

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

DELAWARE

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE

OPEN RECORDS AND MEETINGS LAWS IN

DELAWARE

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DELAWARE

**SIXTH EDITION
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Previously Titled
Tapping Officials' Secrets

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Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

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FOREWORD

At common law a person was entitled to inspect public records, including legislative, executive and judicial records, provided the citizen had an interest therein for some useful purpose and not for mere curiosity. *C. v. C.*, 320 A.2d 717 (Del. 1974).

In 1977, the Delaware General Assembly adopted the Freedom of Information Act, 29 *Del. C.* § 10001 *et seq.* (the “Act” or “FOIA”). The Act’s purpose is stated at the outset in what is titled the “Declaration of Policy”:

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

29 *Del. C.* § 10001.

In 1982 the Act was amended to delete the “grants-in-aid” exclusion, and in 1985 the Act was strengthened and clarified, limiting the available grounds for executive session, improving the procedures for notice, agenda and executive session, and adding to the powers of citizens seeking to enforce the Act. For example, in 1985 the General Assembly cured a defect in the Act by making committees of a public body open, a loophole noted by the Delaware Supreme Court in *Delaware Solid Waste Authority v. News-Journal Co.*, 480 A.2d 628 (Del. 1984). The Delaware Supreme Court in *Delaware Solid Waste Authority v. News-Journal Co.* recognized that the General Assembly, through its amendments, had a continuing interest and commitment to providing a free flow of information.

On July 7, 1987, Delaware’s governor signed into law an amendment to the Act permitting the court to award attorneys’ fees and costs to a successful plaintiff and to a successful defendant if the court finds the action was frivolous or brought solely for the purpose of harassment. 29 *Del. C.* § 10005(d). The amendment also provides that a citizen can request the Attorney General to make a written determination as to whether a violation has occurred. 29 *Del. C.* § 10005(e). If the Attorney General finds that a violation has occurred, the citizen may bring an action or request the Attorney General’s office to bring an action on behalf of the citizenry. *Id.* The Attorney General’s office is not required to bring actions against agencies or commissions that it represents. 29 *Del. C.* § 10005(f). Finally, the amendment restricts the ability of public bodies to hold meetings outside the State of Delaware. 29 *Del. C.* § 10004(g).

The General Assembly appears receptive to curing defects in the Act as they are discovered, primarily as a result of judicial decisions. State officials, for the most part, are complying with the terms of the Act, though a number of early cases arose because state officials were unaware of the terms of the Act. Finally, though the Delaware Act was not modeled on the federal FOIA, certain fundamental language related to exemptions is identical. On occasion the Delaware courts have looked to cases under the federal Act. *News-Journal Co. v. Billingsley*, 1980 WL 3043 (Del. Ch. Nov. 20, 1980). *See also* Del. Op. Att’y Gen.,

No. 95-ib24 (Aug. 7, 1995).

STRUCTURE OF DELAWARE’S ACT

Delaware’s Act is very broad and covers both records and meetings. In order to understand the scope of the Act, it is necessary to consider four important definitions.

DEFINITIONS

I. Public Body. As defined by the Act, only a “public body” creates records or holds meetings that are subject to the Act.

A. “Public body” includes the following groups:

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. 29 *Del. C.* § 10002(c).

A variety of public entities have been found to be “public bodies” subject to FOIA. *See, e.g., New Castle County Vocational-Technical Educ. Ass’n v. Bd. of Educ.*, 1978 WL 4637 (Del. Ch. Sept. 25, 1978) (school board “is unquestionably a public body”); *News-Journal Co. v. Billingsley*, 1980 WL 3043 (Del. Ch. Nov. 20, 1980) (Delaware Association of Professional Engineers); Del. Op. Att’y Gen., No. 92-C011 (Apr. 13, 1992) (Council on Banking); Del. Op. Att’y Gen., No. 94-I025 (Aug. 23, 1994) (Thoroughbred Racing Commission).

B. To qualify as a “public body,” the above-listed entity must perform one of the following functions: (1) be supported in whole or in part by any public funds; (2) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (3) be impliedly or specifically charged by any other public official, body or agency to advise or to make reports, investigations or recommendations. 29 *Del. C.* § 10002(c).

C. The General Assembly of the State of Delaware is excluded from the definition of public body. 29 *Del. C.* § 10002(c).

II. Public Business. Records or meetings that relate to the “public business” are subject to the Act. The Act defines the phrase “public business” as “any matter over which the public body has supervision, control, jurisdiction or advisory power.” 29 *Del. C.* § 10002(e). *See, e.g.,* Del. Op. Att’y Gen., No. 96-ib32 (Oct. 10, 1996) (addressing whether public business was conducted at a nonpublic meeting); Del. Op. Att’y Gen., No. 96-ib02 (Jan. 2, 1996) (same).

III. Public Funds. The phrase “public funds” is defined as “funds derived from the State or any political subdivision of the State.” 29 *Del. C.* § 10002(f).

IV. Public Record. Only “public records” are subject to the Act.

A. The act defines “public record” as “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.” 29 *Del. C.* § 10002(g). Once a document is presented to a public body for review, it becomes a public record even though it is in draft form and may be subject to further change. Del. Op. Att’y Gen., No. 05-ib13 (May 9, 2005) (finding the Town of Laurel violated the public records requirements of FOIA by not providing a copy of the draft employment contract with the Town Manager after the council voted at a public meeting to approve the contract subject to review by

legal counsel).

B. The open records portion of the Act contains sixteen statutory exemptions, which also include all “records specifically exempted from public disclosure by statute or common law.” 29 *Del. C.* § 10002(g)(6). For example, Delaware Superior Court has adopted a constitutional exemption for public records that are subject to a constitutional executive privilege. *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777 (Del. Super. 1995).

ADMINISTRATIVE PROCEDURES ACT

Delaware’s Administrative Procedures Act (the “APA”) contains a section dealing with release of public information that requires agencies to release most information but contains exemptions that do not appear in the Act. 29 *Del. C.* § 10112. For example, documents related to the agency’s internal procedures and personnel practices may not be released under the APA but are subject to disclosure under the Act. However, confidential or privileged material is not required to be released under either statute. *See* 29 *Del. C.* § 10112(b)(4). The Delaware Code defines which agencies are subject to the APA. 29 *Del. C.* § 10161.

Because the Act is broader in scope and provides for payment of attorneys’ fees, it is recommended to proceed under the Act rather than the APA.

Open Records

I. STATUTE — BASIC APPLICATION

A. Who can request records?

Any Delaware citizen and non-citizen. 29 *Del. C.* § 10001. *See Lee v. Minner*, 369 F. Supp. 2d 527 (D. Del. 2005) (where an out-of-state journalist and community activist brought a suit against the governor and others challenging the constitutionality, under the Privileges and Immunities Clause, of the “citizens only” restriction on access to public documents under Delaware’s FOIA), *aff’d*, 450 F.3d 194 (3d Cir. 2006).

Custodian of records. FOIA places responsibility for providing or denying access to public records on the “custodian” of the records. *See* 29 *Del. C.* § 10003(a) (“all public records shall be open to inspection and copying . . . by the custodian of the records for the appropriate public body.”). Delaware’s FOIA, however, does not define the term “custodian.”

Importantly, a “public body” must actually receive a FOIA request in order to trigger any legal obligation to make the records available. Del. Op. Att’y Gen., No. 04-ib04 (Feb. 5, 2004) (noting that as a general rule, an attorney is not the custodian of records that may be in the possession of a client, but concluding that by exercising authority both to release some records and claim exemptions for others on behalf of the producing party, the attorney became the custodian of records.). The burden of proof is on the custodian of records to justify the denial of access to records, 29 *Del. C.* § 10003(b) and (c), and the public body must establish rules and regulations regarding access to such records and the fees charged for copying such records. 29 *Del. C.* § 10003(d).

1. Status of requestor.

Any citizen of Delaware, including corporate citizens, may request disclosure pursuant to the Act. 29 *Del. C.* § 10001; Del. Op. Att’y Gen., No. 91-I003 (Feb. 1, 1991). Non-Delaware citizens may not request disclosure under the Act. Del. Op. Att’y Gen., No. 96-ib01 (Jan. 2, 1996).

2. Purpose of request.

The requester’s purpose (*e.g.*, “commercial purpose”) cannot affect his right to receive records. *New Castle County Vocational-Technical Educ. Ass’n v. Board of Educ.*, 1978 WL 4637 (Del. Ch. Sept. 25, 1978) (declining to find as a basis for excluding a request the fact that the request was made by a labor organization).

3. Use of records.

The Act does not make any restrictions on subsequent use of information, provided, however, that an agency releasing documents under the APA may impose reasonable precautions to preserve the integrity and security of the document. 29 *Del. C.* § 10112(b)(1).

B. Whose records are and are not subject to the act?

1. Executive branch.

a. Records of the executives themselves.

The records of the executives themselves (governor, mayor, other chief executive person or body) are subject to the Act, unless protected, for example, by executive privilege. *See Guy v. Judicial Nominating Comm’n*, 659 A.2d 777 (Del. Super. 1995); *see* definition of “public body.” 29 *Del. C.* § 10002(c).

b. Records of certain but not all functions.

The records of all functions of the executive branch are subject to the Act. *See* 29 *Del. C.* § 10002(e) (defining “public business”).

2. Legislative bodies.

Legislative bodies are covered by the Act. However, the General Assembly, or any caucus thereof, or committee, subcommittee, ad hoc committee, special committee or temporary is specifically exempted. 29 *Del. C.* § 10002(c); *News-Journal Co. v. Boulden*, 1978 WL 22024 (Del. Ch. May 24, 1978). For example, the Wilmington City Council is covered. *News-Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. Ch. 1977).

3. Courts.

The Act defines “public body” to include most executive and legislative agencies or entities established by an Act of the General Assembly. 29 *Del. C.* § 10002(c). Courts are probably not covered under the “records” section of the Act because most courts are a creation of the Constitution and not the General Assembly. See Del. Op. Att’y Gen., No. 95-ib01 (Jan. 18, 1995). However, Family Court, Justice of the Peace Court and the Administrative Office of the Courts are created by the legislature and may be subject to the Act. The Delaware Constitution guarantees that “[a]ll Courts shall be open.” Del. Const. of 1897, art. I, § 9. “The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity” Del. Const. of 1897, art. I, § 5. Issues relating to access to court records at common law and under the state and federal constitutions are beyond the scope of this outline.

4. Nongovernmental bodies.

a. Bodies receiving public funds or benefits.

The Act covers bodies “established . . . appointed . . . or otherwise empowered by any state governmental entity” which: (i) are supported in whole or in part by any public funds; (ii) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (iii) are impliedly or specifically charged by any other public official, body or agency to advise or to make reports, investigations or recommendations. 29 *Del. C.* § 10002(c). The University of Delaware and Delaware State University are not included, except that their respective Boards of Trustees are considered to be “public bodies.” 29 *Del. C.* § 10002(d). University documents relating to the expenditures of public funds are “public records,” and each meeting of the full Board of Trustees of the University of Delaware and Delaware State University are a “meeting.” *Id.*

b. Bodies whose members include governmental officials.

Nongovernmental groups whose members include governmental officials are not covered by the Act simply because governmental officials are members. Nongovernmental groups may qualify if they fall within the definition of public body.

5. Multi-state or regional bodies.

Multistate or regional bodies (such as planning authorities) are covered by the Act if the entities (i) are supported in whole or in part by any public funds; (ii) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (iii) are impliedly or specifically charged by any other public official body or agency to advise or to make reports, investigations or recommendations. 29 *Del. C.* § 10002(c); See *Delaware Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628 (Del. 1984).

6. Advisory boards and commissions, quasi-governmental entities.

Advisory boards and commissions and quasi-governmental entities are covered if they (i) are supported in whole or in part by any public funds; (ii) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (iii) are impliedly or specifically charged by any other public official, body or agency to advise or to make reports, investigations or recommendations. 29 *Del. C.* § 10002(c).

7. Others.

Other bodies to which governmental or public functions are delegated are covered if they (i) are supported in whole or in part by any public funds; (ii) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (iii) are impliedly or specifically charged by any other public official, body or agency to advise or to make reports, investigations or recommendations. 29 *Del. C.* § 10002(c). For example, a committee appointed by a public body established by the General Assembly is now required to hold open meetings, which corrects a defect in the Act pointed out by the Delaware Supreme Court in *Delaware Solid Waste Authority v. News-Journal Co.*, 480 A.2d 628 (Del. 1984).

C. What records are and are not subject to the act?

1. What kind of records are covered?

All “public records” are subject to disclosure under the Act. 29 *Del. C.* § 10002(g). “Public record” is defined as “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.” 29 *Del. C.* § 10002(g). (“Public business” means any matter over which the public body has supervision, control, jurisdiction or advisory power. 29 *Del. C.* § 10002(e)).

Personal notes, however, have not been subject to public access under FOIA. Del. Op. Att’y Gen., No. 02-ib34 (Dec. 21, 2002); Del. Op. Att’y Gen., No. 02-ib30 (Dec. 2, 2002).

2. What physical form of records are covered?

Not specified; see above.

3. Are certain records available for inspection but not copying?

Public records must be maintained in public offices so that they may be available for copying and inspection by Delaware citizens. Del. Op. Att’y Gen., No. 94-I030 (Oct. 19, 1994). See Del. Op. Att’y Gen., No. 00-ib02 (Jan. 10, 2000) (concluding that a public office cannot be liable for a citizen’s failure or refusal to avail him or herself of the times and/or dates set aside for public viewing and copying of records). However, certain records, like a presentence report, prearrest report, supervision history and all other case records obtained in the discharge of official duty by any member or employee of the Department of Corrections are privileged and shall not be disclosed except that the court or Board of Pardons may, in their discretions, permit the inspection of the reports by the offender or the offender’s attorney. No person currently incarcerated shall have access to such records. 11 *Del. C.* § 4322(a).

