IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ROBERT P. REEDER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 1553-N
	)	
DELAWARE DEPARTMENT OF INSURANCE, the DEFENSIVE DRIVING CREDENTIAL COMMITTEE (DDCC), and the DEPARTMENT OF JUSTICE,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 9, 2006
Date Decided: February 24, 2006

Robert P. Reeder, Wilmington, Delaware, *Pro Se.*

Kevin R. Slattery, Esquire, James T. Wakley, Esquire, DEPARTMENT OF JUSTICE, Wilmington, Delaware; *Attorneys for Defendants.*

STRINE, Vice Chancellor

Plaintiff Robert P. Reeder filed this case against the Defensive Driving Credential Committee of the Department of Insurance ("DDCC") and the Department of Justice ("DOJ"), alleging that the DDCC, with the assistance of the DOJ, had violated various provisions of Delaware's Freedom of Information Act or "FOIA."[1] The defendants moved for summary judgment and the parties completed briefing. A hearing on the motion was held. After that, Reeder sought to have me recuse myself.

In this opinion, I resolve the pending motion for summary judgment and deny Reeder's request for recusal. In large measure, I find that Reeder's claims are either untimely, lack merit, or are moot given the recent abolition of the DDCC. As to one claim involving the minutes for a particular DDCC meeting, I find for Reeder and order appropriate relief — the correction of the inadequate minute.

I. Factual Background

A. Reeder's Legitimate Interest In The Regulation Of Defensive Driving Providers

Reeder is the owner of Delaware Defensive Driving, Inc. Delaware Defensive Driving is a for-profit defensive driving course provider under the Insurance Department's Regulation 607.[2] That Regulation sets out guidelines for approving course content and requirements for becoming a provider of driving courses. The Regulation also created the DDCC at least as early as 1998, to approve and regulate providers, courses, and instructors. Like the Insurance Department itself, the DDCC is, per

[1] 29 *Del. C.* ch. 100.
[2] 18 *Del. Admin. C.* 607.

Regulation 607, subject to Delaware's Administrative Procedures Act or "APA."[3] Because it was a public body, the DDCC was also subject to the requirements of FOIA. The DDCC had public meetings at least quarterly to discuss matters relating to its responsibilities. The DDCC had five members. Four of the members were state employees who worked directly for other state agencies, a structure that apparently caused some difficulties, as these employees had other responsibilities that were more primary to their employment. During all periods relevant to this case, Kathy S. Gravell, an employee of the Insurance Department, was the Chair of the DDCC.

In his business, Reeder competes against other for-profit providers of defensive driving courses. As with other professional education credit programs — such as continuing legal education programs — providers are subject to competitive harm if their rivals provide attendees with more credits than they fairly earned. That is, to the extent that a provider gives attendees three hours of credits for attending a class from 7:00 to 10:00 p.m. but actually lets attendees go at 9:00 p.m., that provider might get a leg up on a more scrupulous provider.

As is clear from his papers, Reeder believes that one of his competitors, the Delaware Safety Council ("Safety Council"), has not played fair for years. He believes that the DDCC has been complicit in the Safety Council's practices, in the sense that it has permitted the Safety Council to get away with violations of Regulation 607 and has otherwise favored it in comparison to other providers. In his answering submission,

[3] 29 *Del. C.* § 10100 *et. seq.*

Reeder makes the following strong accusation regarding the relationship between the DDCC and the Safety Council:

> In the calendar year 1994, documentation by the DOJ clearly established an illegal relationship between the [Safety Council] and the Insurance Department. While this illegal alliance between a state agency and a private business was halted . . . an improper nexus between the [Safety Council] and the Insurance Department continued. In the calendar year 2003 there was a transition from an improper relationship into an alleged conspiratorial relationship. In order to cover-up this alleged conspiratorial relationship the Insurance Department engaged in violations of FOIA . . . .[4]

B. The DDCC Public Meetings At Issue

Because of his keen interest in his industry, Reeder regularly attended DDCC meetings during 2004 and 2005.[5] In 2005 before this suit was filed, Reeder attended each of the scheduled DDCC meetings, which were held on February 11, April 12, April 29, and July 12. In addition to addressing the DDCC during public meetings and submitting issues of personal importance for consideration before the DDCC, Reeder also has sent communications to Gravell between meetings.

The claims at issue in this case originated from a course of events beginning in February 2005.[6] During that month, Reeder made a presentation at the February 11

[4] Reeder Br. at 1.

[5] According to the State, Reeder has attended "virtually every meeting for at least the last five years." State Br. at 4. Reeder appears to contest that he attended all these meetings although he does not contest that he attended the public meetings between February and July 2005. Reeder Br. at 62-65.

[6] Reeder's earliest complaints regarding collusion between the DDCC and the Safety Council seems to have been around March 2004 when Gravell allegedly agreed to pass along to the Insurance Department Reeder's request that the relationship between the DDCC and the Safety Council be investigated. Apparently, Reeder had not been contacted by anyone at the Insurance Department by early 2005 and therefore he emailed Commissioner Denn in January 2005 and Gravell in early February 2005 reiterating his complaints and seeking to get on the agenda of the

meeting of the DDCC during which he alleged that there was improper collusion between the Safety Council and the DDCC. In March 2005, Reeder sent an email to the only recently seated Insurance Commissioner Matthew Denn and others complaining that the Safety Council was in violation of Regulation 607.[7] Pursuant to Regulation 607, Gravell forwarded a formal complaint to the Safety Council, and the DDCC started an investigation.[8] In addition to allegations of violations by the Safety Council, Reeder accused individuals in the Insurance Department and the DOJ of fraud in the investigation of the Safety Council.[9]

On April 12, 2005, the DDCC scheduled a public meeting. A quorum was not present, however, as only Gravell and one other member attended. Despite the lack of a quorum, the two members of the DDCC voted to enter executive session to consider Reeder's allegations against the Safety Council and seek legal advice to answer certain relevant regulatory questions. Eventually, the two members ended the executive session, re-entered public session, and voted to take disciplinary action against the Safety Council — that is, they voted to find that the Safety Council had not complied with its obligations as a provider, a finding consistent with Reeder's complaint. But they did so without a quorum present.

February 11 DDCC meeting. *See* Reeder Br., App. C(1) (Emails dated Jan. 25 and Feb. 8, 2005).

[7] State Br. at 5.

[8] State Br. at 5 and Ex. C.

[9] State Br., Ex. E. **(**Emails dated March 2005 from Reeder to Deputy Attorney General Rich, Attorney General Brady, and others).

Less than two weeks later, on April 24, Reeder emailed the Insurance Department's assigned Deputy Attorney General, Michael J. Rich, alleging "Multiple Violations Of FOIA" by the DDCC based on the April 12 meeting.[10] The focus of Reeder's email was that the DDCC had purported to act without the presence of a quorum and also that Gravell was acting as an "enabler" of the Safety Council's "illegal activities."[11] In that email, Reeder referenced that FOIA provides a right to citizens to challenge certain activities by a public body that may have a prejudicial result and that if a violation of FOIA is found that legal fees may be awarded.

Gravell consulted with the DOJ as to the legality of the vote without a quorum present and was told the DDCC had erred by voting without a quorum. The next day, April 25, the DDCC published an amended public notice for the next DDCC meeting, which already had been scheduled for April 29. The original notice for the April 29 meeting went out before the DDCC acknowledged the impropriety of the vote at the April 12 executive session. Amendment of the public notice, therefore, was necessary to include mention of the possibility that part of the April 29 meeting might go into executive session to consider the complaint against the Safety Council. The notice for the meeting included the cryptic reference to a "Complaint," which was intended to refer to the complaint Reeder had made against the DDCC.[12]

Reeder received both the original and amended notices. Both refer again to the "Complaint" without mentioning that it was his complaint against the Safety Council.

[10] State Br., Ex. E (Email dated April 24, 2005 to Deputy Attorney General Rich).
[11] *Id.*
[12] State Br. at 16.

Reeder himself understood what the reference meant although an ordinary member of the public would likely not have.

Reeder attended the April 29 meeting. Before the meeting started, Reeder spotted Gravell speaking privately with a fellow DDCC member. A quorum was present at this meeting, but for some reason the DDCC failed to consider Reeder's complaint against the Safety Council. The DDCC, however, claims to have continued its investigation of the Safety Council and concluded its work in May 2005. Accordingly, the DDCC scheduled a meeting date of July 12, which it believed was the next earliest meeting date where a quorum would be present. The agenda in the public notice for this July 12 meeting again included reference to an item called the "Complaint," an intended reference to Reeder's complaint against the Safety Council, and also mentioned the possibility that the DDCC might enter executive session to discuss a pending complaint.

At the July 12 meeting, a report on the investigation of the Safety Council, including a recommendation for a sanction, was presented to the DDCC. The Executive Director of the Safety Council also commented on the report and recommendation. Reeder and another interested citizen then requested the opportunity to comment, but Gravell denied these requests and ruled that public comment was closed. She also ruled that only the party charged in the matter, the Safety Council, could speak. After that, the DDCC found that the Safety Council had violated its obligation as a provider and voted to enter a sanction against the Safety Council. Later in the meeting, Reeder was given an opportunity to speak for five minutes.

C. On August 10, 2005, Reeder Files This Action Under FOIA

On August 10, 2005, Reeder filed his initial complaint in this court. He named as the defendants the "Delaware Department of Insurance/Defensive Driving Committee (DDCC)" and the Department of Justice. In other words, Reeder's complaint was directed at the actions of the DDCC specifically, rather than the Insurance Department more generally. In the opening paragraph of the complaint, Reeder alleged that the DDCC and DOJ had engaged "in no less than eight (8) violations of [FOIA] in order to shield from the public the Department of Insurance's inappropriate/illegal relationship with the Delaware Safety Council, Inc." Although the complaint makes reference to this allegedly improper relationship, there are no substantive allegations in the complaint supporting that contention. Indeed, neither the sitting Insurance Commissioner, Matthew Denn, nor his predecessor, Donna Lee Williams, is even mentioned in the complaint. But what is mentioned is Reeder's allegation that the DOJ was "foster[ing] serious violations of FOIA . . ." by the DDCC. No factual basis for that allegation is contained in the complaint, other than that the DDCC, as a DOJ client, engaged in conduct that Reeder claimed to be in violation of FOIA.

In the complaint, Reeder sets forth eight counts as follows:

- Count I: This count alleges that the DDCC had failed to approve minutes in a timely manner because on July 12, 2005, it approved minutes for meetings extending back eight months.

