



SPONSOR: Sen. Gay & Rep. Griffith
Sens. Sokola, Townsend; Rep. Brady

DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE BILL NO. 155

AN ACT TO AMEND TITLE 29 OF THE DELAWARE CODE RELATING TO THE FREEDOM OF INFORMATION ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend § 10003, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 10003. Examination and copying of public records.

(h) Response to requests. — (1) The public body shall respond to a FOIA request as soon as possible, but in any event within 15 business days after ~~the receipt thereof, either by providing~~ receiving the request. The public body may respond to a FOIA request by doing any of the following:

a. Providing access to the requested ~~records, denying~~ records.

b. Denying access to all or part of the requested records ~~or parts of them, or by advising if any of the~~ following apply:

1. The denial is authorized elsewhere under this chapter.

2. The request is unreasonably broad, unduly burdensome, intended to disrupt the essential functions of the public body, or is abusive.

c. Advising the requesting party that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived. If access cannot be provided within 15 business days, the public body shall cite 1 of the reasons ~~hereunder~~ under this paragraph (h)(1)c. when explaining why more time is needed and provide a ~~good faith~~ good faith estimate of how much additional time is required to fulfill the request.

(2) If the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial. The public body ~~shall not be~~ is not required to provide an index, or any other compilation, ~~as to~~ for each record record, or part of a record record, that is denied.

(m) Fees. — Unless otherwise set forth in the Delaware Code or any applicable code of a county or municipal public body, the following fees ~~shall~~ apply:

(1) Photocopying and scanning fees. — ~~In instances in which~~ When paper records are provided to the requesting party, ~~photocopying party or scanning is required to provide records, the fees shall be~~ are as follows:

a. Standard-sized, black and white ~~copies; copies.~~ The first 20 pages of standard-sized, black and white copies material ~~shall be~~ are provided free of charge. The charge for copying standard sized, black and white public records ~~for copies over and above 20 shall be after 20 pages is \$0.10 per sheet (\$0.20 and \$0.20 for a double-sided sheet); sheet.~~ This charge applies to copies on all of the following standard paper sizes: 8.5" x 11", 8.5" x 14", and 11" x 17".

b. Oversized ~~copies/printouts; copies or printouts.~~ The charge for copying oversized public records ~~shall be~~ is as follows:

1. 18" x 22", \$2.00 per ~~sheet; sheet.~~

2. 24" x 36", \$3.00 per ~~sheet; documents sheet.~~

3. Documents larger than 24" x 36", \$1.00 per square foot.

c. Color copies/printouts: An additional charge of \$1.00 per sheet will be assessed for all color copies or printouts for standard-sized copies (8.5" x 11", 8.5" x 14", and 11" x 17") under paragraph (m)(1)a. of this section and \$1.50 per sheet for ~~larger copies; oversized copies under paragraph (m)(1)b. of this section.~~

d. Scanning. The first 20 pages of paper records that are scanned into a format for electronic or facsimile delivery are provided free of charge. The charge for scanning paper records after 20 pages is \$0.05 per page and \$0.10 for a double-sided sheet.

(2) Administrative fees. — Administrative fees ~~shall~~ may be levied for requests ~~requiring that require~~ more than 1 hour of staff time to process.

a. Charges for administrative fees may include staff time associated with processing FOIA requests, ~~including, without limitation: identifying records; monitoring file reviews; and generating~~ including any of the following:

1. Identifying records.

2. Reviewing files.

3. Generating computer records (electronic or print-outs). ~~Administrative fees shall not include any cost records, electronically or on paper.~~

4. Costs associated with the public body's legal review of whether any portion of the requested records is or all of the requested records are exempt from FOIA. FOIA and any costs associated with redacting records. The costs for reviewing documents may not include any costs incurred while resolving issues of law that were raised in the course of processing the request.

b. The public body shall make every effort to ensure that administrative fees are minimized, and may only assess such administrative charges as shall be reasonable that are reasonably required to process FOIA requests. ~~In connection therewith, the~~ The public body shall minimize the use of nonadministrative personnel in processing FOIA requests, to the extent possible.

c. Prior to fulfilling any request that would require a requesting party to incur administrative fees, the public body shall provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records. Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.

d. Administrative fees will be billed to the requesting party per quarter hour. These charges will be billed at the current hourly pay ~~grade (prorated grade, prorated for quarter hour increments)~~ increments, of the lowest-paid employee capable of performing the service. Administrative fees will be in addition to any other charges incurred under this section for copying fees.

e. When multiple FOIA requests are submitted by or on behalf of the requesting ~~party~~ party, in an effort to avoid incurring administrative charges, the public body may ~~in its discretion~~ aggregate staff time for ~~all such the~~ requests when computing ~~fees hereunder. Notwithstanding the foregoing, any administrative fees.~~

f. A Freedom of Information Act policy adopted by a public body pursuant to under subsection (b) of this section hereunder may include provisions for the waiver of some or all of the above allowed administrative fees; provided that such fees if the waiver shall apply applies equally to a particular class of persons (i.e., nonprofit organizations); person, such as nonprofit organizations.

