

CITY OF MILFORD
COUNCIL WORKSHOP MINUTES
March 22, 2023

The City Council of the City of Milford convened in a Workshop Session on Wednesday, March 22, 2023, beginning at 6:06 p.m.

PRESIDING: Mayor Archie Campbell

IN ATTENDANCE: Councilpersons Dan Marabello, Mike Boyle, Andrew Fulton, Todd Culotta, Nirmala Samaroo, Brian Baer, Katrina Wilson, and Jason James Sr.

STAFF: Police Chief Cecilia Ashe and Deputy City Clerk Katrina White

COUNSEL: Solicitor David Rutt, Esquire

No one spoke at the unofficial public comment session prior to the start of the workshop.

FOIA (Freedom of Information) Training

Esquire Max Walton of Connolly Gallagher LLP provided the presentation. He began teaching land use classes at the University of Delaware, and later was asked to teach FOIA and still teaches both today.

He explained that FOIA is basically simple and theoretically in the statute. However, the Attorney General's (AG's) has a number of opinions that often makes it not logical or practical. The intro to the statute states it's vital in a democratic society that public business be conducted in an open manner, and for citizens to observe.

Citizens, now, have the right to participate in a certain way, and they have to have easy access to documents.

Mr. Walton talked about what a public body is, and that in the past, he taught that any group appointed by a legislative body was subject to FOIA. In a recent Rehoboth case, the AG opinion 19-IB-04 referenced a group put together by their mayor and included the city manager, finance director, and public works director. The AG's office held that was a working group and subject to FOIA.

Another case involved the Christina School District in which the board president and vice president worked on negotiations with a new superintendent. They claimed they were not a committee and were just two board members getting together and talking to this person. The AG's office held that there must, they must have been at least impliedly appointed, if not directly; and therefore that committee or negotiation group ended up being subject to FOA and was found to be in violation.

The most recent was a small group established by the parks director, to look at surf fishing tags. The AG's office establishes a two-part text about whether a working group constitutes a public body. First, if the entity is impliedly or specifically charged by another public official, body, or agency to advise or make reports, investigations, or recommendations, then it is a public body and the meeting must be noticed, an agenda created, etc.

Secondly, if any public funds are expended, meaning expends or disburses any public funds, and/or is supported in part or in whole by any public funds.

The exception is that focus groups are not subject to FOIA.

When asked if ward meetings or town hall meetings are subject to FOIA, Attorney Walton said he is unfamiliar with the ward structure. However, if a recommendation is being made back to council, he would say that falls under a public body.

Another question followed that if the meeting is only for the purpose of informing constituents and hear response, but not recommendations will follow, Mr. Walton emphasized that if a report, investigation, or a recommendation is the result, then it is a public body.

It was agreed that ward meetings would fail under that explanation.

Mr. Walton explained that if a public body is meeting, public comment must be permitted.

An anchor location must also be provided in the case of virtual meetings, that allows the public to observe it. Observers must have the ability to know who is talking when participating virtually. Any offsite meeting would need to be set up to meet the requirements of the statute, including allowing the public to attend.

He discussed the newest 2023 case that requires video access and in this case, all board members had all cameras off, and only permitted telephone access by audio only. Only one person turned their camera on for a brief period of time and only allowed phone access by audio only. It was determined that audio access only is sufficient to meet the requirements of the statute.

To summarize, all (small or large) committee meetings must be provided at least seven days in advance, along with all regular meetings. The meeting must be posted in house, and each notice must include virtual component and the anchor location.

The agenda can be limited on a very limited basis. In light of an emergency, the meeting date can be moved. Other than that, the date cannot be changed.

The test to use the amendment of an agenda is that if unable to provide seven days' notice, something can be added. For example, if a judge issues a decision on a litigation item on a Friday, and the upcoming meeting is Tuesday. The attorney involved has to make a decision on whether to file a motion for argument within five days, he was unable to provide the seven days' notice, and because he can provide a legitimate reason, it can be done.

However, adding an ordinance, which a municipality has done, and that case is presently in court, is not appropriate. The test he uses is if seven days' notice should have been given, then the agenda item should not be added.

He understands the agenda can change for a typographical error, or additional information needs to be added. An executive session can be added for an urgent matter such as a personnel matter that involves a very important item that cannot wait until the next meeting, Mr. Walton believes the city could get away with that.

Mr. Walton noted there are two material changes in the FOIA statute in the last five years. One is the virtual meetings and the anchor location he talked about.

The second is to allow public comments. Councilmember Baer pointed out that when we allow public comment, it has to relate to an agenda item. Mr. Walton said that is perfectly fine.

Councilmember Baer prefers public comment be allowed on any matter.

Attorney Walton said Solicitor Rutt is here, but provided a horror story about that that occurred in Virginia. Charlottesville Town Council had a policy where they had an open mic and people could talk about anything with no limitation. A gentleman starts talking and begins to express his views upon the Muslims and the community. The mayor threw him out, and he sued them, and won because he had a first amendment right. This was his speech and involved a public forum, and there was no threats to anyone.

Council has the right to do that, but council or the mayor can no longer restrict speech. However, you can restrict speech by allowing only agenda items be discussed. He is not talking about Milford's policy, but there needs to be a close watch on it. He knows that the Town of Charlottesville lost that case and the reason he uses that example.

He explained that minutes are always required, and need to include a record of what happened, who was there and what the votes were on. Because no vote can be taken in an executive session, the minutes only require to was present. However, the Delaware Attorney General does not like that and that should not be done. Actual minutes should be taken as a result, and at least a generalized talking point.

Attorney Walton often takes his own minutes, and he tries to get the sum and substance of what was discussed. He always gets the sum and substance of what was discussed, and how he reeled Council in from talking about things that they weren't supposed to.

He emphasized that executive sessions are really against the public policy of FOIA, which is everything ought to be done in public, so they are very scrutinized.

Following the reasons for allowing an executive session were discussed. Attorneys have to be interviewed for a position because the attorney falls under a contract and is not an employee.

In discussing potential litigation, Attorney Walton spoke about a recent decision that states 'every action of the government has some threat of being sued' and that is insufficient to go into executive session. Whether or not it's reasonably or likely foreseeable the litigation and there must be a clear nexus between the requested documents and the subject matter of the litigation. If a demand letter is received, that is sufficient, but it has to be realistic and tangible threat of litigation. He referred to FOIA 22-IB29 – DelDOT August 2022.

A detailed explanation of the various forms of non-public records was discussed.

Executive Session Rules require the agenda to be specific about the statutory exemption that applies, the need for the body to vote to go into executive session, no votes can be taken in executive session, minutes must be taken, and the body can only talk about the matter allowed by the exemption and not lead into other topic.

Public records are defined as everything except where there is an express exemption. He compared the Brandywine Town Center and the model that is referred to in the deed restrictions that the restrictions are based off. The model is a public record.

Attorney Walton talked about how anything that said could end up in a newspaper or on a website. He cautioned council about writing cuss words into emails. When electronic discovery is done, a flash drive is taken of the hard drive, and several searches follow. Once he possesses everything, he has search terms he runs for all the cuss words, because they end up being the most powerful in the litigation. He encouraged the council to not use cuss words in any document, email, etc.

A review of what is not a public record was then provided. They include personnel records, medical files, trade, secret or financial information, police and criminal and other files, any records specifically exempted from public disclosure under the statute or common law (attorney client privileged memos, letters, things of that nature), the identity of contributors, labor negotiations or collective bargaining, records pertaining to pending or potential litigations that are not records of the court.

While executive sessions are confidential, they may not be confidential forever unless they come from the city attorney.

Also included as non-public records are emails received or sent by members of the Delaware General Assembly or their staff and any communications between a member of the General Assembly and that General Assembly member's constituent. But if it's not their constituents, letters are not protected, but all emails are.

When asked if an environmental report that is used during negotiations, become a public record. Attorney Walton said that it will eventually become a public record and would depend on the timing and the confidentiality needs for that particular issue.

He emphasized that if public money is spent, it will eventually become a public record.

Attorney Walton said that legal bills also become public, and he has had his legal bills FOIA'd many times.