- Count II: This count alleges that the DDCC went into executive session without just cause on April 12, 2005.

- Count III: This count alleges: a) that the agenda for the April 12, 2005 meeting did not identify the possibility of an executive session; and b)

that the meeting notice for the April 29, 2005 meeting was amended less than seven days before the meeting (to add Reeder's complaint against the Safety Council) and that the DDCC then deleted the amended item at the time of the public meeting without explanation. The count also alleges that the DDCC meeting notices do not properly identify agenda items with the required specificity. Although Reeder is not specific, this count seems to be addressed to Reeder's complaint against the Safety Council, its addition to the amended meeting notice for the April 29 meeting, the DDCC's failure to act on that complaint on that date, and the reference to that complaint by the mere use of the word "Complaint" in the meeting notice.

- Count IV: This count alleges that it was improper for the two members of the DDCC who showed up for the April 12, 2005 meeting to even meet in the absence of a quorum. That is, the count alleges that it was a violation of FOIA for the two members simply to discuss public business without a quorum present, whether in public session or not.

- Count V: This count alleges that Gravell refused to answer Reeder's questions at the July 12 meeting but answered questions from Safety Council representatives, in alleged violation of FOIA.

- Count VI: This count complains that the DDCC disclosed Reeder's identity as the complainant to the Safety Council, in alleged violation of FOIA.

- Count VII: This count alleges that it is wrongful for the DDCC to limit Reeder to speaking for five minutes at the July 12 meeting while permitting Safety Council representatives to speak for longer periods of time. Relatedly, it is alleged that the DDCC prevented Reeder and another citizen, John Flaherty, from speaking at all during another portion of that meeting.

- Count VIII: This count alleges that before and after the April 29 meeting, Gravell invited another member of the DDCC to meet with her in private. Reeder does not allege that public business was discussed between them.

It is also important to highlight what Reeder's complaint does not contain. The complaint is devoid of:

- Any mention of Commissioner Denn at all, or reference to any actions by him or any other personnel at the Insurance Department, other than Gravell in her role as Chair of the DDCC;

- Any contention that the decision of the DDCC regarding Reeder's complaint against the Safety Council was erroneous; and

- Any facts supporting an inference that the DOJ provided DDCC with advice intended to help it violate FOIA. At most, the complaint states the fact that the DDCC received legal advice from the DOJ during the period in which the meetings about which Reeder complains occurred.

In sum, the complaint only contains facts and counts challenging the compliance of the DDCC with its obligations under FOIA.

D. The State Moves To Dismiss And Reeder Moves To Amend His Complaint

On September 13, 2005, the State moved to dismiss the complaint, albeit in a manner that turned its motion into a motion for summary judgment. In reaction to that motion, Reeder sought leave to amend his complaint. His proposed amendments were modest. They consisted of:

- Amending Count VII to make clear that Reeder was alleging that it was a violation of FOIA for the DDCC to permit the Safety Council a greater opportunity to speak than he received;[13]

- Adding a demand that the State pay monetary damages, such as general damages, special damages, and the costs of this action, including pre- and post-judgment interest and attorneys fees;[14]

- Requesting prospective orders requiring the State to comply with FOIA in the future;[15]

[13] Am. Compl.
[14] Am. Compl.
[15] Am. Compl. ¶ 1.

- Seeking the issuance of an order, requiring the DDCC to publish "accurate and timely" minutes of all public meetings and other committee meetings in compliance with FOIA.[16]

Again, the amendment is notable for what it does not contain. Like the original complaint, the amended complaint: does not mention Commissioner Denn or any other personnel of the Insurance Department other than Gravell, in her capacity as DDCC Chairwoman; does not challenge the substance of the DDCC's determination of Reeder's complaint against the Safety Council; and does not contain facts supporting an inference that the DOJ provided the DDCC with legal advice intended to help the DDCC violate FOIA. The State opposed this motion to amend urging the court to delay consideration of the amendment in the interests of judicial economy pending the resolution of its motions to dismiss.

E. The Insurance Commissioner Proposes The Abolition Of The DDCC

During the period when the parties were briefing this motion, the Insurance Commissioner adopted an important regulatory measure. On October 1, 2005, the Commissioner proposed to abolish the DDCC and its role in the regulation of defensive driving courses and providers through a substantial amendment of Regulation 607.[17] This has significant practical implications for the concerns raised by Reeder throughout these proceedings.

These amendments to Regulation 607 were adopted on January 5, 2006 and became effective on February 11, 2006.

[16] Am. Compl. ¶ 2.
[17] Regulation 607 was promulgated by the Insurance Department pursuant to the requirements of 18 *Del. C.* § 2503(a)(6). *See* 9 *Del. Reg.* 524-28 (10/1/05) (proposing amendments).

The new amendments to Regulation 607 were responsive to many of the concerns catalogued by Reeder in his papers to this court. For example, in the order issued adopting the proposed changes, the Insurance Commissioner recognized the previous system of complaint investigation and adjudication by the DDCC as "cumbersome, inefficient, and time consuming."[18] Rather than the part-time DDCC assuming responsibility for regulation of defensive driving providers, as under the old Regulation 607, under the new Regulation, the elected Insurance Commissioner has direct responsibility. That responsibility extends to the process of adjudicating complaints against defensive driving course providers. Thus, under this restructuring, which centralizes administrative authority over defensive driving course providers, the Insurance Commissioner can be held accountable for how the regulatory process works and whether oversight is fair and impartial.

As important, the new amendments create a more formalized complaint process.[19] For example, if a complaint is filed properly, an investigation by an Insurance Department staff member is required that will conclude with a written report that must set forth specific information and recommend further action or dismissal. If a staff member recommends further action on a complaint, the Insurance Commissioner will determine what action is appropriate. The new process also provides interested citizens, including

[18] DEL. DEP'T. OF INS., *In re* Regulation 607, Order, Docket No. 2005-140 (Jan. 5, 2006).
[19] The DDCC was subject to Delaware's APA.

complainants such as Reeder, with greater opportunities for participation, such as enhanced procedures related to notice and review of decisions.[20]

By now, the new Regulation 607 has gone into effect. The DDCC has been abolished. The process for regulating defensive driving course providers has been altered fundamentally. This reality necessarily affects the proper handling of this case.

II. Procedural Framework

The State purported to move to dismiss under Court of Chancery Rule 12(b)(6). But the State introduced evidence in support of its motion, and thus its motion is properly treated as a motion for summary judgment.[21] That is especially appropriate because Reeder submitted a large volume of evidence in response to the State's moving papers. Relatedly, Reeder had moved to amend his complaint and the State opposed his motion.

Because the claims in the amended complaint have been fully briefed, I grant Reeder's motion to amend and will address whether summary judgment should be granted as to all of Reeder's claims, including the new claim he added in his amended complaint. In considering whether to grant summary judgment for or against Reeder, I apply a well established standard. To prevail, the moving party — in this case the State — must establish that there is no genuine issue as to any material fact and that the State is entitled to judgment as a matter of law.[22] In examining the record, I must draw every

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[20] *See* DEP'T. OF INS., *In re* Regulation 607 (2006).
[21] *See* Del. Ch. Ct. Rule 12(b); *Dave Greytak Enter. v. Mazda Motors* 622 A.2d 14, 16 (Del. Ch. 1992) ("Because the parties filed evidentiary matter outside the pleadings during the course of briefing, the motion will be treated as one for summary judgment.").
[22] Del. Ct. Ch. R. 56(c). *See, e.g., Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002); *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

reasonable inference in favor of the non-moving party, Reeder, and accept his version of any disputed facts.[23] Likewise, it is established that the court may grant summary judgment for the non-moving party if, after considering the record, it is clear that that party is entitled to judgment on a claim.[24] I now turn to the viability of the legal claims made by Reeder.

III. Legal Analysis

A. Are The Claims Arising From The April 12 And 29 Meetings Timely?

The State's first argument is that Reeder's claims that the DDCC violated FOIA in several respects at its April 12 and April 29 meetings are barred by the statute of limitations established by FOIA in 29 *Del. C.* § 10005(a). The State's argument is meritorious.

Section 10005(a) of FOIA permits citizens to challenge an action taken (or not taken) at a meeting of a public body as a violation of FOIA by filing suit "within 60 days of the citizen's learning of such action but in no event later than 6 months after the date of the action." Reeder filed his complaint on August 10, 2005 detailing his claims arising from the April 12 and 29 meetings. His filing was made well past the sixty-day period FOIA provides for citizens to file suit after learning of the action by the DDCC. Accordingly, certain of Reeder's claims are barred by the statute of limitations.

Here, there is no factual dispute that Reeder was present at both of the April meetings and became contemporaneously aware of the actions of the DDCC he

[23] *See* 810 A.2d at 347; 606 A.2d at 99-100.
[24] *E.g.*, *DaimlerChrysler Corp. v. Matthews*, 848 A.2d 577, 581 (Del. Ch. 2004); *Mell v. New Castle County*, 2003 WL 1919331, at *3 (Del.Ch. Apr. 11, 2003) (citations omitted).

challenged in his complaint. In fact, it was Reeder who initially raised the lack of quorum at the April 12 meeting in his April 24 email alleging "FOIA Multiple Violations" to Deputy Attorney General Rich, which was less than two weeks after the April 12 meeting. Further evidence establishes Reeder's direct knowledge of the irregularities relating to the April 12 meeting by at least April 26. On April 26, Reeder was sent a copy of the amended April 29 meeting agenda, which noted: "This agenda was amended . . . to incorporate business conducted on April 12, 2005 for lack of a quorum . . . ."[25] Thus, there is no question that as to the irregularities surrounding the April 12 meeting that Reeder knew and understood he had a right to challenge the DDCC's actions no later than April 26, but was tardy in filing suit.

Similarly, Reeder's knowledge of the procedural irregularities relating to the April 29 meeting was established in part as early as his receipt of the first agenda for the April 29 meeting, which was sent to him on April 21, and certainly, by April 26 when he received the agenda in an amended form. Reeder also attended the April 29 meeting where he witnessed Gravell speaking with Bush — a fellow DDCC member — in private, which now he alleges was improper under FOIA. Although he knew of these irregularities by April 29, Reeder waited until August 10 to file a complaint — approximately six weeks *after* the sixty-day period under 29 *Del. C.* § 10005(a) had passed or more than 100 days after the DDCC took an action that Reeder now challenges. Thus, Reeder's allegations pertaining to the April 12 and 29 meetings, in Counts II, III, IV, and VIII are untimely and must be dismissed.

