

DELAWARE FREEDOM OF INFORMATION ACT

POLICY MANUAL FOR FOIA COORDINATORS

As of October 25, 2023

DISCLAIMER

The Delaware Department of Justice (“DOJ”) strives to ensure the dissemination of timely, accurate public information. The information contained in this manual is provided for convenience. It is subject to change without notice. FOIA opinions issued by the DOJ and court decisions that interpret FOIA are issued frequently. At times, those authorities may contradict statements contained in this manual. Those authorities take precedence over any statement made in this Manual.

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 issues 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. FOIA is to be liberally construed, and any statutory exemptions are strictly interpreted.

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) define and discuss what constitutes a public body, (ii) define and discuss what constitutes a public record, (iii) explain the duties and responsibilities of the FOIA coordinator, (iv) identify important deadlines, (v) explain the fees a public body is permitted to collect in connection with FOIA records requests, (vi) outline the requirements for a public meeting and explain the reasons for calling an executive session, and (vii) describe FOIA petitions and determinations. 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.

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 an administrative review of FOIA petitions for determination and is different from an opinion of a court. Although we may rely on these opinions as persuasive authority, previous opinions are not binding precedent.

This manual and other FOIA resources of the DOJ are available at <https://attorneygeneral.delaware.gov/executive/open-government>. FOIA opinions are available at <https://attorneygeneral.delaware.gov/opinions/>.

SECTION 1. 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 meeting³ and public records⁴ requirements. FOIA recognizes that an individual may be considered a public body of one member.⁵

A. Statutory Definition

FOIA defines a “public body” as 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**
- (3) Is impliedly or specifically charged by any other public official,

³ See Section 5 for a discussion of open meeting requirements and exemptions.

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

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

body, or agency to advise or to make reports, investigations or recommendations.⁶

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 the entity's funding and 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.⁷

C. 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.⁸

Such a search must be conducted in a manner to determine whether the public body has any responsive documents in its possession.

D. 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

⁶ 29 Del. C. § 10002(k).

⁷ 29 Del. C. § 10002(m).

⁸ See 29 Del. C. § 10003(d)(1).

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.

E. Organizations Previously Found to be Public Bodies

The following agencies and organizations have been found to be public bodies in previous FOIA opinions:

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.

F. 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 excludes the University of Delaware and Delaware State University from the definition of public body 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."

G. 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.

For example, the Delaware courts, the arms of any Delaware court, and agencies directly supporting the courts are not considered public bodies.⁹ 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.¹⁰

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.

⁹ 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 Del. Op. Att’y Gen.* 96-IB03 (Jan. 2, 1996) (“The courts are not public bodies within the meaning of [FOIA]....”).

¹⁰ *See Del. Op. Att’y Gen.* 20-IB08 (Feb. 25, 2020).

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.¹¹ 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.¹² 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.¹³ 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 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**

¹¹ See 29 Del. C. § 10003(a).

¹² 29 Del. C. §§ 501-526. A thorough description of the 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 DOJ 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.

¹³ The definition of “public record” is subject to certain statutory and common law exemptions that will be discussed in greater detail in section III.

physical or electronic record that may be created, maintained or possessed by a public body.¹⁴ 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.¹⁵

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.

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

¹⁴ See 29 Del. C. § 10002(o).

¹⁵ *McBurney v. Young*, 569 U.S. 221 (2013).

“public record” is defined as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected...”¹⁶ 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,¹⁷ 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.”¹⁸ 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.

H. 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.¹⁹

¹⁶ 29 *Del. C.* § 10002(o).

¹⁷ “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).

¹⁸ 29 *Del. C.* § 10003(a).

¹⁹ 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.²⁰ The DOJ encourages public bodies to lean towards transparency and where appropriate, to release records. However, 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),²¹ 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.”²²

²⁰ *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.”).

²¹ 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).

²² *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:** Confidential and proprietary information which, if it falls into a rival’s hands, will cause serious competitive disadvantage.²³
- **Confidential commercial or financial information:** Commercial or financial information obtained from a person which is of a privileged or confidential nature.
- **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.²⁴
- **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.
- **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-

²³ *Del. Op. Att’y Gen.* 14-IB04 (July 18, 2014).

²⁴ 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 (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); *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).

product doctrine, and privacy.²⁵

- **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.**²⁶
- **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.”**²⁷

²⁵ 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).

²⁶ Potential litigation: This exemption only applies to potential litigation against the public body that was 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.’” *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 administrative appeals. *Del. Op. Att’y Gen.* 20-IB09 (Feb. 27, 2020).

²⁷ *See* 29 *Del. C.* § 10004(f).

- **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.²⁸**
- **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.²⁹**
- **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.**
- **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

²⁸ See *Del. Op. Att'y. Gen.* 21-IB10.

²⁹ See *Flowers v. Office of the Governor*, 167 A.3d 530, 543-46 (Del. Super. 2017).

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.³⁰ 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.³¹

³⁰ *Del. Op. Att'y Gen. Op.* 21-IB15 (July 2, 2021).

³¹ *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 litigation' exception, pose a barrier to the public's right to access and are, therefore, narrowly construed.").

SECTION 2. 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.³² 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 working days of any change.³³ The FOIA coordinator is permitted to delegate specific duties and functions to other public body employees.³⁴

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;³⁵
- 6) Maintain a document that tracks all FOIA requests, which includes the following minimum information:

³² See 29 Del. C. § 10003(g).

³³ See 29 Del. C. § 10003(g)(1).

³⁴ *Id.*

³⁵ An analysis of the FOIA coordinator’s obligations under this section requires a fact-based examination of the circumstances. *Del. Op. Att’y Gen. 22-IB47* (determining that FOIA coordinator did not violate duty to foster cooperation under Section 10003(g) when the FOIA coordinator interpreted a request inconsistent with the requesting party’s intent, and upon further clarification of the scope of the request, promptly responded within two days); *Del. Op. Att’y Gen. 19-IB43* (July 22, 2019) (“Cooperation requires both parties to participate in good faith.”).

- a) The requesting party's contact information;
- 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.³⁶

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;
- 6) A public body's review of records requested to determine whether

³⁶ See 29 Del. C. §§ 10003(g)(1)-(3).

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.

SECTION 3. 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 after the receipt of the request. A FOIA request is considered received by the public body when the designated FOIA coordinator receives the request.³⁷
- 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.
 - i) If a FOIA request is denied in whole or in part, the public body must include a reason for the denial.
 - ii) 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.³⁸

³⁷ 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).

³⁸ *Judicial Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1012 (Del. 2021).

iii) A description of the search and the outcome of the search (factual representations on which a public body relies) must be reflected through statements made under oath, such as statements in an affidavit, in order for the public body to satisfy its burden of proof.³⁹ Counsel’s unsworn statements, describing the factual basis for determining that the requested records were not subject to FOIA, are insufficient.⁴⁰

iv) Finally, 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.⁴¹ As an example, 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.

³⁹ See *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 10788530, at *1 (Del. Super. Ct. Oct. 19, 2022), *aff’d*, 2023 WL 4377918 (Del. July 6, 2023).

⁴⁰ *Del. Op. Att’y Gen.* 23-IB21 (July 25, 2023) (citing *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1010-11 (Del. 2021)).

⁴¹ Section 10003(h)(2) requires the public body to “indicate the reasons” for a denial of a FOIA request but notes that the public body “shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.” *But see Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1008-12 (Del. 2021).

SECTION 4. 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.⁴² 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".

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.

⁴² 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.

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,⁴³ the statute allows agencies to waive those fees.⁴⁴ FOIA prohibits collection of administrative fees for requests requiring less than one hour of staff time to process.⁴⁵

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.⁴⁶ 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.⁴⁷ This is an important note for public bodies that do not routinely rely on counsel to determine whether any of the FOIA exemptions apply.

⁴³ See 29 Del. C. § 10003(m)(2).

⁴⁴ 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.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.* (“Administrative fees shall not include any cost associated with the public body’s legal review of whether any portion of the requested records is exempt from FOIA.”).

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.**⁴⁸

(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.
- 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.

⁴⁸ See 29 Del. C. § 10003(m)(2).

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.”⁴⁹ 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,”⁵⁰ public bodies are encouraged to include the hourly rate and reviewing employee’s position in its cost estimates.⁵¹ Upon receiving the estimate, the requesting party may choose to proceed with the request or revise,

⁴⁹ See 29 Del. C. § 10003(i)(2) (email search); (j)(2) (noncustodial records search); (m)(2) (administrative fees).

