



**MATTHEW P. DENN**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX: (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX: (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX: (302) 577-6499

**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 16-IB20**

**September 30, 2016**

**VIA EMAIL**

Mr. Russell Carollo  
1946 Newton Road Extension  
Red Creek Ranch  
Pueblo, CO 81005  
russellcarollo@gmail.com

**Re: FOIA Petition Dated December 7, 2015**

Dear Mr. Carollo:

We write in response to your letter dated December 7, 2015, and received December 14, 2015, in which you allege that the Office of the Delaware State Banking Commissioner (“OSBC”) violated certain provisions of the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001, *et seq.* (“FOIA”) in connection with your July 23, 2015 request for records.<sup>1</sup> We treat your correspondence as a petition (“Petition”) for a determination pursuant to 29 *Del. C.* § 10005(b) of whether OSBC’s denial of access to records violated FOIA.

Pursuant to our routine process in responding to petitions for determination under FOIA, we invited OSBC to submit a written response to your Petition. We received OSBC’s response on December 21, 2015 (“Response”). We have reviewed your Petition and OSBC’s Response. Our determination is that public bodies are only *required* to comply with FOIA when the requesting party is a citizen of the State of Delaware. In all other cases, public bodies *may, and are encouraged to*, fulfill FOIA requests. Because compliance with Delaware’s FOIA is mandatory only with respect to citizens of the State of Delaware, we conclude that OSBC did not violate

---

<sup>1</sup> Enclosed with your letter were a copy of a similar letter dated August 5, 2015 and a FedEx receipt showing delivery on August 7, 2015. This office was unable to locate your August 5, 2015 letter and can find no record of the letter in its log, which is why you did not receive an earlier response. We apologize for any inconvenience that this may have caused.

FOIA when it denied your July 23, 2015 request for records on the basis that you are not a Delaware citizen.

## **I. RELEVANT FACTS**

On July 23, 2015, you submitted a FOIA request that OSBC provide you with “...access to and copies of all records since Jan. 1, 2001, related in any way to Coinbase, Inc.” (“Request”).<sup>2</sup> On July 27, 2015, OSBC’s FOIA Coordinator informed you that OSBC would not provide the requested documents because it did not appear that you were a citizen of Delaware.

## **II. APPLICABLE LAW**

FOIA’s declaration of policy provides:

It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, [Title 29, Delaware Code, Chapter 100] is adopted, and shall be construed.<sup>3</sup>

FOIA further provides that “[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate body” and “[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.”<sup>4</sup>

## **III. ANALYSIS**

Although Delaware’s FOIA makes references to “citizens of this State” and “our citizens,” many public bodies in Delaware provide public records to non-Delaware citizens. Indeed, this office has encouraged the practice. The question presented by this Petition, however, is whether FOIA permits a public body to deny a request for public records on the basis that the requesting

---

<sup>2</sup> This Request is extremely broad and seeks records covering a time period of more than fifteen years. The request also states: “This request includes, but is not limited to, all licensing records; enforcement and/or administrative actions; all complaints; all other public records request letters seeking any of the information being sought in this request, all other communication related to the requests, and all responsive materials provided to requesters; and all correspondence to, from or about Coinbase, Inc.”

<sup>3</sup> 29 *Del. C.* § 10001.

<sup>4</sup> 29 *Del. C.* § 10003(a).

party is not a citizen of Delaware.<sup>5</sup> For the reasons set forth below, we conclude that FOIA does not prohibit a public body from denying a public records request on the basis that the requesting party is not a Delaware citizen. As such, OSBC did not violate FOIA by refusing to provide records in this instance.

Section 10003 of FOIA provides that reasonable access shall not be denied to any citizen.<sup>6</sup> Petitioner argues that “[a]ny Delaware citizen and non-citizen can file requests.” In support, Petitioner cites a 2006 opinion in which the United States Court of Appeals for the Third Circuit concluded that a contrary interpretation would cause Delaware’s FOIA to violate the Privileges and Immunities Clause of the United States Constitution. OSBC argues that “citizen” in this context means a citizen of Delaware. For the reasons discussed below, we agree with OSBC.

#### Petitioner’s Argument Rests on Discredited Case Law

Petitioner’s argument consists solely of a citation to a case whose legal analysis has been expressly discredited by the United States Supreme Court. Petitioner’s argument is quoted in its entirety below:

The [OSBC’s] response was not in accordance with Delaware law.

