TIDESHIFT JUSTICE LEGAL REPORT

When DOC “Policy” Becomes Law

Delaware Administrative Procedure Act duties, security limits, attorney-access implications, and a workable cure for unadopted staff directives

PREPARED FOR	Tideshift Justice
DATE	August 28, 2026
JURISDICTION	Delaware; Third Circuit and persuasive federal authority where noted
PRIMARY QUESTION	When must Delaware DOC treat a staff-created policy as a regulation, and what follows if it did not?
STATUS	Research memorandum; not legal advice and not a substitute for review of the actual directive and enforcement record

BOTTOM LINE

DOC cannot avoid the Delaware APA by calling a future-facing, binding standard a “policy,” “procedure,” “memo,” “practice,” or oral instruction. But not every operational direction is a regulation. The correct response is a mandatory classification process: identify the legal authority, decisionmaker, affected persons, future effect, substantive burden, APA path, security basis, and publication status before enforcement.

Executive conclusions

The problem is not simply that DOC has policies. The problem arises when employees create or enforce rules that function as law—governing future cases, restricting conduct, controlling access, or triggering sanctions—without determining who had authority to issue them and whether Delaware law required formal or informal rulemaking, filing, publication, or a documented emergency order.

- **DOC is within the APA rulemaking framework.** The Department of Correction is not listed among the agencies receiving the full APA under 29 Del. C. § 10161(a). As an unlisted agency, it is nevertheless subject to Subchapters I and II—the definitions and rulemaking provisions—and to §§ 10141, 10144, and 10145. That means DOC rulemaking is regulated, even though ordinary DOC case decisions are not appealable under § 10142.
- **Function controls over label.** Under DeMatteis and Baker, a statement can be a regulation when the agency formulates or promulgates it as a rule, standard, or future decisional guide. A manual, email, post order, memo, custom, computer setting, script, or oral command may qualify if it functions that way.
- **Not every instruction is a regulation.** A one-time operational command, a genuinely internal allocation of work, or an implementation compelled in detail by statute may fall outside the definition or within § 10113(b). The analysis must be made and recorded; the exception should not be assumed.
- **Even “informal” regulations require official filing.** Section 10113(b) permits specified categories to be adopted informally, but the regulation and its adopting order still must be filed with the Registrar of Regulations and thereby become official under 29 Del. C. § 1132.
- **Security is not a magic word.** Section 4322(d) requires a judgment by the Commissioner that the policy contains information capable of jeopardizing safety or security. Under Opinion 24-IB09 and Vanella, unsupported or generalized safety assertions do not necessarily carry the government’s burden. Tactical detail may be confidential while the public standard remains reviewable.
- **Old secrecy cases must be read against the 2022 amendment.** Jackson and Hall applied an earlier categorical confidentiality statute. House Bill 394 replaced that premise with a risk-based Commissioner-judgment standard. The older decisions remain important, but they do not establish that every current DOC policy is categorically secret or exempt from rulemaking.
- **APA compliance does not cure constitutional defects.** A properly adopted rule can still violate access-to-courts, counsel, speech, due-process, or equal-protection requirements. Conversely, an otherwise reasonable restriction can still be vulnerable because the agency failed to adopt it lawfully.

- **Attorney-access rules require calibrated proof.** There is no categorical constitutional entitlement to unlimited calls or every requested participant. But a blanket one-attorney, one-number, or no-three-way-call rule is vulnerable if it substantially burdens representation and DOC offers only a conclusory security explanation instead of a rational, evidence-based connection and reasonable alternatives.
- **The cure is administrative, not complicated.** A centralized Policy Legality Register, a one-page intake test, a written security-designation form, and a case-specific denial notice can prevent nearly all of the recurring defects. A 90-day inventory can classify, publish, adopt, narrow, or suspend existing directives.

NECESSARY CAUTION

This report does not establish that a particular "secret policy" exists or is unlawful. That conclusion requires the actual text or reliable proof of the operative standard, its issuer, repeated application, the affected class, the legal authority claimed, its adoption record, and the security basis. The report supplies the legal test and a proof plan.

