mar. 15, 2007) ("The enumerated statutory exceptions to FOIA, including the 'pending or potential

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.⁴⁸ 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.⁴⁹ “Public business” is broadly defined as “any matter over which the public body has supervision, control, jurisdiction or advisory power.”⁵⁰

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

litigation’ exception, pose a barrier to the public’s right to access and are, therefore, narrowly construed.”).

⁴⁸ 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.

⁴⁹ 29 *Del. C.* § 10002(j) (emphasis supplied).

⁵⁰ *See* 29 *Del. C.* § 10002(m) and *Del. Op. Att’y Gen. Op.* 21-IB17 (July 23, 2021).

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 have been subject to FOIA's open meeting requirements.⁵¹ Informal meetings can be subject to FOIA's open meeting requirements even if no formal decision about the public business discussed is reached.⁵²
- 3) Workshops: Workshops held by public bodies that discuss public business are subject to FOIA's open meeting requirements.⁵³
- 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) Serial emails: Group emails may amount to a meeting of the public body, in violation of FOIA under certain circumstances.⁵⁴

⁵¹ 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.

⁵² 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.").

⁵³ See *id.*

⁵⁴ See *Del. Op. Att'y Gen. 17-IB09* (April 25, 2017); *Del. Op. Att'y Gen. 03-IB11* (May 19, 2003); *Del. Op. Att'y Gen. 21-IB17* (July 23, 2021).

B. Meetings of Committees

Committees, including *ad hoc* or temporary committees may meet the broad definition of “public body” in Section 10002(k) of FOIA. If so, then their meetings must also adhere to FOIA’s open meeting and executive session requirements.

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.⁵⁵ 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.⁵⁶

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.”⁵⁷

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.⁵⁸

⁵⁵ 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).

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

⁵⁷ 29 *Del. C.* § 10004(g)(3).

⁵⁸ *Del. Op. Att’y Gen.* 16-IB17 (July 28, 2016).

E. Virtual Meetings.

A public body may at the discretion of the chair or president officer, allow the public to monitor or participate in the meeting through the use of electronic means of communication like a computer or telephone line.⁵⁹

FOIA defines a virtual meeting as a “meeting of a public body that 1 or more members attend through the use of an electronic means of communication.”⁶⁰ A virtual meeting may be triggered one of two ways: (1) the chair or president officer decides to conduct a virtual meeting; or (2) a member of the public body requests to attend a meeting electronically as a reasonable accommodation for a disability.⁶¹ A public body must adhere to all the following rules to conduct a virtual meeting:⁶²

- The public notice must include information on how the public can monitor or participate in the meeting.
- The meeting must have an anchor location which is defined in Section 10002(b) as “the physical location within the geographic jurisdiction of the public body that is open to the public and at which 1 or more members of a public body attend a virtual meeting.”⁶³
- The identities and actions of members or witnesses must be verified.
- All participating members and witnesses must be able to simultaneously do one of the following:
 - Hear the comments of each member or witness
 - Hear and view the comments of each member and witness.
- Documents used during the meeting must be provided immediately to participating members or witnesses.
- Minutes must be maintained.

⁵⁹ See 29 Del. C. § 10006A(b).

⁶⁰ 29 Del. C. § 10002(r).

⁶¹ 29 Del. C. § 10006A(a).

⁶² See 29 Del. C. § 10006A(c).

⁶³ During a state of emergency, a public body may hold a meeting fully virtually without an anchor location. 29 Del. C. § 10006A(e).

- The public must be able to monitor the meeting and provide public comment if the public body is required to accept, or provides an opportunity for, public comment.

Virtual meetings may be held by any public body without an anchor location during a state of emergency or pursuant to an executive order adopted to prevent a public health emergency. Please see Section 10006A(e) and (f) for additional details about how to notice and conduct this type of virtual meeting.

F. 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.⁶⁴ 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.⁶⁵ Additionally, FOIA authorizes “the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.”⁶⁶

G. Exempt Bodies or Proceedings

⁶⁴ 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). However, some public bodies are required under their own enabling statutes to provide an opportunity for public comment at their meetings. See, e.g., the enabling statute for the State Board of Education at 14 *Del. C.* § 105(c)(1).

⁶⁵ See *id.*

⁶⁶ 29 *Del. C.* § 10004(d).

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) provides that the open meeting requirements do not apply to the proceedings of the following entities:

- 1) Grand juries;
- 2) Petit juries;
- 3) Special juries;
- 4) The deliberations of any court;
- 5) The Board of Pardons and Parole;
- 6) Public bodies having only one (1) member; or
- 7) Certain public bodies within the legislative branch of the State that are not specified in the Delaware Code, such as standing ethics committees. (But the full House and Senate, their standing committees and committees and task forces created by legislative resolution are subject to open meeting requirements.)⁶⁷

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.

⁶⁷ 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."

H. Notice Requirements

Regular Meetings: A “regular meeting” is one that is held on a periodic basis.⁶⁸ 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.

Special Meetings: A “special meeting” is a meeting “to be held less than seven (7) days after the scheduling decision.”⁶⁹ Section 10004(e)(4) 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.

Virtual Meetings: A virtual meeting is a meeting in which one or more members attend through the use of electronic means of communication. Section 10006A mandates that meeting notice must include information on how the public can monitor the meeting and if public comment is scheduled, how the public can participate in the meeting.

Notice requirements for 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.

⁶⁸ See 29 Del. C. § 10004(g)(2).

⁶⁹ 29 Del. C. § 10004(e)(4).

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

I. 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 Section 10004(b) of this title.⁷⁰

“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.”⁷¹ 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”⁷² so that those members of the

⁷⁰ 29 Del. C. § 10002(a).

⁷¹ Del. Op. Att’y Gen. 97-IB20 (Oct. 20, 1997).