Any Delaware citizen and non-citizen can file requests. (29 Del. C. §10001. See *Lee v. Minner*, 369 F.Supp.2d 527 (D. Del. 2005) (where an out-of-state journalist and community activist brought a suit against the governor and others challenging the constitutionality, under the Privileges and Immunities Clause, of the “citizens only” restriction on access to public documents under Delaware’s FOIA), *aff’d*, 450 (sic) F.3d 194 (3d Cir. 2006).<sup>7</sup>

In *Lee v. Minner*,<sup>8</sup> the U.S. District Court for the District of Delaware held that limiting the applicability of Delaware’s FOIA to citizens of Delaware violated the Privileges and Immunities Clause of the United States Constitution. The decision was affirmed on appeal to the United States Court of Appeals for the Third Circuit.<sup>9</sup>

---

<sup>5</sup> We do not here focus upon the selective use by public bodies of “citizens-only” arguments with respect to certain records or of asserting the argument only after a petitioner has requested review by the Attorney General’s Office. Those are not the facts here.

<sup>6</sup> 29 Del. C. § 10003.

<sup>7</sup> Petition at 1 (formatting in original).

<sup>8</sup> *Lee v. Minner*, 369 F.Supp.2d 527 (D. Del. 2005), *aff’d*, 458 F.3d 194 (3<sup>rd</sup> Cir. 2006).

<sup>9</sup> *Id.*

Nearly seven years after the Third Circuit issued its decision in *Lee*, however, the United States Supreme Court decided *McBurney v. Young*.<sup>10</sup> The High Court agreed to hear the *McBurney* case for the express purpose of resolving the conflict between the rationale set forth in the *Lee* decision and the then-existing citizens-only FOIA laws on the books in seven states, including Delaware.<sup>11</sup> The Court concluded that a citizens-only Freedom of Information Act provision did not violate the Privileges and Immunities Clause of the United States Constitution.<sup>12</sup> Rather, *McBurney* made clear that the rationale of *Lee* was flawed from its inception.<sup>13</sup>

#### The Law Preceding *Lee v. Minner*

Before *Lee v. Minner* was decided, there was no question that Delaware's FOIA mandated the disclosure of public records only to citizens of Delaware.<sup>14</sup> This Office opined expressly that "the benefits of the [Freedom of Information] Act are applicable only to a citizen of the State of Delaware."<sup>15</sup> At that time, Section 10003 read, in pertinent part:

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

---

<sup>10</sup> 133 S.Ct. 1709 (2013).

<sup>11</sup> In *McBurney*, 133 S.Ct. at 1714, the United States Supreme Court stated:

Like Virginia, several other States have enacted freedom of information laws that are available only to their citizens. See, e.g., Ala.Code §36-12-40 (2012 Cum.Supp.); Ark.Code Ann. §25-19-105 (2011 Supp.); Del.Code Ann., Tit. 29, §10003 (2012 Supp.); Mo.Rev.Stat. §109.180 (2012); N.H.Rev.Stat. Ann. §91-A:4 (West 2012); N.J. Stat. Ann. §47:1A-1 (West 2003); Tenn.Code Ann. §10-7-503 (2012). In *Lee v. Minner*, 458 F.3d 194 (2006), the Third Circuit held that this feature of Delaware's FOIA violated the Privileges and Immunities Clause. We granted certiorari to resolve this conflict. 568 U.S. —, 133 S.Ct. 421, 184 L.Ed.2d 252 (2012).

<sup>12</sup> *Id.* at 1715-19.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *Del. Op. Att'y Gen.* 01-IB04 (Feb. 27, 2001); *Del. Op. Att'y Gen.* 91-IO03, 1991 WL 474652, at \*1 (Feb. 1, 1991) ("Non-Delaware citizens, therefore, may be denied access [to public records] completely.").

<sup>15</sup> *Del. Op. Att'y Gen.* 96-IB01 (Jan. 2 1996).

made available. Any reasonable expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy.<sup>16</sup>

Then, as now, of course, providing records to non-citizens was permissible.<sup>17</sup>

### Changes in the Law After *Lee v. Minner* Do Not Change Our Opinion

Delaware's FOIA was amended in 2012 to include removing the words "by any citizen of the State" from Section 10003.<sup>18</sup> We are not persuaded, however, that this change to the statute reflected a decision by the General Assembly to respond to the *Lee* decision or to mandate the disclosure of public records to non-Delaware citizens under FOIA. We recognize that a material change to statutory language creates a presumption that a change in the meaning of the statute was intended.<sup>19</sup> However, even if we assume that the 2012 amendment represented a "material change" to the statute,<sup>20</sup> the legislative record here sheds light on the General Assembly's intent, and would

---

<sup>16</sup> 29 *Del. C.* § 10003(a) (emphasis added).