The proposed answer in one page

Question	Legal answer	Required institutional response
Who may make DOC policy?	The Commissioner has broad statutory rulemaking and management authority; subordinates may act only within valid written delegation and cannot enlarge delegated power.	Identify issuer and authority on every directive.
When is a policy a regulation?	When DOC formulates or promulgates a statement as a rule, standard, or future decisional guide; substantive restrictions are the clearest case.	Run the APA classification test before enforcement.
Can DOC use informal adoption?	Yes, only for § 10113(b) categories. Filing the rule and adopting order with the Registrar remains mandatory.	Create and file an adopting order; do not treat "informal" as "unrecorded."

Question	Legal answer	Required institutional response
Can security justify secrecy?	Sometimes. Section 4322(d) requires the Commissioner's judgment and a policy-level risk. FOIA has separate, specific security exemptions.	Publish the governing standard; place sensitive tactics in a confidential annex; document the risk.
What if the policy was never adopted?	A person aggrieved by final agency action may seek declaratory review under § 10141; ultra vires, constitutional, FOIA, and other remedies may also apply.	Suspend or narrow enforcement, preserve records, and use lawful prospective adoption.

1. The legal map: DOC is covered, but not in the ordinary way

1.1 The Delaware APA's purpose and definitions

The Delaware APA seeks uniform, public, and reviewable agency procedure. Section 10101 identifies notice, public participation, standardized process, public access, and judicial review as central aims. Those aims are especially relevant when an institution uses unpublished directives to determine what incarcerated people, counsel, families, or vendors may do.

An "agency" includes a department or other state instrumentality authorized by law to make regulations, decide cases, or issue licenses. An "agency action" includes a regulation or case decision that may become a basis for sanctions or for rights or benefits. A "regulation" is a statement of law, procedure, policy, right, requirement, or prohibition formulated and promulgated by an agency as a rule, standard, or guide for future decisionmaking. 29 Del. C. §§ 10101–10102

A substantive regulation is particularly important: it permits, requires, or forbids conduct that private persons otherwise could or could not undertake, or imposes nonprocedural requirements for a benefit. A DOC rule barring a category of legal participants, authorizing sanctions, limiting numbers, imposing eligibility criteria, or conditioning access is likely to be substantive unless it merely implements a detailed statutory command.

1.2 Section 10161 creates limited—but real—DOC APA coverage

Section 10161(a) lists agencies governed by the full APA. DOC is not on that list. Section 10161(b) then provides the critical rule: every unlisted agency is subject to Subchapters I and II and to §§ 10141, 10144, and 10145. Thus:

- DOC must comply with the APA's definitions and rulemaking procedures.

- An aggrieved person may bring a declaratory challenge to a DOC regulation under § 10141, subject to its conditions and deadlines.
- The stay and service provisions in §§ 10144–10145 apply.
- Ordinary DOC "case decisions" are not appealable through § 10142, because that provision is outside DOC's limited coverage.

Fatir correctly separates the routes: a prison policy may be challenged under § 10141 as a regulation, but an individual disciplinary or grievance outcome is not transformed into a § 10142 appeal merely because DOC policy mentions review. Fatir v. Phelps, Del. Super. Ct. (2018)

THE PRACTICAL CONSEQUENCE

A pleading or administrative demand should identify the object of review. "This generally applicable directive is an invalid regulation" is a § 10141 theory. "This particular grievance decision was wrong" is ordinarily not a § 10142 route against DOC. A single set of events may support other claims, but the theories must not be conflated.

1.3 DOC's own enabling law supplies power—and limits it

The Commissioner is the Department's chief executive and administrative officer and has full and active charge. Sections 6516 and 6517 direct the Commissioner to promulgate rules and regulations for organization, control, operation, custody, training, rehabilitation, discipline, punishment, and departmental management. That broad authority does not displace the APA; it is the substantive delegation that the APA regulates.

Delaware's Supreme Court has emphasized that administrative agencies possess only the power granted by statute and may exercise implied power only when reasonably necessary to carry out the grant—"and no more." Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632 (Del. 2017)

Section 6535 specifically requires DOC to promulgate discipline rules and give incarcerated persons access, at reasonable places and times, to the portions applying to them. It also requires a record of charges and punishments. Section 6537 authorizes visits and correspondence on reasonable conditions. These provisions confirm authority to regulate; they do not authorize staff to invent binding conditions outside the Commissioner's rules or a valid delegation.