(3) Microfilm ~~and/or or~~ microfiche printouts. — The first 20 pages of standard-sized, black and white material copied from microfilm ~~and/or or~~ microfiche ~~shall be~~ are provided free of charge. The charge for microfilm ~~and/or or~~ microfiche printouts ~~over and above 20 shall be~~ after 20 pages is \$0.15 per sheet.

(4) Electronically generated records. — Charges for copying records maintained in an electronic format ~~will be is~~ calculated by the material costs involved in generating the ~~copies (including but not limited to copies, including DVD, CD, or other electronic storage costs)~~ costs and administrative costs.

(5) Payment. — The public body may require that all or any portion of the fees due ~~hereunder to~~ under this section be paid ~~prior to before~~ any service ~~being is~~ performed ~~pursuant to~~ under this section.

Section 2. Amend § 10004, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 10004. Open meetings.

(e)(4) Public notice required by this subsection ~~shall include, but not be limited to, conspicuous~~ must include all of the following:

a. Conspicuous posting of ~~said the~~ notice at the principal office of the public body holding the meeting, or if no such office ~~exists exists~~, at the place where meetings of the public body are regularly ~~held, and making held~~.

b. Making a reasonable number of such notices copies of the notice available. ~~In addition, for all noneounty and nonmunicipal public bodies, public notice required by this subsection shall include, but not be limited to, electronic posting on a designated State of Delaware website, approved by the Registrar of Regulations by May 1, 2013, which shall be accessible to the public. In addition, all public bodies in the executive branch of state government that are subject to the provisions of this chapter shall electronically post said notice to the designated State of Delaware website approved by the Secretary of State.~~

c. Electronic posting that is accessible to the public as follows:

1. All public bodies in the executive branch of state government that are subject to the provisions of this chapter shall electronically post the notice to the designated State of Delaware website approved by the Secretary of State.

2. A public body that is not required to post the notice under paragraph (e)(4)c.1. of this section must post the notice on either of the following:

A. A designated State of Delaware website, approved by the Registrar of Regulations.

B. A website maintained or designated by the public body holding the meeting.

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

Section 3. Amend Chapter 100 of Title 29 by repealing § 10005 in its entirety and inserting in lieu thereof the insertions as shown by underline as follows:

§ 10005. Attorney General and judicial review.

108 (a)(1) Petition to the Attorney General. Any citizen may petition the Attorney General to determine whether a
109 violation of this chapter has occurred. A petition that fails to meet the requirements under this section may be rejected by
110 the Attorney General.

111 (2) Absent exceptional circumstances, the Attorney General, or Chief Deputy, shall issue a written
112 determination no later than 30 business days after the date the complete petition, including any requested additional
113 documents or information, is received under subsection (b) of this section. The Attorney General and Chief Deputy
114 may appoint designees as appropriate to exercise any duties under this section.

115 (3) A determination of the Attorney General or Chief Deputy is advisory only and may not be considered a
116 case decision.

117 (4) There is no right of appeal from a determination of the Attorney General or the Chief Deputy regarding the
118 application of this chapter.

119 (5) A citizen may not seek a written determination with respect to any alleged violation of this chapter that is
120 the subject of a pending lawsuit. If the citizen initiates a lawsuit during the pendency of a petition, the petition is
121 deemed withdrawn to the extent it requests a written determination with respect to any alleged violation of this chapter
122 that becomes the subject of the lawsuit.

123 (b) Petition Requirements and Procedures. The Attorney General shall establish the requirements and procedures
124 under which a petition and a public body's response must be filed and reviewed, and a written determination issued.

125 (1) A petition must include all of the following:

126 a. Identification of the specific FOIA issues and a brief explanation of the nature of the alleged violations.

127 b. All supporting correspondence and documentation and any additional documentation or information
128 requested by the Attorney General.

129 (2) A petition must be received by the Attorney General's designee within 120 calendar days after the date of
130 the conduct alleged in the petition to violate this chapter.

131 (c) Initial screening. On receiving a complete petition, the Attorney General shall determine whether the petition
132 includes allegations against an individual or entity that the Attorney General is obliged to represent under § 2504 of this
133 title. The Chief Deputy shall receive all petitions that include allegations against an individual or entity that the Attorney
134 General is obligated to represent, and the Attorney General shall receive all other petitions.

135 (d) Notice. The Attorney General or Chief Deputy shall notify the individual or entity identified in a petition
136 within 10 calendar days of receiving the petition under subsection (c) of this section.

137 (e) Lawsuits.

138 (1) Any citizen may challenge the validity of any act, omission, or other conduct of a public body because of a
139 failure to comply with this chapter, regardless of whether either of the following occurred:

140 a. The citizen first filed a petition under subsection (a) of this section.

141 b. A determination issued under subsection (a) of this section.

142 (2)a. If the Attorney General, or Chief Deputy, determines that a public body has committed a violation of this
143 chapter, the citizen may, instead of filing a lawsuit, request in writing that the Attorney General file a lawsuit on the
144 citizen's behalf and may also move to intervene as a party in any lawsuit filed by the Attorney General on the citizen's
145 behalf.