<sup>17</sup> See, e.g., *Del. Op. Att'y Gen.* 01-IB04 ("Since HIA does not qualify as a citizen of the State of Delaware, New Castle County and the City of New Castle *may* deny HIA's request for traffic reports on that basis alone.") (emphasis added); *Del. Op. Att'y Gen.* 91-IO03 ("Non-Delaware citizens, therefore, *may* be denied access completely.") (emphasis added).

<sup>18</sup> Senate Bill 231 amended 29 *Del. C.* § 10003(a) as follows:

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

Del. S.B. 231, 146th Gen. Assem., 78 Del. Laws ch. 382 (2012).

<sup>19</sup> Cf. *Disabatino v. State*, 808 A.2d 1216, 1227 (Del. Super. 2002) ("When the General Assembly amends a prior statutory enactment by materially changing the language, rules of statutory construction create a presumption that a change in the meaning of the statute was intended . . . The party who avers that no change was intended in a law by a legislative amendment has the burden of establishing that intent.") (internal citations omitted).

<sup>20</sup> See, e.g., Black's Law Dictionary (10th ed. 2014) (defining material as, among other things, "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential"); Material Definition, Merriam-Webster, <http://www.merriam->

rebut the presumption that the elimination of the words “citizen of the State” was intended to expand Delaware’s FOIA to guarantee public records access to citizens of other states.

As an initial matter, the synopsis of the bill is devoid of any suggestion that the amendment was intended to afford the protections of Delaware’s FOIA to anyone other than Delaware citizens.<sup>21</sup> Specifically, the synopsis states: “This bill codifies the provisions of Executive Order No. 31 (signed October 20, 2011) and expands coverage to include school districts and other public bodies.”<sup>22</sup> Executive Order No. 31, which was issued by Governor Jack Markell, was generally intended to improve public access to public records by, among other things, directing executive branch agencies to develop uniform policies and forms and to create web portals for receiving FOIA requests. Notably, the Executive Order expressly states that the implementation of such uniform FOIA policies “is in the best interest of the *citizens of this State*.”<sup>23</sup> Similarly, the audio tape recordings of the House and Senate floor debates reveal nothing to suggest that the General Assembly had any intent other than adopting the procedures set forth in the Governor’s Executive Order and expanding the scope of public bodies subject to FOIA.<sup>24</sup> As such, we do not believe that the deletion from Section 10003 of the words “by any citizen of the state” was intended to broaden the scope of Delaware’s FOIA to benefit citizens of other states.<sup>25</sup> If it were, we believe that the General Assembly would have expressly indicated its intent and would likely have amended its Declaration of Policy to reflect the change.<sup>26</sup>

---

[webster.com/dictionary/material](http://webster.com/dictionary/material) (last visited August 31, 2016) (defining material as “having real importance or great consequences”).

<sup>21</sup> See *Johnson v. Colonial Ins. Co. of Cal.*, 1997 WL 126994 (Del. Super. Jan. 7, 1997) (“The synopsis of a bill is a proper source from which to glean legislative intent.”) (citing *Carper v. New Castle County Bd. Of Educ.*, 432 A.2d 1202, 1205 (Del. 1981)).

<sup>22</sup> See Del. S.B. 231.

<sup>23</sup> See Executive Order No. 31, entitled “Improving Access to Public Records Through Uniform Procedures for Freedom of Information Act Requests” (attached hereto as Exhibit 1). (emphasis added). The Executive Order also encouraged agencies of state and local government outside of the executive branch to adopt similar uniform policies and procedures.

<sup>24</sup> What little discussion there is on the House and Senate Floor describes the bill as making the Executive Order applicable to towns and other public bodies. There was a question about fees and another question about whether the statute would apply to Delaware State University. There is no discussion of the legislation having any other purpose or intent.

<sup>25</sup> The only exceptions are logically where the context seems to refer only to a citizen of a town (29 *Del. C.* § 10004(f)) and where the statute expressly refers to United States citizens (29 *Del. C.* § 10002(1)(17)(a)(5)(B)).

<sup>26</sup> We note that the General Assembly has previously amended Delaware’s FOIA by striking its Declaration of Policy in its entirety and inserting language replacing “citizens” with “our citizens” and adding language that the statute is intended to “further the accountability of government to the citizens of this State.” Compare Del. S.B. 256, 128th Gen. Assem., 60 Del.

