

Delaware's Freedom Of Information Act and Public Records Law

Overview of Public Records and Open Meetings Rights and Obligations

Presented by Jason W. Staib
Deputy Attorney General

September 9, 2025

OVERVIEW

- Delaware's Freedom Of Information Act, 29 *Del. C.* Ch 100
 - Open Records Provisions
 - ✓ What documents must be made available for public inspection?
 - Open Meeting Provisions
 - ✓ What meetings and discussions must be open to the public?
 - Enforcement
 - ✓ DDOJ & Courts

OVERVIEW CONT'D

➤ Delaware's Public Records Law, 29 *Del. C.* Ch 5

- Records Management and Preservation
 - ✓ What documents must be preserved and for how long?
- Enforcement
 - ✓ Delaware Public Archives
 - ✓ DDOJ & Courts

FOIA Policy Declaration

- Provides public with important rights to
 - observe the performance of public officials
 - monitor the decisions made in formulating and executing public policy
- FOIA is to be interpreted to further the accountability of government to the citizens of this State

What Is A “Public Body”?

➤ Usually not in doubt

- The Board and its Committees
- OST, Department of Finance

➤ Issues arise when two or more members of the same public body meet to discuss public business within the authority of the public body

➤ Issue is important because all public bodies have obligations under FOIA

“Public Body” (continued)

- “Public body” means any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including any board, bureau, commission, department, agency, committee, panel, council or group, or
- Any other entity or body
 - Established by an act of the General Assembly or a body established by the General Assembly
 - Appointed by a state body or public official, or
 - Otherwise empowered by a state entity
- That is
 - supported in whole or in part by public funds
 - expends or disburses grants/gifts
 - impliedly or specifically charged to advise or make reports or recommendations

“Public Body” (continued)

➤ Excluded Bodies

- Any caucus of the House or Senate
- UD/DSU, except for Boards of Trustees

➤ Bodies Exempt from Open Meetings

- Public bodies having only one member
 - ✓ Governor’s Office, Department of Finance, State Treasurer’s Office, Mayor’s Office
- “Body of One” can appoint committees
 - ✓ Staff only?
 - ✓ Inter-agency, citizens, private businesses?

“Public Body” (continued)

➤ Working Groups

- Chief executive invites various public officials and private citizens to formulate and propose changes to law or regulations

➤ Examples of Non-Public Bodies

- “Joint” meeting between various executive branch officials and consultants to review technical proposal
- County Administrator meeting with department heads to develop budget
- County Attorney meeting with board of elections chair and consultant to draft redistricting ordinance
- City Finance Director meeting with “stakeholders” to discuss electric rate structure

Public Records Duties

FACILITATE ACCESS

- Implement a policy for addressing FOIA requests
- Develop a web portal for receiving FOIA requests
- Designate a FOIA Coordinator to coordinate responses
- Provide reasonable assistance to the public in identifying and locating records

Public Record Duties (continued)

- Conduct diligent search for records
 - May need to request that DTI search servers for responsive emails
- Consultation with or referral to originating public body
 - Warm handoff; DTI is only custodian of emails
- Respond Within 15 Business Days
 - Provide access, deny access or advise that additional time is needed
- Make Records Available for Inspection and Copying
 - Under DDOJ guidance, a public body may be required to produce records in electronic format

What Documents Are “Public Records” Under FOIA?

➤ “Public Record” Defined

- Information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.

➤ AGO Carve-Outs

- Working drafts
- Personal notes

Statutory Exemptions

- Personnel, medical and pupil files the disclosure of which would constitute an invasion of personal privacy
- Trade secrets or commercial or financial information obtained from a person which is of a privileged or confidential nature
- [New as of October 2024] The terms of proposals responding to an RFP for professional services, proposal summaries and evaluations are not subject to inspection until receipt of a signed contract.
- IT infrastructure details, source code, network schematics, vulnerability reports and any other information that could jeopardize the security or integrity of a government IT system

Statutory Exemptions (continued)

- Records exempted by statute or common law
 - Statute
 - ✓ Tax information
 - ✓ Healthcare information
 - ✓ 29 *Del. C.* 2722(c)(5) (“Meetings and/or documents relating to investment strategy or negotiations concerning investment of money belonging to the Plans”).
 - Common law
 - ✓ Executive privilege
 - ✓ Attorney-client communications, attorney work product
 - ✓ Personal privacy

Statutory Exemptions (continued)

- Records pertaining to pending or potential litigation which are not records of any court
 - Pending litigation
 - Potential litigation
 - ✓ Threat of litigation, demand letter
- Executive session minutes, but only if public disclosure would defeat the lawful purpose for the executive session
- Emails received or sent by members of the Delaware General Assembly or their staff

Public Meetings

- All public business must be conducted in public except certain discussions that are permitted to take place in executive session; all votes must take place in public session
- What meetings are subject to FOIA?
 - The 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
 - ☐ Social gatherings
 - ☐ National education or training conferences
- Quorum
 - Constructive quorum through a series of telephone calls or emails
- Discussion/Action on Public Business
 - “Public business” means any matter over which the public body has supervision, control, jurisdiction or advisory power

Public Meeting Requirements

- Publication
- Meeting Notices
- Agendas
- Minutes
- Virtual Meetings

Publication:

When to Publish Notice & Agenda

- Regular Meetings
 - Notice posted 7 days in advance of meeting
 - Agenda must be posted with notice or added at least 6 hours in advance
- Special or Rescheduled Meetings
 - At least 24 hours' notice required
 - Requires a showing of an exigent circumstance or compelling need to meet on shortened notice
- Emergency Meetings
 - Exempt from notice requirements if necessary for the immediate preservation of public peace, health or safety