D. Fee provisions or practices.

1. Levels or limitations on fees.

The Act provides that “[a]ny reasonable expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy.” 29 *Del. C.* § 10003(a). The Act further provides, “it shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records.” 29 *Del. C.* § 10003(d). See also Del. Op. Att’y Gen., No. 91-I003 (Feb. 1, 1991) (holding that the requirement to establish rules and regulations, and fees, is mandatory). The public agency must abide by its regulations pertaining to fees, unless the public agency gives a requester adequate notice of a deviation from its fee regulation. Notice has been held inadequate when it was printed in a town newsletter and posted on the town website. Del. Op. Att’y Gen., No. 04-ib08 (Feb. 9, 2004). Rules and regulations, however, found to violate FOIA’s mandate of “easy access to public records” are not permissible. See Del. Op. Att’y Gen., No. 02-ib34 (Dec. 21, 2002). See

also Del. Op. Att’y Gen., No. 02-ib31 (Dec. 6, 2002) (concluding that charging \$10.00 for a 68-page land-use plan was permissible); Del. Op. Att’y Gen., No. 02-ib10 (Apr. 24, 2002) (concluding that a charge of 50 cents per page is reasonable). Agencies subject to the APA are required to make a “reasonable charge” for copying documents. 29 Del. C. § 10112(b)(5).

Typically, a determination of “reasonable cost” is something that the parties resolve. The Delaware Superior Court has indicated its willingness to help parties determine “reasonable cost” absent the parties’ ability to agree. *Bd. of Managers of Delaware Criminal Justice Info. Sys. v. Gannett Co.*, 2005 WL 2660049 (Del. Super. Sept. 6, 2005).

2. Particular fee specifications or provisions.

a. Search.

The Delaware Attorney General has concluded that an agency may charge a person requesting documents for the time spent by the public employees conducting searches of documents and copying such documents, at least where the requester has decided not to personally conduct such searches and copying. See Del. Op. Att’y Gen., No. 95-ib08 (Feb. 6, 1995). To charge for labor and computer processing time, a public body must have a written policy in place. 29 Del. C. § 10003(d); Del. Op. Att’y Gen., No. 07-ib19 (Aug. 28, 2007); Del. Op. Att’y Gen., No. 02-ib10 (Apr. 24, 2002) (the school district did not have a written rule regarding charges for the cost of retrieving information from computer databanks). However, if the agency regulation only indicates that duplication charges will be made and does not indicate that a charge will be made for the time of the government employee as well, the requester may not be obligated to pay such charges. *Id.* See also Del. Op. Att’y Gen., No. 91-I003 (Feb. 1, 1991).

b. Duplication.

Each agency establishes its own fee structure for duplication charges. See Del. Op. Att’y Gen., No. 94-I013 (Mar. 15, 1994).

c. Other.

FOIA does not require an answering party to pull together information from various forms and arrange it in a required format to create a new public record that does not already exist. Del. Op. Att’y Gen., No. 99-ib12 (Sept. 21, 1999); Del. Op. Att’y Gen., No. 00-ib18 (Oct. 31, 2000); Del. Op. Att’y Gen., No. 05-ib08 (Apr. 4, 2005); Del. Op. Att’y Gen., No. 03-ib24 (Oct. 30, 2003); Del. Op. Att’y Gen., No. 03-ib13 (June 2, 2003); Del. Op. Att’y Gen., No. 04-ib14 (June 28, 2004); Del. Op. Att’y Gen., No. 02-ib18 (Aug. 19, 2002); Del. Op. Att’y Gen., No. 02-ib03 (Feb. 1, 2002).

Delaware’s FOIA is silent on how quickly a public body must respond to a public records request, other than to require “[r]easonable access.” 29 Del. C. § 10003(a). It has been determined — by analogy to the federal FOIA — that “reasonable access” means that a public body “should, within ten (10) days after the receipt of a definitive request, issue a written determination to the requestor stating which of the requested records will, and which will not, be released and the reasons for any denial of a request.” Del. Op. Att’y Gen., No. 91-I003 (Feb. 1, 1991). See also Del. Op. Att’y Gen., No. 03-ib26 (Nov. 13, 2003). This 10-day response time may be extended: “(1) When there is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) when there is a need to search for, collect, and examine a voluminous amount of separate and distinct records; which are demanded in a single request; or (3) when there is a need for consultation, which shall be conducted with all practicable speed, with another agency or with agency counsel.” Del. Op. Att’y Gen., No. 91-I003 (Feb. 1, 1991).

3. Provisions for fee waivers.

An agency may provide for the waiver of duplication fees where special circumstances arise; for example, if the public interest would be served by such a waiver. See Del. Op. Att’y Gen., No. 94-I013 (Mar. 15, 1994).

4. Requirements or prohibitions regarding advance payment.

Not specified.

5. Have agencies imposed prohibitive fees to discourage requesters?

Expense cannot be used as an obstacle to the “easy access to public records.” Del. Op. Att’y Gen., No. 02-ib34 (Dec. 21, 2002). A \$.50 per page charge for duplication was found not to be per se unreasonable. See Del. Op. Att’y Gen., No. 94-I013 (Mar. 15, 1994); see also Del. Op. Att’y Gen., No. 95-ib08 (Feb. 6, 1995).

E. Who enforces the act?

1. Attorney General’s role.

By petition of a citizen denied access to information, the Attorney General can determine whether a violation has occurred. 29 Del. C. § 10005(e).

2. Availability of an ombudsman.

Not applicable.

3. Commission or agency enforcement.

Not applicable.

F. Are there sanctions for noncompliance?

A court may award attorneys’ fees and costs to a successful defendant if the action was frivolous or was brought solely for the purpose of harassment. 29 Del. C. § 10005(d).

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

1. Character of exemptions.

a. General or specific?

There are 16 specific exemptions contained within the Act. Additionally, records of the General Assembly and certain records of the University of Delaware and Delaware State University are excluded. 29 Del. C. § 10002(d). See Del. Op. Att’y Gen., No. 00-ib08 (May 24, 2000) (holding that any documents relating to the spending of state funds for those infrastructure improvements are “public records” under FOIA, and that the University was required to make them available for inspection and copying.) Given the Act’s commitment to making records available, the 16 exemptions are construed narrowly and specifically and thus are not easily abused exemptions. See *Delaware Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628 (Del. 1984); *News-Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. Ch. 1977).

The Act preserves all common law and other statutory exemptions to public disclosure. 29 Del. C. § 10002(g)(6).

b. Mandatory or discretionary?

Not specified, but the statute says exempt records “shall not be deemed public.” 29 Del. C. § 10002(g).

c. Patterned after federal Freedom of Information Act?

Though the Delaware Act was not modeled on the federal FOIA, certain fundamental language related to exemptions is identical. On occasion the Delaware courts have looked to cases under the federal FOIA. See, e.g., *News-Journal Co. v. Billingsley*, 1980 WL 3043 (Del. Ch. Nov. 20, 1980).

2. Discussion of each exemption.

a. 29 Del. C. § 10002(g)(1): “Any personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to

personal privacy.” See *Gannett Co. v. Christian*, 1983 WL 473048 (Del. Super. Aug. 19, 1983) (disclosure of teacher salary information not an invasion of privacy). For example, Social Security numbers need not be disclosed. Del. Op. Att’y Gen., No. 95-ib03 (Jan. 25, 1995). Further, withholding taxes, Social Security declarations and elective declarations are not required to be disclosed. Likewise, score sheets of interviewees during the applicant selection process for a new driver’s education instructor have been exempted from disclosure. Del. Op. Att’y Gen., No. 05-ib20 (July 27, 2005). However, the names of the presidents and the contact information for corporations have been held to be public information under FOIA. Del. Op. Att’y Gen., No. 03-ib01 (Jan. 10, 2003).

For purposes of construing Delaware’s FOIA, “personnel file” is defined as “any application for employment, wage or salary information, notices of commendations, warning or discipline, authorization for a deduction or withholding of pay, fringe benefit information, leave records, employment history with the employer, including salary information, job title, dates of changes, retirement record, attendance records, performance evaluations and medical records.” Del. Op. Att’y Gen., No. 02-ib24 (Oct. 1, 2002).

b. 29 Del. C. § 10002(g)(2): “Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.” This exemption has been construed to protect “individuals from a wide range of embarrassing disclosures.” Del. Op. Att’y Gen., No. 03-ib21 (Oct. 6, 2003) (quoting Del. Op. Att’y Gen., No. 87-1031 (Nov. 4, 1987)). For example, the “release of information regarding one’s assets, profits and losses, stock holdings, loans and collateral” are confidential financial information exempt from disclosure under FOIA. Del. Op. Att’y Gen., No. 87-1031 (Nov. 4, 1987). See also Del. Op. Att’y Gen., No. 96-ib30 (Sept. 25, 1996) (tax returns of parents of children applying for scholarships exempt from disclosure under FOIA). See Del. Op. Att’y Gen., No. 00-ib15 (Oct. 4, 2000) (outlining the trade secret exception).

The FOIA exemption for confidential commercial or financial information may apply “when the government requires a private party to submit information as a condition of doing business with the government.” Del. Op. Att’y Gen., No. 03-ib21 (Oct. 6, 2003) (quoting *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000)). To fall within the exemption, the government has the burden of showing that disclosure of the information “is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.*

c. 29 Del. C. § 10002(g)(3): “Investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue.” See *Nasir v. Oberly*, 1985 WL 189324 (Del. Super. Dec. 5, 1985) *appeal dismissed*, 508 A.2d 470 (Del. 1986) (statements of witnesses in robbery investigation); *News-Journal Co. v. Billingsley*, 1980 WL 3043 (Del. Ch. Nov. 20, 1980) (investigation files of professional engineers not public). See also Del. Op. Att’y Gen., No. 04-ib20 (Nov. 16, 2004) (exempting an accident report); Del. Op. Att’y Gen. No. 99-ib14 (Nov. 5, 1999) (exempting documents pertaining to a police complaint relating to an unregistered motor vehicle). The exception applies even after the file has been closed. Del. Op. Att’y Gen., No. 99-ib14 (Nov. 5, 1999); *News-Journal Co. v. Billingsley*, 1980 WL 3043 (Del. Ch. Nov. 20, 1980).

d. 29 Del. C. § 10002(g)(4): “Criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy. Any person may, upon proof of identity, obtain a copy of the person’s personal criminal record. All other criminal records and files are closed to public scrutiny. Agencies holding such criminal records may delete any information, before release, which would disclose the names of witnesses, intelligence personnel and aids or any other information of a privileged and confidential nature.”

e. 29 Del. C. § 10002(g)(5): “Intelligence files compiled for law-enforcement purposes, the disclosure of which could constitute an en-

dangerment to the local, state or national welfare and security.”

f. 29 Del. C. § 10002(g)(6): “Any records specifically exempted from public disclosure by statute or common law.” See *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777 (Del. Super. 1995) (holding that the confidential records of an appointed commission are protected by constitutional and common law doctrine of executive privilege, exempting the records from disclosure); Del. Op. Att’y Gen., No. 02-ib24 (Oct. 1, 2002) (holding that the common law work product privilege can except disclosure); *Jacobs v. City of Wilmington*, 2002 WL 27817 (Del. Ch. Jan. 3, 2002) (holding nonmandatory traffic accident reports were not public records). See also *Mell v. New Castle County*, 2004 WL 1790140 (Del. Super. Aug. 4, 2004).

g. Delaware courts have recognized a common law right of informational privacy, which guards against disclosure by the government of personal information about citizens. See Del. Op. Att’y Gen., No. 01-ib17 (Nov. 19, 2001) (determining that Delaware’s FOIA protects the names and addresses of retired public employees because disclosure of that information would invade their privacy). For example, public employees’ right of privacy in the records of a legal settlement has been found to outweigh the public interest in disclosure. Del. Op. Att’y Gen., No. 02-ib24 (Oct. 1, 2002). See also Del. Op. Att’y Gen., No. 99-ib02 (Apr. 16, 1999).

h. 29 Del. C. § 10002(g)(7): “Any records which disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested of the public body with respect to said contribution by the contributor.”

i. 29 Del. C. § 10002(g)(8): “Any records involving labor negotiations or collective bargaining.” The purpose behind this exception is that each side in a negotiation situation wishes to obtain the most favorable terms in the ultimate agreement. Del. Op. Att’y Gen., No. 04-ib16 (Oct. 13, 2004). The disclosure to the public of discussions and proposals that take place on one side during the course of negotiations would obviously entail the disclosure of those strategic matters to the other party with whom negotiations are taking place. *Id.* (exempting copies of proposed or pending contracts and other documents between the Brandywine School District and Brandywine Education Association).

j. 29 Del. C. § 10002(g)(9): “Any records pertaining to pending or potential litigation which are not records of any court.” FOIA’s pending/potential litigation exemption is intended to prevent litigants from using “FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.” *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003). Del. Op. Att’y Gen., No. 03-ib21 (Oct. 6, 2003).

The pending litigation exemption “turns on the identity of the requestor and the purpose of the request.” Att’y Gen. Op. 03-ib21 (Oct. 6, 2003). The exemption applies when “[i]t is exclusively about litigators and litigants looking for materials that might help them in court.” *Office of the Public Defender v. Delaware State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003). See Del. Op. Att’y Gen., No. 02-ib32 (Dec. 20, 2002) (concluding that the potential litigation exception does not cover a presuit exchange of letters between potential parties); Del. Op. Att’y Gen., No. 04-ib04 (Feb. 5, 2004) (extending the pending litigation exception to Quasi-Judicial proceeding including arbitration); Del. Op. Att’y Gen., No. 03-ib10 (May 6, 2003); *Mell v. New Castle County*, 835 A.2d 141 (Del. Super. 2003) (exempting documents under the pending litigation exception) See also Del. Op. Att’y Gen., No. 03-ib26 (Nov. 13, 2003).