Based upon the foregoing, and absent any evidence that the General Assembly has since broadened the scope of Delaware's FOIA to benefit citizens of other states, we conclude that the most reasonable interpretation, which is consistent with the United States Supreme Court's ruling in *McBurney* and the statute's Declaration of Policy, is that Delaware's FOIA is intended to guarantee access to public records only to citizens of the State of Delaware.

The Canons of Statutory Construction Lead to the Same Result:  
"Citizen," As Used in Section 10003, Means a Citizen of Delaware

Applying traditional canons of statutory construction yields the same result. "The rules of statutory construction are well-settled."<sup>27</sup> At the outset, we must determine whether 29 *Del. C.* § 10003 is ambiguous. "A statute is ambiguous if it is reasonably susceptible of two interpretations."<sup>28</sup> If the statute is unambiguous, then no statutory construction is required and the words are to be given their plain meaning.<sup>29</sup> However, if the meaning of a statutory provision is ambiguous, then Delaware law requires consideration of the statute as a whole and that individual sections be read "in light of all others to produce a harmonious whole."<sup>30</sup> "Undefined words . . . must be given their ordinary, common meaning" and a purpose must be ascribed to the legislature's use of statutory language if reasonably possible.<sup>31</sup> Indeed, as the United States Supreme Court has recognized:

---

Laws ch. 641 (1977) ("It is vital in a democratic society that public business be performed in an open and public manner so that the citizens shall be advised of the performance of public officials and of the decisions that are made by such officials in formulating and executing public policy. Toward this end, this Act is adopted, and shall be construed."), *with* Del. H.B. 264, 133rd Gen. Assem., 65 Del. Laws ch. 191 (1985) ("It is vital in a democratic society that public business be performed in an open and public manner so that *our* citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records, in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.") (emphasis added).

<sup>27</sup> *Taylor*, 14 A.3d 536, 538 (Del. 2011) (citing *Dewey Beach Enterprises, Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010)).

<sup>28</sup> *Dewey Beach*, 1 A.3d at 307.

<sup>29</sup> *Id.*

<sup>30</sup> *Taylor*, 14 A.3d at 538 (citing *Dewey Beach*, 1 A.3d at 307).

<sup>31</sup> *Dewey Beach* 1 A.3d at 307 (citing *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994)).

. . . Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . , or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.<sup>32</sup>

Importantly, “[t]he goal of statutory construction is to determine and give effect to legislative intent.”<sup>33</sup> Therefore, “the interpretation that best furthers the legislative purposes underlying the . . . statutory scheme must prevail.”<sup>34</sup>

Delaware’s FOIA does not define the term “citizen.” Pursuant to 1 *Del. C.* § 303, “[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language.” Black’s Law Dictionary defines “citizen” as “[a] person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges.”<sup>35</sup> Other dictionary definitions of the term “citizen” include both “a person who legally belongs to a country and has the rights and protection of that country” and “a member of a state.”<sup>36</sup> Thus, we assume without deciding that, when read in isolation, the meaning of “citizen” in the context of Section 10003 is ambiguous. However, as discussed more fully below, use of the word “citizen” throughout the remainder of the statute leads us to conclude that the better interpretation of “citizen” here is citizens of the State of Delaware.

In order to determine what the General Assembly meant when it used the term “citizen,” “it is critical to examine how it is used in the context in which it was to be given meaning.”<sup>37</sup> The word “citizen” is used in FOIA nineteen times. Concededly, in many instances, the context provides no strong indication of the intended meaning. Importantly, two of the references to

---

<sup>32</sup> *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (internal citations omitted).

<sup>33</sup> *Delaware Bd. Of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012) (quoting *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007)).

<sup>34</sup> *See Progressive Northern Ins. Co. v. Mohr*, 47 A.3d 492, 497 (Del. 2012) (“If the statute is reasonably susceptible to both interpretations, then it must be deemed ambiguous. In that case, the interpretation that best furthers the legislative purposes underlying the . . . statutory scheme must prevail.”).

<sup>35</sup> Black’s Law Dictionary (10th ed. 2014).

<sup>36</sup> Citizen Definition, Merriam-Webster, <http://www.merriam-webster.com/dictionary/citizen> (last visited August 31, 2016).

<sup>37</sup> *Fuller v. Delaware*, 104 A.3d 817 (Del. 2014) (citing *United Sav. Ass’n*, 484 U.S. at 371).