[25] State Br., Ex. F.

Reeder's only proffered excuse for his untimely filing has no merit. In his moving papers and at oral argument, Reeder claims that he first "discovered [FOIA] on the internet" in mid-April 2005.[26] For example, he stated during the oral argument "*I discovered FOIA in April*. I began — I read FOIA for the first time in April."[27] That claim of "discovery" was also made by Reeder in his brief wherein he flatly states: "Mr. Reeder's suspicions . . . began to fester as he read and reread FOIA, which he discovered on the internet [in April]."[28] That excuse would be inadequate even if it were true. But the excuse is false as the record itself reveals.

In January 2005, Reeder received an opinion issued on January 3, 2005 from the Department of Justice affirming a complaint he had made against the Board of Education of the Capital School District.[29] The DOJ Opinion found that the Capital School District had violated FOIA by restricting the content of a speech Reeder made at a public school district meeting. In the letter, the following text appears:

> On August 10, 2003, we received your letter alleging that the Board of Education of the Capital School District ("the School Board") violated the open meeting requirements of the Freedom of Information Act, 29 Del. C. Chapter 100 ("FOIA"), by restricting your speech at a public meeting on March 17, 2004.[30]

Not only that, the twelve-page opinion is replete with references and citations to FOIA. First, the subject line of the Opinion is typed in bold and states "Freedom of

[26] Reeder Br. at 26.
[27] Tr. at 22-23 (emphasis added).
[28] Reeder Br. at 26. What I refer to as his brief is a very large compendium containing both argument and supporting documents.
[29] Attorney General's Opinion, No. 05-IB01 (Jan. 3, 2005).
[30] *Id.* at 1.

Information Act Complaint . . . ." There also are at least twelve references to "FOIA" as the legal basis on which the decision rests.[31] The Attorney General even states that the Opinion was being issued because FOIA requires the Attorney General, upon petition by a citizen, to determine "whether a violation of this chapter [FOIA] has occurred or is about to occur."[32] There is also a section entitled "Relevant Statutes" that cites only to provisions of FOIA and that quotes and discusses the open meetings provision of FOIA in the following way:

> Relevant Statutes
>
> FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute 29 Del. C. § 10004(a)
>
> FOIA authorizes a public body to meet in executive session to discuss "[p]ersonnel matters in which names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open." Id. § 10004(b)(9).[33]

Reeder admits to both receiving and reading the January 3 Opinion.[34] Although Reeder denies it,[35] Reeder was clearly put on notice of the meaning, existence and statutory location of FOIA by January 2005 after he received and read the Opinion.

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[31] *Id.*
[32] *Id.*
[33] *Id.* at 3-4
[34] Tr. at 24-26.
[35] Tr. at 30 (quoting Reeder on his receipt of the January 3 Opinion, "I will stand under oath and say I discovered FOIA in April, and I did not know what FOIA meant . . . at that time. I didn't pay any attention to FOIA at that time."). I need not, and therefore do not, opine whether Reeder was intending to mislead the court when he repeatedly argued that he "discovered" FOIA in April. Reeder argues that he did not mean to and notes that the January FOIA Opinion by the Attorney General was included in his large compendium. In the latter regard, Reeder's submission was a very lengthy one and the Opinion was not highlighted by him. He did not cite

As important, it is clear that Reeder was aware of FOIA in April, in plenty of time to have filed a timely complaint under § 10005. Making that obvious is Reeder's own email to Michael Rich, the DDCC's Deputy Attorney General. In that email entitled "FOIA Multiple Violations," Reeder noted his awareness that FOIA provided him with the "right to go to the Court of Chancery if [he] feel[s] a violation of FOIA has caused a prejudicial result."[36] Not only did Reeder refer to FOIA in this email, he referenced the substantive content of FOIA by explaining that he understood this court's jurisdiction to hear citizens' challenges. Notably, the provision of FOIA that provides this right is the same one that contains the sixty-day statute of limitations for bringing an action for enforcement.[37]

Put simply, Reeder was aware of the nature of the conduct taken by the DDCC at its April meetings in April. In January, he received a FOIA opinion from the DOJ referencing FOIA and summarizing it. In April, he read FOIA and accused the DDCC of multiple FOIA violations.

There is therefore no excuse for Reeder's failure to file in the time frame required by the statute. By its plain terms, § 10005 of FOIA reflects the General Assembly's determination that FOIA claims must be filed promptly. This is made most obvious by the fact that the statute bars a FOIA claim filed after six months, even if the citizen did not learn of the public body's action until after that period. Here, Reeder was

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to it in the sections of his brief that dealt with when he first learned of FOIA. That said, I repeat that I need not and do not making any finding that Reeder intended to mislead the court.

[36] State Br., Ex. E (Email dated Apr. 24, 2005 to Deputy Attorney General Rich).

[37] *See* 29 *Del. C.* § 10005(a).

immediately aware of the conduct of the DDCC at its April meetings that he contends violated FOIA and began accusing the DDCC of FOIA violations that same month.

Reeder counters that, although he read the FOIA statute in late April,[38] he did not understand FOIA and that he needed additional time to better understand it before filing a complaint. Reeder is adamant on this point and during the January 6 hearing before this court he repeatedly denied knowing or understanding FOIA before the April meetings or even after reading the statute online in April. But Reeder's argument that he did not understand the statute does not excuse his late filing. By his own admission, "[I] read and reread FOIA which [I] discovered on the internet,"[39] in April 2005.[40] If he was uncertain about what it meant, he could have consulted legal counsel, as he admits he does.[41] Having already accused the DDCC of FOIA violations in April, there was no excuse for Reeder not reading and acting upon the clear language of § 10005, which required him to bring suit within sixty days. Reeder's argument that he should be

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[38] Reeder Br. at 65; Reeder Ltr. dated Jan. 24, 2006.

[39] Reeder Br. at 26; Tr. at 22-23 (quoting Reeder, "I discovered FOIA in April. I began – I read FOIA for the first time in April."), 25, 30 (quoting Reeder, "In April of 2005, on the internet. In fact, Mr. Flaherty directed me to FOIA on the internet.").

[40] Reeder also admits that Deputy Attorney General Rich told him how he could get FOIA online. At a later point, Rich also told Reeder about the existence of information about FOIA on the Attorney General's website. In his answering papers, Reeder describes this reference thusly:

> June 9, 2005 – Deputy Attorney General Rich responds to Mr. Reeder's email requesting information about DAG Rich's further research comment. DAG Rich basically told Mr. Reeder to go away. However, he made a fatal error. DAG Rich gave Mr. Reeder the web site address . . . At this point Mr. Reeder's FOIA knowledge took on a new level of learning . . . .

Reeder Br. at 31-32.

[41] Reeder Br. at 32 (noting role of Raymond Otlowski, Esq., "friend and legal advisor" who sent letter to Insurance Commissioner Denn on Reeder's behalf); Tr. at 67-68.

excused from making a timely filing because he did not bother to read FOIA is akin to a driver's education student telling his teacher that although he had the summary of the motor vehicle code the teacher gave him, he did not know that he was responsible for reading it. There is no reason to interpret the state of limitations other than as it is plainly written.[42]

Put plainly, § 10005 represents a legislative mandate that FOIA claims be brought in a timely manner or be forfeited. That mandate would be dishonored if the courts permit citizens to claim that the period is tolled until they take the time to read the statute's clear words. Indeed, it is hard to fathom how legislative limitations periods

[42] Reeder also maintains that tolling the statute of limitations is justified because he was misled by then Deputy Attorney General Rich, who was counsel to the DDCC, as to what the law is regarding whether the DDCC could hold public meetings and/or vote without quorum. Whether or not Deputy Attorney General Rich's opinion regarding the substantive requirements of FOIA was correct, there is no record basis to support the proposition (which Reeder does not even advance) that Rich did anything to lead Reeder to believe he had longer than the period set forth in § 10005 to sue. As a matter of completeness, it also bears mentioning that Rich advised the DDCC that the action allegedly taken at the April 12 meeting regarding Reeder's complaint against the Safety Council was improper because of the absence of a quorum. Thus, to that extent, Reeder believes Rich did the right thing. What Reeder continues to complain about is the failure of Rich to take the position that it was a violation of FOIA for two members of the DDCC who showed up at a noticed meeting of the DDCC to discuss public business even though a quorum of the members did not show up. Because Reeder's claim is time-barred, I need not address his contention in this regard. But I do note that the plain words of FOIA seem directed at requiring public bodies to do their business in public (unless they go into a proper executive session) and that this is accomplished by subjecting public bodies to open meeting requirements when a quorum that could take administrative action is present. *See* 29 *Del. C.* § 10004(a); *see also NewsJournal Co. v. McLaughlin*, 377 A.2d 358, 362 (Del. 1977) (noting that the statutory definition of "meeting" seems satisfied when a quorum of a public body gathers for purpose of discussing or taking action regardless of what they might do once convened). It is by no means obvious that members of a public body do anything wrong in the following scenario. Assume three members show up at a meeting, for example, on a snowy night when the body intended to hear comments from the public. Because of the weather, a quorum does not arrive, but members of the public are present who wish to provide input. Recognizing that they cannot take action because a quorum is not present, would it be a violation of FOIA for the members who are present to hear from the members of the public who braved the storm to present their views? The offense such conduct would work to the text or spirit of FOIA is, frankly, hard to discern.

would serve their purpose if plaintiffs who were aware of the conduct to which they object could claim that they were excused from timely compliance because they were originally ignorant of the statute under which they ultimately sought relief.[43] It would be even less justifiable to excuse an untimely filing by a plaintiff who was aware of the relevant statute, read it well within the limitations period, and yet failed to bring timely suit.

In sum, Reeder failed to honor the time bar clearly set forth in § 10005 and thus his claims regarding the April meetings of the DDCC must be dismissed. Because those claims are untimely, I do not discuss whether any of them have merit. Counts II, III, IV, and VIII are dismissed under 29 *Del. C.* § 10005(a).[44]

B. Reeder's Additional Claims Are Without Merit

Reeder's complaint makes four other claims against the State that are timely under § 10005(a). The State has attacked the viability of each of these claims on its merits or

[43] Under Delaware law, the statute of limitation begins "at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action." *State of Delaware v. Pettinaro Enter.*, 870 A.2d 513, 531 (Del. Ch. 2005); *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999). *See also Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 834 (Del. 1992).