For the potential litigation exemption to apply, “FOIA requires a two-part analysis: first, litigation must be likely or reasonably foreseeable; and second, there must be a clear nexus between the documents requested under FOIA and the subject matter of the potential litigation.” Del. Op. Att’y Gen., No. 03-ib21 (Oct. 6, 2003). “A realistic and tangible threat of litigation is one that can be characterized with reference to objective factors such as: (1) a formal demand letter or some

comparable writing that represents the party's claim and manifests a solemn attempt to sue; (2) previous or pre-existing litigation between the parties or proof of ongoing litigation concerning similar claims; or (3) proof that a party has retained counsel with respect to the claim at issue and has expressed an intent to sue." *Id.* See also Del. Op. Att'y Gen., No. 02-ib32 (Dec. 20, 2002) (concluding that the potential litigation exception does not cover a presuit exchange of letters between potential parties). To invoke this provision there must be a discussion of "litigation strategy." Anticipation of litigation is not enough. *Chem. Indus. Council of Delaware, Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. May 19, 1994). Mere possibility that documents may be involved in potential litigation does not shield those documents from public disclosure under this exemption. See Del. Op. Att'y Gen., No. 93-I005 (Mar. 3, 1993).

k. 29 Del. C. § 10002(g)(10): "[M]inutes of executive sessions [and] any record of discussions held in executive session [so long as public disclosure would defeat the lawful purpose for the executive session]." See 29 Del. C. § 10004(f). *Chem. Indus. Council of Delaware, Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. May 19, 1994). This exemption is related to the open meeting requirements of the Act.

l. 29 Del. C. § 10002(g)(11): "Any records which disclose the identity or address of any person holding a permit to carry a concealed deadly weapon; provided, however, all records relating to such permits shall be available to all bona fide law-enforcement officers."

m. 29 Del. C. § 10002(g)(12): "Any 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."

n. 29 Del. C. § 10002(g)(13): "Any records in the possession of the Department of Correction where disclosure is sought by an inmate in the Department's custody."

o. 29 Del. C. § 10002(d)(14): "Investigative files compiled or maintained by the Violent Crimes Compensation Board."

p. 29 Del. C. § 10002(g)(15): "Any photographs, video recordings or audio recordings of a postmortem examination in the possession of the office of the Chief Medical Examiner."

q. 29 Del. C. § 10002(g)(17)a: Certain enumerated categories of 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." The General Assembly enacted this exemption in 2002 in response to the terrorist attacks of Sept. 11. See Del. Op. Att'y Gen., No. 05-ib19 (Aug. 1, 2005) (stating that the exemption covers law enforcement manuals such as check point guidelines and the Wilmington Police Department's Police Officer's Manual to the extent they contain information that would disclose investigative techniques and procedures or endanger the life and safety of citizens or law enforcement officers).

B. Other statutory exclusions.

1. *Administrative Procedures Act*. Certain agencies may be subject to the APA, which exempts internal procedure manuals, investigative files, and confidential and privileged material. 29 Del. C. § 10112(b) (4).

2. *Antitrust — Investigative Demands*. Any transcripts of oral testimony, documentary material or answers to written interrogatories provided pursuant to a demand by the Attorney General regarding knowledge concerning possible anti-trust violations shall be exempt from disclosure under the Act. 6 Del. C. § 2106(i).

3. *Corporations — Transfer of Domicile*. Documents submitted to the Secretary of State relating to the temporary transfer of corporate domicile to Delaware are exempted from disclosure, unless the corporation actually transfers its domicile to Delaware. 8 Del. C. § 389.

4. *Collective Bargaining — Police and Firefighters, Public Employees, Public Schools*. Negotiating sessions, including strategy meetings of public employers, mediation and the deliberative process of fact-finders are exempt from the Act. 19 Del. C. §§ 1313(b), 1613(b), 4013(b).

5. *Engineers*. The following items are specifically exempted from public disclosure under the Act:

(a) All applications to practice engineering in Delaware and associated documents except for the name and address of the applicant, the date of the application, the action of the Council on the application, and the status of the person's authorization to practice engineering in Delaware. 24 Del. C. § 2828(b)(1).

(b) Records and information received by the Council relating to charges against any person that could result in disciplinary action are not subject to the Act. However, if the information is disclosed at a public hearing or if the council issues an adverse order pursuant to the information, then the records are subject to public disclosure under the Act. 24 Del. C. § 2828(b)(2).

6. *Child Placement Child Review Act*. Meetings at which individual cases are discussed or records that pertain to individual cases and reviews are exempt from public disclosure. 31 Del. C. § 3816(a).

7. *Hazardous Waste*. The Secretary of the Department of Natural Resources may exempt certain information pertaining to hazardous waste obtained by the department if such information is proprietary or would divulge trade secrets. 7 Del. C. §§ 6304(c), 9116.

8. *Health Data*. Protected health information is not public information as defined at § 1002 of Title 29, and may not be disclosed without the informed consent of the individual. 16 Del. C. § 1232(a). Whenever protected health information is disclosed it shall be done in a nonidentifiable form, except when such disclosure is authorized by the individual. 16 Del. C. § 1232(a). Information collected by the State of Delaware in its health care database is exempted from the Act. Raw data is not available for public inspection and is not considered a public record under the Act. 16 Del. C. § 2006. Likewise, the results of mandatory human immunodeficiency virus tests conducted against sex offenders are not public records and are not subject to the Act. 10 Del. C. § 1077; 11 Del. C. § 3913.

9. *Insurance — Reinsurance Intermediary Act*. Reports prepared by the Insurance Commissioner regarding refusal to issue a reinsurance intermediary license are not subject to the Act. 18 Del. C. § 1603(e).

10. *Lotteries*. Information that is required to be reported, such as information pertaining to video lottery agents and financial information of licensees, is not subject to public disclosure under the Act. 29 Del. C. §§ 4805(a)(22), (23) & (b)(14), 4820(g).

11. *Prison Records*. Prison records are not subject to the Act. 11 Del. C. § 4322. *Jenkins v. Gullede*, 1982 WL 593167 (Del. Super. Jan. 25, 1982), *aff'd*, 449 A.2d 207 (Del. 1982). See also 11 Del. C. § 4322(a).

12. *Special Law Enforcement Assistance Fund*. The purpose of this fund is to financially assist law enforcement operations targeted at organized crime and drug trafficking. The sources of the fund are derived from criminal forfeitures. The records, applications, authorizations and reports pertaining to this special fund are not subject to the Act. 11 Del. C. § 4113.

13. *Sexual Offender — Registration*. The documents required by the court pursuant to the sexual offender registration legislation are not subject to public disclosure except if requested by a prospective employer. 11 Del. C. § 4120(i).

14. *Tax Returns*. The state tax information required under Title 30 is not subject to disclosure under the Act. 30 Del. C. § 368. See also Del. Op. Att'y Gen., No. 95-ib13 (Mar. 20, 1995).

15. *Victim's Bill of Rights*. The address, place of employment and telephone number maintained by a court, prosecutor or law-enforcement agency of victims of certain crimes in Delaware are exempt from

disclosure under the Act. 11 *Del. C.* § 9403(c).

16. *Grand Jury Subpoenas.* The Attorney General has opined that Rule 6(e) of the Federal Rules of Criminal Procedure specifically exempts the disclosure of grand jury subpoenas under Delaware's FOIA. *Del. Op. Att'y Gen.*, No. 03-ib02 (Jan. 17, 2003).

17. *Peer Review.* In the medical profession, records of a review board have been said to be exempt. *See 24 Del. C.* § 1768.

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

1. *Executive privilege.* The concept of executive privilege was recognized to exclude a request for the Judicial Nominating Commission records under 29 *Del. C.* § 10002(g)(6) in *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. 1995).

2. *Social Security Numbers.* The Delaware Attorney General has determined that the Social Security numbers contained in sworn payroll information required by the state prevailing wage laws could not be disclosed under the Act. *Del. Op. Att'y Gen.*, No. 95-ib03 (Jan. 25, 1995).

3. *Administrative Burden.* There is some indication that the courts might deny a person disclosure to otherwise nonexempt information if the scope of the request would unduly burden the public body or if the administrative costs were too high. *See Del. Op. Att'y Gen.*, No. 95-ib13 (Mar. 20, 1995).

4. *Other.* Autopsy reports are exempt from the Act as investigatory files. *See Op. Att'y Gen.* No. 05-ib16 (June 22, 2005); *Lawson v. Meconi*, 897 A.2d 740, 745 (Del. 2006) (holding that autopsy information gathered and disclosed to the police department during an investigation was confidential); 29 *Del. C.* § 4701. Death certificates are also similarly treated. 24 *Del. C.* § 3110.

D. Are segregable portions of records containing exempt material available?

Agencies may release redacted versions of documents containing nondisclosable material. *See Del. Op. Att'y Gen.*, No. 88-I028 (Dec. 2, 1988); *Del. Op. Att'y Gen.*, No. 77-037 (Dec. 28, 1977); *Del. Op. Att'y Gen.*, No. 77-029 (Sept. 27, 1977). For example, the public may have access to applications filed with the Committee on Message/Bodywork Practices. However, the portion of the application that discloses individual criminal records must be redacted or scrambled. The reasonable cost for such sanitized records, including cost of copying, redacting, masking or scrambling, should be paid by the requester. *See Del. Op. Att'y Gen.*, No. 94-I010 (Mar. 7, 1994). *See also Del. Op. Att'y Gen.*, No. 04-ib07 (Mar. 8, 2004) (producing redacted billing statements).

E. Homeland Security Measures.

The disclosure of intelligence files that would endanger state, local and national welfare and security are exempted. 29 *Del. C.* § 10002(g)(5). Likewise, Delaware's FOIA has been amended to include an exemption for certain enumerated records that would jeopardize security. 29 *Del. C.* § 10002(g)(17).

III. STATE LAW ON ELECTRONIC RECORDS

The Delaware Freedom of Information Act does not specifically address access to electronic records. However, the Act defines "public records" to include all information "regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." 29 *Del. C.* § 10002(g). Thus, the Act reaches public records held in electronic forms, and in fact fields of electronic information have been disclosed to requesting parties.

The Delaware Attorney General has addressed two potential problems with public access to electronic records. First, public access to computer databases that contain exempt information (such as criminal records or information the disclosure of which would violate the

individuals' privacy) will not be granted. The Attorney General has recommended to one department that when designing such computer systems, the database should be segregable to permit public access to those parts not exempted by the Act or otherwise. *See Del. Op. Att'y Gen.*, No. 91-I013 (Apr. 17, 1991). Second, a request for access to a database may present an administrative burden to screen the database for exempt material. The request may be denied as a result.

A. Can the requester choose a format for receiving records?

The Act does not specifically address whether the requester may choose a format. Each public body that is required to allow public access to records is responsible for issuing its own rules and regulations regarding access to public records. Under Delaware corporate law, access to documents retained by the Secretary of State may only be issued as photocopies, microfiche or electronic images. 8 *Del. C.* § 391(c).

B. Can the requester obtain a customized search of computer databases to fit particular needs?

Not specified.

C. Does the existence of information in electronic format affect its openness?

The Act treats electronic information just like any other information. 29 *Del. C.* § 10002(g). The Act does not make any distinction between records distributed in manual and computer storage systems. *Del. Op. Att'y Gen.*, No. 97-ib06 (Mar. 17, 1997).

D. How is e-mail treated?

The Act does not specifically address e-mail, but e-mails have been requested under a FOIA request. *See, e.g., Del. Op. Att'y Gen.*, No. 11-ib04 (Mar. 29, 2011).

1. Does e-mail constitute a record?

The Act does not specifically address e-mail, but "public records" includes all information "regardless of the physical form or characteristic...." 29 *Del. C.* § 10002(g).

2. Public matter on government e-mail or government hardware

Not specified.

3. Private matter on government e-mail or government hardware

Not specified.

4. Public matter on private e-mail

Not specified.

5. Private matter on private e-mail

Not specified.

E. How are text messages and instant messages treated?

The Act does not specifically address text messages, but "public records" includes all information "regardless of the physical form or characteristic...." 29 *Del. C.* § 10002(g).

1. Do text messages and/or instant messages constitute a record?

Although the Act does not specifically address text messages, such messages have been requested under the Act. *Del. Op. Att'y Gen.*, No. 09-ib04 (June 4, 2009).

2. Public matter message on government hardware.

Not specified.

3. Private matter message on government hardware.

Not specified.

4. Public matter message on private hardware.

Not specified.

5. Private matter message on private hardware.

Not specified.

F. How are social media postings and messages treated?

The Act does not specifically address social media postings, but “public records” includes all information “regardless of the physical form or characteristic....” 29 *Del. C.* § 10002(g).

G. How are online discussion board posts treated?

The Act does not specifically address discussion board posts, but “public records” includes all information “regardless of the physical form or characteristic....” 29 *Del. C.* § 10002(g).

H. Computer software**1. Is software public?**

To the extent that software contains or is proprietary or trade secret information, such software is exempt from disclosure. 29 *Del. C.* § 10002(g)(2); *Del. Op. Att’y Gen.*, No. 06-ib17 (Aug. 21, 2006).

2. Is software and/or file metadata public?

Not specified.

I. How are fees for electronic records assessed?

The Act does not specifically address fees for electronic records, but provides that “[it] shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records.” 29 *Del. C.* § 10003(d). The Delaware Attorney General has approved charging the time, per hour, to attain such records from the computer network system. *Del. Op. Att’y Gen.*, No. 09-ib04 (June 4, 2009).

J. Money-making schemes.

Not specified.

K. On-line dissemination.

Not specified.

IV. RECORD CATEGORIES — OPEN OR CLOSED**A. Autopsy reports.**

Autopsy reports are exempt from the Act as investigatory files, and are afforded protection under Delaware’s Health Record Privacy Statute. 29 *Del. C.* §§ 10002(g)(3), 1000(2)(g)(1) and 16 *Del. C.* § 1230.

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

Not specified.

C. Bank records.

If they meet the definition of public records, bank records are not exempt. However, the Act permits redaction of bank account numbers and other sensitive information. *Del. Op. Att’y Gen.*, No. 06-ib17 (Aug. 21, 2006).

D. Budgets.

If they meet the definition of public records, budgets are not exempt.

E. Business records, financial data, trade secrets.

Exempt if obtained from a person and are of a privileged or confidential nature under open records exemption two. 29 *Del. C.* § 10002(g)(2). For example, financial data supplied to the Division of Alcoholic Beverage Control by applicants for liquor licenses is exempt from disclosure, *Del. Op. Att’y Gen.*, No. 87-I031 (Nov. 4, 1987), but disclosure of financial data may be required where a protest is filed. *Pusey v. Delaware Alcoholic Beverage Control Comm’n*, 596 A.2d 1367 (Del. 1991).

F. Contracts, proposals and bids.

Contracts, proposals and bids are not exempt. 29 *Del. C.* § 6907. *See also Del. Op. Att’y Gen.*, No. 77-037 (Dec. 28, 1977); *Del. Op. Att’y Gen.*, No. 05-ib13 (May 9, 2005).