Ross interpreted a former version of § 6535 that required individual copies of disciplinary rules. The 1998 amendments replaced that language with the current reasonable access standard and mooted the old copy-demand dispute. Ross is therefore important history, not a current right to a personal copy of every policy. Ross v. Department of Correction, 722 A.2d 813 (Del. 1998)

2. The classification test: when a DOC “policy” is a regulation

2.1 The three elements

DeMatteis supplies the current Delaware Supreme Court framework. The challenged material must be: (1) a statement of law, procedure, policy, right, requirement, or prohibition; (2) formulated and promulgated by the agency; and (3) presented as a rule, standard, or guide for future decisionmaking. The analysis is functional. Label, location, and format are not dispositive.

DeMatteis held that not every agency policy choice is a regulation, but it restated the statutory elements and treated formulation/promulgation and future-guidance as essential. DeMatteis v. RiseDelaware, Inc., 320 A.3d 1025 (Del. 2024)

Baker held that mandatory standards, specifications, and criteria housed in a technical document were regulations despite their label and placement. If a document “walks, talks, and acts” like a regulation, the APA applies. Baker v. DNREC, Del. Super. Ct. (2015)

2.2 A workable eight-question screen

1. Is there a statement—written, digital, coded into a system, routinely announced, or proven by a consistent course of conduct?
2. Does it state a requirement, prohibition, eligibility criterion, procedure, right, consequence, or standard?
3. Was it formulated, approved, ratified, or systematically enforced by DOC, a bureau, a facility, or an official exercising apparent agency authority?
4. Does it govern future or repeated cases rather than a single, fact-specific event?
5. Does it bind or materially affect people outside the employee chain of command—incarcerated persons, counsel, legal-team members, families, contractors, or the public?
6. Does noncompliance produce denial, delay, discipline, loss of access, classification effects, fees, or other consequences?
7. Does a statute dictate the precise result, or did DOC supply meaningful standards and choices of its own?
8. If DOC invokes an exception, where are the written classification, adopting order, filing, emergency findings, or security determination?

2.3 Presumptive classification

Type of directive	Presumption	Why
Statewide or facility-wide rule governing incarcerated people or outsiders	Regulation	A future-facing standard with external consequences.

Type of directive	Presumption	Why
Mandatory eligibility criteria, numerical limits, categorical bans, required documentation, sanctions	Usually substantive regulation	Forbids or conditions conduct and supplies decisional criteria.
Employee work assignment, routing, shift coverage, internal reporting	Often § 10113(b) or nonregulatory	May concern internal organization or operations only; external effect can change result.
One-time emergency command responding to an unfolding incident	Often operational	May be fact-specific; a continuing generalized rule triggers further review.
Detailed implementation expressly compelled by statute	Possibly nonregulatory	The "specific and detailed" statutory-directive exception is narrow.
Computer configuration that automatically denies a category of requests	Potential regulation	Code can implement a uniform future standard even without a conventional policy document.
Oral custom consistently enforced across shifts or facilities	Potential regulation or ultra vires practice	Proof of agency formulation/ratification determines the theory.

2.4 The narrow "specific and detailed statute" exception

Free-Flow Packaging and later cases recognize that an agency need not conduct rulemaking when it is carrying out a specific and detailed statutory directive that leaves no meaningful policy choice. The exception is not a license to treat broad enabling authority—such as power to maintain security—as if the legislature itself selected every restriction.

Free-Flow Packaging explains that not everything an agency does culminates in a regulation or case decision, while recognizing that implementation of a specific, detailed legislative command may fall outside rulemaking. Free-Flow Packaging International, Inc. v. DNREC, 861 A.2d 1233 (Del. 2004)

KEY DISTINCTION

If an employee independently invents a rule and the agency never formulated, approved, ratified, or adopted it, the problem may be ultra vires conduct rather than an APA "regulation." If supervisors know, standardize, encode, train, or repeatedly enforce it, the evidence of agency formulation and promulgation becomes much stronger.

3. What DOC must do when it makes a policy

3.1 Always: authority, classification, and public-facing procedure

Every proposed directive should identify its statutory authority, issuer, scope, affected persons, effective date, and review mechanism. Section 10111 separately requires each agency to adopt and make available a description of its organization, methods of operation, contact points, and the nature and requirements of its rules of practice and procedure. Section 1135 reinforces the duty to supply organizational and APA-contact information to the Registrar.