146 b. If the citizen requests that the Attorney General file a lawsuit on the citizen's behalf, the Attorney
147 General shall notify the citizen of the Attorney General's decision within 10 business days after the Attorney
148 General receives the request. There is no right of appeal from the denial of a request to file a lawsuit on the
149 citizen's behalf.

150 c. If the Chief Deputy finds that a violation of this chapter has occurred, or is about to occur, the Attorney
151 General may not represent the public body in a lawsuit filed under this chapter for that violation if the public body
152 fails to comply with any recommendation in the Chief Deputy's determination. If the Attorney General does not
153 represent the public body under this paragraph (c)(2)c., the public body is not required to obtain the approval of
154 the Attorney General to retain outside counsel under § 2507 of this title.

155 (3) Statute of repose.

156 a. Regardless of when a citizen learns of conduct that violates this chapter, a lawsuit may not be brought
157 more than 120 calendar days after the date of conduct that is alleged to have violated this chapter. If a citizen has
158 filed a petition under this section, this 120-day period does not expire until the later of the following:

159 1. Thirty calendar days after the written determination is issued.

160 2. The end of the 120-day period.

161 b. Except as allowed under paragraph (c)(3)a. of this section, the repose period may not be tolled or
162 extended.

163 (4) Jurisdiction and venue.

164 a. Except as provided under paragraph (c)(4)b. of this section, the Superior Court has exclusive
165 jurisdiction of all lawsuits challenging the validity of any act, omission, or other conduct of a public body under
166 this chapter.

b. The Court of Chancery has exclusive jurisdiction of any lawsuit to the extent the lawsuit includes a claim for injunctive relief.

c. The venue for a lawsuit under this section is in the county in which the public body ordinarily meets or in which the plaintiff resides.

(5) Burden of proof. The burden of proof is on the public body for any lawsuit brought under this section.

(6) Judicial Remedies.

a. Remedies for violations of this chapter in lawsuits brought under this section include all of the following:

1. Injunctive relief.

2. Declaratory judgments.

3. Writs of mandamus.

4. Forfeiture of all or part of the compensation of members of the public body.

5. Other appropriate relief.

b. Monetary damages are not recoverable under this chapter.

c. The court may award reasonable attorney fees and costs to a successful plaintiff of any action brought under this section. The court may award reasonable attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment.

SYNOPSIS

This Act revises the Delaware Freedom of Information Act (FOIA) to address how public bodies may respond to FOIA requests that are unreasonable, disruptive, or abusive; requires all public bodies to post notice of meetings electronically; and clarifies and simplifies how a citizen may challenge a public body's failure to comply with FOIA requirements. This Act does not change the definition of "public record."

Specifically, this Act does all of the following:

1. It amends the examination and copying of public records provisions of FOIA to alleviate the significant time, resources, and financial burdens imposed on public bodies by FOIA requests that are unreasonable, disruptive, or abusive. This Act allows a public body to deny a request from a requestor whose intent is to disrupt the essential functions of the public body or abuse the process and allows a public body to charge administrative fees for all reviews, including the review and redaction of information exempt from FOIA. The review and redaction of information is often performed by non-attorney staff in conjunction with necessary review for exceptions and exclusions.

2. Allows a public body to post electronic notice of a meeting on a website maintained, or designated, by the public body.

3. It clarifies, simplifies, and makes uniform the remedies available to citizens when a public body fails to comply with FOIA obligations as follows:

- Clarifies that Attorney General or Chief Deputy determinations are advisory and not appealable.
- Clarifies the timeframes in which a citizen may file a FOIA petition with the Attorney General.
- Eliminates the need for citizens to petition the Attorney General before initiating a lawsuit against an individual or entity that the Attorney General is obliged to represent because this appeal right was under utilized and of limited utility given the limited record produced in the petition process.

- Gives citizens 120 days to bring suit after a FOIA violation, except in that when a petition is filed, a petitioner may file a lawsuit the later of 120 days after the violation occurred or 30 days after issuance of the determination on the petition.

- Provides the Superior Court with exclusive jurisdiction over all FOIA disputes, except that lawsuits involving claims for temporary, preliminary, or permanent injunctive relief when there is no adequate remedy at law must be brought in the Court of Chancery.
- Clarifies that monetary damages may not be awarded for FOIA violations and requires that an award of attorney fees be reasonable.
- Clarifies that a citizen may not file a petition with the Attorney General regarding a FOIA violation that is the subject of a pending lawsuit and that a pending petition is deemed withdrawn if the FOIA violation becomes the subject of a lawsuit.
- Imposes a deadline for citizens to submit petitions to the Attorney General to ensure that citizens have sufficient time to pursue judicial remedies after the issuance of a written determination.
- Requires the Attorney General or Chief Deputy to issue a written determination within 30 business days of receiving a petition, unless there are exceptional circumstances.

This Act requires a greater than majority vote for passage because § 1 of Article IX of the Delaware Constitution requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly to amend a charter issued to a municipal or educational corporation and this Act may amend a municipal or educational charter.

This Act also makes technical corrections to conform existing law to the standards of the Delaware Legislative Drafting Manual.

Author: Senator Gay