⁵⁰ See 29 Del. C. § 10003(m)(2).

⁵¹ Del. Op. Att’y Gen. 21-IB22 (Sept. 29, 2021).

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.⁵²

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.

⁵² See 29 Del. C. § 10003(m)(5); *Del. Op. Att'y Gen.* 19-IB51 (Sept. 16, 2019).

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.⁵³ 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.⁵⁴ “Public business” is broadly defined as “any matter over which the public body has supervision, control, jurisdiction or advisory power.”⁵⁵

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 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.⁵⁶ Informal

⁵³ 29 *Del. C.* § 10004(a) (emphasis supplied). For example, public bodies with only one member, such as the Governor, a town’s mayor, or a county administrator, are exempt from open meeting requirements. 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.

⁵⁴ 29 *Del. C.* § 10002(j) (emphasis added).

⁵⁵ *See* 29 *Del. C.* § 10002(m); *Del. Op. Att’y Gen. Op.* 21-IB17 (July 23, 2021).

⁵⁶ In contrast, in *Del. Op. Att’y Gen.* 95-IB20 (June 15, 1995), this Office found

meetings can be subject to FOIA's open meeting requirements even if no formal decision about the public business discussed is reached.⁵⁷

- 3) Workshops: Workshops held by public bodies that discuss public business are subject to FOIA's open meeting requirements.⁵⁸
- 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.⁵⁹

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.

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.

⁵⁷ 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.").

⁵⁸ See *id.*

⁵⁹ 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).

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.⁶⁰ 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.⁶¹

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.”⁶²

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.⁶³

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.⁶⁴

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.”⁶⁵ A

⁶⁰ 29 *Del. C.* § 10004(g). A “regularly scheduled meeting” is defined as any meeting of a public body held on a periodic basis. 10004(g)(2).

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

⁶² 29 *Del. C.* § 10004(g)(3).

⁶³ *Del. Op. Att’y Gen.* 16-IB17 (July 28, 2016).

⁶⁴ *See* 29 *Del. C.* § 10006A(b).

⁶⁵ 29 *Del. C.* § 10002(r).

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.⁶⁶ A public body must adhere to all the following rules to conduct a virtual meeting:⁶⁷

- 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.”⁶⁸
- 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.
- 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

⁶⁶ 29 *Del. C.* § 10006A(a).

⁶⁷ *See* 29 *Del. C.* § 10006A(c).

⁶⁸ During a state of emergency, a public body may hold a meeting fully virtually without an anchor location. 29 *Del. C.* § 10006A(e).

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 that citizens have timely notice of public meetings so that they can attend if they so choose.

FOIA requires that citizens be permitted to observe public meetings. Prior to a recently adopted amendment, FOIA provided no express right to participate in a public meeting.⁶⁹

However, under this recent amendment to the FOIA statute, an open meeting must include a time for public comment, unless the meeting is held by a public body within the General Assembly which is governed by the rules of proceedings adopted under Section 9, Article II of the Delaware Constitution.⁷⁰ The time for public comment must provide a “meaningful opportunity” for the public to engage with the public body.⁷¹ A public body may impose reasonable time, place, and manner restrictions on the length of the period and the amount of time allotted for each comment. Additionally, FOIA authorizes “the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.”⁷²

G. Exempt Bodies or Proceedings

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

⁶⁹ 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).

⁷⁰ 29 *Del. C.* § 10004(a)(2).

⁷¹ *Id.*

⁷² 29 *Del. C.* § 10004(d).

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.)⁷³

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.

H. Notice Requirements

Regular Meetings: A "regular meeting" is one that is held on a periodic

⁷³ 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."

basis.⁷⁴ 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.”⁷⁵ 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 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.
 - 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. Virtual meetings during a state of emergency or pursuant to an executive order adopted to prevent a public health emergency, held in compliance with Section 10006A, are excluded from this posting

⁷⁴ See 29 Del. C. § 10004(g)(2).

⁷⁵ 29 Del. C. § 10004(e)(4).

requirement.⁷⁶

- 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.
- 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 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.⁷⁷

“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.”⁷⁸ 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”⁷⁹ so that those members of the public with an “intense interest” in a subject will know what it is being discussed.⁸⁰ If the public body knows that the subject is important to the community, “it satisfies

⁷⁶ 29 Del. C. § 10006A(e), (f).

⁷⁷ 29 Del. C. § 10002(a).

⁷⁸ Del. Op. Att’y Gen. 97-IB20 (Oct. 20, 1997).

⁷⁹ *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994); see also Del. Op. Att’y Gen. 08-IB08 (May 23, 2008).

⁸⁰ *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).

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.”⁸¹

The adequacy of an agenda will be judged in light of the factual circumstances pertaining to each case.⁸² 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:

- The agenda must alert the public to the major issues expected to be discussed at the meeting.⁸³
- 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.⁸⁴
- 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.⁸⁵
- The matters to be discussed should be described with enough

⁸¹ *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).

⁸² *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).

⁸³ *See Del. Op. Att’y Gen.* 97-IB13 (June 2, 1997); *Del. Op. Att’y Gen.* 21-IB-21 (Feb. 25, 2021).

⁸⁴ *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 (Aug. 18, 2005); *Del. Op. Att’y Gen.* 06-IB15 (July 24, 2006); *Del. Op. Att’y Gen.* 11-IB12 (Aug. 18, 2011).

⁸⁵ *See Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003).

specificity to provide fair notice to the public.⁸⁶ 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.⁸⁷

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.⁸⁸

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. When a public body must amend an agenda less than seven (7) days prior to the date of the scheduled meeting, 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 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.'"⁸⁹

J. Meeting Minutes

Section 10004(f) of FOIA provides that public bodies must keep minutes of all public meetings, including executive sessions.⁹⁰ The minutes must include a

⁸⁶ See *Del. Op. Att'y Gen.* 03-IB17 (July 31, 2003); *Del. Op. Att'y Gen.* 05-IB05 (Feb. 22, 2005); *Del. Op. Att'y Gen.* 05-IB26 (Aug. 29, 2005).

⁸⁷ *Lechliter v. Becker*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017).

⁸⁸ *Del. Op. Att'y Gen.* 19-IB48 (Sept. 9, 2019).

⁸⁹ *Del. Op. Att'y Gen.* 20-IB26 (Oct. 28, 2020) (citing *Del. Op. Att'y Gen.* 05-IB15 (June 20, 2005)).

⁹⁰ FOIA does not require a public body to transcribe, or tape record the entirety of its meetings, with the exception of virtual meetings held during a state of emergency or pursuant to an executive order adopted to prevent a public health emergency. These types of virtual meetings must be recorded, and those recordings

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.⁹¹

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. 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.* § 10004.⁹² 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?

must be made available for public review within a reasonable time after the meeting concludes. Additionally, a public body’s enabling statute may have transcription or recording requirements.

⁹¹ See 29 *Del. C.* § 10004(e)(4).

⁹² 29 *Del. C.* § 10004(a).

Unless otherwise permitted by the public body's enabling statute,⁹³ the circumstances listed in FOIA “**are exclusive and form the only basis for entering into closed session.**”⁹⁴ 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.”⁹⁵
- 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.’”⁹⁶
- 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.⁹⁷

⁹³ See Section 4.C., above, for examples of public bodies that are permitted to meet in executive session by their enabling statute.

⁹⁴ See *Del. Op. Att'y Gen.* 12-IIB09 (July 13, 2012) (quoting *Del. Op. Att'y Gen.* 80-FOI3 (Aug. 30, 1980)).

⁹⁵ 29 *Del. C.* § 10004(b)(1).

⁹⁶ *Del. Op. Att'y Gen.* 05-IB24 (Aug. 18, 2005) (quoting *Del. Op. Att'y Gen.* 02-IB27 (Nov. 4, 2002)).

⁹⁷ 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

- 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 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).⁹⁸
- 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).⁹⁹ This exemption does not apply to situations where a specific employee’s name is mentioned unrelated to competency or ability. Similarly, general employee-related discussions that do not directly relate to name, competency, and ability are not eligible.¹⁰⁰

B. Requirements for Meeting in Executive Session

19, 1994).

⁹⁸ 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).

⁹⁹ *Del. Op. Att’y Gen.* 17-IB20 (July 12, 2017) (noting that the agenda need not 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).