“citizen” in FOIA are to “our citizens” and “citizens of this State,” both of which are contained in FOIA’s Declaration of Policy.<sup>38</sup> To repeat, FOIA’s Declaration of Policy provides:

It is vital in a democratic society that public business be performed in an open and public manner so that *our citizens* shall have the opportunity to *observe the performance of public officials and to monitor the decisions that are made by such officials* in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and *to further the accountability of government to the citizens of this State*, this chapter is adopted, and shall be construed.<sup>39</sup>

We believe this language is more consistent with the intention that the beneficiaries of the statute be citizens of the State of Delaware than that they be citizens of the United States. Citizens of this state are those most likely to be able to “observe the performance of public officials” through the statute’s open meeting provisions and to have the greatest need to “monitor the decisions” officials make in formulating and executing public policy. The citizens of this state are the people who face directly the consequences of the decisions made by Delaware’s public officials and who, as compared to the citizens of other states, have the greater interest in and ability to hold those officials accountable.<sup>40</sup> The Declaration of Policy applies to the entire statute, and we simply are not persuaded that the remaining references to “citizen” are more consistent with references to a United States citizen than to a Delaware citizen.<sup>41</sup> We also note that the statute explicitly refers to a United States citizen in one context, where it undoubtedly makes sense to do so.<sup>42</sup>

For these reasons, we are not persuaded that reading “United States citizen” into the statute would “produce a harmonious whole or remain faithful to our legislators’ intentions.”<sup>43</sup>

---

<sup>38</sup> 29 Del. C. § 10001. See *Fuller*, 104 A.3d at 824 (“Lastly, this interpretation is most consistent with the policy expressly stated within the statute itself.”).

<sup>39</sup> 29 Del. C. § 10001.

<sup>40</sup> See *id.*

<sup>41</sup> There is one exception, but it does not support Petitioner’s argument. Based upon its context, 29 Del. C. § 10004(f) appears to apply only to the citizens of a town.

<sup>42</sup> See 29 Del. C. § 10002(l)(17)(a)(5)(B) (exempting “[r]ecords not subject to public disclosure under federal law that are shared by federal or international agencies and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for criminal acts against United States citizens or targets” from disclosure as “public records”).

<sup>43</sup> See *Zhurbin v. State*, 104 A.3d 108, 113 (Del. 2014) (“Courts should strive to give effect to the apparent intention of the legislature when that yields a sensible result.”); *State v. Fletcher*,

### Evidence of Citizenship

OSBC's FOIA coordinator inferred from your return address (Pueblo, Colorado), that you are not a Delaware citizen. This is consistent with your argument based on *Lee v. Minner*, and, indeed, is consistent with the fact that you have said nothing to contradict the inference to the agency or in your Petition to this office. In light of these facts and the analysis above, we cannot find that OSBC violated FOIA when it denied you access to records on the basis of non-Delaware citizenship.

#### IV. CONCLUSION

We are not persuaded by your interpretation of Delaware's FOIA. We conclude that "citizen," as used in Section 10003(a), refers to citizens of the State of Delaware. Thus, it is our opinion that Delaware's FOIA statute *guarantees* access to public records only to Delaware citizens. As to anyone else, the disclosure of public records is permissible, as long as it violates no other law. Indeed, we note that requests by non-Delaware citizens – including, for example, members of the media – may also promote the goals of the statute and benefit the citizens of Delaware. In this case, however, OSBC declined to fulfill your Request, and we cannot find that doing so constituted a violation of the statute.

You may appeal this determination to the Superior Court of Delaware within 60 days.<sup>44</sup>

Very truly yours,



---

Danielle Gibbs  
Chief Deputy Attorney General

cc: Frank Broujos, Deputy Attorney General  
Michelle E. Whalen, Deputy Attorney General

---

974 A.2d 188, 196-97 (Del. 2009) ("The role of this Court when construing a statute is to give effect to the policy intended by the General Assembly.").

<sup>44</sup> See 29 Del. C. § 10005(b) ("Thereafter, the petitioner ... may appeal an adverse decision on the record to the Superior Court within 60 days of the Attorney General's decision.").