[44] In Count III, Reeder contends that the DDCC's meeting notices failed to adequately describe the business it would conduct. Although his papers do not indicate in particular which descriptions he found insufficient, I surmise that it is the descriptions of his own complaint against the Safety Council, which appear typically as a one-word description: "Complaint." That contention applies not only to the April meetings, but to the July 12 meeting. As a result, his contention as to the July 12 meeting remains timely. Because the DDCC has been abolished, there is no proper basis for the issuance of prospective relief on this claim as to the July 12 meeting. Although Reeder's claim about the issue was well-founded because the description was, as he contends, inadequate to put the public on fair notice, it is public record and publicly documented that Reeder filed a complaint with the DDCC against the Safety Council, which was heard at its July 12 meeting. Given that Reeder was the complainant, understood what the agenda notice was intended to cover, and that the official record now reflects that subject matter with adequate specificity, this claim is moot.

because Reeder's request for relief has been mooted by the abolition of the DDCC. I take the arguments in order of the Counts they address.

In Count I, Reeder alleges that the DDCC's failure to approve public meeting minutes in a "timely" manner is a violation of FOIA § 10004(f) or the open meetings provision. Section 10004(f) states, "Each public body shall maintain minutes of all meetings . . . and shall make such minutes available for public inspection and copying as a public matter." As evidence of his contention, Reeder notes that during the July 12 meeting, minutes were submitted for approval as much as eight months after the meeting to which they related had been held.[45]

The State admits that the DDCC could and should have been more expeditious in the preparation of minutes. The State also explains that the Insurance Department was concerned about the extent of the time delay in approving meeting minutes, and accordingly, took internal action to prevent reoccurrence of this kind of delay.[46] But the State denies that a failure to approve meeting minutes within a specific period of time is a violation of FOIA.

Given that the DDCC has now been abolished, I decline to issue an advisory opinion about whether the DDCC's approval of minutes in July of 2005 from past meetings as far back as eight months was a violation of FOIA. By its explicit terms,

[45] Reeder Br. at 51.
[46] State Br. at 9 (representing that "the DDCC has indicated that for the remainder of its existence, it will complete and approve its meeting minutes from the previously held meeting at the next regularly scheduled meeting."); Tr. at 85 (Deputy Slattery: "I just want to note that the Commissioner was not pleased when he found out that the July minutes had not been prepared by the October meeting. And he did take appropriate internal action as a result of that.").

Delaware's FOIA — unlike the FOIA of certain other states[47] — does not contain a temporal requirement for the approval of minutes. The ability of a public body to prepare and approve minutes within a certain time period depends on several factors, including the adequacy of staffing and the frequency of the public body's meetings. Although I agree with Reeder that there is a point at which a public body's torpor in approving minutes rises to the level of a failure to keep minutes in accordance with § 10004(f), courts should be cautious about articulating a bright-line rule that the General Assembly could have, but did not, adopt.[48] The adoption of a judicial mandate of that kind comes with a high risk of error and a low level of legitimacy. Without question, such a mandate would involve the judicial determination that scarce administrative resources must give priority to the completion of minutes rather than other agency objectives, many of which are also required by statute.

The reality is that the DDCC took action at the July 12 meeting to approve minutes for meetings that occurred as far back as November 2004.[49] Thus, Reeder in essence challenges the very action that he claims was overdue — the approval of the

[47] *E.g.*, GA. CODE ANN., § 50-14-1 ("The minutes of a meeting of any agency shall be promptly recorded and such records shall be open to public inspection once approved as official by the agency, but in no case later than immediately following the next regular meeting of the agency.").

[48] In July 2005, the General Assembly enacted Senate Bill 131 establishing that the minutes of public meetings must be posted online within five days of the final approval of minutes. The General Assembly did not add a standard for when final approval must occur. The State points out that this was an opportunity for the General Assembly to address a temporal requirement for minutes but did not. *See* S.B. 131, 143rd Sess. (enacted July 12, 2005) ("All public bodies in the executive branch of state government . . . shall electronically post final approved minutes of open public meetings to the designated State of Delaware website . . . within five working days of final approval of said minutes.").

[49] Compl. at Count I.

minutes for the meetings before July 12. Given that reality, the abolition of the DDCC, and the delicacy of formulating a rule for the timeliness of minute approval in the absence of a statutory mandate to that effect, judicial restraint is warranted. I therefore dismiss Count I as moot.

Reeder's next pair of claims are in tension. In the first, set forth in Count VI of the Complaint, Reeder alleges it was a violation of FOIA for the DDCC to reveal him as the complainant against the Safety Council. In the second, set forth in Count V and VII, Reeder alleges that the DDCC violated FOIA by affording the Safety Council a greater opportunity to speak at the July 12 meeting than he received.

I address these claims in turn. Reeder contends that it was a violation for the DDCC members to refer to him publicly as the complainant against the Safety Council[50] because there is a portion of FOIA[51] that exempts from the definition of a public record the following:

> For the purposes of this chapter, the following records shall not be deemed public: . . . (3) Investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files . . . ; (4) Criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy. . . Agencies holding such criminal records may delete any information, before release, which would disclose the names of witnesses, intelligence personnel and aids or any other information of a privileged and confidential nature.[52]

But Reeder misunderstands these exemptions. Although the exemptions limit public access in certain circumstances, they do not purport to create an affirmative right

[50] Compl. at 4.
[51] In his complaint, Reeder referred to these exemptions as being set forth in 29 *Del. C.* § 10003(a). They are more properly exemptions from the scope of § 10002(g)(3)-(4).
[52] 29 *Del. C.* § 10002(g)(3)-(4).

of non-disclosure. Indeed, even as to the sensitive category of witnesses to crimes, the statute says that agencies holding records containing witness names "may" delete their names before releasing other parts of the records.[53] One need not dilate now on the nice question of whether the exemptions to the definition within FOIA can be read alone (without reference to any common law tradition or other source of positive law suggesting a privacy right) as supportive of a citizen's right to prevent the State from disclosing their identity in certain circumstances.[54]

What is clear is that no such right exists here. For one thing, the nature of the complaint made by Reeder against the Safety Council is not of the kind that warrants non-disclosure. Reeder, a competitor of the Safety Council, was alleging that the Council was not playing by the rules and was unfairly being permitted to get away with it. That sort of allegation of civil wrongdoing is made every day in lawsuits and in administrative tribunals without secrecy. Furthermore, even in a criminal case, a complainant or a witness ultimately must give their evidence in a manner that can be confronted by the accused. As uncomfortable as it is for most crime witnesses, they have to tell their stories in open court. In this case, § 8.1 of Regulation 607 required that the Safety Council, as the charged party, receive a copy of a complaint filed with the DDCC and nothing in

[53] 29 *Del. C.* § 10002(g)(4).

[54] *Lawson v. Meconi*, 2005 WL 1323123, at *4, *6 (Del. Ch. May 27, 2005) (noting that the question of whether a FOIA statute grants a right of public access to a document is analytically distinct from whether the government must treat a document exempted from FOIA's definition of a public record as a confidential one, not subject to public disclosure, and that the latter question involves a consideration of whether the common law or a statute other than FOIA gives a citizen a right to demand that the record be maintained as confidential).

Regulation 607 promised a complainant that his identity would be kept confidential.[55] Finally, to the extent that the DDCC labeled Reeder as the complainant, it did little that he already had not done himself. Reeder made his charges against the Safety Council at prior DDCC meetings at which he demanded a DDCC investigation. Given his own public dissemination of his charges in various fora — including the media — Reeder had no expectation of privacy the DDCC was bound to protect.[56] For all these reasons, Count VI is dismissed.

I turn now to Reeder's claim that the DDCC violated FOIA during the July 12 meeting by refusing him the opportunity to (i) make comments; (ii) question the DDCC; and (iii) speak beyond five minutes when he was permitted to comment.[57] Reeder complains of these actions because the Safety Council was allowed to comment and ask questions of the DDCC members beyond five minutes. Reeder bases his claims on § 10001 and § 10004(a) of FOIA.

Section 10001, a declaration of policy, explains the purpose behind the adoption of FOIA stating in part:

> 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 performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy . . . [58]

[55] *See* 18 *Del. Admin. C.* 607 § 7.1.3.
[56] Among Reeder's time-barred claims is a contention that the April DDCC meeting agendas did not adequately identify the pending matter against the Safety Council. A more specific identification could have identified that matter as "Reeder Complaint Against Safety Council For Violations Of Regulation 607." *See supra* note 44.
[57] Compl. at Counts V and VII.
[58] 29 *Del. C.* § 10001.

Section 10004(a), which is the open meetings provision of FOIA, states "Every meeting of all public bodies shall be open to the public except those closed [in certain statutorily enumerated instances, including executive session]."[59]

Reeder misunderstands the central thrust of FOIA. FOIA's purpose is to enable citizens to see their government do business and to obtain access to public records.[60] By these measures, it is hoped that more public-regarding decisions will be made, as public officials will know that the public can scrutinize their actions and hold them accountable through the various means afforded in our republican form of democracy.

Although FOIA entitles citizens to notice of public meetings and to attend meetings of public bodies, FOIA does not mandate that public bodies allow for public comments at any or all meetings.[61] There is nothing in the text of the declaration of policy or the open meeting provision requiring public comment or guaranteeing the public the right to participate by questioning or commenting during meetings. What is provided by FOIA generally, and by the open meetings provision in particular, is public access to attend and listen to meetings.[62] Moreover, should a public body permit the public to comment, there is no requirement in FOIA that an unlimited or extended period

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[59] 29 *Del. C.* § 10004(a).
[60] *See Lawson*, 2005 WL 1323123, at *6 (noting the policy behind FOIA is to inform the public, provide access to public records, and ensure government accountability); *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. Ct. 1995).
[61] 29 *Del. C.* §§ 10001-10005.
[62] Attorney General Opinion, No. 04-IB15 (Sept. 10, 2004) (quoting *Whiteland Woods L.P. v. Township of West Whiteland*, 193 F.3d 177, 181 (3d. Cir. 1999) ("When the state law requires meetings to be open to the public, they 'are precisely the type of public proceeding to which the First Amendment guarantees a public right of access.'")).

of time must be provided to each citizen nor that public bodies permit the public to question their individual members.