¹⁰⁰ *Del. Op. Att’y Gen.* 22-IB41 (Nov. 14, 2022) (holding that items concerning “employee compensation, leave, and vehicle usage” were general discussion topics that did not fall under an exception for open meeting requirements).

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.¹⁰¹ Likewise, a brief statement of the reasons for convening in executive session must be set forth in the agenda for the meeting.¹⁰² 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.¹⁰³ However, any discussions or actions anticipated to follow the executive session may require additional elaboration to meet the notice requirements for open session items.¹⁰⁴ 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 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.¹⁰⁵
- 3) Limited Discussion: The public body must limit the discussion during the closed session to public business that falls within one of the

¹⁰¹ 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).

¹⁰² See 29 Del. C. § 10004(e)(2).

¹⁰³ See *Common Cause of Del. v. Red Clay Consol. Sch. Dist.*, 1995 WL 733401, at *4 (Del. Ch. Dec. 5, 1995).

¹⁰⁴ See *Del. Op. Att’y Gen. 23-IB28* (Oct. 3, 2023); *Del. Op. Att’y Gen. 19-IB31* (June 24, 2019).

¹⁰⁵ See 29 Del. C. § 10004(c).

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.¹⁰⁶ The minutes must also reflect who was present.¹⁰⁷

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 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 or because they hold unique status that warrants the individual's inclusion.¹⁰⁸

¹⁰⁶ See *Levy*, 1990 WL 154147, at *3; 29 *Del. C.* § 10004(f); *Del. Op. Att’y Gen.* 17-IB59 (Nov. 20, 2017).

¹⁰⁷ See 29 *Del. C.* § 10004(f).

¹⁰⁸ *Del. Op. Att’y Gen.* 22-IB44 (July 12, 2017) (allowing for admission of an elected but not yet sworn member because “due to his unique status as an elected [but unsworn] member, to the exclusion of others, [the inclusion] did not transform the executive sessions into meetings that must be open to the public”).

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. FOIA PETITIONS AND DETERMINATIONS

FOIA allows any citizen to petition the DOJ for a determination as to whether a violation of FOIA has occurred or is about to occur.¹⁰⁹ 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.

The DOJ maintains rules of procedures for the FOIA petition process, which were most recently updated in May 2023. 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 DOJ 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 may not be anonymous. At a minimum, the petitioner's name and contact information must be noted on the petition. 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. For petitions alleging violations related to meeting agendas or minutes, copies of those relevant agendas or minutes should be submitted. These evidentiary records, including the request, response, minutes, and agenda, should be attached to the petition in their original format. For

¹⁰⁹ 29 *Del. C.* § 10005.

example, evidentiary emails in .pst may be attached to the emailed petition or forwarded separately.

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 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 DOJ within sixty (60) days of the denial. All other petitions must be received by the DOJ within six (6) months from the date of the alleged violation.

C. Burden of Proof

In a FOIA petition, “the burden of proof is on the custodian of records to justify the denial of access to records and is on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.”¹¹⁰ In answering a petition, unless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts. The facts necessary to support a search will depend on the circumstances, but the affidavit should describe, at a minimum, where a public body searched (including who, by position or title, was asked and when), what, if any, records were reviewed, and any other relevant aspects.¹¹¹ It is also recommended that a public body, as appropriate, explain why the locations were selected to be searched. The public body has the burden to create a record from which the DOJ or the court can determine whether the public body performed an adequate search for responsive documents.

However, in answering a petition, the public body is not required to provide an index or any other compilation listing each record or part of a record that was

¹¹⁰ 29 *Del. C.* § 10005(c).

¹¹¹ *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Jun. 7, 2022).

denied.¹¹² As an example, a public body is not required to produce a privilege log to support a denial of documents under either the attorney-client privilege or the attorney work product doctrine.

D. Judicial Actions

A citizen has the option to pursue FOIA claims through judicial remedies as provided in Section 10005.

¹¹² 29 *Del. C.* § 10003(h)(2).

APPENDIX A

Opinion Summaries for Prior Two Years

Summary of Delaware State Court Opinions Discussing FOIA Matters (October 1, 2021 to September 30, 2023)

Judicial Watch cases

Judicial Watch, Inc. v. Univ. of Del., 267 A.2d 996 (Del. 2021)

Judicial Watch, Inc. and The Daily Caller News Foundation (“Appellants”) appealed certain aspects of the Superior Court’s decision to the Supreme Court of Delaware. The Appellants did not appeal the Superior Court’s rulings that the Senatorial Papers do not relate to the expenditure of public funds and that the visitor logs for the Senatorial Papers are exempt. For the remaining claims, the Supreme Court affirmed in part, reversed in part, and remanded in part, with Justice Vaughn dissenting. The Supreme Court affirmed the Superior Court’s findings: 1) that a document relates to the expenditure of public funds when the *content* of that document relates to the expenditure of public funds; 2) that meeting minutes are only required for full Board meetings and the full Board’s meeting minutes would disclose any use of executive sessions on this topic; and 3) that the Superior Court did not inappropriately shift the burden of proof to the Appellants in its decision. However, the Supreme Court reversed the Superior Court’s decision that the University met its burden of proof, holding that “unless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.” Because the University’s factual assertions were unsworn and do not describe the efforts taken to identify responsive records, the Supreme Court found them insufficient to meet the burden of proof. This case was remanded to Superior Court to determine whether the University has satisfied its burden of proof based on competent evidence in accordance with this opinion. The Superior Court was given leave to accept additional evidence or submissions.

Although the case was remanded, the Supreme Court, for the sake of efficiency, offered a few observations about the impact of this decision on the Superior Court’s finding regarding the University’s search for responsive records. The Supreme Court stated that unless it is clear on the face of the request that the requested records are not subject to FOIA, the public body must search for responsive records and the outcome of the search must be reflected through statements made under

oath. The Supreme Court found that it is not clear on the face of the records that the requests for the agreement or the communications were not subject to FOIA. On remand, the University bears the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive records. Finally, the Supreme Court found that the Superior Court did not err in refusing an award of attorneys' fees and costs, as the Appellants have not yet succeeded in their claims that FOIA was violated.

Judicial Watch, Inc. v. Univ. of Del., 2022 WL 2037923 (Del. Super. Jun. 7, 2022)

On remand from the Supreme Court, the Superior Court received an affidavit from the University's counsel. This affidavit described the procedures that the affiant follows in responding to requests and generally explained the inquiries that were made for these requests. The Superior Court found this affidavit met the University's requirement to provide a statement under oath. However, as the assertions were too generalized, the Superior Court determined that the University did not satisfy its burden of proof. In particular, the Superior Court held that the University must identify at least by position who provided this information, when such inquiries were made, and what if any documents, other than the gift agreement, were reviewed.

Judicial Watch, Inc. v. Univ. of Del., 2022 WL 10788530 (Del. Super. Oct. 19, 2022) aff'd, 2023 WL 4377918 (Del. July 6, 2023)

After receiving a supplemental affidavit from the University's counsel, the Superior Court issued a second opinion evaluating whether this supplemental affidavit was sufficient. The affidavit identified who the University's counsel asked for the records, when she asked, and as no records were provided to her, attested that no records, other than the gift agreement, were reviewed. The Court found the affidavit satisfied the University's burden to create a record from which the Court can determine that the University performed an adequate search for responsive records. Based on this supplemental affidavit, the Superior Court determined that the University's denial of the Appellants' requests does not violate FOIA.

The Delaware Supreme Court subsequently affirmed the Superior Court's decision.

Other Cases

Lambertson v. Del. Bd. of Social Work Examiners, 2022 WL 1222931 (Del. Super. Apr. 26, 2022)

This case involved the appeal of a decision of the Delaware Board of Social Work Examiners denying the Appellant’s application for a baccalaureate social worker license. In addition to several other claims, the Appellant argued that the Board failed to create and produce a record of the hearing at which the Board proposed to deny her application; the Board produced meeting minutes that merely stated the reasons for the denial. In response, the Board argued that FOIA was not violated because verbatim minutes are not a requirement for public meetings. The Superior Court agreed with the Board, noting that “FOIA does not require exact minutes for public meetings.” After considering all the claims, the Superior Court affirmed the Board’s decision.