He talked about items that are not public documents but a lot of people forget, such as building plans, procedures for emergency responses, blueprints, tunnels, emergency response facilities like stadiums, waste and water systems, electric facilities and equipment, utilities records, life, safety and support systems, structural elements, surveillance techniques,

alarm or security systems or technologies, operational and transportation plans or protocols, or personnel deployments, and especially IT information.

The importance of protecting public documents was also discussed and how and when they must be available.

There is no requirement to answer questions and documents can be released without any explanation. While payment of a settlement is often confidential, that will not work, because it is public money under FOIA.

Specific items related to FOIA requests were also included and FOIA Coordinator responsibilities were also reviewed.

Several recent AG opinions/findings were also presented.

Delaware Ethics Training

Attorney Walton talked about City Council in 2017 choosing to adopt the State of Delaware Public Officers, Officials, and Employees Code. He explained that because of that, the Mayor, Council and city officials are subject to the jurisdiction of the Public Integrity Commission. Their purpose is to set standards for employees of government. The statute that you follow is written for state employees though the application applies to all local governments, unless the municipality adopts their own code of conduct, which must be at least as stringent as the state code and approved by Public Integrity Commission (PIC).

Only nine jurisdictions in Delaware chose to adopt their own Code of Conduct.

The powers and duties of the PIC members, pursuant to 29 Del. C. § 5809, are to recommend rules of conduct, issue advisory opinions, investigate (through counsel), hold hearings, and take, or recommend, disciplinary action, maintain records, follow the rules, subpoena witnesses, prepare manuals and guides; assist agencies, employees and officials in administering the provisions of the law, request agencies provide assistance to the commission as needed to do their job, and administer and implement financial disclosure provisions and lobbyist registration provisions.

Discussing conflicts of interest, Attorney Walton stated that an employee/official is unable to participate if there is a personal or a private interest (a personal or private interest is an interest which intends to impair the person's impartial judgment in the performance of their duties).

A personal interest involves a financial interest, which can include your immediate family, etc. It is defined in the statute as 10% financial interest of a company even though any financial interest will be found by PIC to be a disqualifying interest.

If an official becomes disqualified, there is a need to delegate the responsibility to another, and physically get up and leave the seat at the council dais. The code suggests the person with the conflict shouldn't participate in the matter at all.

Attorney Walton said the difficult thing is because the code says the official should not participate in the matter, but the official is really in an agitated state and wants to say something, but the code says it is not permitted. Then again, there is the First Amendment right to go up and speak.

The Attorney said that unless you absolutely have to speak, the official should leave the room and be done with it. Let others do the speak. He added that from a First Amendment perspective, that is a very difficult question. And he does not have the answer but would handle it very gently.

If there is no one else to delegate to when there is a financial interest, as occurs in tiny towns with two employees, the attorney usually goes to PIC ahead of time and try to figure out the right way to handle it.

Officials cannot assist other people with respect to the matter. For example, a councilmember cannot be telling someone how to handle something. No elected official is able to assist a private enterprise with respect to any matter before the city.

An official or an enterprise in which the official has a 10% or greater ownership interest shall not contract with the city except after public notice and competitive bidding, unless the contract involves less than \$2,000 a year, contracts with public school district and/or State Board of Education for the transportation of school children do not require public notice and bidding.

Attorney Walton emphasized that the sole 10% ownership requirement means nothing, and instead applies to a financial interest of any kind to PIC.

When questioned about two councilmembers from the same ward having a potential conflict, Attorney Walton stated, as an example, all of Council had the same conflict of interest, there would be a need to invoke the Rule of Necessity, because there would be nobody that could act. He said that involves a process and he will defer to Solicitor Rutt for the notice requirement to PIC, and other procedures.

Attorney Walton said it could happen, but is very rare and is usually handled through a disqualification. The disqualification can sometimes be used as a weapon especially in zoning. There is one developer's attorney who searches for public comments that were made, goes through FOIA requests to try to disqualify the opponents, what they perceive on council, especially with respect to controversial zoning actions. They FOIA all of their emails, and try to claim they have a personal, or an interest, or a bias because you have prejudged the application. At the end of the day, this process can be used.

He shared a situation whereby a planning commissioner wrote a general letter about 'is this the kind of thing we want in our community'; the developer sent him to PIC and several procedures followed. The planning commissioner ended up being named in a federal court action.

Attorney Walton warned council against making public statements on zoning issues. He added that if an official violates the sanctity of your executive session and your privilege of talking to your attorney, and that information is leaked, that official is in violation of the statute. The leaking of confidential information is something that can't be done under the PIC statutes.

He has had someone take his memo and puts it out there five minutes after it is done. If the City Solicitor provides a memo stating this is a bad idea, and council responds by stating they want to do it anyway, that will catch up with that official. The penalty is whatever PIC enforces under their powers. It could be grounds for removal from office or discipline.

Attorney Walton said that is it not only illegal, it is bad business, bad practice. The official is here to act in the best interest of the city, and the best interest of the city is not the best interest to your political career. He said a councilperson does not want to act in a way that makes it appear that they are violating the public trust. Instead, they are a public officer and the standard of the PIC uses it all the time. The problem is what the appearance is different from person to person and a fuzzy standard.

A city official shall not represent or otherwise assist any private enterprise on any matter involving the city for a period of two years following termination of employment/term of office with the city, if the employee/officer has provided any opinions, investigated, or was directly and materially responsible for the same matter during their employment/term of office.

There was a long discussion about gifts and directed Mayor and Council not to take gifts from anyone. He talked about a developer in a municipality that would pick up the bar tab after the council meeting. In the opinion of PIC, such 'gifts' Impair one's judgment, results in preferential treatment to a person, results in governmental decision, and adversely affects the confidence of the public.

A disclosure statement should be filed of any financial interest in a private enterprise that does business or is regulated by the city. Do not use your position to secure unwarranted privileges, advancement, or gain.

The Attorney shared the process of the waiver procedure and filing a written request.

Reasons the request is no longer confidential were reviewed.

Complaints to PIC can be initiated by the commission or by a third party through a sworn complaint. They can be dismissed if found frivolous or failed to cite the violation.

Attorney Walton concluded by talking about hearing procedures and rights, then the consequences of possible administrative sanctions.

Land Use Training

Planning Director Rob Pierce provided Council with zoning training. He disclosed that some slides were borrowed from the University of Delaware training session created by the previous presenter Max Walton.

Zoning Applications

- ◆ Minor Subdivision, Lot Line Adjustment, Lot Consolidation
- ◆ Permitted Use Site Plan
- ◆ Conditional Use Site Plan
- ◆ Conditional Use
- ◆ Change of Zone
- ◆ Comprehensive Plan Amendment
- ◆ Major Subdivision
- ◆ Planned Unit Development
- ◆ Annexation/De-Annexation
- ◆ Variance (Board of Adjustment)
- ◆ Administrative Appeals (Board of Adjustment)

Delaware Code/State Enabling Legislation

Code Title & Chapter	Sections	Topics
Municipal Planning Authority Title 22, Ch 7	701 702	Planning commission organization Comprehensive plan standards
Municipal Zoning Title 22, Ch 3	301-311 321-332	General provisions Boards of adjustment
Annexation Title 22 Ch 1	101 105	Annexation requirements De-annexation
Statute of Repose Title 10, Ch 81	8126	Limitations on adopted plans and development plans
Meetings & Records (FOIA) Title 29, Ch 100	1003 1004	Public records Open meetings

Subdivisions, Site Plans, Conditional Uses, Change of Zone Requests

Authority to Plan

- *Title 22 Municipalities, Chapter 7, Planning Commission*
- *Title 22 Municipalities, Chapter 3, General Provisions*
- *City Charter – 5.12 – City Planning Commission*
- *Chapter 57 – Planning Commission*
- *Chapter 200 – Subdivision of Land*
- *Chapter 230 – Zoning*
- https://library.municode.com/de/milford/codes/code_of_ordinances?nodeId=14818

Minor Subdivision, Lot Line Adjustment & Lot Consolidation

- *Chapter 200 Subdivision of Land*

- *Chapter 230 Zoning*
 - *Article III – Use and Area Regulations*
 - *Minimum Lot Area, Minimum Lot Width, Max. Lot Coverage, Front, Rear, Side Setbacks*
- *City Construction Standards and Specifications*
- *Administrative Review*