This, of course, does not mean that public bodies have free rein to act arbitrarily or invidiously against citizens who attend their meetings. If a public body seeks comments, for example, on a proposed regulation, both the Administrative Procedures Act and the First Amendment might preclude the body from choosing to hear comments only from certain citizens, and not others, depending on the reason given for the distinctions drawn.[63] But the mere fact that FOIA opens the door to public attendance does not mean that it contains an implicit license for the judiciary to begin to invent a common law of public participation for public bodies.

Here, Reeder, who admits to being allowed to speak at previous DDCC meetings in 2005 during which he made serious accusations against the Safety Council, largely complains that the Safety Council — the party facing disciplinary action — was given a greater opportunity to speak at the July 12 meeting than he or other members of the public were.[64] At that stage, the DDCC limited itself to interacting with the charged party and answered questions from the charged party, while declining to hear from

[63] *E.g.*, *Police Dep't of the City of Chicago et al. v. Mosley*, 408 U.S. 92, 96 (1972) ("Once a forum is opened up to assembly . . . government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone . . . ."); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1192 (3d Cir. 1986) *citing Bonner-Lyons v. School Committee of Boston*, 480 F.2d 442, 444 (1st Cir. 1973) (explaining that it is well-settled that once a forum is open for expression, under the mandate of First Amendment and equal protection clause neither government nor private censor may pick and choose between those views which may or may not be expressed). *But see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech).

[64] *See* Compl. at Counts V and VII.

members of the public at that stage of the meeting. Nothing in the text of FOIA condemns the distinction the DDCC made, which on its face is a rational one. Indeed, nothing in FOIA purports to even address this kind of procedural decision, which is of the kind that public bodies have to make on a regular basis.

Reeder admits that he was later permitted to speak to the DDCC but only for five minutes. He also complains that the DDCC would not answer his questions. Neither of these concerns has a textual foundation in FOIA. Moreover, each would enmesh the judiciary in areas of executive discretion ill-suited for judicial oversight. Judges, for example, know that it is often impossible to do justice to all matters without time limitations for each. There is nothing facially arbitrary about limiting Reeder to speaking for five minutes at the July 12 meeting, particularly in light of his earlier communications to the DDCC about the same subject. Likewise, FOIA does not authorize judicial policing of public body determinations only to hear public comments but not to respond to questions.

This is not to say that there are not bodies of law that courts can and must apply to make sure that public bodies discharge their legal responsibilities in a non-arbitrary and public-regarding manner. There, of course, are. When courts are asked to review the substance of agency decisions under the APA,[65] for example, the fairness of the process

[65] *E.g.*, *NVE, Inc. v. Dep't of Health and Human Services*, 436 F.3d 182, 191 (3d Cir. 2006) (noting that judicial review of a challenge to administrative action under the APA focuses on the agency's decision-making process) *citing Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983); *O'Neill v. Town of Middletown*, 2006 WL 205071, at *34-*36 (Del. Ch. Jan. 18, 2006) (holding a zoning decision void because the

used by the administrative agency is often called into question and can serve as a basis for judicial intrusion. Likewise, the First Amendment substantially prohibits public bodies that have decided to hear from the public from closing out those they disfavor for improper reasons. These are just two examples of the way in which the law operates to encourage fair and equitable behavior by administrative agencies.

But it is important that courts also respect what the General Assembly has not done. If the General Assembly wished to include requirements for public participation in FOIA, it could have done so. It plainly did not, and it would be improper for me to write into FOIA requirements that are clearly not there, which is what Reeder would have me do. That is especially so in a situation when the very body whose acts are challenged has been abolished. Counts V and VII are dismissed.

The final claim made by Reeder against the DDCC relates to his contention that the DDCC approved erroneous minutes for its February 11, 2005 meeting at its July 12, 2005 meeting. The part of the minutes that is challenged simply states:

> New Business
> Robert Reeder, a defensive driving provider, asked the Committee to request an investigation by the Insurance Commissioner of what he feels is the Committee's conspiracy with the Delaware Safety Council.[66]

Reeder claims that this is insufficient under § 10004(f) of FOIA because it omits the action taken by the DDCC in response to his request. The State argues that the DDCC's minutes from that meeting are neither inaccurate nor incomplete, and while in hindsight

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proper procedure, including development of a sufficient factual record to sustain the action, was not undertaken).

[66] State Br., Ex. G (Minutes of Feb. 11, 2005 Meeting).

could have been more expansive, the minutes are sufficient under the statute's requirements.

In a transcript of the meeting agreed upon by the State and Reeder, Chairwoman Gravell of the DDCC admittedly stated the following:

> Mr. Reeder: ". . . I was saying that I . . . been an allegation that there is (inaudible) an indication of conspiracy/collusion between the Department of Insurance and the Delaware Safety Council, and your email said this was being turned over to the Department of Insurance for investigation."
>
> Ms. Gravell: "Well I'll tell you what, at this point I will have to pass it on because we (inaudible) a new administration."
>
> Mr. Reeder: "Okay. Then I would request that the Committee contact Commissioner Denn to suggest there be an investigation as to potential conspiracy between the Delaware Safety Council and the Department of Insurance."
>
> * * *
>
> Ms. Gravell: "I have an idea that might help everybody here to an end. *That is we've already agreed that the Committee will present to the Commissioner your suggestion that there be an investigation*, and it might be in everyone's best interest if you put you[r] side and argument (inaudible) and present it to them because this Committee can't do anything to help you with the questions you've asked so far, and it might be best if it . . . put in writing and I present it to the Commissioner."
>
> Mr. Reeder: "[inaudible] I'd like an investigation 'cause I think there is a solution."
>
> Ms. Gravell: "Well then, then it might be the best interest for you to put this [inaudible] . . . I'll present it to the Commissioner, you know, as part of the recommendation for an investigation."[67]

Reeder claims that Gravell's statement — which was not objected to by any of her fellow DDCC members — constituted an action of the DDCC, in the sense that it

[67] State Ltr. dated Jan. 27, 2006 (Transcript Excerpts); Reeder Ltr. dated Jan. 17, 2006 (same).

committed the DDCC to passing on Reeder's call for an investigation to the Commissioner. In ruling upon this claim, it is important to keep the words of FOIA about the minutes of meetings firmly in mind.[68] They are sparing and simply state:

> Each public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public matter. Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and *action* agreed upon.[69]

Thus, the question presented is whether Gravell's commitment to pass along Reeder's suggestion constitutes "action" that must be incorporated in the minutes. This question is a deceptive one, to the extent that it appears facially simple. Any person familiar with administrative tribunals or corporate boards knows that the subject of what belongs in minutes is a vexing one, about which reasonable minds vociferously differ.

In a more ordinary sense, Gravell did act in the sense that she committed the DDCC to do something. But the term "action" in FOIA is not obviously to be read as reflecting every instance in which a public body does something or commits to do something. Within the structure of FOIA itself — which gives the public the right to challenge action at meetings not conducted in compliance with FOIA — and of

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[68] In an earlier decision, this court referred to the sparseness of § 10004(f), stating:

> [FOIA] requires that certain information be included in the minutes, but neither says that the subjects discussed must be summarized nor attempts to define how specific such a summary should be . . . I cannot conclude that there is a clearly implied statutory requirement to summarize the subjects discussed with any degree of specificity in the minutes of executive sessions.

Common Cause of Delaware v. Red Clay Consolidated Sch. Dist. Bd. of Educ., 1995 WL 733401, at *4 (Del. Ch. Dec. 5, 1995).

[69] 29 *Del. C.* § 10004(f) (emphasis added).

administrative law more generally, there is a good argument that the reference to action within § 10004(f) should be read consistently with the definition of agency action typically used in administrative law. For example, § 10102 of the APA defines "agency action" as "either an agency's regulation or case decision, which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind or the grant or denial of relief or of a license, right or benefit by any agency or court, or both."[70] It would be rational to think that FOIA required public bodies to set forth in their minutes action of the kind defined in the APA, as that is the sort of action that tends to affect particular individuals (e.g., when there is a ruling made on a case decision or as in this case, a complaint against a particular entity, the Safety Council) or the public in general (e.g., when a new regulation is adopted) so concretely as to give rise to a right of judicial review. At the same time, one can also rationally read action more broadly, in keeping with the objective of giving the public a record of the important actions taken by public bodies, regardless if each of those actions would affect the substantial rights of an individual or the public at large.[71]

In my view, which interpretation of the term "action" is best read into § 10004(f) of FOIA is an important one that ought not be made unnecessarily, particularly when the depth of the arguments advanced by the contending parties do not match the importance

[70] 29 *Del. C.* §10102(2) (defining agency action).

[71] In *Levy v. Board of Education of the Cape Henlopen School District*, the court held that "action" should be interpreted more broadly than a "final action by a vote on an item of public business" given the public policy goals of FOIA. 1990 WL 154147, at *6 (Del. Ch. Oct. 1, 1990). The court explained that "[a] more liberal interpretation of the term 'action' is consistent with the Act's broad policy declarations." *Id.* The court also highlighted that the courts of other states have interpreted "action" by a public body to include "fact gathering, deliberations and discussions." *Id.*

of the issues at stake. Although it is important that § 10004(f) be complied with, its meaning is not obvious. To unwisely adopt too broad an interpretation of the term "action" could burden public bodies with onerous minute-taking responsibilities that generate minutes whose fulsomeness contributes trivia rather than real substance to the public record. Relatedly, such a broad interpretation could subject public bodies to claims in situations when there has been no real injury to anyone from an omission. Indeed, that is arguably the case here.

That said, I do not dismiss Reeder's claim. In fact, I grant summary judgment for him on this claim. I do not reach the question of whether the DDCC was required to address Reeder's request for an investigation in its minutes. Rather, I conclude that once the DDCC decided to address Reeder's request in its minutes, it had a duty to do so in a fair and balanced manner that does not misstate or omit what in fact happened. In other words, once a public body undertakes to cover a particular topic in minutes, it cannot describe the topic in a manner that is *materially* misleading.[72] Having concluded that Reeder's request to the DDCC to ask the Commissioner to investigate the relationship between the DDCC and the Safety Council was important enough to reflect on the public record, the DDCC became bound to reflect its own reaction to that request. Otherwise, the minutes leave the materially inaccurate impression that the DDCC did not consider

[72] I draw on analogies to corporate disclosure law. When a corporate board need not have discussed a particular topic, but chose to do so, the law imposes a duty not to describe the topic in an incomplete manner that is materially misleading. *See, e.g.*, *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (noting fiduciary duties of directors require that they disclose fully and with complete candor all material facts when they solicit proxies from stockholders and that a broad rather than a restrictive approach to disclosure is preferable in discharging that duty); *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 15 (Del. Ch. 2002) (same).