Go4Play, Inc. v. Kent Cnty. Bd. of Adjustment, 2022 WL 2718849 (Del. Super. July 12, 2022)

This case involved the appeal of a Board of Adjustment decision. The Board held a hearing in which it determined that a certain business was an adult entertainment establishment, and the appellants appealed that finding to the Superior Court. The Superior Court reversed the Board’s decision related to the relevant ordinance on constitutional grounds. However, in a footnote, the Court stated that several other issues, including the FOIA issue raised in the case, were not dispositive. It was alleged that the Board violated the open meeting requirements through certain email exchanges. As the Board members mostly affirmed what was said in the hearing and the emails showed no active exchange of ideas nor that any votes were cast or exchanged, the Court found that the Board did not circumvent the open meeting requirements of FOIA.

RiseDelaware Inc. v. DeMatteis, 2022 WL 11121549 (Del. Super. Oct. 19, 2022)

The plaintiffs moved to stay the policy decision of the State Employee Benefits Committee’s decision to require all State retirees holding Medicare Supplemental Health Plans to switch to Medicare Advantage. The defendants argued that the only remedy available was a FOIA claim, which was time-barred as six months elapsed since February 28, 2022. The court rejected this argument, finding that the retirees had six months from the learning of the alleged violations, which was August 22, 2022 at the earliest, when the retirees knew or should have been

expected to know about the terms of the contract. The court stated that no reasonable person would be expected to contest the action of a public body related to a contract which had not been discussed or executed. The court concluded, in part, that the plaintiffs filed the action within the time limitations prescribed by the FOIA statute.

Reylek v. Albence, 2023 WL 142522 (Del. Super. Jan. 20, 2023)

This case involved a petition for a writ of mandamus filed against the respondent, the State Election Commissioner ex officio, regarding Delaware's electronic voting machines. In addition to other requests for relief, the petition sought an order to provide all deficient correspondence or documentation relating to the certification of the voting machines. This request was interpreted as a request to compel documents previously requested through FOIA. The respondent argued that to compel documents under FOIA in a writ of mandamus case, the petitioner must show that the discovery process in the FOIA litigation is not available. The Court rejected this interpretation. Instead, the Court determined that the petitioner failed to state a claim under Section 10003. At a minimum, the petitioner had to address what information was requested and when, and whether and how the public body responded within the fifteen- day time limitation.

Attorney General Opinions Issued October 1, 2021 to September 30, 2023

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

Attorney General Opinion No. 21-IB23

Issued to Councilmember Dee Durham re: FOIA Complaint Concerning New Castle County on 10/04/21.

Petitioner alleged that the County's delay in responding to her FOIA request was unreasonable and not justified as of the date of the petition.

DECIDED: No FOIA violation occurred, as there is no indication that the County's invocation of the need for additional time for the stated reasons was improper nor is there any evidence of the County's bad faith in estimating its timeframes for completion.

Attorney General Opinion No. 21-IB24

Issued to Randall Chase re: FOIA Complaint Concerning the Ethics Committee, House of Representatives, Delaware General Assembly ("Committee") on 10/06/21.

Petitioner alleged that the Committee violated FOIA by failing to follow open meeting requirements in setting a meeting agenda.

DECIDED: As Section 10004(h)(7) expressly excludes the proceedings of ethics committees of the General Assembly from the requirements of Section 10004, the Committee has not violated FOIA by failing to meet the open meeting requirements.

Attorney General Opinion No. 21-IB25

Issued to Molli Carter re: FOIA Complaint Concerning the Delaware Department of Health and Social Services (“DHSS”) on 10/20/21.

Petitioner alleged that the DHSS violated FOIA by refusing to provide requested data reports.

DECIDED: The DHSS did not violate FOIA by declining to create new records.

Attorney General Opinion No. 21-IB26

Issued to Karl Baker re: FOIA Complaint Concerning the Diamond State Port Corporation (“DSPC”) on 10/20/21.

Petitioner alleged that the DSPC violated FOIA by refusing to produce emails related to a draft Amendment because the draft Amendment had been presented to a public body.

DECIDED: This Office determined that the DSPC may apply the draft document exception in these circumstances but recommended the DSPC undertake a review of its records and supplement its response as necessary.

Attorney General Opinion No. 21-IB27

Issued to Randall Chase re: FOIA Complaint Concerning the Office of the Auditor of Accounts (“AOA”) on 10/25/21.

Petitioner alleged that the AOA violated FOIA by failing to keep accurate FOIA logs and also requesting the validity of the AOA’s assertion that it could not locate its FOIA log for 2018.

DECIDED: The AOA, for a period of more than three years, failed to maintain its FOIA logs in accordance with 29 *Del. C.* § 10003(g)(3), and the balance of the petition is moot.

Attorney General Opinion No. 21-IB28

Issued to Jeffrey Smith re: FOIA Complaint Concerning the Delaware Department of Transportation (“DeIDOT”) on 10/25/21.

Petitioner alleged that DeIDOT violated FOIA by denying a records request.

DECIDED: This petition was dismissed without consideration of the merits, because the FOIA request at issue did not indicate it was made by or on behalf of the organization submitting the petition. Under FOIA, the party denied access to the requested records is the sole party with standing to challenge a public body’s denial of access to records.

Attorney General Opinion No. 21-IB29

Issued to Amanda Fries re: FOIA Complaint Concerning the City of Wilmington on 11/04/21.

Petitioner alleged that the City improperly denied its request for records of the City’s towing contractors.

DECIDED: The City did not violate FOIA by refusing to provide records that pertain to pending litigation.

Attorney General Opinion No. 21-IB30

Issued to Susan Dixon and James Haubrich re: FOIA Complaint Concerning the Delaware Department of Election on 11/17/21.

Petitioner alleged that the Department improperly denied access to certain voting records and voting equipment.

DECIDED: The Office determined that the Department properly denied access to the physical equipment as equipment is not a public record subject to FOIA and the requested voting records were exempt from disclosure pursuant to 29 *Del. C.* § 10006(o)(6).

Attorney General Opinion No. 21-IB31

Issued to John Young re: FOIA Complaint Concerning the Christina School District on 11/22/21.

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

DECIDED: No FOIA violation was found, as the District attempted to respond to the request within the requisite timeframe but made an inadvertent mistake in addressing the email to the petitioner. When notified, the District provided a copy of the misdirected response.

Attorney General Opinion No. 21-IB32

Issued to Alan McKersie re: FOIA Complaint Concerning the Delaware Department of Transportation (“DelDOT”) on 12/01/21.

Petitioner alleged that DelDOT improperly denied access to its requested records because the records were of great public concern and DelDOT improperly applied the pending or potential litigation exemption.

DECIDED: DelDOT did not violate FOIA by denying access to the requested records pursuant to the pending or potential litigation exemption.

Attorney General Opinion No. 21-IB33

Issued to Matthew Bittle re: FOIA Complaint Concerning the City of Wilmington on 12/08/21.

Petitioner alleged that the City did not need additional time beyond fifteen business days to fulfill the request for records.

DECIDED: As the City provided a response, the petition is considered moot.

Attorney General Opinion No. 21-IB34

Issued to Jeffrey Smith re: FOIA Complaint Concerning the Delaware Department of Transportation (“DelDOT”) on 12/10/21.

Petitioner alleged that in addition to other purportedly violative conduct, DelDOT improperly denied access to records responsive to his request for records related to small cell permits.

DECIDED: It was determined that DelDOT has not violated FOIA by asserting it had no responsive records to provide at the time of its response to the request. The remaining allegations are outside the purview of this Office’s authority under the FOIA statute.

Attorney General Opinion No. 21-IB35

Issued to Jose Matthews and Adrianna Leela Bohm, Ph.D. re: FOIA Complaint Concerning the Red Clay Consolidated School District Board of Education on 12/17/21.

Petitioners alleged several potential issues of noncompliance against the Board, including that a Board committee improperly canceled a meeting due to the presence of a quorum of the full Board and that the Board failed to post committee meeting minutes, omitted certain discussions from meeting minutes, and failed to record committee meetings.

DECIDED: It was determined that a violation of FOIA did not occur. However, this Office noted that the two Board members’ silent observation of the committee meeting did not transform it into a Board meeting.

Attorney General Opinion No. 21-IB36

Issued to Hannah Edelman re: FOIA Complaint Concerning the Domestic Violence Coordinating Council on 12/22/21.

Petitioner alleged that the Council improperly denied a request for records related to a particular domestic violence case.

DECIDED: No violation of FOIA was found, as the records are protected from disclosure by statute.

Attorney General Opinion No. 22-IB01

Issued to Ken Grant re: FOIA Complaint Concerning the Delaware Department of Transportation (“DelDOT”) on 01/28/22.

Petitioner alleged that DelDOT improperly denied access to applications for salvage certificates and the total number of applications received.