Permitted Use Site Plans

- Chapter 200 Subdivision of Land
- Chapter 230 Zoning
 - Article III – Use and Area Regulations
 - 230-19.7 – Open Space, Recreation and Other Public Facilities
 - 230-19.8 - Tree Planting and Preservation
- Article IV- Off-street Parking
- Article V – Landscape Screening
- Article X – Site Plan (procedure)
- State Agency Approvals – DelDOT, Conservation District, SFMO, DNREC/ACE, DHSS
- City Construction Standards and Specifications
- Reviewed during a public meeting but the application is not part of a public hearing.
- Approved by the Planning Commission

Conditional Use Site Plans

- Chapter 200 Subdivision of Land
- Chapter 230 Zoning
 - Article III – Use and Area Regulations
 - 230-19.7 – Open Space, Recreation and Other Public Facilities
 - 230-19.8 - Tree Planting and Preservation
 - Article IV- Off-street Parking
 - Article V – Landscape Screening
 - Article X – Site Plan (procedures)
 - Article IX – Conditional Use
- City Construction Standards and Specifications
- State Agency Approvals – DelDOT, Conservation District, SFMO, DNREC/ACE, DHSS.
- Reviewed during a public hearing.
- Planning Commission makes a recommendation to City Council who makes final decision.

Conditional Use Criteria

- The purpose of the conditional use is to maintain a measure of control over uses that have an impact on the entire community.
- Chapter 230-48 (motions should consider the six below criteria)
 - The presence of adjoining similar uses.
 - An adjoining district in which the use is permitted.
 - There is a need for the use in the area proposed as established by the Comprehensive Plan.
 - There is sufficient area to screen the conditional use from adjacent different uses.
 - Use will not detract from permitted uses in the district.
 - Sufficient safeguards, such as traffic control, parking, screening and setbacks, can be implemented to remove potential adverse influences on adjoining uses.
- City Council approves, denies, or approves applications with conditions (conditions must be reasonable).

Major Subdivision

- Chapter 200 Subdivision of Land
- Chapter 230 Zoning
 - Article III – Use and Area Regulations
 - 230-19.7 – Open Space, Recreation and Other Public Facilities
 - 230-19.8 - Tree Planting and Preservation

- Article IV- Off-street Parking
- Article V – Landscape Screening
- State Agency Approvals – DelDOT, Conservation District, SFMO, DNREC/ACE, DHSS.
- City Construction Standards and Specifications
- Reviewed during a public hearing.
- Planning Commission makes a recommendation to City Council. City Council makes final decision.

Planned Unit Development

- Definition – A development providing housing of various densities, lot sizes, lot coverage and types, including related recreational and community facilities.
- Chapter 200 Subdivision of Land
- Chapter 230 Zoning
 - Article III – Use and Area Regulations
 - 230-19.7 – Open Space, Recreation and Other Public Facilities
 - 230-19.8 - Tree Planting and Preservation
 - 230-19.9 – Planned Unit Development
 - Article IV- Off-street Parking
 - Article V – Landscape Screening
 - Article X – Site Plan (procedure)
- State Agency Approvals – DelDOT, Conservation District, SFMO, DNREC/ACE, DHSS.
- City Construction Standards and Specifications
- Planned Unit Developments (PUDs) allow for flexibility in design, including lot size, lot width, off-street parking, housing types, etc.
- 230-19.9 – Outlines permitted uses, minimum lot area and width requirements, density calculation, bulk regulations and conditions for neighborhood commercial.
- Promotes a mixture of housing types in a single development without needing to rezone the entire property.
- Subject to the same conditional use criteria found under 230-48.

Change of Zone

- Article XII – Zoning Amendments
- Planning Commission makes a recommendation to City Council. City Council makes final decision.
- Change of Zone requests must be consistent with the Comprehensive Plan Future Land Use exhibits & Land; Use & Zoning Link table.
- The purpose statement for each zoning category should be taken into consideration when determining the appropriate zone for a property.

Comprehensive Plan Amendment

- Comprehensive Plan Amendment requests are compiled annually at the end of the calendar year and submitted to the Office of State Planning Coordination for review.
- These could be text or map amendments.
- These could be initiated by private property owners or the City.
- Requests are presented to City Council for informational purposes only prior to solicitation for State comments.
- Upon receipt of State comments, additional public outreach may be needed prior to formal public hearings are scheduled with the Planning Commission and City Council.
- Amendment requests would be reviewed during a public hearing.
- Planning Commission makes recommendation to City Council; Council makes final decision.

Unfavorable Recommendation from Planning Commission

- This applies to Change of Zone requests, Zoning Code amendments, Major Subdivision, Planned Unit Development, Comprehensive Plan amendments and Conditional Use applications.
- In case of an unfavorable recommendation for denial by the Planning Commission, such application shall not be approved except by a favorable vote of 3/4 of the City Council.

Annexation/De-Annexation

- Title 22 Municipalities, Chapter 1, Annexation
- City Charter, Article I, Incorporation, Territory and Annexation
 - 1.04 Annexation
 - 1.05 De-Annexation

Annexation

- Written Petition submitted by property owner.
- Annexation request is reviewed by the Annexation Committee.
- Planning Department submits Plan of Services to State Planning Office.
 - Sewer, water, police, fire, electric service analysis.
- Planning Commission/City Council Public Hearings
- Annexation Agreement
- Request must be contiguous to the City.
- Must be consistent with the City's Comprehensive Plan.
 - Within Urban Growth Boundary.
 - Requested zoning must meet the adopted future land use maps.

De-Annexation

- Except as provided for in Section 1.05(b) of the City Charter, De-Annexation shall follow procedures established in the Delaware Code.
- Section 1.05(b), City Council may authorize the de-annexation of either of the following:
 - Property with zero residents and assessed valuation of less than \$25,000 by ordinance following a public hearing.
 - A parcel which contains less square footage than the smallest parcel in the zoning district in which it is located.

Board of Adjustment

- Title 22 Municipalities, Chapter 3, Board of Adjustment
 - City Charter, Article V, Administration and Appointees
 - 5.13, Board of Adjustment
 - Chapter 230, Article VII, Board of Adjustment
 - Quasi-judicial body
 - Applicant and witnesses are sworn in.
- ✓ Area Variance
 ✓ Use Variance
 ✓ Administrative Appeal
 ✓ Responsible for the interpretation of Chapter 230 Zoning.

Area Variance

- ✓ Area variance. A variance shall be considered an area variance if it relates to bulk standards, signage regulations, and other provisions of the zoning ordinance that address lot layout, buffers, and dimensions, In considering a
- ✓ request for an area variance, the board shall evaluate the following criteria and document them in their findings of fact:
 - The nature of the zone in which the property lies;
 - The character of the immediate vicinity and the contained uses therein;
 - If restriction upon the applicant's property were removed, removal would seriously affect such neighboring properties and uses;
 - Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the provisions of the zoning ordinance.

There being no further business, the Council Workshop concluded at 8:00 p.m.

Respectfully submitted,

Terri K. Hudson, MMC
City Clerk/Recorder

*Delaware Freedom of
Information Act (FOIA)
Milford, Delaware*

March 22, 2023

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CONNOLLY
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Summary

FOIA has two basic components:

1. Open Meetings

2. Open Records

- **These two categories present a number of tricky questions.**
- **Many times the answers are not logical, practical or simple.**



Public Policy of FOIA

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.



Public Bodies

- **While the Town Council is clearly a public body, the statute has a far broader reach.**
- **A public body includes any regulatory, administrative, advisory, executive, appointive, or legislative body of any political subdivision of the State.**
- **That means 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 is subject to FOIA.**



Public Bodies, Cont'd.

- **19-IB-04 – Feb. 11, 2019 (Rehoboth)**
 - **Mayor established a working group to look at rate structures. The group included the City Manager, Finance Director, Public Works Director, and four members of the public.**
 - **Held – Working group is subject to FOIA.**



Public Bodies, Cont'd.

