



FREEDOM OF INFORMATION ACT

ALSO KNOWN AS FOIA

29 *Del. C.* §§ 10001-10007

Introduction

**Presented by:
Deputy Attorney General
Lauren Maguire**

DISCLAIMERS

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

Legislative Declaration

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

29 Del. C. § 10001

Purposes of FOIA

- Promote governmental transparency and accountability
- Inform citizens
- Make it possible for citizens to observe and monitor the performance of public officials

FOIA Manual

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

FOIA Training

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

What This Presentation Will Cover

- FOIA Coordinators' duties and responsibilities
Presented by Deputy Attorney General Dorey Cole
- Requests to inspect and copy public records
Presented by Deputy Attorney General Ed Kosmowski
- Fees that may be charged by a public body responding to a FOIA request
Presented by Deputy Attorney General Joe Handlon
- Open meetings/executive sessions
Presented by Deputy Attorney General Joe Handlon
- Legislative update to virtual meetings
Presented by Deputy Attorney General Carla Jarosz
- Questions & answer Session
- Judicial and AG Opinions re: FOIA for the last two years

FOIA Coordinators' Duties and Responsibilities

Presented by:

Deputy Attorney General

Dorey Cole

FOIA Coordinators

- All public bodies must designate a FOIA Coordinator and:
 - Provide the Department of Justice the FOIA Coordinator's name and contact information
 - OpenGovernment@delaware.gov
 - Identify the FOIA Coordinator on the public body's website
 - Inform the Department of Justice and update the website within 20 working days of any change

29 Del. C. § 10003(g)(1)

FOIA Coordinators

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

FOIA tracking sheet must include:

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

Statute Provides Policies Governing:

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

Statute Provides Policies Governing:

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

Petitions to the Attorney General

- 29 *Del. C.* § 10005: “Any citizen may petition the Attorney General to determine whether a violation of FOIA has occurred or is about to occur.”
- Procedures: <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2019/09/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations.9.26.19.pdf>
- Attorney General Opinions posted online: <https://attorneygeneral.delaware.gov/opinions/>

RESPONDING TO REQUESTS FOR PUBLIC RECORDS

**Presented by:
Deputy Attorney General
Edward J. Kosmowski**

Public Records

- “Public Record” is defined in FOIA (*See 29 Del. C. § 10002(o)*) and the definition is purposefully very broad.
- However, there are many records that are not deemed public, and those exceptions are found in *29 Del. C. § 10002(o)(1)-(19)*.

FOIA Policy

- The DE FOIA statute requires that all State agencies and public bodies adopt a policy to address FOIA requests (29 *Del. C.* § 10003(b)).
- The policy can not violate the FOIA statute.
- A FOIA request may not be denied solely because the promulgated form is not used (29 *Del. C.* § 10003(f)).
- A FOIA policy may include provisions for the waiver of some or all of the administrative fees, which must apply equally to a particular class (*e.g.*, non-profit organizations) (29 *Del. C.* § 10003(m)(2)).

Important Deadlines

- 29 *Del. C.* § 10003(h) requires that a response to a FOIA request be made as soon as possible, but no later than 15 business days after receipt of the request.
- A response must indicate one of the following:
 - Access to the records is being provided;
 - Access to the records is being denied (in whole or in part), including the basis for the denial; or
 - Additional time is needed with a good faith estimate of how much time is required to fulfil the request.

Additional Time

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

Requests for Emails

- FOIA requires each public body to attempt to fulfill requests from its own records using reasonable efforts of its own staff.
- Only after an internal search with reasonable effort should an agency seek assistance from a third-party technology service provider.
 - Before requesting Delaware's Division of Technology and Information (DTI) to provide e-mail records, the public body is required to provide an itemized written cost estimate to the requesting party.
 - DTI charges an hourly rate to retrieve emails.
 - DTI only maintains some emails for only one year.
 - Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.

Suggested Steps to Provide Responsive Emails

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

Requests for Noncustodial Records

- If a FOIA request seeks records controlled by the public body that are not within its possession or cannot otherwise be fulfilled by the public body with reasonable effort from the records it possesses, then the public body shall request that the relevant custodian provide the noncustodial records to the public body.
 - Before requesting any noncustodial records, the public body is required to provide an itemized written cost estimate to the requesting party, listing all charges expected to be incurred in retrieving such records.
 - Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.

Denials

- If a FOIA request is denied, in whole or in part, the public body must include a reason for the denial in its response.
- A public body however, is not required to provide an index or any other compilation listing each record or part of a record that was denied.
 - 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.
 - In such an instance, a public body may meet its burden by producing an affidavit signed by counsel attesting that the records have been reviewed for certain privileges, along with a description of the privilege(s) applied.

Fees

Presented by:

Deputy Attorney General

Joe Handlon

Permitted Fees

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

29 Del. C. § 10003(m)

Photocopy Fees

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

Administrative Fees

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

Administrative Fees

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

Administrative Fees

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

Other Charges

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

Estimates

- “Itemized written cost estimate” for administrative fees
 - Provide to requesting party
 - List all charges expected to be incurred in retrieving such records
- Requestor may elect to proceed with, narrow, or cancel its request in response to the estimate
- Estimate must be prepared in good faith
 - Not too high – to discourage request
 - Not too low – to later pursue a collection action

Advance Payments

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

Fees - Summary

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

Executive Sessions

Presented by:

Deputy Attorney General

Joe Handlon

Executive Sessions:

Overview of Open Meetings

- All meetings of a public body must be open to the public unless specifically exempted in the FOIA statute. 29 *Del. C.* § 10004(b) – (d) & (h).
- *Meeting*: a formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.
- Required to provide notice and maintain minutes of all meetings. 29 *Del. C.* § 10004(e) & (f).