⁷² *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial*

public with an “intense interest” in a subject will know what it is being discussed.⁷³ 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.”⁷⁴

1. The adequacy of an agenda will be judged in light of the factual circumstances pertaining to each case.⁷⁵ 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:

- a. The agenda must alert the public to the major issues expected to be discussed at the meeting.⁷⁶
- b. 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.⁷⁷

Control Board, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994); *See also* Del. Op. Att’y Gen. 08-IB08 (May 23, 2008).

⁷³ *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); *Del. Op. Att’y Gen.* 21-IB0321 (Feb. 25, 2021).

⁷⁴ *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).

⁷⁵ *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).

⁷⁶ *See Del. Op. Att’y Gen.* 97-IB13 (June 2, 1997); *Del. Op. Att’y Gen.* 21-IB0321 (Feb. 25, 2021).

⁷⁷ *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

- c. 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.⁷⁸
- d. The matters to be discussed should be described with enough specificity to provide fair notice to the public.⁷⁹ An agenda’s statement that a public body will consider an item is sufficient notice to the public that the Board may take a vote on that item.⁸⁰

FOIA permits some flexibility regarding the contents of the agenda. Section 10004(e)(3) of FOIA provides: “the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body’s meeting.” This section has been interpreted narrowly. A new agenda item may only be discussed if it arose at the time of the meeting, as a natural evolution of discussions of a related publicly-noticed item. A public body may not simply amend its agenda during the meeting to adopt a new agenda item.⁸¹

Additionally, Section 10004(e)(6) 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. Or in which a public body must amend an agenda less than seven (7) days prior to the date of the scheduled meeting. 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. “This exception does not authorize a public body to

(Aug. 18, 2005); *Del. Op. Att’y Gen.* 06-IB15 (July 24, 2006); *Del. Op. Att’y Gen.* 11-IB12 (Aug. 18, 2011).

⁷⁸ See *Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003).

⁷⁹ 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).

⁸⁰ *Lechliter v. Becker*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017).

⁸¹ *Del. Op. Att’y Gen.* 19-IB48 (Sept. 9, 2019).

amend the agenda prior to a meeting for any reason, but rather applies ‘to add items that come up suddenly and cannot be deferred to a later meeting.’⁸²

J. Meeting Minutes

Section 10004(f) of FOIA provides that public bodies must keep minutes of all public meetings, including executive sessions.⁸³ 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.

K. 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.⁸⁴

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.

⁸² *Del. Op. Att’y Gen. 20-IB26* (Oct. 28, 2020) *citing Del. Op. Att’y Gen. 05-IB15* (June 20, 2005).

⁸³ FOIA does not require a public body to transcribe, or tape record the entirety of its meetings, however a public body’s enabling statute may.

⁸⁴ *See 29 Del. C. § 10004(e)(4).*

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.* § 10004.⁸⁵ 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,⁸⁶ the circumstances listed in FOIA “**are exclusive and form the only basis for entering into closed session.**”⁸⁷ 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.”⁸⁸
- 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.’”⁸⁹

⁸⁵ 29 *Del. C.* § 10004(a).

⁸⁶ See Section 4.C., above, for examples of public bodies that are permitted to meet in executive session by their enabling statute.

⁸⁷ See *Del. Op. Att’y Gen.* 12-IIB09 (July 13, 2012) (quoting *Del. Op. Att’y Gen.* 80-FOI3 (Aug. 30, 1980)).

⁸⁸ 29 *Del. C.* § 10004(b)(1).

⁸⁹ *Del. Op. Att’y Gen.* 05-IB24 (Aug. 18, 2005) (quoting *Del. Op. Att’y Gen.* 02-

- 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.⁹⁰
- 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).⁹¹
- 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).⁹²

IB27 (Nov. 4, 2002)).

⁹⁰ 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).

⁹¹ 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).

⁹² *Del. Op. Att'y Gen.* 17-IB20 (July 12, 2017) (noting that the agenda need not

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, “virtual” meeting or a “special or rescheduled” meeting.⁹³ Likewise, a brief statement of the reasons for convening in executive session must be set forth in the agenda for the meeting.⁹⁴ 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.⁹⁵ However, any discussions or actions anticipated to follow the executive session may require additional elaboration to meet the notice requirements for open session items.⁹⁶ 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

identify the names of the individual to be discussed and contains no mandate that the public body notify the individual that he/she is the subject of the executive session or to affirmatively present the individual the option to have the discussion occur in open session).

⁹³ See 29 Del. C. §§ 10004(e)(2)-(4). 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)(3).

⁹⁴ See 29 Del. C. § 10004(e)(2).

⁹⁵ See *Common Cause of Del. v. Red Clay Consol. Sch. Dist.*, 1995 WL 733401, at *4 (Del. Ch. Dec. 5, 1995).

⁹⁶ See *Del. Op. Att’y Gen.* 19-IB31 (June 24, 2019).

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.⁹⁷

- 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.⁹⁸ The minutes must also reflect who was present.⁹⁹

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

⁹⁷ See 29 Del. C. § 10004(c).

⁹⁸ See Levy, 1990 WL 154147, at *3; 29 Del. C. § 10004(f); Del. Op. Att’y Gen. 17-IB59 (Nov. 20, 2017).

⁹⁹ See 29 Del. C. § 10004(f).

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 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 BRIEF DESCRIPTION OF THE REASONS FOR CALLING THE EXECUTIVE SESSION. DO NOT MEET IN EXECUTIVE SESSION UNLESS YOU ARE CERTAIN ONE OF THE PERMITTED REASONS FOR MEETING IN EXECUTIVE SESSION IS APPLICABLE. OTHERWISE, IN CERTAIN CIRCUMSTANCES, 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.¹⁰⁰ These 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 relevant 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.

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. The public body's response to the petition will be due within six (6) business days and must be sent to both the FOIA Office and the petitioner.

¹⁰⁰ 29 Del. C. § 10005.