3.2 Formal rulemaking for substantive or otherwise nonexempt regulations

Section 10113(a) establishes the default: regulations must be adopted under the APA unless specifically exempted. For a proposed DOC regulation, the minimum pathway is:

1. Prepare the notice, full proposed text, legal authority, synopsis, issues, terms, affected existing regulations, and public-comment instructions.
2. File with the Registrar of Regulations in time for publication in the Delaware Register of Regulations and comply with the Registrar's current formatting and filing rules.
3. Accept written comment for at least 30 days. If a public hearing is held, schedule it no earlier than 20 days after publication and keep written comment open for at least 15 days after the final hearing.
4. Create the administrative record and fairly consider comments, evidence, alternatives, and material counterarguments.
5. Issue a final order containing the evidence summary, factual findings, required climate-impact finding, decision and supporting reasons, exact regulatory text or citation, effective date, and required signatures or quorum.
6. Repropose if the final text makes a substantive change from the proposal. Do not allow a proposal to remain pending beyond the statutory period.
7. File the final order and text with the Registrar. Ordinarily, make the regulation effective no earlier than 10 days after final publication.

The operative rulemaking provisions are 29 Del. C. §§ 10113 and 10115–10118. Delaware APA, Subchapter II

Effective July 11, 2026, 29 Del. Admin. C. § 101 sets current Registrar filing and publication requirements, including filing timing, official text/track-changes conventions, comment-period computations, final orders, withdrawals, incorporation by reference, and error correction. 29 Del. Admin. C. § 101; 30 Del. Reg. 52

3.3 Informal adoption does not mean invisible adoption

Section 10113(b) permits informal adoption of limited categories: organization, operations, and information; practice and procedure; delegation to subordinates; nonsubstantive technical changes; changes required to conform to basic law; and codifications of existing principles of decision. The crucial final sentence still requires the regulation and its adopting order to be filed with the Registrar. Once filed, it becomes an official regulation under § 1132.

§ 10113(b) category	Permitted shortcut	What remains required
Organization / operations / information	No proposal-and-comment process	Authorized adopting order + filing with Registrar.
Practice and procedure	Informal adoption if genuinely procedural	No disguised substantive burden; order + filing.
Delegation to subordinates	Written delegation may be informal	Defined scope, accountable issuer, order + filing.
Nonsubstantive technical changes	No public proposal required	No change in legal effect; order + filing.
Conformity to basic law	Ministerial conforming change	Law must actually compel result; order + filing.
Codification of existing decisional principles	Codification without proposal	Principles must truly preexist; order + filing.

3.4 Emergency rules require findings, limits, and filing

Section 10119 authorizes abbreviated emergency adoption only when an imminent peril to public health, safety, or welfare requires immediate action. DOC must issue written reasons, file the rule, and respect the statutory duration: generally no more than 120 days, with one renewal of no more than 60 days. It must receive and reconsider petitions concerning the emergency regulation. An emergency cannot become a permanent unpublished custom merely because security was cited at the outset.

3.5 Additional review obligations

- Attorney General review. Under 29 Del. C. § 605, no rule or regulation becomes effective until the Attorney General has reviewed it and provided written notice regarding potential private-property takings. That limited review is not a substitute for APA review.
- Regulatory Flexibility Act. Title 29, Chapter 104 expressly includes DOC as an executive-branch agency. When a proposed regulation is substantially likely to impose additional costs or burdens on individuals or small businesses, DOC must prepare the applicable impact/flexibility material or state why it does not apply, subject to statutory exceptions.
- Periodic review. Executive agencies generally must periodically review regulations at least four years old, seek public input, and consider amendment or repeal under § 10407.
- Petitions. Under § 10114, any person may petition for adoption, amendment, or repeal of a regulation. DOC must grant/initiate action or deny with reasons under the statutory process.