# Exhibit 1

STATE OF DELAWARE



EXECUTIVE DEPARTMENT  
DOVER

**EXECUTIVE ORDER  
NUMBER THIRTY-ONE**

TO: HEADS OF ALL STATE DEPARTMENTS AND AGENCIES

RE: IMPROVING ACCESS TO PUBLIC RECORDS THROUGH UNIFORM  
PROCEDURES FOR FREEDOM OF INFORMATION ACT REQUESTS

WHEREAS, it is the policy of this State and this administration that the business of government be performed in an open and public manner so that citizens can "observe the performance of public officials" and "monitor the decisions that are made by such officials in formulating and executing public policy," 29 DEL. C. § 10001, and that policy is guaranteed and implemented by the Freedom of Information Act, 29 DEL. C. ch. 100 (the "Act" or "FOIA"); and

WHEREAS, access to public records is a vital component of FOIA, and public bodies are instructed by the Act to develop policies and rules to implement its provisions faithfully; and

WHEREAS, in the thirty years since the Act became law, executive branch agencies have enacted their own policies to implement the Act, and, over time, those policies have evolved and been amended as the needs of each agency required; and

WHEREAS, as a result of those amendments, the policies of executive branch agencies now differ substantially from one another, leading to inconsistencies and disparities in the implementation of FOIA across agencies; and

WHEREAS, after a comprehensive review of executive branch agency policies, I have concluded that it is in the best interest of the citizens of this State that uniform FOIA policies be implemented by each executive branch agency, and that such uniform policies would help reduce the inconsistencies and differences across agencies while promoting access to public records; and

WHEREAS, standardized FOIA policies for executive branch agencies will also help aid in the implementation of Senate Bill No. 87, which requires the Attorney General to promulgate a standard form by which FOIA requests can be made; and

WHEREAS, a more uniform FOIA policy should help reduce the time and expense of making a FOIA request, and can do so by reducing the copying costs charged by the agency and ensuring that agencies collaborate to ensure that records are produced even when the request is made to the wrong agency; and

NOW, THEREFORE, I, JACK A. MARKELL, by virtue of the authority vested in me as Governor of the State of Delaware, do hereby DECLARE and ORDER that:

1. All executive branch agencies shall implement and promulgate a policy for addressing requests made under the Freedom of Information Act substantially in the form attached hereto as Exhibit A. Executive branch agencies shall adopt such policy and rescind any existing FOIA policy no later than February 1, 2012.

2. All executive branch agencies shall develop a web portal for receiving FOIA requests through the Internet. Such portals shall utilize the standard request form required pursuant to Senate Bill No. 87 and promulgated by the Attorney General, and shall be available for use on Delaware.gov on or before December 1, 2011.

3. All executive branch agencies are reminded of their duty to provide reasonable assistance to the public in identifying and locating public records to which they are entitled access, and that all records held by the agency are "public records" to which the public should have access unless they fall within the scope of an enumerated exception in 29 DEL. C. § 10002(g).

4. Agencies of state and local government outside the executive branch are encouraged to reevaluate their FOIA policies and consider whether, in light of Senate Bill No. 87, evolving technology, or recent FOIA authority, their policies might be updated or amended to improve access to public records and potentially standardize the procedures by which requests for public records are made.

5. This Executive Order is a directive from the Governor to Executive Branch agencies. It is not intended to and shall not create independent causes of action for or on behalf of persons who allege a lack of compliance with the Order.



APPROVED this 20th day of October, 2011

*Jack Markell*  
\_\_\_\_\_  
Governor

ATTEST:  
*[Signature]*  
\_\_\_\_\_  
Secretary of State

## EXHIBIT A

### Uniform Policy Regarding FOIA Requests

#### **1.0 Definitions**

The following words and terms, when used in this policy, shall have the following meaning unless the context clearly indicates otherwise:

"Agency" means \_\_\_\_\_.

"FOIA" means the Freedom of Information Act as established pursuant to Title 29, Chapter 100 of the Delaware Code.

"FOIA Coordinator" shall mean the person designated by the Secretary to receive and process FOIA Requests.

"FOIA Request" or "Request" means a request to inspect or copy Public Records pursuant to Chapter 29, Section 10003 of the Delaware Code and in accordance with the policy hereunder.

"FOIA Request Form" means the form promulgated by the Office of the Attorney General upon which requests for Public Records may be made.

"Non-Custodial Records" shall have the meaning set forth in Section 3.6.

"Public Record" shall have the meaning set forth in *29 Del. C. §10002*.

"Requesting Party" shall mean the party filing a FOIA Request.

"Secretary" means the Secretary of \_\_\_\_\_.

#### **2.0 Purpose**

The purpose of this policy is to set forth the rules and procedures for responding to requests from the public for Public Records under Title 29, Chapter 100 of the Delaware Code, the Freedom of Information Act.

Agency employees are reminded that all Public Records requested under FOIA shall be considered open and subject to disclosure to the Requesting Party, and any information therein may be withheld only if a specific exception applies. Exceptions shall be construed in a manner that shall further the accountability of the Agency and to comply with the policy that the public shall have reasonable access to Public Records.