- **No. 20-IB29 December 2, 2020 (Christiana School District)**
 - **Board President and Vice President set out to conduct negotiations with a superintendent candidate.**
 - **Alleged that two board members were not a committee.**
 - **Held – Board members must have been appointed to engage in negotiations impliedly if not directly and this violates FOIA.**



22-IB50 – DNREC (Dec. 2022)

- **Held: A parks working group, established by the Parks Director, to assist in review of the surf fishing program, constitutes a public body under FOIA.**
- **The AG’s office established a 2 part test for whether a working group constitutes a public body.**
- **First, does it fall within the statutory definition? Second, does it expend public funds.**
- **That, as the AG puts it, can be met “if the entity in question ‘impliedly or specifically [is] charged by any other public official, body or agency to advise or make reports, investigations, or recommendations.”**
- **While focus groups are not public bodies, this body provided recommendations and therefore constitutes a public body.**



Open Meetings

- **The general rule, subject to a few exceptions, is that every meeting of all “public bodies” shall be open to the public. Del. Code Ann. tit. 29 § 10004(a).**
- **So, if there is doubt, the discussion and the meeting should be in the public and follow the statute.**
- **Meetings must be held within the jurisdiction of the public body.**



New FOIA Statute Change

- **Section 10004 (a) (2)**
 - **A meeting that is open to the public under paragraph (a)(1) of this section must include time for public comment, unless the meeting is of a public body within the General Assembly which is governed by the rules of proceedings adopted under § 9 of Art. II of the Delaware Constitution.**
 - a. The time for public comment must provide a meaningful opportunity for the public to engage with the public body.**
 - b. A public body may impose reasonable time, place, and manner restrictions on the length of the public comment period and the amount of time allotted for each public comment.**



Del. Code Ann. tit. 29 § 10006(a)

(c) A public body may hold a virtual meeting if all of the following occur:

- (1) The meeting notice under § 10004 of this title includes information regarding how the public can monitor or participate in the meeting under paragraph (c)(6) of this section.**
- (2) The meeting has an anchor location.**
- (3) The identity of a member or witness is verified, and the actions of a member are authenticated, in a manner satisfactory to the presiding officer or chair.**



Del. Code Ann. tit. 29 § 10006(a), Cont'd.

- (4) All participating members and witnesses can simultaneously do 1 of the following regarding each member or witness who is recognized by the presiding officer or chair:**
 - a. Hear the comments of each member or witness.**
 - b. Hear the comments of and view each member or witness.**

- (5) A document used during the meeting by a member or witness, and that is accepted by the presiding officer or chair, is immediately provided to each member or witness participating in the meeting and made available to the public under § 10003 of this title.**



Del. Code Ann. tit. 29 § 10006(a), Cont'd.

(6) Except during an executive session under § 10004 of this title, the public is able to do all of the following through an electronic means of communication:

a. Monitor the meeting.

b. Provide public comment, if the public body is required to accept, or provides an opportunity for, public comment.

(7) Minutes of the virtual meeting are maintained under § 10004 of this title.



Del. Code Ann. tit. 29 § 10006(a), Cont'd.

- (d) (1) All actions taken during a virtual meeting conducted under this section have the same legal effect as if the members were physically present at the same location.**
- (2) For the purposes of determining quorum for a virtual meeting, a member participating in a virtual meeting is considered present as if the member were physically present at the meeting.**
- (3) For the purposes of voting during a virtual meeting, a member participating in a virtual meeting is able to vote as if the member were physically present at the meeting.**
- (4) A technological problem that prevents or limits public access otherwise required under this chapter does not invalidate a virtual meeting or an action taken at a virtual meeting.**



Del. Code Ann. tit. 29 § 10002(b),

- **Anchor location means the physical location within the geographic jurisdiction of the public body that is open to the public and at which one or more members of the public body attend a virtual meeting.**



23-IB08 – Delaware Board of Elections (Feb. 2023)

- **The board did not violate FOIA by allowing only audio access to the public instead of video access when the board members had video and audio access.**



Notice

- **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 . . .**
- **“Regularly scheduled meeting” means any meeting of a public body held on a periodic basis.**



Notice. Cont'd.

- **Public notice is a conspicuous posting of 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.**
- **If you plan to do virtual meetings, you must say so in the meeting notice and provide contact information.**



Notice, Cont'd.

- **All public bodies shall give this same public notice 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 is defined as one to be held less than 7 days after the scheduling decision is made.**



Agenda

- **Agendas are required for all meetings.**
- **“Agenda” is defined as a general statement of the major issues expected to be discussed at a public meeting.**
- **The agenda may change.**



Agenda, Cont'd.

- **The statute provides that “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.”**



Agenda, Cont'd.

- **When the agenda is not available as of the time of the initial posting of the public notice it must 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.**
- **So, there is flexibility in the agenda for matters that come up after the initial posting.**
- **Hypothetical – what happens if a council member requests that an ordinance be placed on the agenda with less than 7 days notice? What about a request for an executive session?**



Minutes

- **Minutes are always required.**
- **Minutes, at minimum, must include a record of those members present and a record, by individual members, of each vote taken and action agreed upon.**
- **Minutes of executive sessions must be taken and the minutes are considered public records “so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.”**



Executive Sessions



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Executive Sessions

- **Executive sessions, while necessary, are in contravention of the public policy of the open meeting laws.**
- **Thus, executive sessions are closely scrutinized to assure that they are proper.**



Executive Sessions, Cont'd.

- **Executive sessions are permitted ONLY IF they fall under the categories listed in Del. Code Ann. tit. 29 § 10004(b).**
- **The big ones are:**



Executive Sessions, Cont'd.

- (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 does not apply to 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.**



Executive Sessions, Cont'd.

- (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.**



Potential Litigation Test

- **To invoke the potential litigation exception, litigation must be likely or reasonably foreseeable.**
- **When determining whether litigation is “likely or reasonably foreseeable,” the public body should look for objective signs that litigation is coming.**
- **A written demand letter in which a claim is asserted, or action is demanded, may give rise to a proper inference that litigation will soon follow.**



Potential Litigation Test, Cont'd.

- **Other indicators of “potential litigation” might include “previous or preexisting litigation between the parties or proof of ongoing litigation concerning similar claims or [] proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.”**
- **The public body must be able to point to a “realistic and tangible threat of litigation ... characterized with reference to objective factors” before it may avail itself of the “potential litigation” exception to FOIA.**



22-IB29 – DeIDOT (Aug. 2022)

- **DeIDOT had refused to accept subdivision streets, and the propane company’s attorney filed the FOIA request, which DeIDOT denied under the pending litigation exception.**
- **The AG’s office articulated a two prong test for potential litigation:**
 - (1) litigation must be reasonably foreseeable; and**
 - (2) there must be a clear nexus between the requested documents and the subject matter of the litigation.**
- **It was found that DeIDOT violated FOIA.**



22-IB24 DeIDOT (July 2022)

- **Participant that was denied discovery in the claims committee process sought the same documents through FOIA.**
- **It was held that the pending litigation exception applies to quasi-judicial and administrative processes.**



Executive Sessions, Cont'd.

- (6) Discussion of the content of documents, excluded from the definition of “public record” where such discussion may disclose the contents of such documents.**
- (8) The hearing of employee disciplinary or dismissal cases unless the employee requests a public hearing.**
- (9) Personnel matter 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. (**Must be only employees-not subcontractors).**



Executive Session Rules

- **Minutes must be taken.**
- **Governing body must vote to hold an executive session.**
- **Executive session must be on the agenda.**
- **Agenda must be specific about the statutory exemption that applies.**



Executive Session Rules, Cont'd.

- **No votes may be taken in executive session – votes must be in public.**
- **The executive session topics cannot stray from the issues on the agenda.**
- **Prohibited from having a straw poll.**



Public Records



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Public Records

- **Public records are defined by Del. Code Ann. tit. 29 § 10002(1) 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 Records, Cont'd.

- **The exemptions regarding what is a public record are very narrow and are generally narrowly construed.**
- **Thus, assume everything that is written will end up on the front page of the newspaper or on a troublesome website.**



Non-Public Records

- **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;**



Non-Public Records, Cont'd.

- (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.**
- (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;**



Non-Public Records, Cont'd.

- (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;**



Non-Public Records, Cont'd.

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

➤ **New decisions regarding this exception allow withholding of the documents so long as they relate to the litigation.**

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



Non-Public Records, Cont'd.

