



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 the Department of Justice to assist FOIA Coordinators
- Located on the Department of Justice Open Government webpage
- Intended as an “easy reference” for FOIA
- Updated biennially; update will be released October 2023

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
- Records Requests presented by Deputy Attorney General Edward Kosmowski
- Fees presented by Deputy Attorney General Joseph Handlon
- Open Meetings presented by Deputy Attorney General Victoria Groff
- Public Comment presented by Deputy Attorney General Joseph Handlon
- Executive Sessions presented by Deputy Attorney General Eric Zubrow
- Virtual Meetings presented by Deputy Attorney General Kayli Spialter
- Panel of FOIA Coordinators – Questions & Answers Session presented by Deputy Attorneys General Victoria Groff and Kayli Spialter
- 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/50/2023/05/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations-FINAL.pdf>
- Timeframes for filing
- Attorney General Opinions posted online: <https://attorneygeneral.delaware.gov/opinions/>

Will the public body need to provide an affidavit when answering a FOIA Petition?

In most cases, YES

Judicial Watch

- Unless it is clear on the face of the request that the demanded records are not subject to FOIA, the public body must determine if it has responsive records.
- When a FOIA response is challenged, the burden of proof is on the public body.
- Detailed affidavit - a description of the search and the outcome of the search (such as, who provided the information relevant to whether the public body has responsive records, when such inquiries were made, what, if any, documents were reviewed, and why the designated locations were searched).
- Unsworn or generalized statements are not sufficient.

Judicial Watch cases

- *Judicial Watch v. Del. Dep't of Justice*, 2021 WL 22550 (Del. Super. Jan. 4, 2021)
- *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.2d 996 (Del. 2021): affirmed in part, reversed in part, and remanded in part to the Superior Court
- *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923 (Del. Super. June 7, 2022)
- *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 10788530 (Del. Super. Oct. 19, 2022), *aff'd*, 2023 WL 4377918 (Del. July 6, 2023)

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)).

Obligation to Search Files

What Is a Public Body's Obligation to Search Its Files to Identify Public Records in Response to a FOIA Request?

- Unless it is clear on the face of the request that the demanded records are not subject to FOIA, the public body must search for responsive records.
- A public body is obligated to conduct a 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.

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.
 - 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

29 Del. C. § 10003(h)(2)

- If a FOIA request is denied, in whole or in part, the public body must indicate the reasons for the denial in its response.
- The public body is not required to provide an index or any other compilation (e.g., privilege log), as to each record or part of a record that was denied.

Fees

Presented by:

Deputy Attorney General

Joseph C. 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 the Delaware Code or their county or municipal codes.

29 Del. C. § 10003(m)

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.

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

So What's Permitted?

- 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

No Legal Review – What's That?

- 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.
- Also – 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 meant to discourage request
 - But avoid creating 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

- Not for first 20 pages and under one hour
- Ensure fee collection practices comply with the statute and any internal FOIA policy
- Ensure that fees that are assessed are reasonable under FOIA
- Estimates in advance – can request pre-payment

Recent Decisions on Fees

- 23-IB03 1/24/23 (to Amy Roe and DOE)
 - 2 step process ok
 - Can charge for redactions – but not legal review
 - If management used, must explain why
- 22-IB45 11/28/22 (to Richard L. Abbott and DeIDOT)
 - 5 hour (\$200) cost estimate for tab sheets that include project names, numbers, parcels areas acquired and names and addresses of owners
 - Records not in central location
 - Affidavit explaining who had to do review and why

Open Meetings

Presented by:

Deputy Attorney General

Victoria E. Groff

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.

Meeting Notice & Agenda

- Required to provide notice of all meetings. 29 Del. C. § 10004(e) & (f).
- Public notice is required for regular meetings and intent to hold an executive session at least 7 days in advance of the meeting. 29 Del. C. sec. 10004(e)(2).
- If agenda is not available at time of initial posting of public notice, it must be added to the notice at least 6 hours in advance of the meeting and give reason for the delay in posting.
- Exceptions for emergency meetings necessary for the immediate preservation of the public peace, health, or safety, and the General Assembly. 29 Del. C. Sec. 10004(e)(1).

Meeting Notice & Agenda

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)

Public Comment

Presented by:

Deputy Attorney General

Joseph C. Handlon

Public Comment Sessions



HS No. 1 for SB 293

- Meetings open to the public must provide an opportunity for public comment (except GA).
- Time must provide "meaningful opportunity for public to engage with the public body."
- May impose "reasonable time, place and manner restrictions on the length of the public comment period and amount of time allotted for each comment."
- SB 293 originally allowed for restrictions on content, and HS No. 1 removed them. SB 293 originally did not have "meaningful opportunity" language.

Interesting Questions



- Limit content?
- Relevance?
- First Amendment?
- Public discussing confidential info?
- 2 minute restriction upheld for school board meeting.

Executive Sessions

Presented by:

Deputy Attorney General

Eric Zubrow

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(o)(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-IB17.*
- As a matter of good policy, if a member recuses themselves from the matter, they should leave the executive session. *See Del. Op. Att’y Gen. 18-IB38.*

Virtual Meetings

**Presented by:
Deputy Attorney General
Kayli Spialter**

Brief History of Virtual Meetings

- **Senate Bill No. 104** – Approved on 9/17/09
 - Video-conferencing
- **Subst. No. 1 to Senate Bill No. 243** - Approved on 7/23/20 and expired on 6/30/21.
 - Virtual meetings replace video-conferencing.
- **Senate Bill No. 94** - Approved on 6/30/21.
 - 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).
 - 23-IB08: Audio access only is sufficient
- If a public comment period is held, the public must be able to provide public comment.
- Minutes of the virtual meeting are still required.

Virtual Meetings

During a State of Emergency

- The COVID-19 Public Health Emergency ended May 11, 2023, but the exceptions were codified for use in a future 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 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