G. Collective bargaining records.

Collective bargaining records are exempt. 29 *Del. C.* § 10002(g)(8).

H. Coroners reports.

The common law right of privacy does not survive the death of the holder. *Lawson v. Meconi*, 2005 WL 1323123 (Del. Ch. May 27, 2005). Autopsy reports are occasionally treated as exempt under open records exemption four relating to investigations. Coroner reports will likely be treated similarly.

I. Economic development records.

The Act does not require that a citizen be given the right to speak at the Economic Development Subcommittee open meeting so long as no content-based discrimination occurs. *Del. Op. Att’y Gen.*, No. 06-ib19 (Sept. 5, 2006).

J. Election records.

Not specified.

K. Gun permits.

Records identifying individuals holding concealed weapons are exempt. 29 *Del. C.* § 10002(g)(1).

L. Hospital reports.

Hospital records are exempt under open records exemption if the disclosure would constitute an invasion of privacy. 29 *Del. C.* § 10002(g)(1). Malpractice claim reports filed with the Insurance Commission pursuant to 18 *Del. C.* § 6820 are public records, although the name of the patient, portions of the patient’s medical file and any description of the injury may be deleted. *Del. Op. Att’y Gen.*, No. 88-I028 (Dec. 2, 1988).

M. Personnel records.

Under the Act, personnel files are excluded from the definition of public records. 29 *Del. C.* § 10002(g)(1).

1. Salary.

Under the Act, payroll information is not a public record where such salaries are paid through non-public funds. *Del. Op. Att’y Gen.*, No. 07-ib12 (May 10, 2007).

2. Disciplinary records.

Disciplinary records contained within a Department of Correction employee’s file fall within 11 *Del. C.* § 4322(a) and are exempt. *Newsome v. Biden*, 2011 WL 835135 (Del. Ch. Feb. 28, 2011).

3. Applications.

Employment applications are not public records as defined under the Act. 29 *Del. C.* § 10002(g)(6); *Del. Op. Att’y Gen.*, No. 05-ib20 (July 27, 2005) (extending the right of privacy to “records relating to the job qualifications of applicants for public employment”).

4. Personally identifying information.

The disclosure of personal identifiers like home address, telephone number, e-mail address, user ID number or password, etc. may be redacted from files before being made public. Del. Op. Att’y Gen., No. 06-ib17 (Aug. 21, 2006).

5. Expense reports.

Expense reports are not exempt as long as they meet the definition of a public record. 29 Del. C. § 10002(g); Del. Op. Att’y Gen., No. 06-ib17 (Aug. 21, 2006). Disclosure of a public employee’s salary information does not constitute an invasion of privacy. Del. Op. Att’y Gen., No. 06-ib14 (July 12, 2006).

N. Police records.

The exemptions related to criminal records and files are poorly worded and contradictory. Police agencies are willing to release general statistical information but are reluctant to release individual files, often relying on the investigatory records exception. See 29 Del. C. § 10002(g)(3).

1. Accident reports.

State law requires police to submit traffic reports to the Department of Public Safety of accidents involving an impaired driver, personal injury or deaths and apparent property damage of \$1500.00. 21 Del. C. §4203(d). Those reports “shall not be open to public inspection.” *Id.* at § 313(b).

2. Police blotter.

Not specified.

3. 911 tapes.

Not specified.

4. Investigatory records.

Not specified.

5. Arrest records.

Not specified.

6. Compilations of criminal histories.

Title 11 Chapter 85 restricts access to criminal histories. News media may be given conviction data, but not all criminal history data. *Bd. of Managers of Delaware Criminal Justice Info. Sys. v. Gannett*, 2003 WL 1579170 (Del. Super. Jan. 17, 2003).

7. Victims.

Not specified.

8. Confessions.

Not specified.

9. Confidential informants.

Not specified.

10. Police techniques.

Not specified.

11. Mug shots.

Not specified.

12. Sex offender records.

Not specified.

13. Emergency medical services records.

Not specified.

O. Prison, parole and probation reports.

Prison, parole and probation reports could be exempt if the disclosure would invade personal privacy, or by statute. See 29 Del. C. § 10002(g)(4). See also 11 Del. C. § 4322(a). Certain records, like a presentence report, preparole report, supervision history and all other case records obtained in the discharge of official duty by any member or employee of the Department of Corrections are privileged and shall not be disclosed except that the court or Board of Pardons may, in their discretions, permit the inspection of the reports by the offender or the offender’s attorney. No person currently incarcerated shall have access to such records. 11 Del. C. § 4322(a).

P. Public utility records.

Not exempt.

Q. Real estate appraisals, negotiations.

Not specified.

R. School and university records.

1. Athletic records.

Not specified.

2. Trustee records.

Not specified.

3. Student records.

Not specified.

4. Other.

University not required to turn over communications regarding potential wind turbine project. Del. Op. Att’y Gen., No. 10-ib14 (Nov. 15, 2010).

S. Vital statistics.

1. Birth certificates.

Not specified.

2. Marriage & divorce.

Not specified.

3. Death certificates.

Death certificates are exempt. See 29 Del. C. § 1000(2)(g)(6) and 16 Del. C. § 3110(a) and (f).

4. Infectious disease and health epidemics.

Not specified.

V. PROCEDURE FOR OBTAINING RECORDS

A. How to start.

1. Who receives a request?

This depends on the agency, but generally FOIA responsibilities are not assigned to specific offices. A “public body,” however, must actually receive a FOIA request in order to trigger any legal obligation to make requested records available. Del. Op. Att’y Gen., No. 04-ib04 (Feb. 5, 2004).

2. Does the law cover oral requests?

The Act does not specify the manner in which requests must be made. Del. Op. Att’y Gen., No. 91-I003 (Feb. 1, 1991) (the DFOIA does not address whether requests may be made in writing or orally).

a. Arrangements to inspect & copy.

If the requester can inspect and copy records, it is not required that he or she make arrangements beforehand. However, it is good prac-

tice to make a request in advance if the request involves a number of documents.

b. If an oral request is denied:

Not specified.

(1). How does the requester memorialize the refusal?

A requester should write a letter to memorialize the refusal of an oral request.

(2). Do subsequent steps need to be in writing?

Any subsequent steps taken by the requester need to be in writing.

3. Contents of a written request.

a. Description of the records.

The letter must describe the records requested. Broad sweeping requests are not permitted. Del. Op. Att’y Gen., No. 95-ib24 (Aug. 7, 1995); Del. Op. Att’y Gen., No. 03-ib24 (Oct. 30, 2003). “It is the duty of the requestor to frame the request with sufficient specificity so that it is not unnecessarily broad.” Del. Op. Att’y Gen., No. 03-ib24 (Oct. 30, 2003) (citing Del. Op. Att’y Gen., No. 95-ib24 (Aug. 7, 1995)). FOIA does not require a public body to honor “[b]road, sweeping requests lacking specificity.” Del. Op. Att’y Gen., No. 03-ib24 (Oct. 30, 2003) (citing Del. Op. Att’y Gen., No. 94-I030 (Oct. 19, 1994)).

A FOIA request must sufficiently describe the records requested in order to enable a public body to locate the records. See Del. Op. Att’y Gen., No. 95-ib24 (Aug. 7, 1995). FOIA, however, does not require a citizen to identify each individual record that might be within the purview of the request. Del. Op. Att’y Gen., No. 03-ib13 (June 2, 2003). Such a requirement would be unreasonable because the public body, as the custodian of the records, is in a unique position to know what records it has. *Id.* All that is required is that the public body have enough information to know what records may be responsive to the request in order to search for and locate those records, if in fact they exist. *Id.* See also Del. Op. Att’y Gen., No. 97-ib06 (Mar. 17, 1997) (FOIA requires “the requesting party . . . to allow the public body to locate the records with reasonable diligence”).

b. Need to address fee issues.

The letter should offer to pay reasonable copying charges as the “reasonable expense” of copying can be levied on the requesting party. 29 Del. C. § 10003(a).

c. Plea for quick response.

The letter should contain a deadline such as 10 days and include a statement that the requester will sue if the Act is not complied with.

d. Can the request be for future records?

The request cannot be for future records.

B. How long to wait.

1. Statutory, regulatory or court-set time limits for agency response.

The Attorney General has suggested that responses should issue within 10 days after receiving a request, absent special circumstances requiring a longer delay. Del. Op. Att’y Gen., No. 91-I003 (Feb. 1, 1991). If the requested information is not exempt, agencies must give “reasonable” access to records during “regular business hours and [at the] place of business.” 29 Del. C. §§ 10003(a), 10112(b)(3).

“Reasonable access” as used in Delaware’s FOIA means that a public body “should, within ten (10) days after the receipt of a definitive request, issue a written determination to the requestor stating which

of the requested records will, and which will not, be released and the reasons for any denial of a request.” Del. Op. Att’y Gen., No. 91-I003 (Feb. 1, 1991). Weekends and legal holidays have been excluded from the 10-day calculation. Del. Op. Att’y Gen., No. 03-ib13 (June 2, 2003).

2. Informal telephone inquiry as to status.

Informal telephone inquiry as to status is acceptable.

3. Is delay recognized as a denial for appeal purposes?

Any citizen denied access to public records as provided in this chapter may bring suit within 60 days of such denial. 29 Del. C. § 10005(b).

4. Any other recourse to encourage a response.

A citizen may petition the Attorney General to determine whether any violation of the Act has occurred or is about to occur. 29 Del. C. § 10005(e). The Attorney General has 20 days to make a written determination of whether a violation has occurred and to provide the custodian of records or the public body involved with a copy of the determination. If the Attorney General finds that a violation has occurred, the citizen may sue or request that the Attorney General file suit. If a request is made, the Attorney General shall notify the citizen within 15 days of the decision to file suit. The citizen has the absolute right to file suit regardless of the determination of the Attorney General and may move to intervene as a party in any suit filed by the Attorney General. 29 Del. C. § 10005(e). If the Attorney General represents the board or agency involved, an opinion is not required. 29 Del. C. § 10005(f).

As a general rule, “for fairness and practical reasons,” the Attorney General has stated that it will not “investigate events that occurred more than six months before [it] received the [FOIA] complaint.” Del. Op. Att’y Gen., No. 02-ib10 (Apr. 24, 2002); see also Del. Op. Att’y Gen., No. 00-ib05 (Feb. 18, 2000). Also, the Attorney General’s office will not grant requests for reconsideration of an opinion unless presented with new facts or controlling legal authority. Del. Op. Att’y Gen., No. 03-ib26 (Nov. 13, 2003).

C. Administrative appeal.

Delaware does not have an administrative appeal procedure.

2. To whom is an appeal directed?

4. Contents of appeal letter.

D. Court action.

1. Who may sue?

Any citizen, 29 Del. C. § 10005(b), or the Attorney General, 29 Del. C. § 10005(e).

2. Priority.

A court does not give records questions priority on the docket, except when the parties can demonstrate urgency meriting expedited litigation.

3. Pro se.

Pro se litigation is possible but not advisable. It is recommended to petition the Attorney General, requesting that the Attorney General bring the action. 29 Del. C. § 10005(e).

4. Issues the court will address:

The burden of proof is on the custodian of records to justify the denial of access to records or any failure to comply with the act. 29 Del. C. § 10005(c).

A court will address the reason for denial, scope of request, applicable exemptions, fees for records and delays.

a. Denial.

A court will determine whether the reason for the denial is proper under Delaware's FOIA.

b. Fees for records.

Where the parties cannot agree on the reasonable expense of producing the information to the requesting party, Delaware courts have indicated their willingness to intervene. *Bd. of Managers v. Gannett Co.*, 2005 WL 2660049 (Del. Super. Sept. 6, 2005).

c. Delays.

A court may award attorneys' fees and costs to a successful plaintiff. An improper delay in production of requested information may support such an award of attorneys' fees and costs.

d. Patterns for future access (declaratory judgment).

A declaratory judgment action is a permissible means of bringing an alleged violation of the Act to the attention of the court in an attempt to gain future access to the information. Likewise, declaratory actions can be brought for a finding that no such violation occurred. *See, e.g., Bd. of Managers of Delaware Criminal Justice Info. Sys. v. Gannett Co.*, 808 A.2d 453 (Del. Super. 2002) (where a declaratory action was brought by the State after a media company sought information).

5. Pleading format.

General rules of pleading are typically followed. Where a citizen's action, seeking a writ of mandamus to compel county officials to produce various documents that were requested in the context of another lawsuit relating to alleged campaign improprieties, was brought under Delaware's FOIA, the court found that as to certain requests, the record was unclear as to whether mandamus was the only available relief obtaining for those documents. *Mell v. New Castle County*, 835 A.2d 141 (Del. Super. 2003).

6. Time limit for filing suit.

Time limit for filing suit is within 60 days of a denial. 29 *Del. C.* § 10005(b). A court will dismiss an untimely action. *Jenkins v. Gullede*, 1982 WL 593167 (Del. Super. Jan 25, 1982), *aff'd*, 449 A.2d 207 (Del. 1982). With that said, a timing deficiency is a procedural defect easily remedied with a new FOIA request. *Id.* The 60-day statute of limitations in Section 10005 has been held not to apply to the Attorney General because "[the] statute[] of limitations do not apply to a state when suing in its sovereign capacity." *Mayor & Council of Wilmington v. Dukes*, 157 A.2d 789, 794 (Del. 1960).

7. What court.

A court of competent jurisdiction in the county or city in which the public body ordinarily meets or in which the plaintiff resides. 29 *Del. C.* § 10005(b). If access to records is sought, the action should be filed in Superior Court. If the plaintiff seeks to enjoin action or wants access to a meeting, the action should be brought in the Court of Chancery.

8. Judicial remedies available.

If an adequate remedy at law is available in the form of a writ of mandamus, the Court of Chancery will not hear FOIA cases relating

to access to records. *Brisco v. Gullede*, 1981 WL 15137 (Del. Ch. Apr. 3, 1981).

9. Litigation expenses.

a. Attorney fees.

A court may award attorneys' fees to the successful plaintiff in an action brought under the Act. A court may award attorneys' fees and costs to a successful defendant, but only if it finds that the action was frivolous or was brought solely for the purpose of harassment. 29 *Del. C.* § 10005(d). *See Bd. of Managers of Delaware Criminal Justice Info. Sys. v. Gannett Co.*, 2003 WL 1579170 (Del. Super. Jan. 17, 2003) (awarding attorneys' fees and costs to requesting party).

b. Court and litigation costs.