(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;

(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;



Non-Public Records, Cont'd.

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

...

(19) Any communications between a member of the General Assembly and that General Assembly member's constituent, or communications by a member of the General Assembly on behalf of that General Assembly member's constituent, or communications between members of the General Assembly.

***Example - Flowers v. Office of the Governor**



Non-Public Records, Cont'd.

(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.**



Non-Public Records, Cont'd.

- 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.**

...



Non-Public Records, Cont'd.

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.**



Non-Public Records, Cont'd.

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



Non-Public Records, Cont'd.

B. Records not subject to public disclosure under federal law that are shared by federal or international agencies an 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.



Non-Public Records, Cont'd.

7. Information technology (IT) infrastructure details, source code, logical and physical design of IT systems and interfaces, detailed hardware and software inventories, network architecture and schematics, vulnerability reports, and any other information that, if disclosed, could jeopardize the security or integrity of an information and technology system owned, operated or maintained by the State or any public body subject to the requirements of this chapter.



Non-Public Records, Cont'd.

(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

- **There are a number of exceptions applicable to the veteran's exemption.**



Production of Public Documents

- **Records should be open for inspection during normal business hours.**
- **FOIA requests should generally be made in writing.**
- **The requestor must be as specific as possible – and seeking clarification about what the requestor wants is acceptable.**
- **Even if not in physical possession of the documents sought, “the public body shall promptly request that the relevant custodian provide the noncustodial records to the public body.”**



Production of Public Documents, Cont'd.

- **E-mails (if requested) must be produced.**
- **If they cannot be obtained with “reasonable effort,” “the public body shall promptly request that its information and technology personnel or custodians provide the e-mail records to the public body.”**
- **Additional costs should be paid by the persons requesting – and an itemized list of charges must be presented to the requestor in advance for this special service.**



Responses to Requests – Production of Public Documents

- **Responses to FOIA requests must be made within 15 business days.**
- **If more time is needed, the reason for more time must be legitimate and must be explained.**
- **If the request is denied, the reason for denial must be explained.**
- **Documents may be reviewed prior to disclosure to assure that non-public records are excluded from the request.**



FOIA QUIZ

- **Does FOIA require public bodies to answer questions?**
- **Does a confidentiality clause in a settlement agreement exempt the settlement agreement from FOIA?**
- **Can a public body go into executive session to discuss interview questions?**



FOIA QUIZ, Cont'd.

- **Can you remove someone from a public meeting for saying, in public comment**
 - **“You treated him like a pubescent son found with a porn magazine?”**
- **Is it a violation of FOIA not to explain why additional time is needed to respond to a FOIA request?**
- **Are you required to post meeting minutes on a website?**
- **Is the public body required to respond to FOIA requests from out of state requestors?**



Recouping Incurred Costs

- **Unless your code provides otherwise, the standard charges are:**
 - **The first 20 pages of standard-sized, black and white copies shall be provided free of charge.**
 - **The charge for copying standard sized, black and white public records for copies over and above 20 shall be \$0.10 per sheet (\$0.20 for a double-sided sheet).**
 - **Other standard rates are set for oversized, color, and microfiche.**
 - **Charges for copying records maintained in an electronic format will be calculated by the material costs involved in generating the copies (including but not limited to DVD, CD, or other electronic storage costs) and administrative costs.**



Recouping Incurred Costs, Cont'd.

- **Administrative costs may be charged if the project takes more than 1 hour at the rate of the lowest paid capable employee. Fees and anticipated costs must be disclosed to the person making the request.**
- **Administrative costs must be billed in ¼ hour increments.**



23-IB03 – DOE (Jan. 2023)

- **This is a dispute about costs.**
- **The estimate was for \$38 an hour for 2.1 hours to extract items from archives and to redact e-mails (e.g. scrubbing e-mails).**
- **This cost was valid. But, attorney time may not be charged.**



FOIA Coordinator

- **Every public body must designate a FOIA coordinator.**
- **FOIA coordinator must be designated on website with contact information.**
- **Duty to notify AG's office when FOIA coordinator changes – within 20 days of change.**
- **FOIA coordinator responsible for fostering cooperation.**
- **Public bodies are required to provide reasonable assistance to the public in identifying and locating public records to which they are entitled access.**



Enforcement

- **Attorney General's Office generally enforces FOIA and/or decides a FOIA complaint, although citizens may bring suit as well in certain circumstances.**
- **For public records denials, there is a 60 day SOL.**
- **For open meeting violations, the SOL is 6 months.**
- **The burden is on the custodian denying access to public records.**



Enforcement, Cont'd.

- **The Court may award attorneys' fees and costs for the failure to produce records in a FOIA suit.**
- **For open meeting violations, the offending parties may be required to forfeit compensation for participation.**
- **The Attorney General's Office may also hear an action for a prospective violation.**



Appeals

- **A person denied records by a State agency is permitted to file an appeal to the Chief Deputy and thereafter to the Superior Court.**
- **Such appeal must be filed within 60 days of the Attorney General's decision.**
- **Thus far, these appeals have been very rare – but they are not unprecedented.**



Recent Decisions

- **No. 21-IB17 – July 23, 2021 (Georgetown)**
 - **Phone calls and emails resulting in a decision violated FOIA.**
- **No. 21-IB14 – June 20, 2021 (Sussex County)**
 - **No requirement to post agenda on website for municipalities and counties.**
- **No. 21-IB03 – February 25, 2021 (Sussex Technical School District)**
 - **Board agenda not required to name the personnel to be discussed in executive sessions but “Personnel Action Items” insufficient to alert public of vote of superintendent.**



Recent Decisions, Cont'd.

- **No. 22-IB04 – March 3, 2022 (Wilmington Charter)**
 - **Violated FOIA by not properly noticing Advancement and Finance Committee Meetings.**
- **No. 22-IB03 – February 18, 2022 (Diamond State Port Corp.)**
 - **Violation of FOIA for not properly posting notice of Executive Session.**
- **No. 22-IB49 – City of New Castle (Dec. 2022)**
 - **Allegation that council members must have met and discussed a particular contract appointment. They held that the Petitioner bears the burden of demonstrating a prima facie case that a meeting occurred. Thereafter, the burden shifts to the public body to establish that no violation of the open meeting laws occurred.**



Recent Decisions, Cont'd.

- **22-IB34 – Georgetown (Sept. 2022)**
- **Allegation that Town Council members met illegally to sign a check for a contribution to the historical society. It was a prima facie violation (according to the AG's office) for the three members to meet to issue the check. There was an intent found that the members desired to avoid a physical quorum – and a FOIA violation was found.**



Questions?