DECIDED: DelDOT violated FOIA by denying access to the entirety of the applications but did not violate FOIA by refusing access to the number of salvage certificate applications received.

Attorney General Opinion No. 22-IB02

Issued to Amanda Fries re: FOIA Complaint Concerning the Delaware Criminal Justice Information System (“DELJIS”) on 02/01/22.

Petitioner alleged that DELJIS improperly denied access to the request for statistics.

DECIDED: The petition was determined to be moot.

Attorney General Opinion No. 22-IB03

Issued to Randall Chase re: FOIA Complaint Concerning the Diamond State Port Corporation (“DSPC”) on 02/18/22.

Petitioner alleged that the DSPC violated FOIA by failing to provide proper notice of a recent executive session, to take the requisite vote of its members to enter executive session, and to consider certain meeting minutes in public session.

DECIDED: The DSPC violated FOIA by failing to provide proper public notice of this executive session and to take the requisite vote of its present members in a meeting open to the public before entering the executive session. The Petition’s allegation about the meeting minutes was not determined to be a violation of FOIA.

Attorney General Opinion No. 22-IB04

Issued to Jayshree Tailor, Nancy Fan, and Jenn Ruebush re: FOIA Complaint Concerning the Charter School of Wilmington, Inc. (“CSW”) on 03/03/22.

Petitioners alleged that the CSW and its Board of Directors violated the open meeting requirements of FOIA in conducting its December 3, 2021 meeting to discuss advancement issues and its January 20, 2022 Finance committee meeting.

DECIDED: The CSW violated FOIA by failing to follow the open meeting requirements for both meetings.

Attorney General Opinion No. 22-IB05

Issued to Michael Vild re: FOIA Complaint Concerning the Delaware Department of Insurance on 03/04/22.

Petitioner alleged that the Department improperly denied access to certain records related to a special purpose financial captive insurance company.

DECIDED: The Department did not violate FOIA by denying access to the requested records pursuant to 29 *Del. C.* § 10002(o)(6).

Attorney General Opinion No. 22-IB06

Issued to Loreto P. Rufo re: FOIA Complaint Concerning the Delaware Health and Social Services (“DHSS”) on 03/29/22.

Petitioner alleged that the DHSS improperly denied the request for certain communications and investigative records arising from an incident at a long-term care facility.

DECIDED: The DHSS did not violate FOIA by denying access to the requested records under Sections 10002(o)(3) and (6).

Attorney General Opinion No. 22-IB07

Issued to Randall Chase re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control (“DNREC”) on 04/04/22.

Petitioner alleged that DNREC untimely responded to his request and improperly denied his request for records related to the Drinking Water Protection Act.

DECIDED: It was concluded that the timeliness claim was moot and that DNREC improperly denied access to certain requested records under the exception for draft documents.

Attorney General Opinion No. 22-IB08

Issued to Ken Grant re: FOIA Complaint Concerning the Delaware Department of Transportation (“DelDOT) on 04/04/22.

Petitioner alleged that DelDOT improperly prepared its cost estimate.

DECIDED: DelDOT did not violate FOIA as alleged in the Petition.

Attorney General Opinion No. 22-IB09

Issued to Janice Lorrh re: FOIA Complaint Concerning the Delaware Department of Health and Social Services (“DHSS”) on 04/07/22.

Petitioner alleged that the DHSS improperly responded to her request, as the DHSS did not answer her follow-up inquiry and the response letter only included website links, instead of records.

DECIDED: No violation of FOIA was found.

Attorney General Opinion No. 22-IB10

Issued to Joe Berg re: FOIA Complaint Concerning the Village of Ardencroft on 04/14/22.

Petitioner alleged that the Village violated FOIA by failing to timely send the agenda and to update the agenda over the past year, and by holding its meeting fully virtually.

DECIDED: The Village violated FOIA by failing to demonstrate it gave timely notice of its meeting agenda and failing to adequately describe the major items expected to be discussed on its agendas. The Village did not violate FOIA by meeting without an anchor location.

Attorney General Opinion No. 22-IB11

Issued to Joe Berg re: FOIA Complaint Concerning the Village of Ardencroft on 04/18/22.

Petitioner alleged that the Village violated FOIA by failing to produce the home addresses and phone numbers of eligible voters in violation of Title 15 of the Delaware Code and FOIA.

DECIDED: The issue presented is outside the scope of this Office's authority.

Attorney General Opinion No. 22-IB12

Issued to Jordyn Pusey re: FOIA Complaint Concerning the Office of the Auditor of Accounts ("AOA") on 04/18/22.

Petitioner alleged that the AOA's denial of records beyond the two documents provided is improper.

DECIDED: The AOA violated FOIA by failing to include a sworn affidavit in its response to the Petition.

Attorney General Opinion No. 22-IB13

Issued to Daniel Hagelberg re: FOIA Complaint Concerning the City of Wilmington on 04/20/22.

Petitioner alleged that the City improperly denied its requests for all police reports for accidents involving certain police officers between October 1, 2021 and November 15, 2021.

DECIDED: The City properly denied the request under 29 *Del. C.* § 10002(o)(3), and 29 *Del. C.* § 10002(o)(6).

Attorney General Opinion No. 22-IB14

Issued to William Weistling, Jr. re: FOIA Complaint Concerning the Town of Fenwick Island on 04/20/22.

Petitioner alleged that the Town violated FOIA by not allowing certain members of the public speak during the comment period of a public hearing.

DECIDED: The factual record does not support the violation alleged in the Petition.

Attorney General Opinion No. 22-IB15

Issued to Xerxes Wilson re: FOIA Complaint Concerning the Office of the Auditor of Accounts on (“AOA”) 04/26/22.

Petitioner alleged that the AOA violated FOIA by improperly redacting the records responsive to his request.

DECIDED: The AOA violated FOIA by failing to sufficiently justify the redactions in the responsive documents based on an exception for “working papers.”

Attorney General Opinion No. 22-IB16

Issued to Xerxes Wilson re: FOIA Complaint Concerning the Delaware Department of Correction (“DOC”) on 04/29/22.

Petitioner alleged that the DOC improperly denied its requests for records related to the use of force and video footage.

DECIDED: The DOC did not violate FOIA by denying access to the use of force records under the pending or potential litigation exemption and by declining to produce video footage polices that the DOC staff attested did not exist.

Attorney General Opinion No. 22-IB17

Issued to Eric Marquis re: FOIA Complaint Concerning the City of Harrington on 05/05/22.

Petitioner alleged that the City Council's Budget Committee improperly held a meeting discussing employee bonuses in violation of FOIA.

DECIDED: The City's Budget Committee violated FOIA by holding a meeting about this matter without complying with open meeting requirements.

Attorney General Opinion No. 22-IB18

Issued to Will Lowrey re: FOIA Complaint Concerning the Delaware Department of Agriculture on 05/09/22.

Petitioner alleged that the Department improperly denied its request for two items related to avian flu outbreak in Delaware.

DECIDED: The Department failed to meet its burden to justify denial of these records under 29 *Del. C.* § 10002(o)(3), 29 *Del. C.* § 10002(o)(6), and the exception for working drafts.

Attorney General Opinion No. 22-IB19

Issued to William Pickett re: FOIA Complaint Concerning the Sussex County Vocational – Technical School District on 05/16/22.

Petitioner alleged that the Board violated FOIA by discussing substitute compensation in an executive session and voting under a catch-all heading in public session.

DECIDED: The Board violated FOIA by improperly discussing substitute compensation in executive session. No violation of FOIA was found regarding the vote under the catch-all heading.

Attorney General Opinion No. 22-IB20

Issued to John Morgan, III re: FOIA Complaint Concerning the City of Newark on 05/18/22.

Petitioner alleged that the City violated FOIA by failing to timely respond to his request for application materials for proposed appointees to the City's boards and commissions and by inappropriately redacting the application materials produced. The petition also alleged that the City's new practice of allowing the nominating councilmember sole access to the appointees' qualifications to vet the appointees to the City's boards and commissions violates FOIA.

DECIDED: The City violated FOIA by failing to meet its burden of proof to justify its denial of access to the redacted information. No violations of FOIA were found regarding the remaining two issues.

Attorney General Opinion No. 22-IB21

Issued to Amanda Fries re: FOIA Complaint Concerning the City of Wilmington on 05/27/22.

Petitioner alleged that the City's cost estimate over-charged the hourly administrative fees, failed to waive all fees, and improperly delayed its cost estimate.