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

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

Summary of Delaware State Court Opinions Discussing FOIA Matters

(October 1, 2019 to September 30, 2021)

Judicial Watch v. Del. Dep't of Justice, 2021 WL 22550 (Del. Super. Jan. 4, 2021)

The University of Delaware denied requests from Judicial Watch, Inc. and The Daily Caller News Foundation for various records related to the Joseph R. Biden, Jr. Senatorial Papers (“Senatorial Papers”), which the University was processing for archival at the University library. FOIA states that the University’s records are not public records, except for university documents relating to the expenditure of public funds, nor are the meetings of the University considered meetings of a public body, except meetings of the full Board of Trustees. These organizations filed petitions with the Attorney General to challenge the denial of access to the requested records, and the resulting Attorney General Opinion determined the denials were proper. The organizations appealed this decision to the Superior Court, who affirmed the Attorney General Opinion. In reaching this conclusion, the Superior Court found the following: 1) the organizations’ request for information from any meeting where the Senatorial Papers were discussed may be denied because the Senatorial Papers were not discussed before the full Board; 2) the documents “which relate to the expenditure of public funds” are defined as documents that discuss or show how the University itself spends public funds; 3) the University attorneys’ statements in response may be given proper weight to satisfy the University’s burden of proof; 4) the University was not required to review every record in order to respond to this request; and 5) the request for log-in sheets for every visitor was properly denied pursuant to 29 Del. C. § 10002(1)12), which exempts “any 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.”

Ryle v. Dep't of Justice, 2020 WL 5230736 (Del. Sept. 1, 2020)

An inmate requested records from the Delaware Department of Corrections (“DOC”), who denied the request pursuant to [29 Del. C. § 10002\(l\)\(13\)](#). The Attorney General issued an opinion determining that DOC’s denial was appropriate. The inmate appealed this decision to the Superior Court, who found that it had no jurisdiction to consider the appeal. The Supreme Court of Delaware disagreed with the Superior Court’s decision that it lacked jurisdiction. However, the Supreme Court determined that the inmate’s appeal was legally frivolous, because [29 Del. C. § 10002\(l\)\(13\)](#) exempts any records in DOC’s possession where disclosure is sought by an inmate in DOC’s custody.

Cuppels v. Mountaire Corp., 2020 WL 1866867 (Del. Super. Apr.14, 2020)

The plaintiffs served a subpoena on non-party Delaware Department of Natural Resources and Environmental Control (“DNREC”) for all documents from July 1, 2017 to the present, in the possession or control of five DNREC employees, that related to the Millsboro plant’s wastewater, sludge facilities, groundwater, and nearby wells. The plaintiffs also served subpoenas for depositions of the five DNREC employees named in the document subpoena. DNREC filed motions to quash the subpoenas or in the alternative for a protective order. DNREC argued that the information sought by plaintiffs in this discovery process include documents and information gathered by DNREC in its investigation, as well as information exchanged in settlement discussions between DNREC and defendants in another case. In support of its motion, DNREC made four arguments: (1) the information is privileged and protected by the investigatory files exemption of FOIA, as Delaware Rules of Evidence (“DRE”) 508 requires recognition of governmental privileges created by statute; (2) the information is part of settlement discussion protected by DRE 408; (3) the information is protected by the attorney-client or the work product privilege; and (4) the request creates an undue burden on DNREC. With respect to the first argument, the Superior Court found that DRE 508 and the investigatory files exemption did not apply to subpoenas in this case, noting that a similar argument was rejected in *State Department of Transportation v. Figg Bridge Engineers, Inc.* and that the argument was contrary to the DNREC’s broad disclosure requirements to the public under [7 Del. C. § 6014](#). As the court also rejected DNREC’s other three arguments, the court denied DNREC’s motion to quash these subpoenas.

State of Del. Dep’t of Natural Res. and Envtl. Control v. Cuppels, 2020 WL 4333591 (Del. July 28, 2020)

The Superior Court denied DNREC’s motion in the above case, and DNREC petitioned the Supreme Court to file an interlocutory appeal to review the Superior Court’s decision. The Supreme Court denied the petition because “[e]xceptional circumstances that would merit interlocutory review of the Superior Court’s interlocutory opinion do not exist in this case, and the potential benefits of interlocutory review do not outweigh the inefficiency, disruption, and probable costs caused by an interlocutory appeal.” *Id.* at *2.

1313, LLC v. New Castle Cnty., 2020 WL 499227 (Del. Super. Jan. 30, 2020)

This case involves an appeal of New Castle County Board of Assessment Review's decision regarding a property tax assessment. In addition to other arguments regarding due process, fairness, and the valuation process, the appellant argued that the Board violated FOIA by not reaching its decision in public, as the written decision differed from the Board's stated rationale at the meeting. The Superior Court found that the Board did not violate FOIA, as it held a public meeting and discussed its decision regarding the reassessment. The appellant did not present any evidence or an allegation that a quorum of the Board privately met to discuss the appellant's case. Therefore, the Superior Court rejected the appellants' argument on these grounds. However, because the Board did not consider the impact of a high vacancy rate on the property's fair market value, the court remanded this matter to the Board.

Attorney General Opinions Issued October 1, 2019 to September 30, 2021

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

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 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

Issued to Mr. John Young re: FOIA Complaints Concerning the Christina School District on 11/8/2019.

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.

Attorney General Opinion No. 19-IB64

Issued to Ms. Kathryn Gifford re: FOIA Complaints Concerning the Christina School District on 11/12/2019.

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; that the Board must have improperly made the decision to conduct the vote by that method in executive session; and that the Board must have improperly decided on candidate interview questions outside of a public meeting.

DECIDED: In Attorney General Opinion No. 19-IB63, this Office found that the District violated FOIA with respect to the secret ballot process and the executive session at the October 8, 2019 meeting. With regard to the allegations regarding the interview format and questions, this Office accepted the representations of the Board's attorney and found no additional FOIA violations.

Attorney General Opinion No. 19-IB65

Issued to Ms. Stephanie Lynch re: FOIA Complaint Concerning Sussex County on 11/25/2019.