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ETHICS IN GOVERNMENT TRAINING MILFORD, DELAWARE

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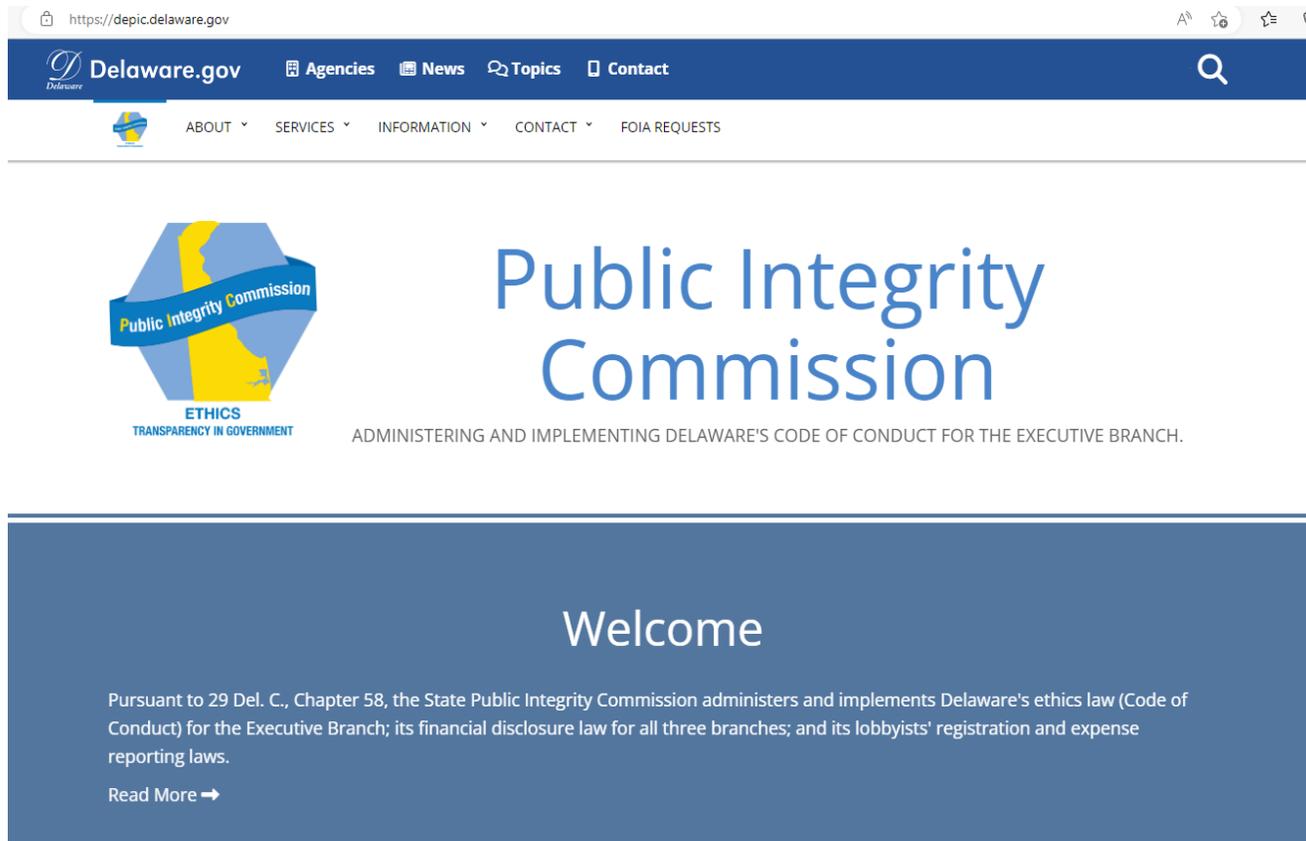
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The Public Integrity Commission “PIC”



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https://depic.delaware.gov



The screenshot shows the homepage of the Delaware Public Integrity Commission. At the top is a navigation bar with the Delaware state logo and the text "Delaware.gov". To the right of the logo are links for "Agencies", "News", "Topics", and "Contact". A search icon is located on the far right of the navigation bar. Below the navigation bar is a secondary menu with links for "ABOUT", "SERVICES", "INFORMATION", "CONTACT", and "FOIA REQUESTS". The main content area features the Public Integrity Commission logo on the left, which includes a map of Delaware and the text "Public Integrity Commission" and "ETHICS TRANSPARENCY IN GOVERNMENT". To the right of the logo is the title "Public Integrity Commission" in a large blue font, followed by the subtitle "ADMINISTERING AND IMPLEMENTING DELAWARE'S CODE OF CONDUCT FOR THE EXECUTIVE BRANCH." Below this is a dark blue banner with the word "Welcome" in white. Underneath the banner, there is a paragraph of text explaining the commission's role and a "Read More" link with a right-pointing arrow.

https://depic.delaware.gov

Delaware.gov Agencies News Topics Contact

ABOUT SERVICES INFORMATION CONTACT FOIA REQUESTS



Public Integrity Commission
ETHICS
TRANSPARENCY IN GOVERNMENT

Public Integrity Commission

ADMINISTERING AND IMPLEMENTING DELAWARE'S CODE OF CONDUCT FOR THE EXECUTIVE BRANCH.

Welcome

Pursuant to 29 Del. C., Chapter 58, the State Public Integrity Commission administers and implements Delaware's ethics law (Code of Conduct) for the Executive Branch; its financial disclosure law for all three branches; and its lobbyists' registration and expense reporting laws.

[Read More →](#)

PIC

- *Purpose-* to ensure propriety, public respect and confidence by setting specific standards of conduct for State personnel/government employees without unduly circumscribing their activities.
- *Application-* applies to all local governments unless they adopt their own Code of Conduct which must be approved by the PIC and must be at least as stringent as the PIC's code of conduct.
- *Authority-* 29 Del. C. § 5808.



PIC

Article IV, City of Milford Charter

Section 4.14 - The Mayor and City Council shall develop, adopt, and adhere to a Code of Ethics applying to elected officials and to City employees in general (passed 3/2017).

In **2022**, local governments who had adopted their own Codes of Conduct included:

New Castle County
Dover
Lewes

Millsboro
Newark
Smyrna

Delaware City
Georgetown
City of Wilmington



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PIC

Members-

- 7 members appointed by the Governor with concurrence of the senate
- No more than 4 of the same political party
- Appointed for a term of 7 years
- Cannot hold elected office
- A quorum requires 4 members present and disciplinary actions requires at least 4 affirmative votes



PIC

Powers and Duties- 29 Del. C. § 5809

- To recommend rules of conduct.
- Issue advisory opinions.
- Investigate (through counsel), hold hearings, and take, or recommend, disciplinary action.
- Maintain records, follow the rules, subpoena witnesses.
- Prepare manuals and guides; assist agencies, employees and officials in administering the provisions of the law; and request agencies provide assistance to the Commission as needed to do their job.
- Administer and implement financial disclosure provisions and lobbyist registration provisions.





Conflict of Interest

Conflict of Interest

- 29 *Del. C.* §5805(a).
- No employee/official may participate in the review or disposition of a matter in which the employee/official has a personal or private interest.
- A personal or private interest is an interest which tends to impair a person's impartial judgment in the performance of their duties.



Conflict of Interest, cont.

- Impairment of judgment occurs where-
 - the employee/officer or a close relative will receive a financial benefit or suffer a detriment to a greater extent than would accrue to other members of the same class.
 - the employee/officer or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected to a lesser or greater extent than like enterprises or interest.
- Action
 - Delegate the responsibility to another
 - If unable to do so, must provide written notice to the PIC fully disclosing the interest and where the duty cannot be delegated



Conflict of Interest, cont..

- 29 *Del. C.* § 5805(b).
- No employee/officer may represent or assist any private enterprise with respect to a matter before the state agency with which the employee/office is associated.
- No officer may assist a private enterprise with respect to any matter before the State (city or town).
- Exception- an employee/officer may assist a private enterprise in the exercise of such person's official duties.



Conflict of Interest, cont..

- 29 *Del. C.* § 5805(c).
- An employee/officer, or an enterprise in which the employee/officer has a 10% or greater ownership interest
 - Shall not contract with the State except after public notice and competitive bidding.
 - Unless the contract involves less than \$2,000/year.
 - Contracts with public school district and/or State Board of Education for the transportation of school children do not require public notice and bidding.



Conflict of Interest, cont..

- 29 *Del. C.* § 5805(d).
 - An employee/officer shall not represent or otherwise assist any private enterprise on a matter involving the State for a period of 2 years following termination of employment with the State, if the employee/officer
 - gave an opinion about
 - investigated
 - or was directly and materially responsible for the same matter during their employment.



Conflict of Interest, cont..

- 29 *Del. C.* § 5805(e).
- **Do not disclose confidential information including (but not limited to):**
 - Disclosure statements of financial interests of employees/officers. 29 *Del. C.* § 5806(d).
 - Applications to the PIC for waivers of requirements or advisory opinions. 29 *Del. C.* § 5807(b) and (d).
 - Proceedings related to a violation of these rules. 29 *Del. C.* § 5810(h).



Conflict of Interest, cont..

Recent High Profile Case-



COURTS & LAW

Delaware auditor dodges felony charges, guilty of misconduct

Jurors on Friday acquitted McGuinness of felony theft and intimidation charges. But they found her guilty of conflict of interest official misconduct.



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Conflict of Interest, cont..

Violations:

- Illegally structuring a contract for a firm that worked on her campaign (later overturned).
- Conflict of interest related to employing her daughter.
- Conflict of interest- favorable treatment.