DECIDED: This Office found no basis to conclude that the City violated FOIA as alleged in the Petition.

Attorney General Opinion No. 22-IB22

Issued to Councilmember Linda Gray re: FOIA Complaint Concerning the City of Wilmington on 06/03/22.

Petitioner alleged that the City Council held private meetings in violation of FOIA.

DECIDED: The petition has not formed a sufficient basis to determine whether City Council privately met in violation of FOIA.

Attorney General Opinion No. 22-IB23

Issued to John Reiss re: FOIA Complaint Concerning the Town of Blades on 07/07/22.

Petitioner alleged that the Town violated FOIA by improperly charging fees related to his request and by failing to timely post a meeting notice and agenda on its website.

DECIDED: The Town violated FOIA with respect to its charges for the request, but the Town did not violate FOIA by posting its Town Council meeting notice and agenda on its website three days before the meeting.

Attorney General Opinion No. 22-IB24

Issued to Jared Green re: FOIA Complaint Concerning the Delaware Department of Transportation (“DelDOT”) on 07/11/22.

Petitioner alleged that DelDOT improperly denied his request under the pending or potential litigation exemption.

DECIDED: No FOIA violation occurred as alleged.

Attorney General Opinion No. 22-IB25

Issued to Janice Lorrhah re: FOIA Complaint Concerning the Senate Elections & Government Affairs Committee on 07/20/22.

Petitioner alleged that the Committee violated FOIA by holding a virtual meeting without an anchor location, voting outside the meeting, and removing her from the latter portion of this virtual meeting.

DECIDED: The majority of the Petition's allegations are not appropriate for resolution. However, the Committee did not violate FOIA by holding a virtual meeting without an anchor location.

Attorney General Opinion No. 22-IB26

Issued to Erin Markham re: FOIA Complaint Concerning the City of Wilmington on 08/12/22.

Petitioner alleged that the spreadsheet produced in response to her FOIA request was incomplete and she could not reasonably be expected to interpret the data.

DECIDED: No FOIA violation occurred. FOIA does not require a public body to create a new record or to interpret any provided data in response to a request.

Attorney General Opinion No. 22-IB27

Issued to John Reiss re: FOIA Complaint Concerning the Town of Blades on 08/19/22.

Petitioner alleged that the Town violated FOIA by considering and voting on certain items at the meeting without proper notice on the agenda.

DECIDED: The Town violated the open meeting requirements by failing to justify its decision to discuss employee bonuses and raises in private and by failing to provide any notice on the June 13, 2022 meeting agenda of employee bonuses, employee raises, or the water line extension project discussed and voted on at its Council meeting.

Attorney General Opinion No. 22-IB28

Issued to Dan Shortridge re: FOIA Complaint Concerning the Delaware Auditor of Accounts (“AOA”) on 08/23/22.

Petitioner alleged that the AOA violated FOIA with regard to a records request and failed to meet the 15-business day statutory deadline.

DECIDED: The petition is now moot because the AOA provided an affidavit response to the request.

Attorney General Opinion No. 22-IB29

Issued to John Paradee re: FOIA Complaint Concerning the Delaware Department of Transportation (“DelDOT”) on 08/23/22.

Petitioner alleged that DelDOT improperly denied its request for records under the potential litigation exemption.

DECIDED: DelDOT has not met its burden of demonstrating that the potential litigation exemption applies to the entirety of this request.

Attorney General Opinion No. 22-IB30

Issued to India Scott re: FOIA Complaint Concerning the Caesar Rodney School District Board of Education on 08/24/22.

Petitioner alleged that the Board violated FOIA by precluding her from providing public comment at the July 26, 2022 Board meeting and by improperly noticing the change to the start time of the April 12, 2022 Board meeting.

DECIDED: It was determined that the Board violated FOIA by failing to meet its burden to demonstrate that the rescheduled April 12, 2022 meeting was properly noticed, but the allegations about the public comment period at the July 26, 2022 meeting did not constitute a violation of FOIA.

Attorney General Opinion No. 22-IB31

Issued to Amy Roe re: FOIA Complaint Concerning the Childhood Lead Poisoning Committee, Delaware Health and Social Services (“DHSS”) on 08/26/22.

Petitioner alleged that the Committee and its subcommittees, which are administratively supported by the DHSS, failed to meet their obligations to maintain and post minutes for certain Committee and subcommittee meetings.

DECIDED: The Committee and its subcommittees violated FOIA.

Attorney General Opinion No. 22-IB32

Issued to Barbara Bullock re: FOIA Complaint Concerning the City of Harrington on 08/31/22.

Petitioner alleged that the City violated FOIA by failing to respond to the request within fifteen business days.

DECIDED: No violation of FOIA was found.

Attorney General Opinion No. 22-IB33

Issued to Jack Guerin re: FOIA Complaint Concerning the Fort DuPont Redevelopment and Preservation Corporation (“FDRPC”) on 09/01/22.

Petitioner alleged that the FDRPC violated FOIA by improperly denying the request for the minutes of a certain Finance Committee meeting.

DECIDED: The FDRPC violated FOIA by failing to meet its burden to justify denial of access to the requested minutes.

Attorney General Opinion No. 22-IB34

Issued to Tom Irvine re: FOIA Complaint Concerning the Town Council of Georgetown on 09/15/22.

Petitioner alleged that three members of the Town Council violated FOIA by privately meeting to sign and deliver a check to a historical society.

DECIDED: A quorum of the Town Council violated FOIA by privately discussing and taking action on the Georgetown Historical Society’s grant check without complying with the open meeting requirements.

Attorney General Opinion No. 22-IB35

Issued to Jack Guerin re: FOIA Complaint Concerning the Delaware Office of the Auditor of Accounts (“AOA”) on 09/23/22.

Petitioner alleged that the AOA violated FOIA by failing to respond to the FOIA request.

DECIDED: The AOA violated FOIA by not providing a response to the FOIA request.

Attorney General Opinion No. 22-IB36

Issued to Esteban Parra re: FOIA Complaint Concerning the Division of Forensic Science (“DFS”), Delaware Department of Safety and Homeland Security (“DSHS”) on 09/30/22.

Petitioner alleged that the DFS of the DSHS improperly denied the request for the date of death of a deceased gunshot victim.

DECIDED: DFS did not violate FOIA by denying access to the requested records, as they are exempt from disclosure under FOIA.

Attorney General Opinion No. 22-IB37

Issued to Thaddeus Weaver re: FOIA Complaint Concerning the Office of the Governor (“OGov”) on 10/11/22.

Petitioner alleged that the OGov improperly denied the request for records related to a project to construct a container port in New Castle County.

DECIDED: OGov did not violate FOIA by denying access to the requested records by invoking the pending litigation exemption.

Attorney General Opinion No. 22-IB38

Issued to Karl Baker re: FOIA Complaint Concerning the Delaware Department of Insurance on 10/17/22.

Petitioner alleged that the Department employed a bad-faith delaying tactic to respond to the FOIA request with subsequent time reassessments of thirty business days.

DECIDED: The Department demonstrated that its need for additional time to respond to the request was appropriate under the statute and that no violation of FOIA occurred with respect to the Department's estimations of when a response would be complete.

Attorney General Opinion No. 22-IB39

Issued to Hannah Edelman re: FOIA Complaint Concerning the Delaware Department of Correction ("DOC") on 10/17/22.

Petitioner alleged that the response of the DOC was improper for failing to provide the information in the requested format.

DECIDED: The DOC violated FOIA, as the DOC failed to meet its burden of justifying the denial of access to the requested record.

Attorney General Opinion No. 22-IB40

Issued to Scott Becker re: FOIA Complaint Concerning the Delaware Department of Safety and Homeland Security ("DSHS") on 10/19/22.

Petitioner alleged that the DSHS failed to respond to a FOIA request.

DECIDED: The DSHS violated FOIA by not responding to a request in accordance with the FOIA statute.

Attorney General Opinion No. 22-IB41

Issued to Andrew West and Randall Chase re: FOIA Complaints Concerning the Dover City Council on 11/14/22.

Petitioners alleged that the Council violated FOIA by voting to discuss a certain item involving special event overtime, vacation and city vehicle usage in a future executive session and the Council did not provide enough information about the item in its meeting packet or by outlining the item during or before the meeting.

DECIDED: The Council may commit a violation of FOIA by discussing all matters contained in this item in executive session, but it was determined that there is no evidence that this alleged violation has occurred to date. In addition, the Council did not violate FOIA by failing to provide information about this item in its meeting packet or a detailed outline about this item before or during the meeting.