Petitioner alleged Sussex County improperly denied her FOIA requests. The County provided a cost estimate for certain records, and the Petitioner also alleged that the County improperly denied her request to reduce the cost estimate by the value of the time employees performing the search had spent on personal internet usage in a time period prior to the search.

DECIDED: No FOIA violation was found. The records requested related to pending or potential litigation, and no error was found in the County's denial of the Petitioner's request to subtract employees' personal internet time from the costs estimated to fulfill the Petitioner's request.

Attorney General Opinion No. 19-IB66

Issued to Mr. Richard Stifter re: FOIA Complaint Concerning the City of Wilmington on 11/26/2019.

Petitioner alleged the City of Wilmington improperly denied his request for a certificate of insurance.

DECIDED: No violation was found. In accordance with *McBurney v. Young* and prior Attorney General Opinions, a Delaware public body may deny a FOIA request solely because the requesting party is not a citizen of Delaware, and the only evidence in the record indicated that the Petitioner was not a citizen.

Attorney General Opinion No. 19-IB67

Issued to Mr. Richard Abbott re: FOIA Complaint Concerning the Delaware Department of Transportation on 12/18/2019.

Petitioner alleged DelDOT improperly denied his FOIA request on behalf of his client for draft appraisals and communications regarding appraisals by citing exemptions for pending or potential litigation, trade secrets or commercial or financial information, and attorney-client privilege.

DECIDED: This Office determined that DelDOT adequately demonstrated that potential litigation with DelDOT is likely or reasonably foreseeable and the draft appraisals and the communications related to the appraisals have a clear nexus to this potential litigation. Thus, these records were exempt under 29 Del. C. § 10002(1)(9) and properly withheld under FOIA.

Attorney General Opinion No. 19-IB68

Issued to Mr. George X re: FOIA Complaint Concerning New Castle County on 12/30/2019.

Petitioner alleged that New Castle County redacted “flagged” information from 911 records pertaining to his address without citing a statutory exemption from FOIA. The County responded that the “flagged” information maintained in the 911 system contains specific warnings and response strategies that aid law enforcement in responding to a particular address and that the disclosure of flagged information may endanger the safety of neighboring citizens and the responding officers, and is thus exempt pursuant to 29 Del. C. § 10002(1)(17).

DECIDED: No FOIA violation was found. FOIA requires a public body to provide a reason for denying a request but does not require a specific citation to the statute. Based on the County’s representations, this Office found that the County properly asserted the 29 Del. C. § 10002(1)(17) exemption in these circumstances.

Attorney General Opinion No. 20-IB01

Issued to Rep. John Kowalko re: FOIA Complaint Concerning the Delaware Prosperity Partnership on 1/3/2020.

Petitioner alleged that the Delaware Prosperity Partnership is a public body and is obligated to respond to his request for certain records.

DECIDED: No FOIA violation was found. DPP was determined not to be a public body subject to FOIA.

Attorney General Opinion No. 20-IB02

Issued to Rep. Kim Williams re: FOIA Complaint Concerning Odyssey Charter School on 1/3/2020.

Petitioner alleged Odyssey Charter School's Board of Directors held a Board meeting on December 3, 2019 in a locked building that did not allow adequate public access. The Petitioner also asserted that this location also was not the Board's typical meeting location. Petitioner further alleged the Board and its Nominating Committee improperly held executive sessions.

DECIDED: The Board did not violate FOIA in its provision of access to the December 3, 2019 meeting because it provided proper notice of the location and made arrangements for main office staff to allow access to the building. However, this Office determined that the Board's failure to provide notice of its December 3, 2019 executive session was a violation of FOIA. The Board committed to discuss the qualifications of the candidates and take a vote selecting the Board members in open session at a future public meeting. No additional steps were recommended.

Attorney General Opinion No. 20-IB03

Issued to Ms. Laura Allen re: FOIA Complaint Concerning the Division of Public Health on 1/14/2020.

Petitioner alleged that the Division of Public Health of the Delaware Department of Health and Social Services ("DPH") improperly withheld documents regarding certain animal control complaints and evidence.

DECIDED: DPH did not violate FOIA, as the requested records were investigatory file records exempt pursuant to 29 Del. C. § 10002(1)(3).

Attorney General Opinion No. 20-IB04

Issued to Rep. Kim Williams re: FOIA Complaint Concerning Odyssey Charter School on 1/14/2020.

Petitioner alleged the Nominating Committee of the Odyssey Charter School's Board of Directors improperly noticed its intent to hold an executive session.

DECIDED: Because any public body can hold an executive session in the manner authorized by FOIA, the Board's Nominating Committee, as a public body, did not violate FOIA by noticing its intent to hold an executive session.

Attorney General Opinion No. 20-IB05

Issued to Richard Abbott, Esq. re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 1/23/2020.

Petitioner alleged that DNREC improperly denied his request for records regarding his client's wetland map amendment application.

DECIDED: DNREC did not violate FOIA as alleged. DNREC satisfied the statutory requirement in this instance by citing to the pending or potential litigation exemption as its reason for denying the request. In addition, the Office found that the circumstances met the two-prong test for the potential litigation exemption, and DNREC appropriately denied the request on this basis.

Attorney General Opinion No. 20-IB06

Issued to Mr. Dan Cannon re: FOIA Complaint Concerning the City of Seaford on 2/5/2020.

Petitioner alleged that the Board of Adjustment of the City of Seaford provided insufficient public notice of its consideration of a variance at its December 4, 2019 meeting.

DECIDED: This Office determined that the City did not violate FOIA as alleged by the Petitioner, as the agenda provided adequate notice to the members of the public with an intense interest in the variance.

Attorney General Opinion No. 20-IB07

FOIA Opinion Letter to Mr. Kohl Harrington re: FOIA Complaint Concerning the Delaware Department of Agriculture on 2/24/2020.

Petitioner alleged they were denied records on the basis that they were not a Delaware citizen.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 20-IB08

Issued to Mr. Randall Chase re: FOIA Complaint Concerning the Delaware River and Bay Authority on 2/25/2020.