Costs may be awarded. *See Bd. of Managers of Delaware Criminal Justice Info. Sys. v. Gannett Co.*, 2003 WL 1579170 (Del. Super. Jan. 17, 2003) (awarding attorneys' fees and costs to requesting party).

10. Fines.

Not available.

11. Other penalties.

Not available.

12. Settlement, pros and cons.

Settlement is usually not appropriate because a court may award attorneys' fees. In an action by a private citizen seeking disclosure of legal fees paid by a county for public employees who had been the targets of a federal investigation, the court granted mandamus to enforce a settlement freely entered into by the parties regarding the disclosure of information. *Mell v. New Castle County*, 2004 WL 1790140 (Del. Super. Aug. 4, 2004).

E. Appealing initial court decisions.

1. Appeal routes.

An appeal can be made to the Delaware Supreme Court. There are no intermediate appellate courts.

2. Time limits for filing appeals.

A party has 30 days to file an appeal. Del. Supr. Ct. R. 6.

3. Contact of interested amici.

The Delaware Supreme Court has in the past permitted filing of a friend-of-the-court brief on similar issues. Del. Supr. Ct. R. 28.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

F. Addressing government suits against disclosure.

On at least one occasion, a government agency has filed suit to bar disclosure, seeking a declaratory judgment that it did not have to produce requested information. *See, e.g., Bd. of Managers of Delaware Justice Info. Sys. v. Gannett Co.*, 808 A.2d 453 (Del. Super. 2002) (where a declaratory action was brought by the State after a media company sought information).

Open Meetings

I. STATUTE — BASIC APPLICATION.

A. Who may attend?

Any citizen of Delaware, subject to certain exceptions, may attend a “meeting.” 29 *Del. C.* § 10001; *see also* Del. Op. Att’y Gen., No. 96-ib01 (Jan. 2, 1996). A “meeting” is defined as 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.” 29 *Del. C.* § 10002(b). *See* 29 *Del. C.* § 10002(c) (defining “public body”); 29 *Del. C.* § 10002(e) (defining “public business”). As a general matter, meetings must be held within the geographic jurisdiction of the public body. 29 *Del. C.* § 10004(g).

B. What governments are subject to the law?

All levels of government, including state, county, local and municipal governments, are covered by the Act. 29 *Del. C.* § 10002(c).

1. State.

State governmental bodies are covered by the Act. *See* Del. Op. Att’y Gen., No. 99-ib16 (Dec. 17, 1999) (addressing alleged violations of the Delaware Department of Transportation).

2. County.

County governmental bodies are covered by the Act. *See* Del. Op. Att’y Gen., No. 02-ib22 (Sept. 13, 2002) (addressing alleged violations by the New Castle County Council).

3. Local or municipal.

Local and/or municipal governments are covered by the Act. *See* Del. Op. Att’y Gen., No. 05-ib29 (Oct. 13, 2005) (addressing alleged violations by the Town of Cheswold); Del. Op. Att’y Gen., No. 99-ib15 (Dec. 9, 1999) (addressing violations by the City of Newark).

C. What bodies are covered by the law?

FOIA defines “public body” to include any “executive body” or “committee” of, or “advisory board” to, any executive 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.” 29 *Del. C.* § 10002(c); *see also* Del. Op. Att’y Gen., No. 02-ib19 (Aug. 19, 2002) (informal monthly meeting of one or two representatives from each of six school districts constitutes a “public body” for purposes of FOIA). The open meeting requirements of FOIA, however, do not apply to “[p]ublic bodies having only 1 member.” 29 *Del. C.* § 10004(h)(6). *See, e.g.*, Del. Op. Att’y Gen., No. 01-ib15 (Oct. 23, 2001) (holding the open meeting laws do not apply to the County Administrator because he is a “body of one.”) A “committee” may be a “public body” for purposes of FOIA if it is “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 . . . to advise or to make reports, investigations or recommendations.” 29 *Del. C.* § 10002(c); Del. Op. Att’y Gen., No. 01-ib15 (Oct. 23, 2001). When an executive body of one exercises his or her decision-making authority, the open meeting requirements of FOIA usually do not apply to fact-finding discussions with staff. Del. Op. Att’y Gen., No. 01-ib15 (Oct. 23, 2001). Where, however, an executive official delegates any of his or her decision-making authority to a group of individuals, FOIA might apply because the group may amount to a “committee” appointed by an executive body. *Id.*

1. Executive branch agencies.

Though the Executive Branch is subject to the records portion of the Act, meetings of the Executive Branch are only open if they fall

within the definition of a public body. The open meeting provision does not apply if the public body has only one member. 29 *Del. C.* § 10004(h)(6).

a. What officials are covered?

FOIA does not usually apply to an executive body of one. Del. Op. Att’y Gen., No. 01-ib15 (Oct. 23, 2001).

b. Are certain executive functions covered?

When an executive official delegates any of his or her decision-making authority to a group of individuals, FOIA might apply because the group may amount to a “committee” appointed by an executive body. Del. Op. Att’y Gen., No. 01-ib15 (Oct. 23, 2001).

c. Are only certain agencies subject to the act?

A body is covered if they (i) are supported in whole or in part by any public funds; (ii) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (iii) are impliedly or specifically charged by any other public official, body or agency to advise or to make reports, investigations or recommendations. *See* 29 *Del. C.* § 10002(c).

2. Legislative bodies.

The General Assembly is not subject to the Act nor are any of the caucuses thereof, or any committee, subcommittee, ad-hoc committee, special committee or temporary committee thereof. 29 *Del. C.* § 10002(c); *News-Journal Co. v. Boulden*, 1978 WL 22024 (Del. Ch. May 24, 1978). However, other legislative bodies are subject to the Act, including the Wilmington City Council. *News-Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. Ch. 1977).

3. Courts.

The courts and juries are not covered by the Act, but Delaware courts are required to be open by the Delaware Constitution. 29 *Del. C.* § 10004(h); Del. Const. of 1897, art. I, § 5. However, Family Court, Justice of the Peace Court and the Administrative Office of the Court are created by the legislature and may be subject to the Act.

4. Nongovernmental bodies receiving public funds or benefits.

Nongovernmental bodies that are supported in whole or in part by public funds, or expend or disburse public funds, including grants, gifts or similar disbursements, or are impliedly or specifically charged by any other public official body or agency to advise or to make reports, investigations or recommendations are covered by the Act. 29 *Del. C.* § 10002(c). *But see* *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777 (Del. Super. 1995).

5. Nongovernmental groups whose members include governmental officials.

Nongovernmental groups whose members include government officials are not covered by the Act simply because governmental officials are members. Nongovernmental groups may qualify if they meet the conditions set forth above. *See* Del. Op. Att’y Gen., No. 89-I010 (May 11, 1989) (advisory group chosen by governor to advise him on selection of prison site, consisting of members of governor’s staff, city employee and county official, does not constitute a “public body” because no public funds were expended, notwithstanding the Governor, a public official charged the committee to advise him). *See also* Del. Op. Att’y Gen., No. 99-ib15 (Dec. 9, 1999) (group consisting of members of the City Planning Department, the City Parking Committee and private consultants does not constitute a “public body” under the Act). The University of Delaware and Delaware State University are not included except that the Boards of Trustees of the Universities shall each be a “public body,” University and College documents relating to the expenditures of public funds shall be “public records,” and each meeting of each full Board of Trustees shall be a “meeting.” 29 *Del. C.* § 10002(d).

6. Multi-state or regional bodies.

These bodies are covered if they (i) are supported in whole or in part by any public funds; (ii) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (iii) are impliedly or specifically charged by any other public official, body or agency to advise or to make reports, investigations or recommendations. *Delaware Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628 (Del. 1984).

7. Advisory boards and commissions, quasi-governmental entities.

These bodies are covered if they (i) are supported in whole or in part by any public funds; (ii) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (iii) are impliedly or specifically charged by any other public official, body or agency to advise or to make reports, investigations or recommendations. *See 29 Del. C. § 10002(c)*.

While the Delaware Supreme Court emphasized in *Delaware Solid Waste Authority v. News-Journal Co.* that the “open meeting laws are liberally construed,” 480 A.2d 628, 637 (Del. 1984), the General Assembly has excepted the proceedings of several boards from the purview of the open meeting law, in statutes other than FOIA. *See, e.g.*, 13 *Del. C. § 2105* (Domestic Violence Coordinating Council); 24 *Del. C. § 1191* (Board of Dental Examiners); 24 *Del. C. § 1768* (Board of Medical Practice); 31 *Del. C. § 3810(c)* (meetings of the Foster Care Review Board “at which individual cases are discussed or reviewed shall not be subject to § 10004 of Title 29”). House Bill 205 further exempts deliberations in case decisions by the Industrial Accident Board, the Human Relations Commission and the Tax Appeals Board.

8. Other bodies to which governmental or public functions are delegated.

These bodies are covered if they (i) are supported in whole or in part by any public funds; (ii) expend or disburse any public funds, including grants, gifts or other similar disbursements and distributions; or (iii) are impliedly or specifically charged by any other public official, body or agency to advise or to make reports, investigations or recommendations. *See 29 Del. C. § 10002(c)*. For example, a committee appointed by the General Assembly is now required to hold open meetings. 29 *Del. C. § 10002(c)*. This corrects a defect in the Act that was addressed by the Delaware Supreme Court in *Delaware Solid Waste Authority v. News-Journal Co.*, 480 A.2d 628 (Del. 1984). Agencies covered by the APA are required to hold public hearings. 29 *Del. C. §§ 10117, 10124*.

9. Appointed as well as elected bodies.

Both appointed and elected bodies are covered if established by the General Assembly. 29 *Del. C. § 10002(c)*.

D. What constitutes a meeting subject to the law.

A “meeting” is defined as a formal or informal gathering of a quorum of the members of any public body for the purposes of discussing or taking action on public business. 29 *Del. C. § 10002(b)* The “public body” is a defined term. 29 *Del. C. § 10002(c)*. The Act also defines “public business” as any matter over which the public body has supervision, control, jurisdiction or advisory power.” 29 *Del. C. § 10002(e)*. *See, e.g.*, Del. Op. Att’y Gen., No. 01-ib13 (Aug. 9, 2001) (deciding a discussion of a waste transfer facility was a matter of “public business,” subject to the open meeting laws); Del. Op. Att’y Gen., No. 02-ib07 (Mar. 22, 2002) (informal luncheon with members of Sussex County Council and private organization was a “meeting” subject to the FOIA laws and, as such, minutes should have been prepared).

1. Number that must be present.

a. Must a minimum number be present to constitute a “meeting”?

A quorum is the minimum number to be present to constitute a “meeting.” The Act does not define what minimum number consti-

tutes a “quorum.” The number could be set by statute at a number greater than a majority. *See Delaware Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628 (Del. 1984). A public body could be subject to the Act without a quorum if the body attempts to avoid the Act by meeting without a quorum. *See Del. Op. Att’y Gen.*, No. 96-ib02 (Jan. 2, 1996). A gathering of members of a committee of a public body is a “public meeting” if a quorum of the committee is present. Del. Op. Att’y Gen., No. 02-ib33 (Dec. 23, 2002) (“If the public body has five members, and appoints a committee of three members, then a meeting of a quorum (two) members of the committee will be subject to FOIA.”).

b. What effect does absence of a quorum have?

Without a quorum, there is no meeting. 29 *Del. C. § 10002(b)*.

2. Nature of business subject to the law.

a. “Information gathering” and “fact-finding” sessions.

There is no exemption for “information gathering” and “fact-finding” sessions or for meetings related to deliberations towards a decision. In fact, strategy or work sessions may be open meetings if “public business” is discussed. *News-Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. Ch. 1977). “Public business” means any matter over which the public body has supervision, control, jurisdiction or advisory power.” 29 *Del. C. § 10002(e)*. *But see 29 Del. C. § 10004(b)(4)* (exempting certain strategy sessions involving collective bargaining or potential litigation where the open meeting could adversely affect the position of the public body).

The Chancery Court, however, “has rejected the notion that the open meetings requirements of FOIA apply only to meetings where “formal action” [is] taken.” Del. Op. Att’y Gen., 97-ib22 (Nov. 24, 1997) (citing *News Journal Co. v. McLaughlin*, 377 A.2d 358, 362 (Del. Ch. 1977)). Otherwise, “there would be no remedy to deter Board members from privately meeting for discussion, investigation or deliberation about public business as long as the Board reached no formal decision at that private meeting.” *Levy v. Bd. of Educ. of Cape Henlopen Sch. Dist.*, 1990 WL 154147, at *6 (Del. Ch. Oct. 1, 1990). Thus, the open meeting laws are said to cover “factfinding, deliberations and discussions, all of which surely influence the public entity’s final decision.” Del. Op. Att’y Gen., No. 00-ib07 (Apr. 28, 2000). FOIA “recognizes that policy decisions by public entities cannot realistically be understood as isolated instances of collective choice, but are best understood as a decisional process based on inquiry, deliberation and consensus building.” *Id.*

b. Deliberations toward decisions.

All meetings of a public body for the purpose of discussing or taking action on public business are open to the public unless subject to a specific exemption. 29 *Del. C. § 10004(a)*. The deliberative process does not exist. *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. May 19, 1994). FOIA does not allow “straw polling,” nor does it allow public bodies to reach “consensus votes” that they strive later to ratify in a public meeting. Del. Op. Att’y Gen., No. 05-ib29 (Oct. 13, 2005).

3. Electronic meetings.

The Act does not specifically address electronic meetings. However, it appears that electronic meetings that qualify as public meetings under 29 *Del. C. § 10002(b)* are subject to the Act. *Tyron v. Brandywine Sch. Dist. Bd. of Educ.*, 1990 WL 51719 (Del. Ch. Apr. 20, 1990); *see also Del. Op. Att’y Gen.*, No. 03-ib11 (May 19, 2003).

a. Conference calls and video/Internet conferencing.

Conference calls between a quorum of the members of any public body for the purposes of discussing or taking action on public business appear to constitute public meetings that are subject to the Act.