4. What DOC must not do

Prohibited or high-risk practice	Why it is defective	Corrective action
Use “policy,” “procedure,” “post order,” “memo,” or oral custom to evade rulemaking	Function—not label—controls under DeMatteis and Baker.	Classify by effect; formally or informally adopt and file as required.
Allow staff to create externally binding restrictions without delegated authority	Agency power comes from statute; subordinates cannot enlarge it.	Require written delegation and Commissioner-level approval for external rules.
Treat § 10113(b) as permission for secret, undocumented rules	Informal regulations and adopting orders still must be filed.	File both items with the Registrar and add to public registry.
Rely on generic “safety and security” language	Current § 4322(d) requires Commissioner judgment; FOIA and constitutional burdens may require a concrete nexus.	Document threat, mechanism, evidence, scope, alternatives, duration, and decisionmaker.
Hide the governing standard because implementation details are sensitive	Confidential tactics do not necessarily require secret legal standards.	Split public rule from confidential operational annex; redact narrowly.
Convert a temporary emergency response into a permanent norm	Section 10119 imposes written findings and time limits.	Expire, renew once if authorized, or conduct ordinary rulemaking.
Adopt first and rationalize after challenge	Final orders must rest on a real record and findings; conjecture is not substantial support.	Build record before decision; answer counterarguments.
Make substantive changes after public comment without reproposal	Section 10118 requires reproposal of substantive changes.	Publish revised proposal and reopen the process.
Assume APA adoption validates an unconstitutional restriction	Statutory procedure and constitutional merits are separate.	Conduct First/Sixth/Fourteenth Amendment and access-to-courts review.
Assume an individual grievance decision is appealable under § 10142	DOC has limited APA coverage under § 10161(b).	Use § 10141 for regulation challenge and identify other available claims/remedies.

4.1 Evidence, counterarguments, and the administrative record

Bernie's Conchs illustrates the general Delaware administrative-law principle that agency findings cannot rest on speculation and conjecture. A decisionmaker should address material contrary evidence and alternatives rather than treat the hearing as a formality after the outcome is fixed. Section 10118 independently requires findings and a decision supported by those findings.

The Superior Court rejected an agency record that lacked a reasonable evidentiary basis and emphasized the need to confront material counterarguments. Bernie's Conchs, LLC v. DNREC, Del. Super. Ct. (2007)

4.2 Retroactive cure is unsafe

If DOC discovers an unadopted regulation, prospective rulemaking is the safest cure. Later adoption does not automatically validate past enforcement, erase prejudice, resolve a constitutional claim, or eliminate remedies for an ultra vires act. DOC should preserve the history, identify affected decisions, suspend unsupported future enforcement where safely possible, and separately determine whether reconsideration or individualized relief is required.

5. Security and confidentiality: the required showing

5.1 Current § 4322(d) contains two gates

Current 11 Del. C. § 4322(d) makes confidential a DOC policy or procedure that, "in the judgment of the Commissioner," contains information that could jeopardize institutional, staff, offender, or public safety or security. The statute defines policy broadly, but confidentiality is not automatic merely because DOC owns the document.

- Decisionmaker gate: the judgment must be the Commissioner's—not simply a line employee's, facility administrator's, bureau chief's, or lawyer's post hoc assertion unless valid authority and actual exercise are shown.
- Risk gate: the policy must contain information capable of jeopardizing safety or security. The conclusion should connect identified content to an identified risk mechanism.

In Opinion 24-IB09, the Attorney General concluded that affidavits from a Bureau Chief did not demonstrate the Commissioner's required § 4322(d) judgment. DOC prevailed only because separate FOIA security evidence established a specific tactical/escape risk. Delaware Attorney General Opinion 24-IB09

5.2 The 2022 amendment matters

Before October 14, 2022, § 4322 broadly treated DOC policies and procedures as confidential. House Bill 394, enacted as 83 Del. Laws ch. 467, replaced that categorical premise with the current Commissioner-judgment and jeopardy standard. Its synopsis expressly described the change as permitting dissemination to incarcerated people and the public when safety or security would not be endangered.

House Bill 394 bill history and enacted text. HB 394 (151st General Assembly)

5.3 Jackson and Hall are limited by their statutory setting

Jackson held under the former categorical statute that DOC's lethal-injection protocol was confidential and therefore outside public APA promulgation. The Delaware Supreme Court affirmed. Hall later rejected a publication claim concerning internal classification and housing procedures, relying on the old confidentiality regime and a then-existing APA provision. These cases remain material, especially for genuinely tactical or internal security matters, but their categorical confidentiality premise no longer appears in § 4322(d).

No reported Delaware appellate decision located for this report squarely decides how the post-2022 version of § 4322(d) interacts with APA rulemaking. The cautious expert position is therefore not that all confidential policies must be publicly published in full, nor that confidentiality erases every APA duty. The better structure is a public, legally operative standard plus a confidential annex containing only tactics or details whose disclosure satisfies the statutory risk test.