#### **3.0 Records Request, Response Procedures and Access**

##### **3.1. Form of Request**

3.1.1. All FOIA Requests shall be made in writing to the Agency in person, by email, by fax, or online in accordance with the provisions hereunder. FOIA Requests may be submitted using the FOIA Request Form promulgated by the Office of the Attorney General; provided, however, that any FOIA Request that otherwise conforms with the policy hereunder shall not be denied solely because the request is not on the promulgated form. Copies of the FOIA Request Form may be obtained from the Agency's website, or from the office or website of any state agency.

3.1.2. All requests shall adequately describe the records sought in sufficient detail to enable the Agency to locate such records with reasonable effort. The Requesting Party shall be as specific as possible when requesting records. To assist the Agency in locating the requested

records, the Agency may request that the Requesting Party provide additional information known to the Requesting Party, such the types of records, dates, parties to correspondence, and subject matter of the requested records.

### 3.2. Method of Filing Request

3.2.1.1. FOIA Requests may be made by mail or in person to the FOIA Coordinator at \_\_\_\_\_, by email to \_\_\_\_\_, by fax at \_\_\_\_\_; or via online request form, which may be found on the Agency's home page at \_\_\_\_\_.

### 3.3. FOIA Coordinator

3.3.1. The Secretary shall designate a FOIA Coordinator, who shall serve as the point of contact for FOIA Requests and coordinate the Agency's responses thereto. The FOIA Coordinator shall be identified on the Agency's website. The FOIA Coordinator may designate other Agency employees to perform specific duties and functions hereunder.

3.3.2. The FOIA Coordinator and/or his or her designee, working in cooperation with other Agency employees and representatives, shall make every reasonable effort to assist the Requesting Party in identifying the records being sought, and to assist the Agency in locating and providing the requested records. The FOIA Coordinator and/or his or her designee will also work to foster cooperation between the Agency and the Requesting Party. Without limitation, if a Requesting Party initiates a FOIA Request that would more appropriately be directed to another agency, the FOIA Coordinator shall promptly forward such request to the relevant agency and promptly notify the Requesting Party that the request has been forwarded. The Agency may close the initial request upon receipt of a written confirmation from the FOIA Coordinator of the relevant agency that the relevant agency has received such request. The Agency shall provide the Requesting Party with the name and phone number of the FOIA Coordinator of the relevant agency.

3.3.3. In addition to the foregoing responsibilities, beginning on January 1, 2012, the FOIA Coordinator shall maintain a document tracking all FOIA Requests for the then-current calendar year. For each FOIA Request, the document shall include, at a minimum: the Requesting Party's contact information; the date the Agency received the Request; the Agency's response deadline pursuant to §3.4; the date of the Agency's response pursuant to §3.4 (including the reasons for any extension pursuant to §3.4.1); the names, contact information and dates of correspondence with individuals contacted in connection with requests pursuant to §§3.3.2, 3.5 and 3.6; the dates of review by the Agency pursuant to §3.7 and the names of individuals who conducted such reviews; whether documents were made available; the amount of copying and/or administrative fees assessed; and the date of final disposition.

### 3.4. Agency Response to Requests

3.4.1. The Agency shall respond to a FOIA Request as soon as possible, but in any event within fifteen (15) business days after the receipt thereof, either by providing access to the requested records; denying access to the records or parts of them; or by advising 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 fifteen (15) business days, the Agency shall cite one of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.

3.4.2. If the Agency denies a request in whole or in part, the Agency's response shall indicate the reasons for the denial. The Agency shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.

### 3.5. Requests for Email

3.5.1. Requests for email records shall be fulfilled by the Agency from its own records, if doing so can be accomplished by the Agency with reasonable effort. If the Agency determines that it cannot fulfill all or any portion of such request, the Agency shall promptly request that the Department of Technology and Information ("DTI") provide the email records to the Agency. Upon receipt from DTI, the Agency may review the email records in accordance with § 3.7 hereunder.

3.5.2. Before requesting DTI to provide email records, the Agency shall provide a written cost estimate from DTI to the Requesting Party, listing all charges expected to be incurred by DTI in retrieving such records. Upon receipt of the estimate, the Requesting Party may decide whether to proceed with, cancel or modify the request.

### 3.6. Requests for Other Non-Custodial Records

3.6.1. If all or any portion of a FOIA Request seeks records controlled by the Agency but that are either not within its possession or cannot otherwise be fulfilled by the Agency with reasonable effort from records it possesses (collectively, the "Non-Custodial Records"), then the Agency shall promptly request that the relevant public body provide the Non-Custodial Records to the Agency. Prior to disclosure, records may be reviewed in accordance with §3.7 hereunder by the Agency, the public body fulfilling the request, or both. Without limitation, Non-Custodial Records shall include budget data relating to the Agency.