Meeting Notice Must Contain

Time, date and place of meeting and whether the meeting will be conducted under Section 10006A.

-29 *Del. C.* § 10004(e)(2)

Preliminary Agenda

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

-29 *Del. C.* §§ 10004(e)(2)&(e)(5)

Minutes

- Every meeting, including executive sessions
- Record the members present, each vote taken and each action agreed upon
- Unless vote is unanimous, minutes must state how each member voted and note abstentions and recusals.
- Executive session minutes may be withheld from public disclosure only so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.
- 29 *Del. C.* § 10004(f)

Calling an Executive Session

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

Executive Session—Reasons

- An individual citizen's qualifications to hold a job or pursue training (Applies generally only to Boards with statutory authority to hire their own employees. Does not apply to any Title 24 Board when discussing applications.) 29 *Del. C.* § 10004(b)(1)
- Preliminary discussions on site acquisitions for any publicly funded capital improvement or sales/leases of real property. 29 *Del. C.* § 10004(b)(2)
- Law enforcement agency's efforts to collect information leading to criminal apprehension. 29 *Del. C.* § 10004(b)(3)
- Discussions of identifiable, lawful, charitable contributors when anonymity has been requested. 29 *Del. C.* § 10004(b)(5)
- Student disciplinary cases, unless open meeting requested. 29 *Del. C.* § 10004(b)(7)
- Employee disciplinary cases or dismissal cases, *unless the individual requests that it be open.* 29 *Del. C.* § 10004(b)(8)
- Personnel matters, when the names, competency and abilities of individual employees or students will be discussed unless open meeting requested. 29 *Del. C.* § 10004(b)(9); *see also* Del. Op. Att'y Gen. 18-IB42 (determining executive session related to Town Solicitor was proper purpose).

Executive Session—Reasons

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

Proper Executive Session Discussions

- Collective Bargaining Discussions
- Pending Litigation
- Potential Litigation

29 Del. C. § 10004(b)(4)

See also Chemical Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd., 1994 WL 274295, at *10-11 (Del. Ch. May 19, 1994) for a discussion of the scope of this provision.

- Discussion of Non-Public Documents. 29 Del. C. § 10004(b)(6). *See* Del. Op. Att'y Gen. 18-IB05 (finding that the public body properly convened an executive session for the purpose of discussing a non-public record, or more specifically personnel records which would constitute an invasion of personal privacy, as exempted from disclosure by 29 Del. C. §10002(l)(1)).

Executive Session – Attendees

- “[S]everal of the exceptions for executive session imply the presence of non-board members (such as attorneys to discuss litigation strategy, or teachers and school administrators in student discipline cases). We believe that FOIA allows a public body to invite individuals to attend an executive session to provide information related to the subject matter for which the executive session is authorized. But a public body cannot invite non-members as observers. . . .” *Del. Op. Att’y Gen. 02-IB-17*.
- As a matter of good policy, if a member recuses themselves they should leave the executive session. *See, Del. Op. Att’y Gen. 18-IB38*.

Legislative Update to Virtual Meetings

**Presented by:
Deputy Attorney General
Carla Jarosz**

COVID-19 Pandemic's effect on Public Meetings

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

Subst. No. 1 to Senate Bill No. 243

- Signed on July 23, 2020 and Expired on June 30, 2021.
- Replaced video-conferencing with virtual meetings.
 - Video-conferencing – all members must participate at a noticed public location.
 - Virtual meeting - public meeting of a public body where one or more members attend through the use of electronic means.

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

- Effect – citizens and members of public bodies became comfortable with virtual meetings. Attendance and participation increased.

Senate Bill No. 94

- Signed on June 30, 2021.
- Repealed former video-conferencing provisions and replaced the temporary provisions in Subst. No. 1 to Senate Bill No. 243 with permanent changes to FOIA.

Virtual Meetings

How does a Virtual Meeting occur?

Mandatory

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

Discretionary

- **At the discretion of the chair or presiding officer**, a public body **may** call a virtual meeting.

Virtual Meetings Rules

- Meeting notice must include how the public can monitor or participate in the meeting.
- Meeting must have an Anchor location.
 - Defined in 10002(b) as "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."
- Member and witness identities must be “verified” and their actions “authenticated” to the satisfaction of the Chair.
- Members and witnesses must be able to do one of these:
 - Hear the comments of each member or witness
 - Hear the comments of **and view** each member or witness

Virtual Meeting Rules

- A document “accepted by the presiding officer or chair” must be provided to every member during the meeting and “made available to the public under Section 10003 of this title”
- The public must be able to monitor the meeting through electronic means (except executive session)
- The public must be able to provide public comment, if a public comment period is held
- Minutes of the virtual meeting are still required

Virtual Meetings During a State of Emergency

- Any public body can hold a virtual meeting during a state of emergency
- All board members can participate by electronic means
- No anchor location required
- Same public notice requirements as in-person except the posting at the principal office or where the meetings are regularly held is not required

Virtual Meetings During a State of Emergency

- If the law requires a public body to keep a verbatim transcript, the public body still must keep a verbatim transcript
- Only elected public bodies: A document used during the meeting by a member or witness that is accepted by the Chair must be immediately transmitted to each member or witness participating and the public must be able to view a recording of the meeting “within a reasonable time after” the meeting concludes

Final Words on Virtual Meetings

- All actions taken during a virtual meeting have the same legal effect as if it was an in-person meeting
- Virtual participants count toward quorum
- Virtual participants are allowed to vote
- Technological problems that limit public access will not invalidate the meeting or actions taken during the meeting.

Question and Answer

