

Citizen's Guide to Delaware's Open Government Law

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Democracy Work

Introduction to Delaware's Open-Government Procedures

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. Louis D. Brandeis (Justice, U.S. Supreme Court)

"Open-Government," embodies the concept that, as a natural requirement of a democratic system, ordinary people have the right to access public records and monitor public meetings. The concept of openness of procedure was not a totally novel idea in the early American experience; in practice, however, it was not commonly and consistently practiced.

Following the lead of several other countries and a few states, in 1967 Congress established in law the concept of Open-Government: *The Freedom of Information Act*. Delaware was one of the first States to enact the Freedom of Information Act ("FOIA"). Today, all 50 States, thousands of counties, cities, school districts and over 100 countries- from Albania to Zimbabwe- now have adopted FOIA principles, including Pakistan, Nigeria, China.

FOIA established our right to access government records and codified our right to know what our government is doing in public meetings. In recent years, however, this presumption has been eroding. In the name of homeland security, opportunities for citizens to gain access to information have been limited.

Having FOIA laws on the books does not necessarily guarantee that government records and meeting will be indeed open. Citizens need to exercise their right of access to these records and meeting. This *Citizens Guide to Open-Government* is designed to help ordinary citizens in pursuit of that objective.

Public Records

DE's FOIA law defines public body: *"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 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) 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 other public official, body, or agency to advise or to make reports, investigations or recommendations. Public body shall not include any caucus of the Delaware General Assembly.*

Delaware Code defines a 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... "Public business" means any matter over which the public body has supervision, control, jurisdiction or advisory power. 29 Del. C. § 10002).* Personal notes and emails between legislators and their constituents are not subject to public access. 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. Courts are 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-I001 (Jan. 18, 1995)

Public Meetings

DE's FOIA law defines public body: *"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 council or any other entity or body established by an act of 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 Delaware General Assembly.*

All public meetings must provide notices that shall include: agenda, if such has been determined at the time, the dates, times and places of meeting (*however, the agenda shall be subject to change to include added or deleted items including executive sessions which arise at the time of the meeting.*) Notice of meetings shall not apply to any emergency meeting which is necessary for the immediate preservation of the public health and safety.

Special or rescheduled meetings shall be defined as one to be held less than 7 days after scheduling decision is made. The public notice of a special or rescheduled meeting *shall include an explanation* for the short notice. Public notice shall include 1) conspicuous posting at the office of the public body holding the meeting, 2) making a reasonable number of such notices available and 3) all public bodies in the executive branch of state government shall electronically post said notice to the designated State of Delaware website.

There are three types of meetings: Regular, Special and Executive Session. All public bodies must provide: 1) advanced notice of meeting, 2) Agenda which include subjects to be discussed for Regular, Special and Executive meetings and 3) Minutes. Minutes do not become public records until they are ratified at the following meeting. Minutes of Executive Sessions are not public.

Executive Sessions

An executive session is a public meeting that is closed to the public. They are held only for the purpose of discussing matters authorized for executive session, such as labor negotiations, collective bargaining issues, litigation or other issues that 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. Notice must be publically posted 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. Notice must provide an agenda that includes *the specific grounds for the executive session* and the *subjects to be discussed* 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).*

Executive meetings must be held within the geographic jurisdiction of that body- 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. If the requested information is not exempt, agencies must give "reasonable" access to records during "regular business hours.

Delaware's FOIA does not permit a "stand alone" executive session. *Del. Op. Att'y Gen., No. 02-ib33 (Dec. 23, 2002).* A public body must convene its regular or special meeting and announce its intention to go into executive session. Following the executive session, *it must return to the public meeting before adjourning.*

Accessing Public Records:

FOIA laws in all state and the national government exempt some records from public access. They typically include: National Security, Internal Agency Rules, Information Exempted by another Federal Statute, Trade Secrets, Internal Agency Memoranda, Personal Privacy, Investigatory Records, Special Interest – Banking, Special Interest – Oil Wells.

Before making a formal FOIA request, check to determine if the record being sought is already publically available. Some commonly sought records are often posted on the agency's website or in local newspapers.

Making a FOIA Request:

* Confirm that the record is not "exempt".

* Determine which agency is likely to have the record being sought. * Determine if the record actually exists and the name of it.



- * If preliminary search for data is unsuccessful then contact agency in question.
- * A phone call to the City or County Clerk may be useful.
- * For State records, contact the agency.
- * For Legislative records, contact the appropriate General Assembly committee administrator.
- * For commonly requested records (meeting agendas or minutes) some agencies may accept a verbal or phone request. More commonly, agencies require a completed "FOIA Request" form.

Delaware's FOIA law does not require an agency to create a record that does not already exist. The requester must ask for a specific record that contains the desired information. If that source record is unknown, the request may be worded, for example: "...the records that contain Councilmen's expense account for 2011-12." It should state that this is a FOIA request. If the agency has records only in electronic format the request will be provided in that format. Agencies are not required to convert records to another format.

Fees and Costs:

There are no fees for examining public records. There are fees for copying these records. Agencies will generally provide these records either on a disk or downloaded them onto a flash drive. FOIA permits an agency to charge for the time it takes a public employee to search for the requested records. An agency can usually estimate the search charges in advance. FOIA is silent on the use of digital devices in copying public records. FOIA requires public agencies to respond to a FOIA request within 15 business days. If an agency is uncooperative or taking too long to respond, a follow-up phone call to the clerk or the agency's supervisor may be useful. If that fails, a FOIA appeal process is available.

Making a FOIA Complaint:

FOIA complaint must be made within 60 days of the time of violation. Anyone may petition the Attorney General to determine whether a FOIA violation has occurred or is about to occur. The request should include a brief description of the violation, including dates and names.

Upon receiving a petition, 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 custodian of records or public body involved with a copy of the determination. If the Attorney General finds that a violation of FOIA has occurred or is about occur, the citizen may:

- * file suit or
- * 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 public body has agreed to comply with this determination. In most cases it does.

FOIA complaints against State Agencies:

FOIA complaints against an administrative office or officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent shall be referred to the Chief Deputy Attorney General who shall, within 20 days of receiving the complaint, 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 has occurred, either party may appeal the matter on the record to Superior Court for a \$175 fee. If the Chief Deputy Attorney General had found against the agency and the agency continued to deny the records, the Attorney General's Office is barred from representing the agency in court.

Great websites for more information:

<http://rcfp.org/ogg/index.php?op=browse&state=DE>
www.attorneygeneral.delaware.gov/opengovernment/
http://www.citizen.org/litigation/free_info/
<http://nfoic.org/foi-center>
<http://www.brechner.org/>
<http://dllg.org>

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