Publication:

Posting the Notice

- Posting of notice
 - At the principal office or, if none, where meetings are regularly held and
 - On the State's public meeting calendar
- Each notice must include the date, time and place of the meeting and indicate whether the meeting will be conducted virtually
- Each notice must include the agenda if known at the time of posting

Publication: The Agenda

- General statement of the major issues expected to be discussed at a public meeting
 - Must draw the public's attention to the fact that an important subject will be addressed
- Statement of intent to hold an executive session and the specific grounds therefor
 - Should reference the statutory ground(s) for the executive session.
- Must include “Public Comment” as an agenda item
 - Must provide meaningful opportunity for the public to engage with the public body
 - May impose reasonable time, place, and manner restrictions on the length of the public comment period and time allotted for each public comment

Publication:

The Agenda Cont'd

- Notices/Agendas may be amended in certain circumstances
 - If unknown at the time of posting, the agenda may be added to the notice up to 6 hours prior to the meeting. Must include reasons for the delay.
 - An agenda may be amended up to 6 hours prior to the meeting if the new matter came up unexpectedly and required immediate attention. Must explain delay and justify need for shortened notice.
 - The agenda may be changed during a public meeting to include a new agenda item (raised by a member of the public) if it is reasonably related to items that were noticed in the agenda and required immediate attention.

Executive Session

- A public body may discuss certain matters in private
 - Strategy sessions, including those involving legal advice or opinion from an attorney, about collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on bargaining or litigation position
 - ✓ May discuss litigation objectives, deployment of resources, legal issues, parameters for settlement
 - The contents of public documents that are excluded from the definition of a “public record” – **NEW**: bids pending award.
 - Personnel matters in which the names, competency and abilities of the individual employees or students are discussed
 - Investment strategy or negotiations concerning the investment of money belonging to a plan – **Note**: unique to PMB (CMPB, Pensions)
- As with all voting, the vote on whether to enter executive session must take place in open session

Meeting Minutes

- Must prepare minutes even when meeting taped
- Must post draft minutes within 20 working days after the meeting
- Minimal content requirements
 - Attendance record
 - Accounting of each vote taken or action agreed upon
- Final approved minutes must be posted on the public meeting calendar within 5 working days from final approval
 - Executive session minutes need not be posted and may be withheld for as long as the sensitive matters discussed remain confidential or privileged

Virtual Meetings

- FOIA historically required that most public bodies meet and vote in person. FOIA recently was amended (SB 94) to permit all public bodies to meet virtually but only if at least one member of the body is physically present at the physical meeting (or “anchor”) location.
- As with a few other State entities, the Board has separate statutory authority to conduct virtual meetings without the use of an anchor location and has consistently exercised that authority.
- It is not clear that SB 94 was intended to limit the Board’s existing statutory authority to convene virtually.

Enforcement

- Actions taken at a meeting in violation of FOIA's open meetings provisions may be challenged in and voided by the Court of Chancery.
 - 60-day limitations period; 6-month statute of repose
- A Delaware citizen denied access to public records has the right to sue or seek a determination from the DDOJ, but if the public body is a State entity represented by the DDOJ, the citizen must first seek a determination from the Chief Deputy Attorney General.
 - Must file petition within 60 days of the denial.
- Any citizen may petition the DDOJ to determine whether a violation of FOIA has occurred or is about to occur.
 - 60 days to appeal a determination on the record to Superior Court.
 - If the DDOJ finds that a violation of this chapter has occurred or is about occur, the citizen may file suit or request that the DDOJ file suit on the citizen's behalf.

Delaware Public Records Law

- Legislative Findings
- Purpose
- Archives' Duties
- Definition of Public Records
- Officer/Employee Duties
- Violations

Findings

➤ Statement of Legislative Findings

- Public records are essential to the administration of state and local government
- Public records contain information which allows government programs to function, provide officials with a basis for making decisions and ensure continuity with past operations
- Public records document the legal responsibility of government, protect the rights of citizens and provide citizens with a means of monitoring government programs and measuring the performance of public officials
- Public records need to be systematically managed to ensure preservation of historically valuable materials, to provide ready access to vital information and to promote the efficient and economical operation of government

Purpose

➤ What does the DPRL do?

- Establishes a single body of law for record management and retention applicable to all public officers and employees of the State and local governments
- Established the Delaware Public Archives within the Department of State and charged it with administering, implementing and enforcing all provisions of the DPRL

Archives

➤ Duties

- Establish records retention and disposition schedules setting forth the minimum length of time that records need to be retained
- Provide training to State agencies and political subdivisions
- Preserve, classify and catalogue public records for use
- Restrict access to confidential materials

Public Records - Defined

- Definition of “public record” under the DPRL
 - Any document, book, photographic image, electronic data recording, paper, sound recording or other material regardless of physical form or characteristics, including electronic records created or maintained in electronic information systems, made, used, produced, composed, drafted or otherwise compiled or collected or received in connection with the transaction of public business or in any way related to public purposes by any officer or employee of this State or any political subdivision thereof

Officer and Employee Duties Violations

- Duties of officials and employees
 - Adequately document the transaction of public business
 - Retain and adequately protect all public records in their custody
 - Cooperate with Archives to establish an agency-specific retention schedule
 - Retain, dispose of and transfer to Archives (for permanent preservation) all public records in accordance with approved record retention schedules
- Cannot destroy, sell or otherwise dispose of any public record without Archive's consent

Violation of DPRL

- Violations are unclassified misdemeanors
 - Subject to fine of not more than \$500, and/or imprisonment of not more than 3 months
- Enforcement actions?