Petitioner alleged that the Delaware River and Bay Authority violated FOIA's open meeting requirements by holding an improper executive session.

DECIDED: Delaware River and Bay Authority is not subject to Delaware's FOIA law, and therefore, the petition is dismissed.

Attorney General Opinion No. 20-IB09

Issued to Mr. James Owen re: FOIA Complaint Concerning New Castle County on 2/27/2020.

The Petitioner alleged that New Castle County violated FOIA by failing to complete a review of its records as it committed to do and by improperly denying access to records under the pending or potential litigation exemption.

DECIDED: The County violated FOIA by failing to timely give a reason for its delay and a good faith estimate of time needed to respond to the request. However, as it was determined that the request was ultimately properly denied under the potential litigation exemption, no remediation was recommended.

Attorney General Opinion No. 20-IB10

Issued to Mr. John Young re: FOIA Complaint Concerning Christina School District on 3/12/2020.

Petitioner alleged that the Board did not provide adequate notice to the public that a censure resolution of a school board member would be discussed and voted on at the February 11, 2020 meeting. Specifically, he alleged that the Board added the item without adequate public notice, violated emergency meeting requirements, did not place the agenda item in the appropriate section of the agenda, and did not include the language of the resolution.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 20-IB11

Issued to Mr. Gary Myers re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 3/13/2020.

Petitioner alleged that DNREC improperly asserted the exemptions for pending or potential litigation and for attorney-client privilege and attorney work product doctrine in denying his request for records pertaining to an ongoing dispute over the Renewable Energy Portfolio Standards Act (“REPSA”) regulations.

DECIDED: No FOIA violation was found, as the pending litigation exemption applies.

Attorney General Opinion No. 20-IB12

Issued to Mr. Scott Becker re: FOIA Complaint Concerning the Delaware Criminal Justice Information System on 3/17/2020.

Petitioner alleged that DELJIS improperly denied his request for statistical information from the Criminal Justice Information System databases because DELJIS failed to contact other state agencies to retrieve records responsive to his request and DELJIS improperly asserted exemptions for investigatory and criminal history information.

DECIDED: No FOIA violation was found. FOIA does not require DELJIS to contact other state agencies to collect records for this request. In addition, FOIA does not require a public body to create a new record, and fulfilling this request would require DELJIS to create a new record.

Attorney General Opinion No. 20-IB13

Issued to Ms. Julie Nay re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 3/30/2020.

Petitioner alleged DNREC improperly denied her request for a site safety report, but DNREC's legal counsel responded the report did not yet exist.

DECIDED: No FOIA violation was found. FOIA does not require a public body to produce a record that does not exist.

Attorney General Opinion No. 20-IB14

Issued to Mr. Scott Becker re: FOIA Complaint Concerning the Delaware State Police on 4/6/2020.

Petitioner alleged that as a Delaware statute requires a certain firearms report be provided to the General Assembly, the State Bureau of Identification of the Delaware State Police ("DSP") improperly denied his request for this report.

DECIDED: As DSP's counsel represented this report does not exist and DSP's compliance with any statute other than the FOIA statute is outside this Office's authority, it was determined that DSP did not violate FOIA.

Attorney General Opinion No. 20-IB15

Issued to Ms. Julie Nay re: FOIA Complaint Concerning New Castle County on 4/8/2020.

Petitioner alleged that New Castle County failed to timely respond to her FOIA request.

DECIDED: No FOIA violation, as New Castle County attempted to respond to the request by producing the requested records but made an inadvertent mistake in the petitioner's email address. When notified, New Castle County rectified this inadvertent error and provided petitioner with the requested documents.

Attorney General Opinion No. 20-IB16

Issued to Mr. Esteban Parra re: FOIA Complaint Concerning the Delaware State Police on 4/8/2020.

Petitioner alleges that as a Delaware statute requires a certain firearms report be provided to the General Assembly, the State Bureau of Identification of the Delaware State Police ("DSP") improperly denied his request for this report.

DECIDED: As DSP's counsel represented this report does not exist and DSP's compliance with any statute other than the FOIA statute is outside this Office's authority, it was determined that DSP did not violate FOIA.

Attorney General Opinion No. 20-IB17

Issued to Mr. Jeffrey Clouser re: FOIA Complaint Concerning the Delaware State Police on 4/8/2020.

Petitioner alleged that DSP failed to timely respond to its request for records.

DECIDED: As DSP since provided a response, petitioner's claim is now moot. DSP is cautioned to provide timely communications in the future.

Attorney General Opinion No. 20-IB18

Issued to Mr. Jeremy Rothwell re: FOIA Complaint Concerning the City of Harrington on 5/22/2020.

The Petitioner alleged that the City of Harrington 1) improperly delayed a response to a FOIA request for certain items; and 2) did not respond to the remaining items in a timely manner.

DECIDED: This Office was unable to make a finding regarding whether the response was improperly delayed. Because the City has since provided the Petitioner with a response to the remaining items in his FOIA request, the second allegation is moot.

Attorney General Opinion No. 20-IB19

Issued to Mr. Sean Dunagan re: FOIA Complaint Concerning the University of Delaware on 6/25/2020.

Petitioner alleged that the University of Delaware improperly denied their request for records and communications related to Vice President Biden's senatorial papers or communications between anyone acting on behalf of the university and Vice President Biden, his presidential campaign, or other person acting on his behalf.

DECIDED: No FOIA violation was found. The University of Delaware is exempt from FOIA except for the meetings of its Board of Trustees and records related to the expenditure of public funds. The factual record did not indicate that the records requested were related to the expenditure of public funds.

Attorney General Opinion No. 20-IB20

Issued to Mr. Andrew Kerr re: FOIA Complaint Concerning the University of Delaware on 7/1/2020.

Petitioner alleged that the University of Delaware improperly denied its request for records related to the Vice President Biden senatorial papers maintained at the University library.