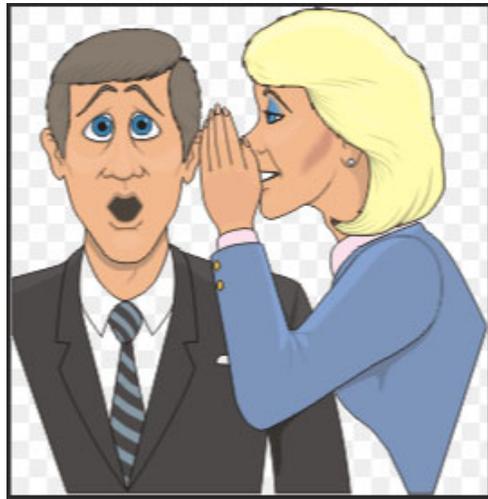


Code of Conduct

Code of Conduct

29 Del. C. § 5806-

- (a) Act in a way that does not make it appear you are violating public trust.



- (b) Avoid the appearance of impropriety – do not obtain interests in enterprises which are in conflict with the performance of your duties.

Code of Conduct

29 Del. C. § 5806-



- Do not accept gifts, compensation or payment of expenses where it could appear such item:
 - (i) Impairs your judgment
 - (ii) Results in preferential treatment to a person
 - (iii) Results in governmental decision
 - (iv) Adversely affects the confidence of the public



Code of Conduct, cont.

29 Del. C. § 5806-

- (c) Avoid financial interest in private enterprises which may be directly involved in decisions you make in your employment.
- (d) File a disclosure of any financial interest in a private enterprise that does business with the State or is regulated by the State.
- (e) Do not use your office to secure unwarranted privileges, advancement, or gain.
- (f)-(h) Do not engage in activity in activity which may cause disclosure of confidential information, or disclose confidential information, or use sexual favors as a condition for favorable treatment.



Code of Conduct, cont.

Recent Advisory Opinion (2021)

- Government official approached Town Council requesting the official be given a historic artifact. After initially saying no, the Town attempted to appraise the artifact but was unable to do so. The official asked again and this time, the Town considered giving the artifact to the official, but decided to seek an advisory opinion.
- The Commission opined:
 - The proposed conduct made the artifact a “gift” and, in asking for the gift, the conduct already showed impaired judgment;
 - giving it to an official rather than disposing through bidding would show preferential treatment;
 - a governmental body giving government property to a government official did not avoid the appearance of impropriety.





Waivers and Advisory Opinions



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Waivers and Advisory Opinions

- Waiver Procedure- File a written request 29 Del. C. § 5807 (a) and (b).
- The written request is confidential unless-
 - The applicant requests public disclosure writing.
 - It is required for prosecution of a violation.
 - The PIC needs the utilize the document to report substantial evidence of a criminal violation.
 - If a waiver is granted, the decision and record proceedings are no longer confidential.



Waivers and Advisory Opinions, cont.

- Opinion Procedure- File a written request 29 *Del. C.* § 5807 (c) and (d).
- The written request is confidential unless-
 - The applicant requests in public disclosure writing.
 - It is required for prosecution of a violation.
 - The PIC needs to utilize the document to report substantial evidence of a criminal violation.
 - A summary of all advisory opinions shall be prepared by the PIC and made public without disclosure of the applicant's identity(s).



Complaints, Hearings, and Dispositions



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Complaints, Hearings, and Dispositions

- 29 *Del. C.* § 5810.
- Complaints
 - The Commission can initiate a complaint on its own.
 - If initiated by a third party, must be a sworn complaint.
 - May be dismissed if deemed frivolous or fails to state a violation. 29 *Del. C.* § 5809(3).



Complaints, Hearings, and Dispositions

Hearing Procedure/Rights

- Notice and an opportunity to be heard.
- Legal counsel.
- Right to inspect, copy or photograph tangible evidence which will be used as evidence against a party.
- The Commission must share any exculpatory information.
- Subpoena witnesses.
- Confidentiality unless the person charged requests a public hearing.
- Appeal to the Superior Court.



Complaints, Hearings, and Dispositions

Consequences



Complaints, Hearings, and Dispositions, cont.

Consequences- Possible Administrative Sanctions

- 29 Del. C. § 5810(d)- If the Commission determines a violation has occurred it may:
 - Issue a written reprimand or censure of conduct; and/or
 - Non-elected employee/officer may be removed, suspended or demoted, or other (undefined) disciplinary action;
 - For elected officials recommend action by taken to remove from office.



Complaints, Hearings, and Dispositions, cont.

Consequences- Rules Resulting in Administrative Sanctions Only

- Improperly accepting gifts, other employment, compensation, or anything of monetary value.
- Misuse of public office for private gain or unwarranted privileges.
- Improper use or disclosure of confidential information.



Complaints, Hearings, and Dispositions, cont.

Consequences - Criminal

- 29 *Del. C.* § 5805(f)- A person who knowingly violates Chapter 58 faces a misdemeanor charge punishable by up to a year in jail and up to a \$10,000 fine.
- 4 of the previously discussed violations are considered criminal:
 - participates in State matters if a personal or private interest would tend to impair judgment in performing official duties
 - represents or assists a private enterprise before their own agency and/or other State agencies
 - contracts with the State absent public notice and bidding/arm's length negotiations
 - represents or assists a private enterprise on certain State matters for 2 years after leaving State employment



Complaints, Hearings, and Dispositions, cont.

Further Possible Consequences

- 29 *Del. C.* § 5805(g)- Any contract entered into in violation of Chapter 58 is voidable within 30 days of when the state agency knew, or should have known, of the violation.





Planning & Zoning Training

Planning Department

March 22, 2023



Zoning Applications

- ▶ Minor Subdivision, Lot Line Adjustment, Lot Consolidation
- ▶ Permitted Use Site Plan
- ▶ Conditional Use Site Plan
- ▶ Conditional Use
- ▶ Change of Zone
- ▶ Comprehensive Plan Amendment
- ▶ Major Subdivision
- ▶ Planned Unit Development
- ▶ Annexation/Deannexation
- ▶ Variance (Board of Adjustment)
- ▶ Administrative Appeals (Board of Adjustment)



Delaware Code/State Enabling Legislation

Code Title & Chapter(s)	Sections	Topics
Municipal Planning Authority Title 22, Ch 7	701 702	Planning commission organization Comprehensive plan standards
Municipal Zoning Title 22, Ch 3	301-311 321-332	General provisions Boards of adjustment
Annexation Title 22 Ch 1	101 105	Annexation requirements De-annexation
Statute of Repose Title 10, Ch 81	8126	Limitations on adopted plans and development plans
Meetings & Records (FOIA) Title 29, Ch 100	1003 1004	Public records Open meetings

► <https://delcode.delaware.gov/>



Subdivisions, Site Plans, Conditional Uses, Change of Zone Requests



Authority to Plan

- ▶ Title 22 Municipalities, Chapter 7, Planning Commission
- ▶ Title 22 Municipalities, Chapter 3, General Provisions
- ▶ City Charter - 5.12 - City Planning Commission
- ▶ Chapter 57 - Planning Commission
- ▶ Chapter 200 - Subdivision of Land
- ▶ Chapter 230 - Zoning
- ▶ https://library.municode.com/de/milford/codes/code_of_ordinances?nodeId=14818



Minor Subdivision, Lot Line Adjustment & Lot Consolidation

- ▶ Chapter 200 Subdivision of Land
- ▶ Chapter 230 Zoning
 - ▶ Article III - Use and Area Regulations
 - ▶ Min. Lot Area, Min. Lot Width, Max. Lot Coverage, Front, Rear, Side Setbacks.
- ▶ City Construction Standards and Specifications
- ▶ Administrative Review



Permitted Use Site Plan

- ▶ Chapter 200 Subdivision of Land
- ▶ Chapter 230 Zoning
 - ▶ Article III - Use and Area Regulations
 - ▶ 230-19.7 - Open Space, Recreation and Other Public Facilities
 - ▶ 230-19.8 - Tree Planting and Preservation
 - ▶ Article IV- Off-street Parking
 - ▶ Article V - Landscape Screening
 - ▶ Article X - Site Plan (procedure)
- ▶ State Agency Approvals - DelDOT, Conservation District, SFMO, DNREC/ACE, DHSS.
- ▶ City Construction Standards and Specifications
- ▶ Reviewed during a public meeting but the application is not part of a public hearing.
- ▶ Approved by the Planning Commission



Conditional Use Site Plan

- ▶ Chapter 200 Subdivision of Land
- ▶ Chapter 230 Zoning
 - ▶ Article III - Use and Area Regulations
 - ▶ 230-19.7 - Open Space, Recreation and Other Public Facilities
 - ▶ 230-19.8 - Tree Planting and Preservation
 - ▶ Article IV- Off-street Parking
 - ▶ Article V - Landscape Screening
 - ▶ Article X - Site Plan (procedures)
 - ▶ Article IX - Conditional Use
- ▶ City Construction Standards and Specifications
- ▶ State Agency Approvals - DelDOT, Conservation District, SFMO, DNREC/ACE, DHSS.
- ▶ Reviewed during a public hearing.
- ▶ Planning Commission makes a recommendation to City Council. City Council makes final decision.