Reeder's request but simply allowed him to state it.[73] Thus, judgment shall be entered for Reeder.

Because the DDCC has been abolished, the remedy shall be accomplished by action of the Commissioner and the DOJ to implement this ruling. They shall, by order of the court, amend the minutes to add the following sentence after the reference to Reeder's request: "The Committee, through its Chair, thereafter agreed to pass along Mr. Reeder's request for an investigation to the Insurance Commissioner but also urged Mr. Reeder to put the reasons for the request in writing for the Committee to pass along to the Commissioner."

The amended minutes shall contain the notation that the minutes were amended, per order of the court, after the abolition of the DDCC.[74]

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[73] Arguably, the question of materiality is a close one here. But Reeder was charging the DDCC itself with improprieties and calling on it to ask the Commissioner to investigate itself. It seems to me to be materially misleading for the minutes to state Reeder's request without reflecting the Chairwoman's agreement to pass on his request to the Commissioner. Nothing in this opinion should be read to support the notion that plaintiffs can state claims under FOIA by raising semantical quibbles with the minutes of public bodies over materially accurate and non-misleading descriptions of what happened at public meetings.

[74] For many reasons, this case suggests that FOIA's requirements related to minutes be either supplemented or replaced by a requirement that public bodies record and keep audiotapes of their meetings for public review. Obviously, any replacement of the minute requirement would have to provide a means for public determination of actions taken in executive sessions. But overall, such a requirement would provide a more reliable and verifiable record of what a public body did, at arguably lower cost than is involved in minute preparation and approval. And, of course, such a requirement would seem to expand rather than contract public access, especially because other statutes often set forth the degree of formality by which public bodies can take certain actions. *See, e.g.*, *Fields v. Kent County*, 2006 WL 345014, at *3 (Del. Ch. Feb. 2, 2006) (holding that a county's approval of an amendment to a development plan by oral resolution rather than ordinance diverged from the procedural requirements imposed on the exercise of the county's delegated regulatory powers because actions by a county government having the force of law must be accomplished by formal ordinance).

C. The Remainder Of Reeder's Claims

As noted, Reeder also named the DOJ as a defendant based on the DOJ's role as legal counsel to the Insurance Department and DDCC. The DOJ is a state agency that provides legal advice and guidance to other state agencies. This is the DOJ's statutory responsibility.[75] Reeder has advanced no facts that support a rational determination that the DOJ gave legal advice other than in a good faith belief that the advice was consistent with its view of the law.[76] Indeed, by Reeder's own admission, the DOJ instructed the DDCC that its purported action without a quorum at the April 12 meeting was illegal. Although Reeder has lumped the DOJ in with the many public officials who he accuses of corruption, there is no record basis for his accusation and his claim against the DOJ is dismissed.[77]

For the sake of completeness, I also note that Reeder seeks a judicial order requiring the Insurance Department to comply with FOIA in the future. That relief is unwarranted and unnecessary. The DDCC has been abolished and therefore there is no

[75] 29 *Del. C.* ch. 25.

[76] For obvious reasons, it would be unwise to create an incentive for plaintiffs to name the DOJ as a defendant whenever they allege that a client agency of the DOJ's engaged in unlawful conduct. There is much grey in the world and the fact that the DOJ gave particular legal advice about a statute and that an agency accepted that advice does not mean that either intended to violate that statute even if a court later concludes that the agency action was unlawful under the statute and that action was consistent with DOJ advice about the agency's freedom of action under the statute. Put simply, the good-faith provision of (what in hindsight turns out to be) erroneous legal advice about a statute by a deputy attorney general to a client is no basis for a suit against the deputy or the DOJ under the statute.

[77] There are other reasons to dismiss the DOJ that I need not discuss, including ones that involve immunities and the attorney-client relationship. Regrettably, Reeder also filed a procedurally and substantively defective Rule 11 motion against Deputy Attorney General Slattery who has been the lead attorney for the State in litigating this matter. That motion is denied. I do not dilate on the multiple reasons why the motion is defective.

need to monitor its future conduct. The Insurance Commissioner's new Regulation 607 contains procedural safeguards that reflect a recognition of the importance of due process. If the Insurance Commissioner violates the new Regulation 607, or the FOIA and the APA in the future, Reeder can seek relief at that time. There is no justification on this record for an injunction requiring the Insurance Department to do what it must do in any event — comply with applicable statutory constraints on its behavior.[78]

IV. Does An Appearance Of Impropriety Exist Requiring Recusal?

After oral argument on the State's motion for summary judgment, an unusual development arose. A newsreporter sent an email to my chambers asking for me to comment on Reeder's request that I recuse myself from the case. That was surprising because Reeder had never filed a motion to recuse. Instead of doing so, Reeder went to the press. Being forbidden to comment, I inquired of Reeder whether he was asking me to recuse.[79]

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[78] *See generally Pettinaro Enter.*, 870 A.2d at 536 (explaining that when there is no basis to conclude that a defendant will breach the law in the immediate future, no claim for an injunction exists because "it is not all clear what purpose would be served by enjoining [the defendant] from violating duly enacted statutes that is already duty-bound to honor."). Reeder also seeks monetary damages, a form of relief not contemplated by FOIA. *See* 29 *Del. C.* § 10005(d) (detailing the various forms of remedy, including awards of attorneys' fees, available under FOIA but not mentioning monetary damages). The absence of a reference to claims for monetary damages in FOIA is coupled with the immunity that the DOJ and Insurance Department, as state agencies, have against claims for monetary damages. *See* DEL. CONST. ART. I, SEC. 9; *see, e.g., Doe v. Cates*, 499 A.2d 1175 (Del. 1985) (explaining sovereign immunity provides that the State and its agencies may not be sued without the State's consent); *Pagano v. Hadley*, 525 F. Supp. 92 (D. Del. 1982) (discussing how the doctrine of sovereign immunity bars an award of monetary damages).

[79] Ltr. from this court to Reeder dated Jan. 18, 2006.

In his response, Reeder denied that he was moving for recusal. At the same time, however, he asked me to consider whether I should recuse. I therefore will treat his non-motion as a motion.

Although it is not easy to tell exactly the basis for Reeder's contention that I should recuse, it appears to involve two circumstances. First, Reeder went to the press after learning from the Insurance Commissioner's website that my father, who is also named Leo E. Strine but without the "Jr.," was named by the Insurance Commissioner in April 2005 as the unpaid Chair of the Life & Health Agents Advisory Committee. He claims that this appointment raises a conflict for me. Second, Reeder believes that questions asked and statements made by me at the summary judgment hearing reflect a bias against him. The State has taken the position that Reeder's arguments do not provide a sufficient basis for my recusal.

After careful consideration, I conclude that neither circumstance warrants my recusal. I will now explain why, taking the circumstances in turn. I preface that explanation with a citation to the governing standards.

The touchstone for evaluating whether a judge should disqualify himself or herself is the Delaware Judges' Code of Judicial Conduct. Two canons in particular address the appearance of impropriety and disqualification. First, Canon 2 discusses the appearance of impropriety and states in relevant part: "B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment."[80] The commentary to this canon sets out the test for appearance of impropriety as "whether the conduct would

[80] *Del. R. C. Jud. Conduct*, Canon 2(B).

create in *reasonable* minds, with knowledge of all relevant circumstances that a *reasonable* inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[81]

Second, and related to the actual impartiality and the appearance of impartiality, Canon 3(C)(1)(a) deals with disqualification and states in pertinent part:

> C. Disqualification. (1) A judge should disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) The judge has a personal bias or prejudice concerning a party . . . (d) The judge or the judge's spouse, or a person with the third degree of relationship to either of them, or the spouse of such person: (i) Is a party to the proceeding, or an officer, director, or trustee of the party . . . (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . .[82]

When faced with a claim of personal bias or prejudice under Canon 3C(1), our Supreme Court has stated that a judge is required to engage in a two-part analysis to determine whether disqualification is warranted.[83] This includes both a subjective and objective consideration of bias.[84] The Supreme Court also has noted that there is a compelling

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[81] *Del. R. C. Jud. Conduct*, Commentary to Canon 2 (emphasis added). The United States Supreme Court has stated similarly that the recusal inquiry must be "made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Cheney v. U.S. District Ct. for the Dist. Of Columbia*, 124 S.Ct. 1391, 1400 (Memo of Scalia, J.) (2004) *citing Microsoft Corp.*, 530 U.S. at 1301, 1302 (Rehnquist, C.J.) (2000) (internal citations omitted). The Court also noted that the decision whether a judge's impartiality can "reasonably be questioned is to be made in light of facts as they existed, and not as surmised or reported." *Cheney*, 124 S.Ct. at 1393 *citing Microsoft Corp.*, 530 U.S. at 1302 (internal citations omitted). *See also* 28 U.S.C. § 455(a) (2005) (codifying disqualification standards for federal judges).

[82] *Del. R. C. Jud. Conduct*, Canon 3. The ABA Model Code of Judicial Conduct on disqualification, Rule 2.12, is quite similar to Delaware's Canon 3(C)(1)(a) and (d).

[83] *See Los v. Los*, 595 A.2d 381, 384 (Del. 1991).

[84] *Id.* at 384-85 ("First, [the judge] must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the

policy reason for a judge not to disqualify himself or herself unnecessarily, and in the absence of genuine bias, a litigant should not be permitted to "judge shop."[85] In that regard, it is also recognized that judges who too lightly recuse shirk their official responsibilities, imposing unreasonable demands on their colleagues to do their work and risking the untimely processing of cases.[86]

Having these standards firmly in mind, I begin with the charge that Reeder initially leveled in the press, which relates to my father principally, and to some extent to other members of my family. Reeder contends that an appearance of impropriety exists because of certain public service and civic activities in which my parents — primarily my father — are involved. Reeder has alleged the following as evidence of an appearance of impropriety and my bias: (1) "any connection [my] father may have had" with Commissioner Denn's 2004 election campaign;[87] (2) my father's service as a member of the Life and Health Agent Advisory Committee to the Department of Insurance and his

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judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality.").

[85] *Id.* at 385 ("The orderly administration of justice would be severely hampered by permitting a party to obtain disqualification of a judge through the expedient of filing suit against him."). This policy of not recusing unless necessary is sometimes referred to as the duty to sit, and traditionally has been viewed as somewhat in tension with the duty to avoid the appearance of impropriety. *See* M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Proprietary Standard*, 7 J. App. Prac. & Process 45, 56 (2005).