DECIDED: No FOIA violation was found, as the records were not "public records" subject to FOIA or were exempt pursuant to 29 Del. C. 10002(1)(12) as library patron records.

Attorney General Opinion No. 20-IB21

Issued to Councilmember Vicki Carmean re: FOIA Complaint Concerning the Town of Fenwick Island on 7/22/2020.

Petitioner alleged that the Town Council of Fenwick Island violated FOIA because the Town officials should have discussed the matter of approving an open pool bar at a public meeting and certain Town officials made unauthorized statements about this approval.

DECIDED: As these issues are outside the scope of FOIA, no violation of FOIA occurred.

Attorney General Opinion No. 20-IB22

Issued to Ms. Jeanne Kuang re: FOIA Complaint Concerning the City of Wilmington on 10/06/2020.

Petitioner alleged that City applications for federal grants and emails with federal agencies were improperly withheld. The City argued that the completed applications were under the exclusive control of the federal government and email requests should be directed to the Delaware Department of Technology and Information.

DECIDED: The City violated FOIA by denying the requests.

Attorney General Opinion No. 20-IB23

Issued to Richard Abbott, Esq. re: FOIA Complaint Concerning the Environmental Appeals Board on 10/13/2020.

Petitioner alleged the EAB improperly deliberated an appeal twice in executive session. DNREC argued that 7 Del. C. § 6008(a) permitted these deliberations.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 20-IB24

Issued to Ms. Keanne Kuang re: FOIA Complaint Concerning the Wilmington Neighborhood Conservancy Land Bank Corporation on 10/21/2020.

Petitioner alleged that the Land Bank improperly assessed charges for legal review of requested documents. The Land Bank responded that the review of nonpublic information would be done by a staff member rather than an attorney and would thus be considered administrative.

DECIDED: The Land Bank violated FOIA, as the determination of whether information is exempt from FOIA is legal review. This Office recommended that the Land Bank update its cost estimate accordingly.

Attorney General Opinion No. 20-IB25

Issued to Mr. Bruce Vivari re: FOIA Complaint Concerning the City of Rehoboth Beach on 10/28/2020.

Petitioner alleged that Rehoboth failed to respond to multiple records requests.

DECIDED: This Office determined that the City violated FOIA by failing to timely respond to three requests.

Attorney General Opinion No. 20-IB26

Issued to Ms. Marie Hatkevich and Mr. Harvey Shulman re: FOIA Complaint Concerning the City of Rehoboth Beach on 10/28/2020.

Petitioners alleged that the Rehoboth Beach listed an agenda item for a meeting that was impermissibly vague because it did not include the name of a nominee to its membership. The agenda item was amended less than seven days before the meeting to include the name of the nominee.

DECIDED: The City violated FOIA by not briefly stating its reason for amending its agenda, as required by FOIA.

Attorney General Opinion No. 20-IB27

Issued to Mr. Steck re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 11/09/2020.

Petitioner alleged that DNREC improperly denied a comment period at a hearing to members of the general public while permitting permit applicants to speak.

DECIDED: No FOIA violation was found, because the permit hearing is not subject to FOIA's open meeting requirements.

Attorney General Opinion No. 20-IB28

Issued to Councilmember Samuel L. Guy re: FOIA Complaint Concerning the City of Wilmington on 11/09/2020.

Petitioner alleged that the Wilmington City Council President violated FOIA by notifying a councilmember of the revocation of their position without a public meeting, that City held a virtual public meeting and denied this councilmember meeting access codes and other items, and that FOIA does not permit a pre-emptive bar on a public body member's participation in the public body's meetings.

DECIDED: No FOIA violation was found.

Attorney General Opinion No. 20-IB29

Issued to Mr. John Young re: FOIA Complaint Concerning the Christina School District Board of Education on 12/02/2020.

Petitioner alleged that the Christina School District Board of Directors selected and negotiated terms of employment with a candidate for superintendent out of public view and a meeting's agenda item, "Board Action on Superintendent Search," was insufficient to meet the agenda items.

DECIDED: The Board violated FOIA by not noticing and preparing minutes of the meetings of the two Board members, who constituted a Board committee subject to FOIA. No FOIA violation was found relating to allegation about the agenda, because the agenda item provided adequate public notice of the Board's action.

Attorney General Opinion No. 20-IB30

Issued to Ms. McFalls re: FOIA Complaint Concerning New Castle County on 12/07/2020.

Petitioner alleged that the New Castle County Division of Police improperly denied a request for a copy of an arrest warrant. In response, the County provided an affidavit of its FOIA Coordinator asserting that the County did not have the requested records within its possession or custody.

DECIDED: As the County demonstrated it had no responsive records, no FOIA violation was found.

Attorney General Opinion No. 20-IB31

Issued to Mr. Randall Chase re: FOIA Complaint Concerning the Finance/Employee Compensation & Benefits/Facilities Committee of the Delaware Association of Professional Engineers on 12/11/2020.

Petitioner alleged DAPE improperly planned to discuss financial data in executive session per its published agenda.

DECIDED: This Office accepted the representation that financial data was not discussed in executive session and its inclusion on the agenda was an error. This error was a technical violation of FOIA for which no remediation was necessary.

Attorney General Opinion No. 20-IB32

Issued to Mr. Sam Chick re: FOIA Complaint Concerning the Delaware Department of Transportation on 12/14/2020.

Petitioner alleged DelDOT improperly withheld certain records because DelDOT's produced records indicated an exchange of text messages on a private cell phone occurred and those text messages were not included with the production. In addition, Petitioner argued that DelDOT failed to provide any records related to the Office of the Governor.

DECIDED: As DelDOT's counsel indicated no additional responsive records were located, no FOIA violation was found.

Attorney General Opinion No. 20-IB33M

Issued to Mr. William Paskey re: FOIA Complaint Concerning the Delaware Department of Safety and Homeland Security on 12/18/2020.