Tyron v. Brandywine Sch. Dist. Bd. of Educ., 1990 WL 51719 (Del. Ch. Apr. 20, 1990) (finding that a telephone conversation was not a public meeting only because the conversation was between less than a quorum). A series of telephone calls made by a member of a public body to a number of other members of the same body, which number constitutes a quorum of the public body, is a meeting subject to the open meetings laws. Del. Op. Att’y Gen., No. 04-ib17 (Oct. 18, 2004).

b. E-mail.

An exchange of e-mail between members of a public body discussing public business constitutes a meeting subject to the FOIA laws. Del. Op. Att’y Gen., No. 03-ib11 (May 19, 2003).

c. Text messages.

Although the Act does not specifically address text messages, such messages have been requested under the Act. Del. Op. Att’y Gen., No. 09-ib04 (June 4, 2009).

d. Instant messaging.

Not addressed by the Act.

e. Social media and online discussion boards.

Not addressed by the Act

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

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

b. Notice.

(1). Time limit for giving notice.

Notice of a meeting must be given at least seven days in advance. 29 *Del. C.* § 10004(e)(2); *Ianni v. Dep’t of Elections*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986) (six days’ advance notice was insufficient). *See* Del. Op. Att’y Gen., No. 01-ib10 (June 12, 2001) (holding that although violations occurred, remediation was not required because interested citizens were well represented by their elected representatives from city, state and federal government).

(2). To whom notice is given.

Notice must be given to the public. 29 *Del. C.* § 10004(e)(2), (3). Thus, notice in the form of a memorandum given to members of a committee but not the public at large has been held insufficient. Del. Op. Att’y Gen., No. 00-ib07 (Apr. 28, 2000).

(3). Where posted.

Notice must be conspicuous. A conspicuous posting can be at the principal office of the public body holding the meeting or, if no such office exists, at the place where meetings of the public body are regularly held. A reasonable number of copies of such notice must be made available. 29 *Del. C.* § 10004(e)(4); *Ianni v. Dep’t of Elections*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986) (posting of a single notice insufficient; other copies must be made available).

(4). Public agenda items required.

An agenda is required; however, FOIA contemplates that it is subject to change to include additional items such as executive session or the deletion of items. 29 *Del. C.* § 10004(e)(2); *but see* Del. Op. Att’y Gen., No. 99-ib11 (June 25, 1999) (agenda change should have been noticed because City Council knew of need to address issue at least 12 days in advance of meeting). An agenda should be worded in plain and comprehensive language and must directly state the purpose of the meeting. *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. May 19, 1994). If the agenda is available at the time of the initial posting, it should be added to the

notice at least six hours in advance of the meeting, and the reasons for the delay in posting should briefly set forth in the agenda. 29 *Del. C.* § 10004(e)(5). A general description in the agenda should be sufficient to draw attention to the significance of the subject to be discussed. *Ianni v. Dep’t of Elections*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986); Del. Op. Att’y Gen., No. 05-ib30 (Oct. 24, 2005).

FOIA permits changes in the agenda “to include additional items . . . which arise at the time of the public body’s meeting.” 29 *Del. C.* § 10004(e)(2). “If a public body knows that an item of public interest will be addressed at a meeting, then it cannot claim, in good faith, that the issue arose at the time of the public body’s meeting in order to circumvent the notice requirement of FOIA.” Del. Op. Att’y Gen., No. 97-ib20 (Oct. 20, 1997); Del. Op. Att’y Gen., No. 00-ib07 (Apr. 28, 2000).

(5). Other information required in notice.

A notice must include the times, dates and places of such meetings. *See* 29 *Del. C.* § 10004(e)(2); *Ianni v. Dep’t of Elections*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986).

(6). Penalties and remedies for failure to give adequate notice.

Any action taken at the meeting not adequately notified is voidable. 29 *Del. C.* § 10005(a); *Ianni v. Dep’t of Elections*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986) (Court of Chancery reluctant to enter injunction where important public interests involved).

c. Minutes.

(1). Information required.

Minutes should contain the following information: a record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens vote), of each vote taken and the action agreed upon. 29 *Del. C.* § 10004(f). Minutes of a meeting of a public body should be prepared by the time of the public body’s next regularly scheduled meeting. Del. Op. Att’y Gen., No. 03-ib05 (Feb. 5, 2003).

(2). Are minutes public record?

Minutes are public records and they must be available for public inspection and copying as a public record. 29 *Del. C.* § 10004(f). *See also* 29 *Del. C.* § 10002(g)(10).

2. Special or emergency meetings.

a. Definition.

An emergency meeting is defined as one that is necessary for the immediate preservation of the public peace, health or safety. 29 *Del. C.* § 10004(e)(1). A special or rescheduled meeting is defined as a meeting held less than seven days after the scheduling decision is made. 29 *Del. C.* § 10004(e)(3).

b. Notice requirements.

There need only be 24 hours’ notice for a “special meeting.” Del. Op. Att’y Gen., No. 01-ib02 (Jan. 30, 2001). The public notice of a special meeting “shall include an explanation as to why [seven days’ notice] could not be given.” 29 *Del. C.* § 10004(e)(3). For example, the Attorney General has determined that notice of a special meeting posted 24 hours before the meeting failed to explain why normal seven-day notice could not be given. Del. Op. Att’y Gen., No. 94-I037 (July 26, 1994). FOIA, however, “requires only a reason, not a specific detailed factual basis why the seven day requirement could not be met.” Del. Op. Att’y Gen., No. 96-ib15 (May 10, 1996) (finding that the notice lacked “any explanation” why the seven-day requirement was not met). *See* Del. Op. Att’y Gen., No. 01-ib02 (Jan. 30, 2001) (holding the town violated the open meeting requirements of FOIA by not including an explanation of why it could not give seven days’ notice); *see also* Del. Op. Att’y Gen., No. 05-ib21 (Aug. 1, 2005) (school district violated FOIA by not including reason in notice as to

why seven days' notice of meeting could not be given).

(1). Time limit for giving notice.

Notice for special meetings should be given as soon as reasonably possible, but in any event no later than 24 hours before such meeting. 29 *Del. C.* § 10004(e)(3). No notice is required for emergency meetings that are necessary for the immediate preservation of the public peace, health or safety. 29 *Del. C.* § 10004(e)(1).

(2). To whom notice is given.

Notice should be given to the public.

(3). Where posted.

Notice should be conspicuous. A conspicuous posting should be made at the principal office of the public body holding the meeting or, if no such office exists, at the place where meetings of the public body are regularly held. Also, a reasonable number of copies of such notice shall be made available. 29 *Del. C.* § 10004(e)(4); *Ianni v. Dep't of Elections*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986) (posting of a single notice insufficient; other copies must be made available).

(4). Public agenda items required.

An agenda is required; however, it is subject to change to include additional items such as executive session or the deletion of items. 29 *Del. C.* § 10004(e)(2). If the agenda is available at the time of the initial posting, it should be added to the notice at least six hours in advance of the meeting, and the reasons for the delay in posting should briefly set forth in the agenda. 29 *Del. C.* § 10004(e)(5). A general description in the agenda should be sufficient to draw attention to the significance of the subject to be discussed. *Ianni v. Dep't of Elections*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986).

(5). Other information required in notice.

Times, dates and places of such meetings are required in a notice. See 29 *Del. C.* § 10004(e)(2). The public notice of special or rescheduled meetings shall include an explanation as to why the seven days' required notice could not be given. 29 *Del. C.* § 10004(e)(3).

(6). Penalties and remedies for failure to give adequate notice.

The penalty for failure to give adequate notice may be that the actions taken at the meeting are voidable. 29 *Del. C.* § 10005(a).

c. Minutes.

(1). Information required.

Minutes should contain the following information: a record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens vote), of each vote taken and the action agreed upon. 29 *Del. C.* § 10004(f). Minutes of a meeting of a public body should be prepared by the time of the public body's next regularly scheduled meeting. Del. Op. Att'y Gen., No. 03-ib05 (Feb. 5, 2003).

(2). Are minutes a public record?

The minutes are available for public inspection and copying as a public record. 29 *Del. C.* § 10004(f). See also 29 *Del. C.* § 10002(g)(10).

3. Closed meetings or executive sessions.

a. Definition.

An executive session is defined as a public meeting that is closed to the public. Executive sessions may be held only for the discussion of public business. 29 *Del. C.* § 10004(c). See Del. Op. Att'y Gen., No. 01-ib03 (Feb. 16, 2001) (concluding FOIA permits a public body to go into executive session to discuss labor negotiations or collective bargaining because the discussion of those issues may disclose the contents of documents exempted from disclosure under FOIA). It is the

public body's burden to justify a decision to meet in executive session. 29 *Del. C.* § 10005(c). FOIA does not permit a "stand alone" executive session. Del. Op. Att'y Gen., No. 02-ib33 (Dec. 23, 2002).

The agenda must include but is not limited to a statement of intent to hold an executive session and the specific grounds for the executive session under the Act. 29 *Del. C.* § 10004(e)(2).

Location. Regularly scheduled meetings of a public body are required to be held within the geographic jurisdiction of that body. Thus a city, town or school district must hold its meetings within its district or the county in which its principal office is located. The geographic limitation on location of meetings is not applicable to emergency meetings necessary for the immediate preservation of public peace, health or safety or for the immediate preservation of public financial welfare. 29 *Del. C.* § 10004(g).

b. Notice requirements.

(1). Time limit for giving notice.

Notice at least seven days in advance for an executive session called during a regular meeting and at least 24 hours in advance for an executive session called during a special meeting. 29 *Del. C.* § 10004(e)(3). A public body meeting only to discuss matters authorized for executive session must still notice the meeting to the public so that the public has the opportunity to attend the opening of the meeting, to see that the public body follows the required procedures for going into executive session, and to observe any discussion of any public business that follows. Del. Op. Att'y Gen., No. 02-ib17 (Aug. 6, 2002).

(2). To whom notice is given.

Notice must be given to the public.

(3). Where posted.

Notice should be posted at the principal office of the public body holding the meeting or, if no such office exists, at the place where meetings of the public body are regularly held. 29 *Del. C.* § 10004(e)(4).

(4). Public agenda items required.

The purpose of such executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in Section 10004(b) of the Act. 29 *Del. C.* § 10004(c). See *Common Cause of Del. v. Red Clay Consol. Sch. Dist.*, 1995 WL 733401 (Del. Ch. Dec. 5, 1995); Del. Op. Att'y Gen., No. 01-ib03 (Feb. 16, 2001) (the reasons for an executive session must be clearly delineated in the agenda); Del. Op. Att'y Gen., No. 03-ib20 (Sept. 3, 2003) (agenda listed a topic authorized by section 10004(b)(9) as one suitable for executive session, but since town council discussed item that would have been suitable for executive session under a different section of 10004(b)(1), a technical FOIA violation had occurred).

(5). Other information required in notice.

Times, dates and places of such meetings are required in the notice. See 29 *Del. C.* § 10004(e)(2).

(6). Penalties and remedies for failure to give adequate notice.

Failure to give adequate notice could result in the action taken at the meeting being voidable. 29 *Del. C.* § 10005(a); see also Del. Op. Att'y Gen., No. 02-ib33 (Dec. 23, 2002).

c. Minutes.

(1). Information required.

A record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens vote), of each vote taken and the action agreed upon. 29 *Del. C.* § 10004(f).

(2). Are minutes a public record?

Minutes are a public record. However, minutes or portions thereof, and any public records pertaining to executive sessions conducted pursuant to this section, may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session. 29 *Del. C.* § 10004(f). The burden of proving that public disclosure of the minutes would defeat the lawful purpose of the executive session is on the public body wishing to prevent disclosure. See *Del. Op. Att’y Gen.*, No. 05-ib26 (Aug. 29, 2005). A practical reason for a public body to keep “meaningful minutes” (a contemporaneous record of subjects discussed in executive session) is to avoid failing to meet its burden of proving that the action was justified. The Act neither requires that subjects discussed in executive session must be summarized nor attempts to define how specific such a summary should be. See *Common Cause of Del. v. Red Clay Consol. Sch. Dist.*, 1995 WL 733401 (Del. Ch. Dec. 5, 1995).

d. Requirement to meet in public before closing meeting.

In order to go into executive session there must be an affirmative vote of a majority of members present at a meeting of the public body. 29 *Del. C.* § 10004(c). The vote on the question of holding an executive session shall take place at a meeting of the public body that shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes. *Id.*

e. Requirement to state statutory authority for closing meetings before closure.

Although there is no requirement to give a statutory authority before executive sessions are held, “[t]he purpose of such executive sessions shall be set forth in the agenda and shall be limited to” meeting exemptions in the Act. 29 *Del. C.* § 10004(c).

f. Tape recording requirements.

While there are no tape recording requirements, tape recordings of meetings are public records and, like written minutes, are subject to public disclosure unless exempt. See *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. May 19, 1994). See also *Del. Op. Att’y Gen.*, No. 00-ib19 (Nov. 8, 2000) (requiring that audio tapes be made available to the requesting party).

F. Recording/broadcast of meetings.

There is no provision as to whether making sound or photographic recordings is allowed at meetings.

1. Sound recordings allowed.

Not addressed.

2. Photographic recordings allowed.

Not addressed.

G. Are there sanctions for noncompliance?

The only “sanctions” permitted under the Delaware Act is the award of Attorney fees and costs to a successful plaintiff.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

a. General or specific.

The Act contains nine discretionary exemptions for closing executive sessions to the public. See 29 *Del. C.* § 10004(b).

b. Mandatory or discretionary closure.

The Act contains nine discretionary and eleven mandatory exemptions to the opening meeting statute. 29 *Del. C.* § 10004(h).

2. Description of each exemption.

a. Nine discretionary exemptions:

1. 29 *Del. C.* § 10004(b)(1): “Discussion of an individual citizen’s qualification to hold a job or pursue training unless the citizen requests that such a meeting be open.” This exception is limited to discussions of whether to hire a new employee such as a town manager or police chief. *Del. Op. Att’y Gen.*, No. 01-ib01 (Jan. 16, 2001).

2. 29 *Del. C.* § 10004(b)(2): “Preliminary discussions on site acquisitions for any publicly funded capital improvements.”

3. 29 *Del. C.* § 10004(b)(3): “Activities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension.”