[86] *See Del. R. C. Jud. Conduct*, Canon 3(A)(2) ("A judge *should* hear and decide matters assigned, unless disqualified . . . .") (emphasis added); *United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000) (noting an erroneous recusal may be prejudicial in some circumstances and that "the unnecessary transfer of a case from one judge to another is inherently inefficient and delays the administration of justice"); *Camacho v. Autoridad de Telefonos de Puerto Rico,* 868 F.2d 482, 491 (1st Cir. 1989) (noting that the judicial system would be "paralyzed" were standards for recusal too low).

[87] Reeder Ltr. dated Jan. 24, 2006 at 2.

promotion to chair of that Committee under Commissioner Denn;[88] (3) my immediate family's involvement with the State Democratic Party, which is the same political party of Commissioner Denn.[89]

Of the factual allegations that relate to my family and Commissioner Denn,[90] Reeder has focused his attention on the appearance of impropriety that exists because of my father's unpaid position as Chair of the Life and Health Agent Advisory Committee to the Department of Insurance. Reeder alleges my father has been and will be working directly with Commissioner Denn on this Advisory Committee, which colors my hearing of this case with an appearance of impropriety. He believes this requires recusal although the Advisory Committee on which my father serves has no relationship with the DDCC or defensive driving course providers.

For the sake of accuracy and objectivity, I asked the DOJ to inquire of the Insurance Department, and to place on the record, the dates of my father's service on this committee and other committees of the Insurance Department upon learning of Reeder's concerns through the an email from a former local reporter.[91] Reeder, who raised the concern about my father, complained about this request, stating: "I . . . suggest you are wasting taxpayer's money with your frivolous investigation by the Department of Justice."[92]

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[88] Reeder Ltr. dated Jan. 28, 2006 at 1.
[89] Reeder Ltr. dated Feb. 3, 2006 at 1.
[90] In fact, Reeder has not bothered to specify what other civic, political, or charitable activities of my family warrant my recusal. I know of none.
[91] Ltr. from the court dated Jan. 26, 2006.
[92] Reeder Ltr. dated Jan. 28, 2006.

Because Reeder raised the concern, I believed it incumbent upon me to obtain the facts from a reliable and objective source and to make them of record. The Department of Insurance, through a senior employee, filed an affidavit[93] complying with my request, stating the following regarding my father:

- Based on the Department's licensing records, Leo E. Strine ("Strine") is employed at the Financial House, 5818 Kennett Pike, Wilmington, Delaware, has been a licensed insurance producer since December 1, 1975, and remains in good standing as a licensed producer in the State of Delaware. He is current in all his license and educational requirements and has no reported complaints against him in the Department.[94]

- Prior to January 1, 1993, Strine served as an appointed member of the Continuing Education Advisory Council ("the Council") established by the Department's Regulation 504. *See* Regulation 504 attached hereto. Subsequent to the installation of Donna Lee H. Williams as Commissioner in 1993, Strine resigned from the Council.[95]

- The Council's authority is limited to matters relating to the continuing education requirement for insurance producers and is not now, nor has it ever been, charged with any matter relating to the approval or regulation of defensive driving education courses or the approval or regulation of defensive driving education providers established under the Department's Regulation 607. Service on the Council is voluntary and by invitation. Service on the Council was and is voluntary, unpaid and no expenses are remunerated to the members thereof.[96]

- Former Commissioner Donna Lee H. Williams continued the Life & Health Agents Advisory Committee ("the Committee") that had been in existence during the term of her predecessor, David Levinson. The purpose of the Committee was to meet at periodic intervals with the Commissioner to provide information, advice and recommendations relating to matters of life and health insurance on behalf of producers licensed in the State of Delaware on matters over which the Commissioner had jurisdiction. Service on the Committee was and is

[93] State Ltr. to the court dated Jan. 27, 2006, Ex. (Aff. of Eugene T. Reed, Jr.)
[94] Reed Aff. ¶ 3.
[95] Reed Aff. ¶ 4.
[96] Reed Aff. ¶ 5.

voluntary, unpaid and by invitation. As a division director, I attended most meetings of the Committee.[97]

- At some point after 1999, Strine was invited to become a member of the Committee. The earliest ascertainable record in the Department reflecting Strine's service on the Committee is April 22, 2001. Records prior to that date relating to the Committee have been destroyed. Strine continued to serve on the Committee through the end of Commissioner Williams' tenure and was invited to remain on the Committee by current Commissioner Matthew Denn. In a press release dated April 24, 2005, Commissioner Denn announced that Strine would serve as the chair of the Committee . . . .[98]

- The Committee is not now, nor has it ever been, charged with any matter relating to the approval or regulation of defensive driving education courses or the approval or regulation of defensive driving education providers established under the Department's Regulation 607. Its duties are limited as stated in paragraph 6 above.[99]

- Strine has never, in any personal or individual capacity, been involved with any matter relating to the approval or regulation of defensive driving education courses or the approval or regulation of defensive driving education providers established under the Department's Regulation 607.[100]

Thus, the objective reality is this:

- My father has been a licensed insurance agent in good standing without any complaints against him since 1975;
- My father served on unpaid advisory committees of the Insurance Department under each of the last three Commissioners;
- My father first began service on the Life and Health Advisory Committee under Commissioner Donna Lee H. Williams, Commissioner Denn's Republican predecessor;
- My father was merely invited to remain on the Committee and then elevated to Chair of that Committee by Commissioner Denn;
- None of the positions that my father has occupied deal with the regulation of defensive driving providers; and

[97] Reed Aff. ¶ 6.
[98] Reed Aff. ¶ 7.
[99] Reed Aff. ¶ 8.
[100] Reed Aff. ¶ 9.

- None of the positions that my father has occupied come with any pay.

As a further matter, I reviewed Department of Election reports and found no material contributions by my father to Commissioner Denn, but one modest contribution by my mother.[101] Reeder has pointed to no facts to the contrary, except to contend that my family is active in the political and civic life of the community. That is, of course, their civil right. Notably, neither my mother nor my father owe their livelihoods to political service. Each has spent their careers entirely in the private sector, and have engaged in civic, charitable, and political activities in their spare time. In other words, their ability to fend for themselves has never had any connection to what party held which offices.

These facts do not come close to meriting my recusal.

For starters, Reeder argues his non-motion for recusal in a manner very different than he argues the case itself. The lynchpin of his recusal motion is that I might be perceived as unable to rule in this case because Commissioner Denn has so much at stake and because my father supposedly has a conflict-engendering relationship to Commissioner Denn.

From the get-go, however, Reeder's argument founders. Let's begin with his tardy assertion that this case somehow has partisan political consequences. Whatever one might make of the merits of Reeder's charges against a multitude of public servants, what

[101] *See* Delaware's Commissioner of Elections Website, *available at* http://www.state.de.us/election/information/campaignfinance/campaignfinance.shtml (last viewed Jan. 2005).

one cannot say is that Reeder is partisan against the democratic party in his charges.[102] As quoted previously, Reeder alleges that the improper relationship between the Insurance Department and the Safety Council he contends existed arose beginning in 1994 and deepened in 2003. During this entire period, the Insurance Commissioner was a Republican. In this respect, Reeder has alleged that the Speaker of the House, a Republican, was involved in this improper relationship. Reeder's allegation that the DOJ helped cover up the improper relationship was leveled against a DOJ headed by a Republican. Simply put, the idea that this case is somehow a crusade by Reeder against Commissioner Denn — who first took office in January 2005, long after Reeder had begun complaining about the DDCC's relationship with the Safety Council — or the democratic party is belied by the record. And even if it were, my parents would face no repercussions from the outcome of such a suit nor would I.

In this same regard, it bears reiteration that Commissioner Denn is *not* named as an individual defendant in this action. The defendants listed in Reeder's complaint are "the Delaware Department of Insurance/Defensive Driving Committee (DDCC) and the Department of Justice."[103] Commissioner Denn is the elected official who heads the

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[102] Reeder has expressed his dissatisfaction and made allegations of impropriety against several public officials. These officials, both elected and appointed and of different political persuasions, at last count include: former Attorney General, now Superior Court Judge, M. Jane Brady; former DDCC Chair Gravell; former Insurance Commissioner Donna Lee H. Williams; Speaker of the House Terry Spence; and as already discussed, Deputy Attorney General Rich; Deputy Attorney General Slattery; Commissioner Denn; and of course, myself. *E.g.*, Reeder Br. at 2-9, 14, 27-29, 31, 45-46 and App. C(1) (Email dated Mar. 22, 2005 from Reeder to Deputy Attorney General Rich); Reeder Ltr. dated Jan. 24, 2006 at 4; Reeder Ltr. dated Jan. 31, 2006; Reeder Motion dated February 9, 2006; Matt Donegan, *Citing Conflict, Man Wants A New Judge*, DOVER POST, Jan. 25, 2006, at 2A.

[103] Compl. at 1.

Insurance Department, but Reeder's claims are focused on the conduct of a particular committee, the DDCC. Commissioner Denn was not a member of the DDCC, was not directly involved in the DDCC (in votes or other decision making), and did not attend the DDCC meetings that are at the center of this dispute.

For that reason, Commissioner Denn is not mentioned in either the original complaint or the amended complaint. His name was not a focus of Reeder in arguing this case until such time as Reeder decided to move for recusal.[104]

From an objective viewpoint, this case also seems to have few potential implications for Commissioner Denn. He had been in office only about one month when the February 11 meeting occurred at which Reeder leveled his accusation about a long-standing improper relationship between the DDCC and the Safety. Although Reeder apparently does not like Denn's solution, Denn abolished the DDCC within a year of that meeting.[105] He has also established a much more formal process of regulation — one that gives complainants like Reeder a role in the process, and that subjects the Commissioner's own decisions to review under the APA. Given these realities, it is difficult to find this case to be politically consequential to Commissioner Denn.

Relatedly, Reeder does not point to facts suggesting that my father is beholden in any way to Commissioner Denn. My father was a licensed insurance agent in good standing for decades before Commissioner Denn took office. My father does not owe that status to Commissioner Denn and it cannot be taken away from my father without

[104] Reeder Br. at 1, 5-20 (describing his views of an improper relationship between the DDCC and the Safety Council beginning in 1994).
[105] DEL. DEP'T. OF INS., *In re* Regulation 607, Order, Docket No. 2005-140 (Jan. 5, 2006).

just legal cause. My father has been the head of several professional organizations in his industry and it is therefore unsurprising that three Commissioners in a row have looked to him to provide uncompensated service on committees with no relationship to the provision of defensive driving courses. Indeed, my father does not even sell car insurance. Put bluntly, Commissioner Denn is not in any position to exercise dominion over my father, my father owes him nothing, and there is no basis for any reasonable person to believe that my ruling in this case would be influenced by a concern for my father's relationship with Commissioner Denn.