Attorney General Opinion No. 22-IB42

Issued to Thomas Pledgie re: FOIA Complaint Concerning the State Employee Benefits Committee (“Committee”) of the Delaware Department of Human Resources (“DHR”) on 11/16/22.

Petitioner alleged that the Committee of the DHR improperly denied his FOIA request.

DECIDED: The Committee violated FOIA by denying access to the September 19, 2022 public meeting recording.

Attorney General Opinion No. 22-IB43

Issued to Richard Funke re: FOIA Complaint Concerning the City of Wilmington on 11/18/22.

Petitioner alleged that the City improperly denied his client's request for body camera footage and city surveillance footage related to a motor vehicle accident in the City.

DECIDED: The City appropriately withheld the requested body camera footage, as it is exempt pursuant to the investigatory files exemption. However, it was determined that the City failed to meet its burden of proof to justify its denial of access to the city surveillance footage.

Attorney General Opinion No. 22-IB44

Issued to Henry Clampitt re: FOIA Complaint Concerning the Red Clay Consolidated School District Board of Education on 11/28/22.

Petitioner alleged that the Board violated FOIA by allowing a member of the Board, who was elected but unsworn at the time, to observe two executive sessions.

DECIDED: The Board did not violate FOIA by permitting this Board member to observe two executive sessions.

Attorney General Opinion No. 22-IB45

Issued to Richard Abbott re: FOIA Complaint Concerning the Delaware Department of Transportation ("DelDOT") on 11/28/22.

Petitioner alleged that the DelDOT imposed unreasonable and unnecessary administrative charges for access to public documents.

DECIDED: DelDOT did not violate FOIA as alleged, because DelDOT met its burden of proof to support its estimated costs to compile the records requested.

Attorney General Opinion No. 22-IB46

Issued to Xerxes Wilson re: FOIA Complaint Concerning the University of Delaware on 11/29/22.

Petitioner challenged the University's representation that it has no public records responsive to his request.

DECIDED: The University did not violate FOIA, as it met its burden of proof to demonstrate that it has no public records responsive to this request.

Attorney General Opinion No. 22-IB47

Issued to Xerxes Wilson re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control ("DNREC") on 11/30/22.

Petitioner alleged that the DNREC violated FOIA by relying on the personnel file exemption to withhold an employment settlement agreement and that DNREC's FOIA coordinator failed to work to foster cooperation between him and DNREC, as required by Section 10003(g).

DECIDED: The claim regarding the settlement agreement is moot, and DNREC's FOIA coordinator did not violate FOIA by failing to satisfy the duty to cooperate under Section 10003(g).

Attorney General Opinion No. 22-IB48

Issued to Erica Lindsey re: FOIA Complaint Concerning the Fort DuPont Redevelopment and Preservation Corporation ("FDRPC") on 12/12/22.

Petitioner alleged that the FDRPC violated FOIA by not responding to two FOIA requests seeking records relating to financial audits of the FDRPC.

DECIDED: FDRPC violated FOIA by failing to timely respond to two FOIA requests.

Attorney General Opinion No. 22-IB49

Issued to Michael Platt, City Council President, re: FOIA Complaint Concerning the New Castle City Council (“Council”) on 12/16/22.

Petitioner alleged that three members of the Council privately discussed and reached a consensus on the tourism director position and that these members regularly used private and public email systems to communicate outside of public meetings and referenced an email in which one councilmember intended to have private discussions with another member.

DECIDED: As the Council provided appropriate sworn testimony, the Petition’s claims allegations did not constitute violations of FOIA.

Attorney General Opinion No. 22-IB50

Issued to John Hawley re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control (“DNREC”), the Delaware Parks and Recreation Council (“Parks Council”), and the Parks Council’s Stakeholder Workgroup (“Workgroup”) on 12/16/22.

Petitioner alleged that DNREC, the Parks Council, and the Workgroup violated FOIA by failing to adhere to FOIA’s open meeting requirements because the Parks Council’s agendas for its February, May, August, and November 2022 meetings did not give adequate notice of its intent to review or change the surf fishing permit program. Petitioner also alleged that the Workgroup was required to provide public notice of its meetings.

DECIDED: Parks Council did not violate FOIA with its agenda topics. However, the Workgroup is a public body under FOIA and thus, did violate FOIA’s open meeting requirements.

Attorney General Opinion No. 22-IB51

Issued to Randall Chase re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control (“DNREC”) on 12/19/22.

Petitioner alleged that DNREC had not responded to his request as of the date of the Petition and that the raw sampling data and related internal correspondence had not been provided, despite this Office’s previous opinion regarding these records.

DECIDED: The Petition’s claim that DNREC failed to respond to the request was determined to be moot. DNREC violated FOIA by failing to demonstrate its withholding of access to the requested raw data and the related internal correspondence was proper under FOIA.

Attorney General Opinion No. 23-IB01

Issued to Mike Lang re: FOIA Complaint Concerning the Delaware Interscholastic Athletic Association (“DIAA”) Board of Directors on 01/09/23.

Petitioner alleged that the Board of Directors of the DIAA violated FOIA at its November 10, 2022 meeting because the motion to take administrative action on a personnel matter discussed in the preceding executive session did not adequately describe the topic subject to vote.

DECIDED: The Board did not violate FOIA by failing to describe more specifically the personnel matter subject to vote.

Attorney General Opinion No. 23-IB02

Issued to Donald Burdick re: FOIA Complaint Concerning Sussex County on 01/19/23.

Petitioner alleged that Sussex County violated FOIA by failing to provide responsive records to two requests related to a certain wastewater facility.

DECIDED: The County has met its burden of proof to demonstrate that it has not violated FOIA by failing to provide responsive records to the two requests.

Attorney General Opinion No. 23-IB03

Issued to Amy Roe re: FOIA Complaint Concerning the Delaware Department of Education (“DOE”) on 01/24/23.

Petitioner alleged that the DOE violated FOIA by including in its cost estimate for email retrieval time to scrub email results and including in its potential administrative cost the time to redact documents.

DECIDED: This Office found no basis to conclude that DOE violated FOIA as alleged in the petition.

Attorney General Opinion No. 23-IB04

Issued to Thomas Pledge re: FOIA Complaint Concerning the Delaware Department of Finance on 01/25/23.

Petitioner alleged that the Department improperly denied his request for certain meeting minutes because he was not a citizen of Delaware.

DECIDED: The Department did not violate FOIA by denying access to the requested records.

Attorney General Opinion No. 23-IB05

Issued to Christiane Marchio re: FOIA Complaint Concerning the Delaware Department of Health and Social Services (“DHSS”) on 02/03/23.

Petitioner alleged that the DHSS violated FOIA by denying access to an animal welfare complaint report.

DECIDED: The DHSS did not violate FOIA, as the requested record is exempt under the investigatory files exemption.

Attorney General Opinion No. 23-IB06

Issued to Jack Guerin re: FOIA Complaint Concerning the Trustees of the New Castle Common on 02/07/23.

Petitioner alleged that the Trustees failed to respond to two requests for contracts.

DECIDED: The Trustees violated FOIA by failing to meet their burden of demonstrating that the requested contracts are exempt from disclosure.

Attorney General Opinion No. 23-IB07

Issued to Steven LePage re: FOIA Complaint Concerning the State Employee Benefits Committee, Delaware Department of Human Resources on 02/08/23.

Petitioner alleged that the Committee failed to justify its denial of access to the redacted information in the Medicfill contract.

DECIDED: The Committee satisfied its burden of demonstrating that requested materials were appropriately withheld under the pending litigation exemption.

Attorney General Opinion No. 23-IB08

Issued to Randall Chase re: FOIA Complaint Concerning the State of Delaware Board of Elections on 02/09/23.

Petitioner alleged that the Board violated FOIA by allowing board members to have visual and audio access to its January 9, 2023 virtual meeting but limiting the public to audio access.

DECIDED: The Board did not violate FOIA by allowing the public to access this meeting through audio means only.

Attorney General Opinion No. 23-IB09

Issued to Dr. Christopher Curry re: FOIA Complaint Concerning the Wilmington City Council on 03/22/23.

Petitioner alleged that the City Council voted privately in two executive sessions to select candidates for two Council seats in violation of FOIA.