4. 29 *Del. C.* § 10004(b)(4): “Strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body.” See *Oberly v. Red Clay Consol. Sch. Dist.*, 1985 Del. Ch. LEXIS 399 (Del. Ch. Mar. 6, 1985) (cannot use meeting with attorney as device to avoid public discussion of merits of plan); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. May 19, 1994) (cannot use to discuss views on regulations and to draft new regulations); *Common Cause of Del. v. Red Clay Consol. Sch. Dist.*, 1995 WL 733401 (Del. Ch. Dec. 5, 1995); *Beebe Med. Ctr. v. Certificate of Need Appeals Bd.*, 1995 WL 465318 (Del. Super. June 30, 1995), *aff’d*, 676 A.2d 900 (Del. 1996) (TABLE). This exemption applies to a “question and answer” session/meeting between a county attorney and members of a public body who have been named in their individual capacity as defendants in a lawsuit. *Del. Op. Att’y Gen.*, No. 05-ib28 (Sept. 7, 2005). Potential litigation under this exemption applies only when there is a realistic or tangible threat based on objective factors, such as a written demand letter, notice of intent to sue, etc. *Del. Op. Att’y Gen.*, No. 05-ib24 (Aug. 18, 2005).

5. 29 *Del. C.* § 10004(b)(5): “Discussions which would disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested of the public body with respect to said contribution by the contributor.”

6. 29 *Del. C.* § 10004(b)(6): “Discussion of the content of documents, excluded from the definition of ‘public record’ . . . where such discussion may disclose the contents of such documents.” See *Del. Op. Att’y Gen.*, No. 96-ib30 (Sept. 25, 1996) (determining that it was proper for the school board to meet in executive session to consider scholarship applications, since the board had to review academic transcripts and parents’ tax returns, which documents were exempt from disclosure under FOIA).

7. 29 *Del. C.* § 10004(b)(7): “The hearing of student disciplinary cases unless the student requests a public hearing.”

8. 29 *Del. C.* § 10004(b)(8): “The hearing of employee disciplinary or dismissal cases unless the employee requests a public hearing.”

9. 29 *Del. C.* § 10004(b)(9): “Personnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open.” See, e.g., *Del. Op. Att’y Gen.*, 99-ib05 (May 12, 1999); *Del. Op. Att’y Gen.*, 99-ib03 (Apr. 28, 1999); *but see Del. Op. Att’y Gen.*, No. 02-ib17 (Aug. 6, 2002) (“personnel matters” does not include discussions relating to the mechanics of the selection process and criteria for a new school board superintendent). This exemption does not apply to independent contractors hired by a public entity. *Del. Op. Att’y Gen.*, No. 05-ib02 (Jan. 12, 2005); *Del. Op. Att’y Gen.*, No. 05-ib14 (June 8, 2005).

b. Eleven mandatory exemptions:

1. 29 *Del. C.* § 10004(h)(1): Grand juries.
2. 29 *Del. C.* § 10004(h)(2): Petit juries.
3. 29 *Del. C.* § 10004(h)(3): Special juries.
4. 29 *Del. C.* § 10004(h)(4): The deliberations of any court.
5. 29 *Del. C.* § 10004(h)(5): The Board of Pardons and Parole.
6. 29 *Del. C.* § 10004(h)(6): Public Bodies having only one member.
7. 29 *Del. C.* § 10004(h)(8): In certain circumstances the Violent Crimes Compensation Board may close a meeting.
8. 29 *Del. C.* § 10004(h)(9): Deliberations of the State Human Relations Commissions Industrial Accident Board and the Tax Appeals Board for cases governed by the APA.
9. 29 *Del. C.* § 10004(e)(1): Emergency sessions.
10. 29 *Del. C.* § 10002(c): The General Assembly.
11. 29 *Del. C.* § 10002(d): Certain meetings of The University of Delaware and Delaware State University.

B. Any other statutory requirements for closed or open meetings.

Persons may be removed from a meeting who are willfully or seriously disruptive of the conduct of the meeting. 29 *Del. C.* § 10004(d).

C. Court mandated opening, closing.

Courts may not create exemptions to open meetings that are not found in the Act.

III. MEETING CATEGORIES — OPEN OR CLOSED.

A. Adjudications by administrative bodies.

Deliberations are not necessarily closed, nor are fact-finding conferences.

1. Deliberations closed, but not fact-finding.

The open meeting laws cover “factfinding, deliberations and discussions.” Del. Op. Att’y Gen., No. 00-ib07 (Apr. 28, 2000). So long as “public business” is discussed, a session is open unless it falls within an exception.

2. Only certain adjudications closed, i.e. under certain statutes.

The open meeting laws are clear that only certain meetings can be closed to the public. Such closed meetings are governed by statutes.

B. Budget sessions.

Budget sessions are open.

C. Business and industry relations.

Meetings regarding or discussing business and industry relations are open.

D. Federal programs.

Federal program meetings are open.

E. Financial data of public bodies.

Meetings addressing the financial information of public bodies are open.

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

Meetings regarding or discussing trade secrets or proprietary data may be closed. See 29 *Del. C.* § 10004(b)(6). See also 29 *Del. C.* §

10002(g)(2) (exempting documents relating to trade secrets or privileged or confidential financial information).

G. Gifts, trusts and honorary degrees.

Meetings regarding charitable contributions and the like may not be open. See 29 *Del. C.* § 10004(b)(5).

H. Grand jury testimony by public employees.

Meetings involving grand jury testimony of public employees are closed. See 29 *Del. C.* § 10004(h)(1).

I. Licensing examinations.

Licensing examinations may be closed under the open meeting exemption allowing for employees to close such meetings. See 29 *Del. C.* § 10004(b)(9). However, hearings on licenses may be open under the APA. See 29 *Del. C.* § 10131.

J. Litigation; pending litigation or other attorney-client privileges.

Meetings involving pending litigation or other attorney-client privileges are generally closed. 29 *Del. C.* §§ 10004(b)(4), 10004(b)(6) and 10002(g)(9).

K. Negotiations and collective bargaining of public employees.

Any sessions regarding collective bargaining are closed only if an open meeting would have an adverse effect on the bargaining position of the public body. 29 *Del. C.* § 10004(b)(4).

L. Parole board meetings, or meetings involving parole board decisions.

Parole board meetings are closed. 29 *Del. C.* § 10004(h)(5).

M. Patients; discussions on individual patients.

Patient meetings are probably closed to preserve privacy of the patient.

N. Personnel matters.

1. Interviews for public employment.

Meetings regarding interviews for public employment are closed. 29 *Del. C.* § 10004(b)(1), (9).

2. Disciplinary matters, performance or ethics of public employees.

Disciplinary meetings are closed unless the public employee requests an open meeting. 29 *Del. C.* § 10004(b)(8), (9).

3. Dismissal; considering dismissal of public employees.

Meetings regarding dismissal of a public employee are closed unless the employee requests the meeting to be open. 29 *Del. C.* § 10004(b)(8), (9).

O. Real estate negotiations.

Meetings involving real estate negotiations are closed. 29 *Del. C.* § 10004(b)(2).

P. Security, national and/or state, of buildings, personnel or other.

Such meetings might be closed depending on the subject of the meeting.

Q. Students; discussions on individual students.

Discussions of individual students are closed, unless the student requests that the meeting be open. 29 *Del. C.* § 10004(b)(7), (9).

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

A. When to challenge.

FOIA provides that a citizen complaining of a violation of the open meeting law has a right to challenge the validity “of any action of a public body by filing suit within 60 days of the citizen’s learning of such action but in no event later than 6 months after the date of the action.” 29 *Del. C.* § 10005(a). The Attorney General has declined to pursue any FOIA complaint where the act complained of took place more than six months prior to the date of the complaint. *Del. Op. Att’y Gen.*, No. 00-ib05 (Feb. 18, 2000) (stating that since the meeting that is the subject of your complaint occurred more than six months ago, the Attorney General could not take any further action with regard to your complaint.) *See also* *Del. Op. Att’y Gen.*, No. 01-ib10 (June 12, 2001) (requiring a council “to begin the decision-making process anew” in order to remedy violations of the open meetings laws).

The Act, however, does not provide an expedited procedure for reviewing requests to attend upcoming meetings, for ruling on being barred from a meeting, for ruling on whether to set aside decisions made at improperly closed meetings, or for ruling on future meetings. Those illegally barred from a meeting should attempt to persuade the agency to open the meeting; if this fails, negotiation with the public body’s attorney or litigation should be considered.

B. How to start.

1. Where to ask for ruling.

a. Administrative forum.

(1). Agency procedure for challenge.

Request for ruling should be made at the agency level, although this is not a required step.

(2). Commission or independent agency.

There is no independent agency that adjudicates open meetings issues in Delaware.

b. State attorney general.

Any citizen may petition the Attorney General to determine whether a violation of the Act has occurred or is about to occur. 29 *Del. C.* § 10005(e). Within 20 days of receiving the petition, the Attorney General shall make a written determination of whether a violation has occurred or is about to occur and send a copy of the determination to the public body involved. *Id.* If the Attorney General finds that a violation has occurred, the citizen may either sue or request that the Attorney General file suit. *Id.* The citizen has the absolute right to sue regardless of the determination of the Attorney General and may move to intervene as party in any suit filed by the Attorney General. *Id.*

c. Court.

The meetings portion of the Act contemplates an action in the Court of Chancery. 29 *Del. C.* § 10005(a). However, in the interest of judicial economy, the Superior Court may entertain certain actions under the Act as well. *See Beebe Medical Ctr. v. Certificate of Need Appeals Bd.*, 1995 WL 465318 (Del. Super. June 30, 1995), *aff’d*, 676 A.2d 900 (Del. 1996) (TABLE).

2. Applicable time limits.

Any citizen may challenge a public action under the Act by filing suit within 60 days of learning of the action, but no later than six months after the action. 29 *Del. C.* § 10005(a).

3. Contents of request for ruling.

The Act does not prescribe a specific form.

4. How long should you wait for a response?

Practice suggests waiting 10 days.

5. Are subsequent or concurrent measures (formal or informal) available?

No.

C. Court review of administrative decision.

1. Who may sue?

Any Delaware citizen or the Delaware Attorney General may initiate an action regarding an open meeting violation. 29 *Del. C.* § 10005(e).

2. Will the court give priority to the pleading?

Priority is only given to a pleading/action if it seeks injunctive relief.

3. Pro se possibility, advisability.

It is inadvisable to proceed *pro se* due to the subtleties of the Act and procedural requirements of litigation. Petition the Attorney General pursuant to 29 *Del. C.* § 10005(e).

4. What issues will the court address?

A court will address whether the meeting was subject to the Act, whether the meeting was properly closed, whether a proper exemption was asserted, whether to order future meetings opened, and the nature of the proper remedy.

a. Open the meeting.

A court will decide whether the meeting was subject to the open meeting provisions of the Act, which kind of meeting it was, and whether it should have been open (or closed) to the public. A court can also determine whether the meeting was properly noticed and that the meeting was conducted within the scope of the agenda.

b. Invalidate the decision.

A court may find that a violation of the Act occurred.

c. Order future meetings open.

If a court finds that a violation occurred, it can order future meetings to be open and void the meeting that is in violation of the Act. 29 *Del. C.* § 10005(a).

5. Pleading format.

The Federal Rules are generally followed by the Chancery Court.

6. Time limit for filing suit.

Within 60 days of learning of the action but not later than six months after the action occurred. 29 *Del. C.* § 10005(a).

7. What court.

Actions should be brought in the Delaware Court of Chancery. 29 *Del. C.* § 10005(a).

8. Judicial remedies available.

Action taken at a meeting in violation of the Act may be voidable. 29 *Del. C.* § 10005(a). Remedies permitted by this section include injunction, a declaratory judgment, writ of mandamus and/or other appropriate relief. 29 *Del. C.* § 10005(d); *see also Wilmington Fed’n of Teachers v. Howell*, 374 A.2d 832 (Del. 1977) (invalidation of public body’s decision constitutes an extreme sanction and in the absence of an unequivocal statutory mandate declaring action taken in derogation thereof to be null and void action so taken not to be summarily invalidated by a court); *Retail Liquor Dealers Ass’n v. Del. Alcoholic Beverage Control Comm’n*, 1980 WL 273545 (Del. Ch. Apr. 23, 1980). The 1985 Amendments to the Act appears to address the concern that invalidation is an extreme remedy. *See Ianni v. Dep’t of Elections*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986) (court expressed concern about using injunction to revise action of Board of Election). *See Del. Op. Att’y Gen.*, No. 96-ib18 (May 29, 1996) (finding that a public body

meeting was held in violation of the Act but providing for no remedy other than the opinion itself). *But see Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. May 19, 1994).

9. Availability of court costs and attorneys' fees.

A court may award attorneys' fees and costs to the successful plaintiff of any action brought under this Act. 29 *Del. C.* § 10005(d). A court may also award attorneys' fees and costs to a successful defendant, but only if it finds that the action was frivolous or was brought solely for the purpose of harassment. *Id.*

10. Fines.

None.

11. Other penalties.

None.

D. Appealing initial court decisions.

1. Appeal routes.

An appeal can be made to the Delaware Supreme Court. There are no intermediate appellate courts.

2. Time limits for filing appeals.

Pursuant to Delaware Supreme Court Rule 6, a party has 30 days to appeal.

3. Contact of interested amici.

The Delaware Supreme Court has in the past permitted filing of a friend-of-the court brief on similar issues. Del. Supr. Ct. R. 28.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

V. ASSERTING A RIGHT TO COMMENT.

A. Is there a right to participate in public meetings?

"Open to the public" means that members of the public attending the meeting should have an opportunity to participate actively, subject to reasonable time and other controls. The Attorney General has encouraged a public body to fulfill its statutory obligation to have an open public meeting by answering questions by the citizens at public meetings. "[A public body] should make diligent efforts to answer valid, bona fide, good faith questions by its citizens. Otherwise, the statutory mandate contained in 29 *Del. C.* § 10001, § 10004(a) is not being met by the [public body]." Del. Op. Att'y Gen., No. 94-I023 (June 21, 1994). A public body, however, can restrict the opportunity for public comments to a designated time on the agenda.

B. Must a commenter give notice of intentions to comment?

Not addressed.

C. Can a public body limit comment?

Yes, so long as such restrictions are not content based.

D. How can a participant assert rights to comment?

Not specifically addressed, but presumably through active participation in open meetings.