3.6.2. Before requesting any Non-Custodial Records, the Agency shall provide a written cost estimate 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.

### 3.7. Review by Agency

3.7.1. Prior to disclosure, records may be reviewed by the Agency to ensure that those records or portions of records deemed non-public may be removed pursuant to 29 Del. C. §10002(g) or any other applicable provision of law. In reviewing the records, all documents shall be considered Public Records unless subject to one of the exceptions set forth in 29 Del. C. §10002(g) or any other applicable provision of law. Nothing herein shall prohibit the Agency from disclosing or permitting access to Public Records if the Agency determines to disclose such records, except where such disclosure or access is otherwise prohibited by law or regulation.

### 3.8. Hours of Review

3.8.1. The Agency shall provide reasonable access for reviewing Public Records during regular business hours.

## 4.0 Fees

### 4.1. Photocopying Fees

4.1.1. In instances in which paper records are provided to the Requesting Party,

photocopying fees shall be as follows:

4.1.1.1. Standard Sized, Black and White Copies: The first 20 pages of standard sized, black and white copied material 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 (*i.e.*, \$0.10 for a single-sided sheet, \$0.20 for a double-sided sheet). This charge applies to copies on the following standard paper sizes: 8.5" x 11"; 8.5" x 14"; and 11" x 17".

4.1.1.2. Oversized Copies/Printouts: The charge for copying oversized Public Records shall be as follows:

18" x 22": \$2.00 per sheet

24" x 36": \$3.00 per sheet

Documents larger than 24" x 36": \$1.00 per square foot

4.1.1.3. 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"), and \$1.50 per sheet for larger copies.

#### 4.2. Administrative Fees

4.2.1. Administrative fees shall be levied for requests requiring more than one hour of staff time to process. Charges for administrative fees may include staff time associated with processing FOIA Requests, including, without limitation, (a) identifying records; (b) monitoring file reviews; and (c) generating computer records (electronic or print-outs). Administrative fees shall not include any cost associated with the Agency's legal review of whether any portion of the requested records is exempt from FOIA. The Agency shall make every effort to ensure that administrative fees are minimized, and may only assess such charges as shall be reasonably required to process FOIA Requests. In connection therewith, the Agency shall minimize the use of non-administrative personnel in processing FOIA Requests, to the extent possible.

4.2.2. Prior to fulfilling any request that would require a Requesting Party to incur administrative fees, the Agency shall provide a 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.

4.2.3. Administrative fees will be billed to the Requesting Party per quarter hour. These charges will be billed at the current hourly pay grade (pro-rated for quarter hour 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 4, including copying fees.

4.2.4. When multiple FOIA Requests are submitted by or on behalf of a Requesting Party in an effort to avoid incurring administrative charges, the Agency may in its discretion aggregate staff time for all such requests when computing fees hereunder.

4.3. Microfilm and/or Microfiche Printouts: The first 20 pages of standard sized, black and white material copied from microfilm and/or microfiche shall be provided free of charge. The charge for microfilm and/or microfiche printouts over and above 20 shall be \$0.15 per sheet.

4.4. Electronically Generated Records: 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.

#### 4.5. Payment

4.5.1. The Agency may require all fees to be paid prior to any service being performed

hereunder.

4.5.2. The Agency may require pre-payment of all fees prior to fulfillment of any request for records hereunder.

#### 4.6. Waiver of Fees Pursuant to Prior Policy

4.6.1. Notwithstanding anything herein to the contrary, if any executive branch agency subject to this policy had a FOIA policy in effect as of October 20, 2011, and such policy included a waiver of any copying or administrative fees (*i.e.*, for non-profit organizations or members of the media), then such agency shall have the right (but not the obligation) to continue such waiver of fees.

4.7. Appointment Rescheduling or Cancellation: Requesting Parties who do not reschedule or cancel appointments to view files at least one full business day in advance of the appointment may be subject to the charges incurred by the Agency in preparing the requested records. The Agency shall prepare an itemized invoice of these charges and provide the same to the Requesting Party for payment.

#### 5.0 Applicability

5.1. To the extent any provision in this policy conflicts with any other law or regulation, such law or regulation shall control, and the conflicting provision herein is expressly superseded.

#### 6.0 Agency-Specific Provisions

#### 7.0 Effective Date

This policy shall become effective immediately.