Petitioner alleged DSHS violated FOIA by not timely responding to his request for records. DSHS advised Petitioner on the date of his request that the request had been sent for legal review and DSHS would respond within 15 business days, but DSHS failed to do so and did not respond to Petitioner's follow-up correspondence.

DECIDED: The petition was determined to be moot, as DSHS provided the requested records while the petition was pending. However, DSHS's immediate citation of a need for legal advice and failure to respond until the petition was filed, despite the petitioner's follow-up, violate the spirit of FOIA. DSHS was cautioned to invoke extensions for additional time to respond to requests only when needed and to timely communicate regarding requests in the future.

Attorney General Opinion No. 21-IB01

Issued to Anthony W. Dohring, Esquire re: FOIA Complaint Concerning the Delaware Department of Corrections on 01/14/2021.

Petitioner alleged that the Department of Correction failed to timely respond to his request and improperly denied his request for surveillance video and disciplinary hearing records.

DECIDED: No FOIA violation was found. The allegation of untimeliness was moot, and the requested records were determined to be exempt under sections 10002(l)(6) & (17) of FOIA.

Attorney General Opinion No. 21-IB02

Issued to Mr. Warren Rosenkranz re: FOIA Complaint Concerning the Village of Arden on 01/21/2021.

Petitioner alleged that the Chair of the Town Assembly of the Village of Arden improperly denied him records and excluded him from discussions with the attorney related to the Village's litigation. He argued that he was entitled to the records as a member of the Town Assembly.

DECIDED: No FOIA violation was found. The petitioner's rights in regard to his membership in the Town Assembly is outside the scope of this Office's authority to determine. The pending or potential litigation exemption is applicable to his request because the requested records pertain to the Village's pending litigation.

Attorney General Opinion No. 21-IB03

Issued to Ms. Brooke Schultz re: FOIA Complaint Concerning the Sussex Technical School District Board of Education on 02/25/2021.

Petitioner alleged that the Sussex Technical School District Board of Education did not give adequate notice on its agenda of its intent to appoint a superintendent.

DECIDED: The Board gave sufficient notice for discussing a job candidate's qualifications in executive session by noting that "Personnel" would be discussed, but violated FOIA by not giving adequate notice of its intent to appoint a superintendent in open session. This Office recommended that the Board hold a new vote on the matter in a future meeting after providing more specific notice to the public.

Attorney General Opinion No. 21-IB04

Issued to Mr. Craig O'Donnell re: FOIA Complaint Concerning the City of Delaware City on 03/01/2021.

Petitioner alleged that Delaware City violated FOIA by improperly responding to FOIA requests for its community center financial records, its FOIA log, and request for a lease agreement, including the following: 1)) whether the responses from the City to Petitioner's Community Center requests were timely and responsive in terms of its level of detail; 2) whether the City violated FOIA by failing to maintain its FOIA log and by erroneously marking the Community Center requests on the log as closed; 3) whether the City's response to Petitioner's request for an agreement was untimely, incomplete, and improperly designated as complete on the FOIA log; 4) whether the City's request to fill out a certain form violated FOIA; and 5) whether certain aspects of the City's FOIA website were improper, including the FOIA Coordinator information, the availability of multiple request forms, and the .pdf form not being a "fillable" document.

DECIDED: No FOIA violation was found, but the City was reminded to properly maintain its FOIA log, to accept FOIA requests as provided by the FOIA statute, and to timely update its FOIA Coordinator information.

Attorney General Opinion No. 21-IB05

Issued to Mr. Jordan Howell re: FOIA Complaint Concerning the Delaware Department of State on 03/05/2021.

Petitioner alleged that the Department of State violated FOIA by failing to provide certain records responsive to his request for conference materials.

DECIDED: As the Department verified that the specific records requested do not exist, no FOIA violation was found.

Attorney General Opinion No. 21-IB06

Issued to Mr. Xerxes Wilson re: FOIA Complaint Concerning the City of Wilmington on 03/08/2021.

Petitioner alleged that that the City of Wilmington improperly denied his request for investigatory records related to a fire in Wilmington. The cause of the fire was not determined, and the investigation was marked undetermined/closed. The investigator reserved the ability to modify the investigative conclusion if new evidence was discovered.

DECIDED: The City did not violate FOIA by denying access to these records, as the City verified the records pertain to investigatory files for criminal law enforcement and this exemption applies even after the investigation is closed.

Attorney General Opinion No. 21-IB07

Issued to Ms. Kathy Hughes re: FOIA Complaint Concerning the Delaware State Police on 03/24/2021.

Petitioner alleged that the Delaware State Police (“DSP”) improperly denied her request for a criminal complaint.

DECIDED: DSP did not violate FOIA, as the investigatory files exemption applies to the criminal complaint.

Attorney General Opinion No. 21-IB08

Issued to Ameera Shaheed re: FOIA Complaint Concerning the City of Wilmington on 04/21/2021.

Petitioner alleged that the City of Wilmington failed to respond to a request for records.

DECIDED: No FOIA violation occurred, as the City provided evidence of its timely response to the request.

Attorney General Opinion No. 21-IB09

Issued to Ms. Wrobel re: FOIA Complaint Concerning the Delaware Department of Insurance on 04/22/2021.

Petitioner alleged that the Department of Insurance improperly cited exemptions in response to its request for certain records.

DECIDED: The Department did not violate FOIA in denying the items in the request on the basis of the pending or potential litigation exemption, the statutory exemption for examination work papers, and the investigatory files exemption.

Attorney General Opinion No. 21-IB10

Issued to Mr. Millard E. Price re: FOIA Complaint Concerning the Delaware Department of Corrections on 05/04/2021.

Petitioner alleged that DOC improperly denied his request for DOC policies and other records.

DECIDED: No FOIA violation occurred, as 29 Del. C. 10002(1)(13) exempts any records in DOC's possession which are sought by an inmate in DOC's custody.