E. Are there sanctions for unapproved comment?

Not addressed.

Statute

Open Records and Meetings

Title 29. State Government

Part X. General Regulations for State Agencies

Chapter 100. Freedom of Information Act

§ 10001. Declaration of policy

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

§ 10002. Definitions

(a) "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 therefor under subsection (b) of § 10004 of this title.

(b) "Meeting" means 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 either in person or by video-conferencing.

(c) "Public body" means, unless specifically excluded, 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, body, or agency to advise or to make reports, investigations or recommendations. Public body shall not include any caucus of the House of Representatives or Senate of the State. Public body shall include any authority created under Chapter 14 of Title 16 of this Code.

(d) "Public body," "public record" and "meeting" shall not include activities of the University of Delaware and Delaware State University, except that the Board of Trustees of the University and the Board of Trustees of the University shall be "public bodies," and University and University documents relating to the expenditure of public funds shall be "public records," and each meeting of the full Board of Trustees of either institution shall be a "meeting."

(e) "Public business" means any matter over which the public body has supervision, control, jurisdiction or advisory power.

(f) "Public funds" are those funds derived from the State or any political subdivision of the State.

(g) "Public record" is 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. For purposes of this chapter, the following records shall not be deemed public:

(1) Any personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy;

(2) Trade secrets and commercial or financial information obtained from

a person which is of a privileged or confidential nature;

(3) Investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue;

(4) Criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy. Any person may, upon proof of identity, obtain a copy of the person's personal criminal record. All other criminal records and files are closed to public scrutiny. Agencies holding such criminal records may delete any information, before release, which would disclose the names of witnesses, intelligence personnel and aids or any other information of a privileged and confidential nature;

(5) Intelligence files compiled for law-enforcement purposes, the disclosure of which could constitute an endangerment to the local, state or national welfare and security;

(6) Any records specifically exempted from public disclosure by statute or common law;

(7) Any records which disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested of the public body with respect to said contribution by the contributor;

(8) Any records involving labor negotiations or collective bargaining;

(9) Any records pertaining to pending or potential litigation which are not records of any court;

(10) Subject to subsection (f) of § 10004 of this title with respect to release of minutes of executive sessions, any record of discussions held in executive session pursuant to subsections (b) and (c) of § 10004 of this title;

(11) Any records which disclose the identity or address of any person holding a permit to carry a concealed deadly weapon; however, all records relating to such permits shall be available to all bona fide law-enforcement officers;

(12) Any 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;

(13) Any records in the possession of the Department of Correction where disclosure is sought by an inmate in the Department's custody;

(14) Investigative files compiled or maintained by the Violent Crimes Compensation Board;

(15) Any photographs, video recordings or audio recordings of a postmortem examination in the possession of the office of the Chief Medical Examiner;

(16) Emails received or sent by members of the Delaware General Assembly or their staff;

(17)a. The following 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:

1. Response procedures or plans prepared to prevent or respond to emergency situations, the disclosure of which would reveal vulnerability assessments, specific tactics, specific emergency procedures or specific security procedures.

2. Building plans, blueprints, schematic drawings, diagrams, operational manuals or other records of mass transit facilities, bridges, tunnels, emergency response facilities or structures, buildings where hazardous materials are used or stored, arenas, stadiums, waste and water systems, electric transmission lines and substations, high-pressure natural gas pipelines and compressor stations, and telecommunications networks facilities and switching equipment, the disclosure of which would reveal the building's or structure's internal layout, specific location, life, safety and support systems, structural elements, surveillance techniques, alarm or security systems or technologies, operational and transportation plans or protocols, or personnel deployments. Records that disclose the substances being used or stored on a given piece of property are public records; however, records which disclose the specific location on that property of the substances being used or stored may be disclosed only if the chief administrative officer of the agency from which the record is requested determines that disclosure will not jeopardize the security of any structure owned by the State or any of its political subdivisions, or will not facilitate the planning of a

terrorist attack, or will not endanger the life or physical safety of an individual.

3. Records of any building or structure operated by the State or any of its political subdivisions, the disclosure of which would reveal the building's or structure's life, safety and support systems, surveillance techniques, alarm or security systems or technologies, operational and evacuation plans or protocols, or personnel deployments.

4. Records prepared to prevent or respond to emergency situations identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained or regulated by the State or any of its political subdivisions.

5. Those portions of records assembled, prepared or maintained to prevent, mitigate or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety. The only items that are protected from disclosure by this paragraph are:

A. Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments or to the response or deployment plans; and

B. Records not subject to public disclosure under federal law that are shared by federal or international agencies and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for criminal acts against United States citizens or targets.

6. Nothing in this subsection shall be deemed to prohibit the disclosure of information necessary to comply with the requirements of Chapter 8 of Title 26, the Underground Utility Damage Prevention and Safety Act.

b. Nothing in this paragraph shall interfere with the right of any committee of the General Assembly to hear information in the committee at the request of the committee chair or, if appropriate, to hear information in an executive session of the committee, or to subpoena information pursuant to § 705 of this title;

(18)a. Any military service discharge document or documents, a discharge, separation notice, certificate of service, report of transfer or discharge, or any other notice or 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, or any document that purports to represent a notice of separation from or service in any armed forces of the United States including but not limited to the United States Department of Defense, DD Form 214, of a veteran of the armed forces of the United States, which has been heretofore recorded at a county recorder of deeds. Such document or documents may only be disclosed in accordance with the provisions of paragraph (g)(17)b of this section.

b. Access to authorized persons. The following persons are permitted to view or reproduce recorded military service discharge documents:

1. The veteran subject of the discharge;

2. The spouse or child of a veteran, with consent of the veteran;

3. If the veteran is deceased, a survivor or heir of the veteran who may be eligible to claim any type of benefit by virtue of the veteran's service in the military;

4 A person with a signed and notarized authorization from the veteran;

5. A county, state or federal officer assisting the veteran or veteran's family with a veteran's benefit application;

6. Anyone authorized by an order from a Delaware court, to view or copy the document; or

7. Government agencies, including courts, that have an interest in assisting the veteran subject to the military service discharge record or in assisting the beneficiaries of the deceased veteran subject to the military service discharge record in obtaining a benefit.

c. Any document referenced in subparagraph a. of this paragraph shall be deemed a public record upon the passage of 70 years from the date of the subject veteran's separation or discharge from service.

§ 10003. *Examination and copying of public records*

(a) All public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body. Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen. If the record is in active use or in storage and, therefore, not available at the time a citizen requests access, the custodian shall so inform the citizen and make an appointment for said citizen to examine such records as expediently as they may be made available. Any reasonable expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy.

(d) It shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records.

§ 10004. *Open meetings*

(a) Every meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of this section.

(b) A public body may call for an executive session closed to the public pursuant to subsections (c) and (e) of this section, but only for the following purposes:

(1) Discussion of an individual citizen's qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open. This provision shall not apply to the discussion by a licensing board or commission which is subject to the provisions of § 8735 of this title, of an individual citizen's qualifications to pursue any profession or occupation for which a license must be issued by the public body in accordance with Delaware law;

(2) Preliminary discussions on site acquisitions for any publicly funded capital improvements;

(3) Activities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension;

(4) Strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body;

(5) Discussions which would disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested of the public body with respect to said contribution by the contributor;

(6) Discussion of the content of documents, excluded from the definition of "public record" in § 10002 of this title where such discussion may disclose the contents of such documents;

(7) The hearing of student disciplinary cases unless the student requests a public hearing;

(8) The hearing of employee disciplinary or dismissal cases unless the employee requests a public hearing;

(9) Personnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open.

(c) A public body may hold an executive session closed to the public upon affirmative vote of a majority of members present at a meeting of the public body. The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes. The purpose of such executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in subsection (b) of this section. Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public.

(d) This section shall not prohibit the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.

(e)(1) This subsection concerning notice of meetings shall not apply to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety, or to the General Assembly.

(2) All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days

in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings including whether such meeting will be conducted by vide-conferencing; however, 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.

(3) All public bodies shall give public notice of the type set forth in paragraph (2) of this subsection of any special or rescheduled meeting as soon as reasonably possible, but in any event no later than 24 hours before such meeting. A special or rescheduled meeting shall be defined as one to be held less than 7 days after the scheduling decision is made. The public notice of a special or rescheduled meeting shall include an explanation as to why the notice required by paragraph (1) of this subsection could not be given.

(4) Public notice required by this subsection shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available. In addition, all public bodies in the executive branch of state government that are subject to the provisions of this chapter shall electronically post said notice to the designated State of Delaware website approved by the Secretary of State.

(5) When the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth on the agenda.

(f) Each public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record. Such minutes shall include a record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens are entitled to vote), of each vote taken and action agreed upon. Such minutes or portions thereof, and any public records pertaining to executive sessions conducted pursuant to this section, may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but no longer. All public bodies in the executive branch of state government that are subject to the provisions of this chapter shall electronically post final approved minutes of open public meetings to the designated State of Delaware website approved by the Secretary of State within 5 working days of final approval of said minutes.

(g) Every regularly scheduled meeting of a public body shall be held within the geographic jurisdiction of that public body. All such other meetings shall be held as follows:

(1) A public body serving any political subdivision of the State, including, but not limited to, any city, town or school district, shall hold all such other meetings within its jurisdiction or the county in which its principal office is located, unless it is school board training that has been approved by the Secretary of Education as beneficial to school board development activities.

(2) For the purposes of this subsection, a "regularly scheduled meeting" shall mean any meeting of a public body held on a periodic basis.

(3) The provisions of this subsection, insofar as they are not practicable, shall not apply to 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.

(h) This section shall not apply to the proceedings of:

(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 1 member;

(7) Public bodies within the legislative branch of the state government other than the House of Representatives, the Senate, the Joint Finance Committee, the Joint Committee on Capital Improvement, the Joint Sunset Committee, Legislative Council, Committees, excluding ethics committees, specifically enumerated and created by Resolution of the House of Representatives

and/or Senate or task force specifically enumerated and created by Resolution of the House of Representatives and/or Senate;

(8)a. The Violent Crimes Compensation Board may close any meeting to the public where:

1. The claim to be considered derives from any sexual offense within the definitions of a crime in § 9002 of Title 11.

2. The claims to be considered derives from any offense by or against a child, as defined in this section, unless such child has been deemed amenable to the jurisdiction of a criminal court as to the matter before the Board.

3. The claim to be considered derives from any matter not yet adjudicated.

4. The claim to be considered involves a “victim” who is a “child” as those terms are defined in Chapter 90 of Title 11.

b. The Board shall produce a complete record of any proceedings closed to the public which record may be denied to anyone seeking access for good cause shown; and

(9) The deliberations of the following agencies for any case decision governed by the Administrative Procedures Act in Chapter 101 of this title:

a. State Human Relations Commission;

b. Industrial Accident Board; and

c. Tax Appeals Board.

(i) In an enforcement action pursuant to § 10005 of this title, a citizen or the Attorney General, as the case may be, may seek the forfeiture of all or part of the compensation of members of a board, commission or other public body for any closed meeting which such board, commission or other public body closed knowing that such action violated this chapter. Such forfeiture may only be ordered by the Court if the Court makes a specific finding that the board, commission or public body had no good faith basis to believe that the meeting could be closed. It shall be an absolute defense that an individual never voted in favor of the closed meeting. If the board, commission or public body also met validity for other purposes on the same day as the meeting which violated the act, such valid action shall be considered by the Court in determining the extent of any forfeiture award.

§ 10005. *Enforcement*

(a) Any action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery. Any citizen may challenge the validity under this chapter of any action of a public body by filing suit within 60 days of the citizen's learning of such action but in no event later than 6 months after the date of the action.

(b) Any citizen denied access to public records as provided in this chapter may bring suit within 60 days of such denial. Venue in such cases where access to public records is denied shall be placed in a court of competent jurisdiction for the county or city in which the public body ordinarily meets or in which the plaintiff resides. Notwithstanding the foregoing, a person denied access to public records by an administrative office or officer, a department head, com-

mission, or instrumentality of state government which the Attorney General is obliged to present a petition and all supporting documentation to the Chief Deputy as described in subsection (e) of this section. Thereafter, the petitioner or public body the Attorney General is otherwise obligated to represent may appeal an adverse decision on the record to the Superior Court within 60 days of the Attorney General's decision.

(c) In any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records, and shall be on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.

(d) Remedies permitted by this section include an injunction, a declaratory judgment, writ of mandamus and/or other appropriate relief. The court may award attorney fees and costs to a successful plaintiff of any action brought under this section. The court may award attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment.

(e) Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur. The petition shall set forth briefly the nature of the alleged violation. Upon receiving a petition, the Attorney General shall promptly determine whether the petition is against an administrative office or officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of this title. Every petition against an administrative office or officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of this title shall be referred to the Chief Deputy Attorney General who shall, within 20 days of receiving the petition, render a written determination to the petitioner and the public body involved declaring whether a violation has occurred or is about to occur. If the Chief Deputy finds that a violation of this chapter has occurred or is about to occur, the Attorney General shall not represent the public body in any appeal filed pursuant to this chapter for such violation if the public body the Attorney General is otherwise obligated to represent fails to comply with the Chief Deputy's determination. Regardless of the finding of the Chief Deputy, the petitioner or the public body may appeal the matter on the record to the Superior Court. In every other case, the Attorney General shall, within 10 days, notify in writing the custodian of records or public body involved. Within 20 days of receiving the petition, the Attorney General shall make a written determination of whether a violation has occurred or is about to occur, and shall provide the citizen and any custodian of records or public body involved with a copy of the determination. If the Attorney General finds that a violation of this chapter has occurred or is about occur, the citizen may: (1) File suit as set forth in this chapter; or (2) request in writing that the Attorney General file suit on the citizen's behalf. If such request is made, the Attorney General may file suit, and shall within 15 days notify the citizen of the decision to file suit, unless the custodian of records or public body has agreed to comply with this chapter. The citizen shall have the absolute right to file suit regardless of the determination of the Attorney General, and may move to intervene as a party in any suit filed by the Attorney General.

(f) An administrative office or officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obligated to represent pursuant to § 2504 of this title shall not require the approval of the Attorney General pursuant to § 2507 of this title to address claims of violation under this chapter.