Conditional Use Criteria

- ▶ Purpose of the conditional use is to maintain a measure of control over uses that have an impact on the entire community.
- ▶ Chapter 230-48 (motions should consider the six below criteria)
 - ▶ The presence of adjoining similar uses.
 - ▶ An adjoining district in which the use is permitted.
 - ▶ There is a need for the use in the area proposed as established by the Comprehensive Plan.
 - ▶ There is sufficient area to screen the conditional use from adjacent different uses.
 - ▶ There use will not detract from permitted uses in the district.
 - ▶ Sufficient safeguards, such as traffic control, parking, screening and setbacks, can be implemented to remove potential adverse influences on adjoining uses.
- ▶ City Council can approve conditional use applications, deny them or approve with conditions. Conditions placed on the approval must be reasonable.



Major Subdivision

- ▶ Chapter 200 Subdivision of Land
- ▶ Chapter 230 Zoning
 - ▶ Article III - Use and Area Regulations
 - ▶ 230-19.7 - Open Space, Recreation and Other Public Facilities
 - ▶ 230-19.8 - Tree Planting and Preservation
 - ▶ Article IV- Off-street Parking
 - ▶ Article V - Landscape Screening
- ▶ State Agency Approvals - DelDOT, Conservation District, SFMO, DNREC/ACE, DHSS.
- ▶ City Construction Standards and Specifications
- ▶ Reviewed during a public hearing.
- ▶ Planning Commission makes a recommendation to City Council. City Council makes final decision.



Planned Unit Development

- ▶ Definition - A development providing housing of various densities, lot sizes, lot coverage and types, including related recreational and community facilities.
- ▶ Chapter 200 Subdivision of Land
- ▶ Chapter 230 Zoning
 - ▶ Article III - Use and Area Regulations
 - ▶ 230-19.7 - Open Space, Recreation and Other Public Facilities
 - ▶ 230-19.8 - Tree Planting and Preservation
 - ▶ 230-19.9 - Planned Unit Development
 - ▶ Article IV- Off-street Parking
 - ▶ Article V - Landscape Screening
 - ▶ Article X - Site Plan (procedure)
- ▶ State Agency Approvals - DelDOT, Conservation District, SFMO, DNREC/ACE, DHSS.
- ▶ City Construction Standards and Specifications



Planned Unit Development

- ▶ Planned Unit Developments (PUDs) allow for flexibility in design, including lot size, lot width, off-street parking, housing types, etc.
- ▶ 230-19.9 - Outlines permitted uses, minimum lot area and width requirements, density calculation, bulk regulations and conditions for neighborhood commercial.
- ▶ Promotes a mixture of housing types in a single development without needing to rezone the entire property.
- ▶ Subject to the same conditional use criteria found under 230-48.



Change of Zone

- ▶ Article XII - Zoning Amendments
- ▶ Planning Commission makes a recommendation to City Council. City Council makes final decision.
- ▶ Change of Zone requests must be consistent with the City's Comprehensive Plan Future Land Use exhibits and the Land Use & Zoning Link table.
- ▶ The purpose statement for each zoning category should be taken into consideration when determining the appropriate zone for a property.

Future Land Use	Zoning District
Employment	H-1, IM, IS
Commercial	C-1, C-2, C-2A, C-3, OC-1, BP, H-1
Industrial	I-1, I-2
Institutional	Permitted as conditional uses in residential, commercial and employment zones.
Low Density Residential	R-1, R-2, C-1, OB-1
Moderate Density Residential	R-3, R-8, C-1, OB-1
Open Space	R-1



Comprehensive Plan Amendment

- ▶ Comprehensive Plan Amendment requests are compiled annually at the end of the calendar year and submitted to the Office of State Planning Coordination for review.
- ▶ These could be text or map amendments.
- ▶ These could be initiated by private property owners or the City.
- ▶ Requests are presented to City Council for informational purposes only prior to solicitation for State comments.
- ▶ Upon receipt of State comments, additional public outreach may be needed prior to formal public hearings are scheduled with the Planning Commission and City Council.
- ▶ Amendment requests would be reviewed during a public hearing.
- ▶ Planning Commission makes recommendation to City Council. City Council makes final decision.



Unfavorable Recommendation from Planning Commission

- ▶ This applies to Change of Zone requests, Zoning Code amendments, Major Subdivision, Planned Unit Development, Comprehensive Plan amendments and Conditional Use applications.
- ▶ In case of an unfavorable recommendation for denial by the Planning Commission, such application shall not be approved except by a favorable vote of 3/4 of the City Council.



Annexation/Deannexation



Annexation/Deannexation

- ▶ Title 22 Municipalities, Chapter 1, Annexation
- ▶ City Charter, Article I, Incorporation, Territory and Annexation
 - ▶ 1.04, Annexation
 - ▶ 1.05, Deannexation



Annexation

- ▶ Written Petition submitted by property owner.
- ▶ Annexation request is reviewed by the Annexation Committee.
- ▶ Planning Department submits Plan of Services to State Planning Office.
 - ▶ Sewer, water, police, fire, electric service analysis.
- ▶ Planning Commission/City Council Public Hearings
- ▶ Annexation Agreement
- ▶ Request must be contiguous to the City.
- ▶ Must be consistent with the City's Comprehensive Plan.
 - ▶ Within Urban Growth Boundary.
 - ▶ Requested zoning must meet the adopted future land use maps.



Deannexation

- ▶ Except as provided for in [Section 1.05\(b\)](#) of the City Charter, deannexation shall follow procedures established in the Delaware Code.
- ▶ Section 1.05(b), City Council may authorize the deannexation of either of the following:
 - ▶ Property with zero residents and assessed valuation of less than \$25,000 by ordinance following a public hearing.
 - ▶ A parcel which contains less square footage than the smallest parcel in the zoning district in which it is located.



Board of Adjustment



Board of Adjustment

- ▶ Title 22 Municipalities, Chapter 3, Board of Adjustment
- ▶ City Charter, Article V, Administration and Appointees
 - ▶ 5.13, Board of Adjustment
- ▶ Chapter 230, Article VII, Board of Adjustment
- ▶ Quasi-judicial body
 - ▶ Applicant and witnesses are sworn in.



Board of Adjustment

- ▶ Area Variance
- ▶ Use Variance
- ▶ Administrative Appeal
- ▶ Responsible for the interpretation of Chapter 230 Zoning.



Area Variance

- ▶ Area variance. A variance shall be considered an area variance if it relates to bulk standards, signage regulations, and other provisions of the zoning ordinance that address lot layout, buffers, and dimensions, In considering a request for an area variance, the board shall evaluate the following criteria and document them in their findings of fact:
 - ▶ The nature of the zone in which the property lies;
 - ▶ The character of the immediate vicinity and the contained uses therein;
 - ▶ Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring properties and uses; and
 - ▶ Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the provisions of the zoning ordinance.



Use Variance

- ▶ Use Variance. A variance shall be considered a use variance if it would permit a use of the subject property that would otherwise not be permitted on the subject property. In considering a request for a use variance, the board shall determine that the following criteria exist and document them in their findings of fact:
 - ▶ The property cannot yield a reasonable return when used only for the permitted use;
 - ▶ The need for the variance is due to unique circumstances and not general conditions in the neighborhood;
 - ▶ The use sought will not alter the essential character of the locality; and
 - ▶ All uses permitted on the land under the existing zoning are economically unfeasible.



Questions