Attorney General Opinion No. 21-IB11

Issued to Mr. Jason M. Schupp re: FOIA Complaint Concerning the Delaware Department of Insurance on 05/12/2021.

Petitioner alleged that the Delaware Department of Insurance improperly denied his request on the basis of his status as a non-citizen and on the basis of other statutory provisions applicable to the Department.

DECIDED: No violation of FOIA occurred as alleged in the petition.

Attorney General Opinion No. 21-IB12

Issued to Kenneth T. Kristl, Esquire re: FOIA Complaint Concerning the Delaware Department of Agriculture on 05/18/2021.

Petitioner alleged that his client's requests for records submitted to the Delaware Department of Agriculture were improperly denied. The Department asserted that the records were exempt by statute, pursuant to 29 Del. C. 10002(1)(6) and 3 Del. C. 2247.

DECIDED: The Department did not meet its burden to justify its denial of access to the requested records.

Attorney General Opinion No. 21-IB13

Issued to Ms. Fries re: FOIA Complaint Concerning the Delaware Department of Health and Social Services on 06/23/2021.

Petitioner alleged that the Delaware Department of Health and Human Services violated FOIA by failing to identify the specific records it withheld and by giving excessive cost and time estimates.

DECIDED: No FOIA violation found.

Attorney General Opinion No. 21-IB14

Issued to Ms. Mara Payan, Ms. Kerri Evelyn Harris, Ms. Charito Calvachi-Mateyko, Mr. Greg Layton, Mr. Jay Monteverde and Mr. Joseph Meyer re: FOIA Complaint Concerning Sussex County on 06/30/2021.

Petitioners alleged that Sussex County failed to give proper notice of a Council meeting and the Industrial Revenue Bond Committee public hearing.

DECIDED: Counties are excluded from the requirement to post its notices and agendas online. No FOIA violation was found, as the Council and Industrial Revenue Bond Committee properly posted its physical notices for the Council meeting and public hearing regarding the Bond application.

Attorney General Opinion No. 21-IB15

Issued to John W. Paradee, Esq. re: FOIA Complaint Concerning the Delaware Department of Transportation on 07/02/2021 .

Petitioner alleged that DelDOT improperly asserted attorney-client privilege, pending or potential litigation, draft document exclusion, and the exemption for confidential financial or commercial information to deny his clients' request for a traffic impact study and related draft documents and correspondence.

DECIDED: DelDOT violated FOIA by failing to meet its burden with respect to the records it claims are subject to attorney-client privilege, attorney work product, or the pending litigation exemption. It was recommended DelDOT review its records in accordance with this Opinion and provide a supplemental response in accordance with the timeframes permitted in Section 10003(h). This response is recommended to include a statement that the attorney-client privileged and work product materials were reviewed and to include any responsive records, with the exception of materials subject to attorney-client privilege or attorney work product and any working drafts, subject to any redactions otherwise appropriate under FOIA.

Attorney General Opinion No. 21-IB16

Issued to Mr. William Pickett re: FOIA Complaint Concerning the Governor's Council on Agriculture and the Delaware Council on Food and Farm Policy on 07/06/2021.

Petitioner alleged that the Governor's Council on Agriculture and the Delaware Food and Farm Policy Council failed to follow the open meeting requirements of FOIA by posting notices, agendas, and minutes of its meetings.

DECIDED: Both Councils are public bodies and in violation of FOIA for their failure to comply with the open meeting requirements.

Attorney General Opinion No. 21-IB17

Issued to Mr. William Pickett re: FOIA Complaint Concerning the Town of Georgetown on 07/23/2021.

Petitioner alleged that the Town of Georgetown violated FOIA by voting via email outside of a public meeting regarding the observation of the Juneteenth holiday this year.

DECIDED: The Town Council violated FOIA by voting on a matter of Council business by a series of calls and emails outside of a public meeting.

Attorney General Opinion No. 21-IB18

Issued to Bernice I. Corman, Esq. re: FOIA Complaint Concerning the Delaware Department of Transportation on 08/06/2021.

Petitioner alleged that her request was improperly denied on the basis of her lack of citizenship and the potential litigation exemption.

DECIDED: The request was properly denied on the basis of petitioner's lack of citizenship.

Attorney General Opinion No. 21-IB19

Issued to Ms. Shannon Marvel McNaught re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 08/18/2021.

Petitioner alleged that DNREC improperly denied her request for septic system inspection records under the investigatory files exemption.

DECIDED: DNREC's denial of the request was proper under the investigatory files exemption.

Attorney General Opinion No. 21-IB20

Issued to Mr. Leo A. Ventresca re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control on 09/14/21.

Petitioner alleged that DNREC improperly denied his request for records under the pending or potential litigation exemption. In addition, the petitioner alleged that DNREC failed to fulfill its obligations under the State Implementation Plan and a certain memorandum of understanding.

DECIDED: As an appeal was pending before the Environmental Appeals Board and the request related to that matter, this Office found that DNREC did not violate FOIA by denying the request under the pending litigation exemption. The remaining issues are outside the purview of this Office's authority.

Attorney General Opinion No. 21-IB21

Issued to Mr. William Pickett re: FOIA Complaint Concerning the Indian River School District on 09/27/21.

Petitioner alleged that the Indian River School District ("IRSD") violated FOIA by holding two votes at its August 22, 2021 meeting without providing proper notice to the public on the agenda.

DECIDED: IRSD violated FOIA as alleged in the Petition.

Attorney General Opinion No. 21-IB22

Issued to Mr. Karl Baker re: FOIA Complaint Concerning the Delaware Department of State on 09/29/21.

Petitioner alleged the Department of State improperly assessed charges for legal review of requested documents and failed to comply with its statutory obligations to make every effort to ensure that the administrative fees are minimized and to sufficiently itemize its cost estimate.

DECIDED: The Department violated FOIA by failing to meet its burden to demonstrate that it minimized the use of nonadministrative personnel to the extent possible in responding to this request.

APPENDIX B

Sample FOIA Request Tracking Sheet