In so concluding, it is useful to compare the purported appearance of impropriety that Reeder alleges exists because of my father's connection to a government officer not named in the suit before me with the situation where the judge is a friend of a government officer named in the suit before that judge.[106] Judges are not required to recuse themselves from cases even when they have a friendship with a government officer who is sued in an official capacity. In a recent case (involving FOIA in part), Justice Scalia distinguished between personal and official capacity of a government officer. He determined he did not need to recuse himself from a case in which his friend, Vice President Cheney, was named as a defendant although Scalia and his family

[106] There is no basis for my recusal grounded in my own relationship with Commissioner Denn. Although I have known him for many years — as is also true as to many elected officials within this State — my relationship with Commissioner Denn is not of the kind that would even cause me to pause over whether I should recuse in this matter.

members had traveled on the Vice President's government plane to a hunting lodge at which they hunted ducks with the Vice President.[107] The Justice explained,

> That an officer is named [as a defendant] has traditionally made no difference to the proposition that friendship is not considered to affect impartiality in official-action suits. Regardless of whom they name, such suits, when the officer is the plaintiff, seek relief not for him personally but for the Government; and, when the officer is the defendant, seek relief not against him personally, but against the Government.[108]

What Reeder alleges is problematic about my father's relationship with Commissioner Denn is far more indirect and removed than the situation Justice Scalia describes as not requiring recusal. As Justice Scalia has explained in deciding a motion for his recusal,

> [W]hile friendship is a ground for recusal . . . where the personal fortune or personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.[109]

In the *Cheney* case, the compliance with FOIA of a group directly headed by the Vice President was at issue. The political consequences to the Vice President of that case were immensely more substantial to him than this case is to Commissioner Denn, and Commissioner Denn's personal fortune or personal freedom are not in any peril. Justice

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[107] *See Cheney,* 124 S.Ct. at 1397-98.
[108] *Id.* at 1395.
[109] *Cheney,* 124 S.Ct. at 1394 ("A rule that requires Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling."). In *Cheney,* Justice Scalia presents several historical examples of personal relationships former Supreme Court justices had with government officials during the time in which the Supreme Court was considering cases naming these officials. I highlight this only for purposes of contrast and to point out that the appearance of impropriety Reeder raises originates from a far more indirect relationship — that of my father's relationship with a state official who is not being sued in the case before me but rather who heads a state agency that is being sued.

Scalia had a personal friendship with Vice President Cheney that involved traveling together to go to weekend outings together. Here, my father was promoted by Commissioner Denn from an unpaid member of an advisory committee having no relationship to this case to the unpaid chairman of an advisory committee having no relationship to this case. By parity of reasoning, it is obvious that the grounds for recusal are far less substantial in this case than in the *Cheney* case.

Stated another way, my father is not "a party to the proceeding [or]…an officer, director, or trustee of the party" nor does he have any financial or personal interest that could be "substantially affected" by the outcome of the proceeding.[110] Applying our Supreme Court's two-part analysis to my own situation, I am neither subjectively or objectively biased nor do the facts create an appearance of impropriety.

The second set of circumstances that Reeder argues create an appearance of impropriety, are statements I made during the January 6, 2006 judgment hearing. In particular, Reeder argues that it evidenced bias on my part to question him regarding his repeated representation to this court that he first "discovered" FOIA in April 2005 despite having received in January 2005 an affirmative ruling, which described FOIA and identified its statutory location, from the DOJ regarding his FOIA complaint against a school district.

Reeder has chosen to proceed as a pro se litigant in this matter. As a result, questions that a judge would ordinarily ask to the party's lawyer about the party were put directly to Reeder. In this instance, the questions necessarily bore on the accuracy of

[110] *Del. R. Jud. Conduct*, Canon 3(C)(1)(d).

Reeder's assertion that he first discovered FOIA in April 2005, and raised the issue of whether Reeder was being as candid as he should have been in his papers. Although Reeder is obviously comfortable leveling charges of misconduct, he was not as comfortable answering questions about when he discovered FOIA.[111]

I regret that discomfort, as I do any litigant's or lawyer's, over having to answer difficult questions in an open courtroom. But that is a reality of our system of justice. Given Reeder's attempt to defend his untimely filing by arguing that he discovered FOIA in April, it was proper for me to ask Reeder directly about that contention. By doing so, I was giving Reeder a chance to explain himself.

I did not come to the oral argument harboring any bias against Reeder or in favor of the defendants. I do not know Reeder nor do I know the person he portrays as his principal antagonist, Chairwoman Gravell. The questions I asked of Reeder were entirely inspired by the issues raised in the record before me.

It is settled law that there are no grounds for recusal simply because a judge takes notice of the record and asks questions in reaction to it.[112] Likewise, to the extent that I

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[111] At oral argument, Reeder reiterated early on his contention that he discovered FOIA in April 2005. He later admitted to receiving the DOJ Opinion in January 2005 that explains and refers repeatedly to FOIA but claimed it meant nothing to him.

[112] The Delaware Judges' Code of Judicial Conduct and the relevant cases applying it establish that a judge's exposure to facts learned in the context of adjudicating a case is not a basis for recusal. Thus, it is well established that recusal is not required when a judge learns potentially adverse facts about a party or his or her claims during the course of his discharge of his official duties of hearing a case or reading submissions. *See Los*, 595 A.2d at 384-385 (holding recusal was not required where litigant "made no claims concerning the [judge's] conduct . . . apart from the of discharge of [his] official duties . . . ."). *See also Weber v. State*, 547 A.2d 948 (Del. 1988) *citing Steigler v. State*, 277 A.2d 662, 668 (Del. 1971) (explaining that the bias envisioned by Canon 3C(1) is not created merely because the judge has learned facts or made adverse rulings during the course of a trial).

indicated at oral argument that Reeder should not have argued repeatedly to the court that he first discovered FOIA in April 2005 when he admits to having received in January 2005 the Attorney General's FOIA Opinion, such an indication provides no basis for recusal.[113] Judges are expected to learn facts during cases and to react to them.

Here, the reality is that I bore no animus toward Reeder before the summary judgment hearing and bear him none after. Although I believe Reeder should not have argued that he first discovered FOIA in April 2005, that was not based on any prejudice or bias against him, just on my reaction to an argument that was not grounded in fact. A more candid argument would have admitted knowledge of the existence of FOIA in January 2005 but denied reading the statute until April 2005. But that reaction to Reeder's approach to arguing his defense is not a basis for recusal, it is simply a standard reaction by a judge to the arguments of a party.[114]

Likewise, I have reviewed the other concerns Reeder has raised about questions or statements made at the summary judgment hearing. Read in context, none of them reasonably reflect any bias or prejudice against him. Indeed, there are, as one would expect, parts of the transcript in which I take issue with the practices of the DDCC and

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[113] *Id.* Courts beyond Delaware also have recognized that it would be "extraordinary" to disqualify a judge for bias or appearance of partiality when the judge's remarks arguably reflect what he or she learned or thought he or she learned, during the proceedings. In *Liteky v. United States*, the United States Supreme Court stated that "a judge . . . may, upon completion of the evidence, be exceedingly ill disposed towards the defendant who has been shown to be a thoroughly reprehensible person." 510 U.S. 540, 550-51 (1994). The Court continues on to explain that a judge need not recuse herself for bias or prejudice because "knowledge and the opinion it produced were necessarily and acquired in the course of the proceedings, and are . . . sometimes . . . necessary to completion of the judge's task." *Id.* at 551.

[114] "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943).

inquire about their propriety. One of the most useful purposes of oral argument is for the judge to press each side on its vulnerable points.[115] That gives each side an opportunity to address the concerns that have arisen in the judge's mind as a result of reading the record. In other words, oral argument provides the chance for the parties to have the kind of give-and-take Reeder desired from the DDCC at its meetings.

A fair and objective reading of the entire summary judgment hearing reflects no improper bias or prejudice against Reeder. Indeed, there are portions of the transcript that reflect sympathy for Reeder's status as a pro se litigant, that acknowledge the positive policy effect his complaints about the DDCC appear to have had, that recognized the legitimate concerns he had about the DDCC's practices in regard to complying with FOIA, and expressed understanding of his right and practical need to make a record of the DDCC meetings. As firmly as I regret that Reeder perceived certain comments at the summary judgment hearing to reflect a bias against him, I just as firmly find that no such bias existed or exists and that the summary judgment hearing provides no grounds for recusal.

Put bluntly, I harbor no bias against Reeder, no extraneous consideration affects my ability to determine this matter purely on its merits, and it would simply be shirking for me to step aside. That last point bears reiteration.

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[115] Reeder's status as a pro se plaintiff does not excuse him from the responsibility of supporting his legal arguments and justifying his own actions under questioning by a judge. Reeder made the decision to file and present his case pro se although the record indicates that Reeder has consulted with and used counsel in the time leading up and during this litigation. *See* Reeder Br. at 32, 34; Tr. at 67-68.

It took no small number of hours to thoroughly read the record in this case and prepare for oral argument. Reeder did not seek my recusal through a proper motion but through charges issued to the news media after I was deep into considering and writing this opinion. In several ways, it would have been less burdensome for me personally to have simply walked and left this case as one of my colleague's problems to deal with, thereby invariably impinging on his ability to address the many other matters already pending on his docket.

That would have been irresponsible. Being positioned to impartially to decide the case, it was my duty to do so. That is what I have now done.

V. Conclusion And Final Judgment

For the foregoing reasons, Reeder's motion to amend the complaint is granted. The State's motion for summary judgment is granted as to all Counts I, II, III, IV, V, VI, VII, and VIII and other requests for relief in the complaint, as amended, with the exception that Reeder's claim that the minutes for the February 11, 2005 DDCC meeting must be corrected is sustained. Therefore, the minutes shall be corrected as provided for within this opinion within ten days. The State shall file an affidavit of compliance with a copy of the corrected minutes with the Register In Chancery and serve a copy upon Reeder. Reeder's Rule 11 motion is denied. Each party shall pay its own costs. This case is now closed.

IT IS SO ORDERED.