



KATHLEEN JENNINGS  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
CRIMINAL DIVISION (302) 577-8500  
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400  
FAMILY DIVISION (302) 577-8400  
FRAUD DIVISION (302) 577-8600  
FAX (302) 577-2610

**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 22-IB42**

**November 16, 2022**

**VIA EMAIL**

Thomas Pledgie  
[tpledgie@msn.com](mailto:tpledgie@msn.com)

**RE: FOIA Petition Regarding the State Employee Benefits Committee**

Dear Mr. Pledgie:

We write regarding your correspondence alleging that the State Employee Benefits Committee of the Delaware Department of Human Resources (“DHR”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we conclude that the Committee violated FOIA by denying access to the September 19, 2022 meeting recording you requested.

**BACKGROUND**

On September 20, 2022, you submitted a request seeking the recording of the September 19, 2022 Committee meeting.<sup>1</sup> In response, the DHR offered meeting minutes when they are approved, but you reiterated that you would like to receive the recording. The DHR’s FOIA coordinator responded to your request on October 7, 2022, denying access to the recording because it falls under FOIA’s exemption for “any records pertaining to pending or potential litigation that are not records of any court” in Section 10002(o)(9). You again followed up, asking whether there are any recordings of the meetings of the Committee and its subcommittees from the last two years that would be made available and to what litigation DHR was referring. DHR did not respond as of the date of your Petition.

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<sup>1</sup> Petition.

The Petition alleges that you have been refused access to any existing meeting recordings for the Committee or its subcommittees, and these recordings would allow access to the public meeting for the members of the public that were not able to attend. Such a refusal, you allege, contradicts FOIA's requirement that meetings be open to the public.

The Committee, through its counsel, responded on October 24, 2022 to the Petition ("Response"). The September 19, 2022 meeting agenda included the item, "Medicare Advantage Implementation Updates/OE Planning." The Committee argues that the pending litigation exemption is appropriate in this case, because after the meeting, RISE Delaware filed suit against the Committee and other parties, seeking to stay the implementation of the Medicare Advantage Plan. The Committee's counsel states that the Court has stayed implementation of the plan, pending a final determination of the merits of the case. The Committee's counsel asserts that it is "without question that the recording of the [Committee's] meeting on September 19, 2022, which included implementation of the Medicare Advantage Plan on the agenda, pertains to the pending litigation."<sup>2</sup> Accordingly, the Committee's counsel contends that the Committee properly invoked the pending litigation exemption. Additionally, the Committee's counsel points out that FOIA does not require this meeting to be recorded.

## **DISCUSSION**

FOIA mandates that public records be "open to inspection and copying during regular business hours" and that "[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen."<sup>3</sup> The term, "public record," is broadly defined to include "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced."<sup>4</sup> However, "records pertaining to pending or potential litigation which are not records of any court" are excluded from the definition of "public record."<sup>5</sup> The public body carries the burden of proof to justify its denial of access to records.<sup>6</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>7</sup>

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<sup>2</sup> Response.

<sup>3</sup> 29 Del. C. § 10003(a).

<sup>4</sup> 29 Del. C. § 10002(o).

<sup>5</sup> 29 Del. C. § 10002(o)(9).

<sup>6</sup> 29 Del. C. § 10005(c).

<sup>7</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

The meetings of public bodies are generally required to be open to the public.<sup>8</sup> With one limited exception in Section 10006A for elected public bodies, FOIA does not require a public body to record a meeting and maintain a recording of that meeting for public inspection. Rather, public bodies are required to maintain minutes of meetings by recording the members who attended and except for town assemblies, recording by individual, each vote taken and action agreed upon.<sup>9</sup> Those meetings minutes must be made available for public inspection and copying.<sup>10</sup> Minutes for executive sessions must also be maintained and made available for public inspection and copying, except they may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.<sup>11</sup>

When public bodies create and maintain recordings directly transcribing public meetings, Delaware's Court of Chancery has found that those verbatim recordings are akin to the meeting minutes.<sup>12</sup> When they exist, these recordings must also be made available for public inspection and copying, subject to the provisions of Section 10004(f) governing meeting minutes.<sup>13</sup>

In this case, the agenda indicates that the item, "Medicare Advantage Implementation Updates," was an open session item discussed at a public meeting. Although we agree that FOIA does not require the Committee to create and maintain a video recording of the September 19, 2022 meeting, once the Committee created and maintained this recording, it is subject to FOIA and must be made available for public inspection and copying in the same manner as the meeting minutes. Thus, we find that the Committee violated FOIA by refusing access to the video recording of this meeting. It is recommended that the Committee provide access to the video recording of this public meeting within the timeframe provided in Section 10003.

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<sup>8</sup> Limited exceptions are noted in the FOIA statute. 29 *Del. C.* § 10004.

<sup>9</sup> 29 *Del. C.* § 10004(f).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*13 (Del. Ch. May 19, 1994) (finding that tape recordings of executive sessions are "simply another form of verbatim recording of the executive sessions" and "a verbatim recording, like written minutes, would be exempt from disclosure only if the recorded discussions pertain to a lawful purpose for holding the executive session").

<sup>13</sup> *Id.* (holding that a board must release tape recordings of certain executive sessions, only redacting those portions that specifically concern the lawful purpose of the executive sessions).

## **CONCLUSION**

For the foregoing reasons, we determine that the Committee violated FOIA by not providing you access to the recording of its September 19, 2022 public meeting.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Adria B. Martinelli, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General