DECIDED: The Council's Committee of the Whole violated FOIA by voting via secret ballot in executive session at the November 28, 2022 and February 1, 2023 Committee meetings to recommend the selected candidates for two Council vacancies.

Attorney General Opinion No. 23-IB10

Issued to Councilmember Tamara Skis re: FOIA Complaint Concerning the Town of Ellendale on 03/30/23.

Petitioner alleged that 1) the January 30, 2023 Planning and Zoning Commission meeting notice failed to include an agenda as required; and 2) a quorum of councilmembers met in person and communicated over email to discuss and make decisions about public business outside of a public meeting.

DECIDED: The Town violated FOIA by failing to establish that an agenda for the January 30, 2023 Planning and Zoning Commission meeting was properly posted. In addition, the Town Council violated FOIA by meeting via a constructive quorum without satisfying FOIA's requirements for open meetings.

Attorney General Opinion No. 23-IB11

Issued to Jack Guerin re: FOIA Complaint Concerning the City of Delaware City on 04/06/23.

Petitioner alleged that a certain public hearing notice was not separately posted on the website of the City and that the hearing was merely mentioned in the agenda for the public meeting.

DECIDED: We conclude that the City did not violate FOIA by failing to post this public hearing notice on the City's website.

Attorney General Opinion No. 23-IB12

Issued to A. Nicole Mezick re: FOIA Complaint Concerning the Delmar School District Board of Education on 04/18/23.

Petitioner alleged that the Board did not provide proper notice of its intention to make certain changes to the superintendent position in the December 8 and 13, 2022 meeting agendas for the open and executive sessions and that the Board must have met privately to decide on certain actions related to the superintendent position prior to the December 13, 2022 Board meeting.

DECIDED: The Board violated FOIA by giving insufficient notice on its December 8 and 13, 2022 meeting agendas of the executive sessions and the superintendent matters intended to be addressed in open session at these meetings. However, the Board met its burden to demonstrate that it did not violate FOIA by meeting privately prior to the December 13, 2022 meeting about the identified issues.

Attorney General Opinion No. 23-IB13

Issued to Brian Rostocki re: FOIA Complaint Concerning the Delaware Department of Finance on 04/20/23.

Petitioner alleged that the Department improperly denied access to certain records related to unclaimed property auditors.

DECIDED: The Department did not violate FOIA by denying access to these requested records under the pending litigation exemption in 29 *Del. C.* § 10002(o)(9).

Attorney General Opinion No. 23-IB14

Issued to Joshua Vincent re: FOIA Complaint Concerning the Delmar School District Board of Education on 04/21/23.

Petitioner alleged that the Board violated FOIA by failing to properly notice the executive session of its March 21, 2023 meeting, by considering the agenda items out of order at the meeting, and by failing to identify the individual personnel items subject to vote.

DECIDED: The Board violated FOIA by failing to provide proper notice of its executive session in its March 21, 2023 meeting agenda and by the manner in which the Board reordered its agenda without notice to the attendees. The personnel items were addressed in Attorney General Opinion No. 23-IB12.

Attorney General Opinion No. 23-IB15

Issued to Susan Dixon re: FOIA Complaint Concerning the Delaware Department of Elections on 05/18/23.

Petitioner alleged that the Department improperly denied access to certain records related to voting.

DECIDED: The Department did not violate FOIA by denying access to the requested records.

Attorney General Opinion No. 23-IB16

Issued to Jack Guerin re: FOIA Complaint Concerning the Fort DuPont Redevelopment and Preservation Corporation (“FDRPC”) on 06/06/23.

Petitioner alleged that the FDRPC violated FOIA by responding to his request by granting him the opportunity to inspect the records at the FDRPC’s office.

DECIDED: The FDRPC did not violate FOIA by offering an appointment to inspect the requested records.

Attorney General Opinion No. 23-IB17

Issued to Ken Grant re: FOIA Complaint Concerning the City of Wilmington on 06/13/23.

Petitioner alleged that the City violated FOIA by denying access to certain records related to the City’s parking enforcement.

DECIDED: The City did not violate FOIA, because the City demonstrated that the pending ligation exemption applied to the requested records.

Attorney General Opinion No. 23-IB18

Issued to Randall Chase re: FOIA Complaint Concerning the Diamond State Port Corporation (“DSPC”) on 06/26/23.

Petitioner alleged that the DSPC violated FOIA by failing to post a timely and sufficient notice of its May 22, 2023 executive session and by allowing nonmembers of the Board to attend an executive session.

DECIDED: The DSPC did not violate FOIA as alleged in the Petition with respect to the May 22, 2023 executive session agenda. However, the DSPC violated FOIA by failing to meet its burden of demonstrating its executive session attendees were appropriate.

Attorney General Opinion No. 23-IB19

Issued to Tamara Skis re: FOIA Complaint Concerning the Town of Ellendale on 07/03/23.

Petitioner alleged that the Town failed to respond to two requests for meeting minutes and the most current decorum policy.

DECIDED: The Town has violated FOIA by failing to meet its burden to justify its denial of access to these requested records.

Attorney General Opinion No. 23-IB20

Issued to Warren Rosenkranz re: FOIA Complaint Concerning the Villages of Arden, Ardentown, and Ardencroft (the “Villages”) on 07/12/23.

Petitioner alleged that the Villages violated FOIA by failing to post the June 26, 2023 meeting notices on their websites and by scheduling these meetings in Arden.

DECIDED: As the Villages are not required to post their meeting notices and agendas on their website and the meetings’ locations were compliant with FOIA, no FOIA violation occurred.

Attorney General Opinion No. 23-IB21

Issued to Randall Chase re: FOIA Complaint Concerning the Indian River School District on 07/25/23.

Petitioner alleged that the District improperly denied a request for certain employment information and District policies. In addition, the Petition claimed that the District improperly failed to maintain an online portal for accepting FOIA requests.

DECIDED: The District violated FOIA by failing to meet its burden to justify its denial of access to the employment information requested. No violations were found with respect to the Petitioner's claims about the online portal or the requested policies.

Attorney General Opinion No. 23-IB22

Issued to Brandon Holveck re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control ("DNREC") on 08/01/23.

Petitioner alleged that the DNREC improperly denied a request for various records of the Diamond State Port Corporation related to its selection of an operator for the Port of Wilmington.

DECIDED: DNREC did not violate FOIA by denying access to these requested records.

Attorney General Opinion No. 23-IB23

Issued to Excellent Asare re: FOIA Complaint Concerning the City of Dover on 08/08/23.

Petitioner alleged that the City improperly denied a FOIA request for a list of properties with their water shut off.

DECIDED: As the City provided sworn testimony that it does not have a responsive record, it was determined that no violation of FOIA occurred.

Attorney General Opinion No. 23-IB24

Issued to Meredith Newman re: FOIA Complaint Concerning the Delaware Department of Health and Social Services (“DHSS”) on 08/09/23.

Petitioner alleged that the DHSS violated FOIA by failing to provide updates and good faith estimates of the time needed to fulfill two FOIA requests.

DECIDED: The DHSS violated FOIA by failing to provide good faith estimates of the time needed, as required by the FOIA statute.

Attorney General Opinion No. 23-IB25

Issued to Erica Lindsey re: FOIA Complaint Concerning the City of Delaware City on 08/15/23.

Petitioner alleged that voting on the permit less than fifteen days after the public hearing is a violation of applicable law; that a certain councilmembers’ vote was substantively inconsistent with the councilmember’s answers to questions; and that the City failed to post its April meeting minutes, and any subsequent meeting minutes, to its website.

DECIDED: The City did not violate FOIA by failing to post meeting minutes to its website. This Office lacks the authority to determine the remaining claims.

Attorney General Opinion No. 23-IB26

Issued to Dwayne Bensing re: FOIA Complaint Concerning the City of Wilmington on 09/18/23.

Petitioner alleged that the City improperly denied requests for certain records related to Operation Safe Streets and the Governor’s Task Force under the pending litigation exemption.

DECIDED: The City did not violate FOIA by denying access to certain records pursuant to the pending litigation exemption.

Attorney General Opinion No. 23-IB27

Issued to Dr. Robert Heiligman re: FOIA Complaint Concerning the Delaware Department of Natural Resources and Environmental Control (“DNREC”) on 09/18/23.

Petitioner alleged that the DNREC improperly denied a request for an electronic copy of the necropsy report for a pudu solely based on citizenship.

DECIDED: DNREC did not violate FOIA by denying access to the requested record.

APPENDIX B

Sample FOIA Request Tracking Sheet