Old-law confidentiality and lethal-injection protocol. Jackson v. Danberg, Del. Super. Ct. (2008), aff'd, Del. (2008)

Old-law internal classification/housing procedures. Hall v. Coupe, Del. Ch. (2016)

5.4 FOIA is related but analytically separate

FOIA begins with a strong policy favoring public access, but it contains exemptions. Relevant provisions include records made confidential by statute, requests made by persons in DOC custody, and particular public-safety/security categories in § 10002(o). A document can be exempt from disclosure without being a valid regulation; conversely, disclosure does not itself prove that a document was lawfully adopted.

A requester denied access by a state agency generally must use the statutory Attorney General petition route under § 10005 within 60 days and then, if necessary, take the on-record appeal to Superior Court within the statutory 60-day period. Exact procedure should be checked against the current denial letter and statute before filing.

5.5 Why generalized security allegations are insufficient

The strongest Delaware statement is Vanella v. Duran, decided August 24, 2026. Applying FOIA, the Delaware Supreme Court held that generalized officer-safety concerns did not satisfy the public body's burden for the records at issue. It reinforced Gannett's principle that a safety rationale must be supported by the showing the statute requires. Opinion 24-IB09 similarly demanded proof of the proper statutory decisionmaker, while accepting a distinct, specific tactical explanation.

Generalized officer-safety concerns, without the required showing, were insufficient; partial disclosure and redaction remain important tools. Vanella v. Duran, Del. Supr., No. 419, 2025 (Aug. 24, 2026)

Gannett rejected a generalized officer-safety justification in the FOIA context and required the asserted exemption to be supported under the governing statutory standard. Gannett Co. v. Board of Managers of DELJIS, 840 A.2d 1232, 1239 (Del. 2003)

SECURITY FINDING TEMPLATE

Identify: (1) the exact content withheld or restriction imposed; (2) the threat; (3) how disclosure or access would enable that threat; (4) evidence or experience supporting the connection; (5) narrower alternatives considered; (6) why redaction, verification, supervision, delay, or individualized review is insufficient; (7) duration and reassessment date; and (8) the Commissioner's dated approval.

6. Constitutional security review: deference is not abdication

6.1 Turner's four-factor framework

For many prison restrictions affecting constitutional rights, Turner asks whether the regulation is reasonably related to legitimate penological interests. Courts give substantial deference to correctional expertise, but there must be a valid rational connection between the restriction and the interest; the connection cannot be remote, arbitrary, or irrational. Courts also consider alternative means of exercising the right, the impact of accommodation on staff and resources, and obvious ready alternatives that may show an exaggerated response.

Turner's rational-relationship framework and four factors. Turner v. Safley, 482 U.S. 78 (1987)

Deference remains substantial, but restrictions still require a rational relationship to legitimate penological interests. Overton v. Bazzetta, 539 U.S. 126 (2003)

6.2 The Third Circuit requires more than a conclusory assertion when the link is not apparent

Jones v. Brown held that prison officials must do more than offer a conclusory security assertion to establish Turner's rational connection. Common sense may sometimes establish an obvious connection, but when it does not, factual development matters. Monroe v. Beard repeated the principle while upholding restrictions supported by the record before it.

Legal-mail security rationale and the need for more than a conclusory assertion. Jones v. Brown, 461 F.3d 353 (3d Cir. 2006)

Application of Turner and record-supported security justification. Monroe v. Beard, 536 F.3d 198 (3d Cir. 2008)

6.3 A rigorous security record should answer six questions

1. What legitimate penological interest is claimed—contraband control, witness safety, identity verification, escape prevention, fraud prevention, network integrity, staffing, or another defined interest?
2. What is the causal mechanism connecting the challenged activity to the risk?

3. What evidence supports that mechanism: incidents, audits, logs, expert assessment, system constraints, or reliably documented experience?
4. What alternative avenues remain available to exercise the affected right, and are they meaningful in time and function?
5. What operational impact would a narrower accommodation have?
6. Is there an obvious, low-cost alternative—verification, allowlisting, monitored setup with unmonitored substance, conference credentials, time limits, case-specific screening, or confidential annex—that substantially reduces the burden?

7. Attorney and legal-team access as a case study

7.1 Rights and limits must both be stated accurately

The Constitution protects meaningful access to courts and, in criminal matters, counsel. But the cases do not establish a free-standing right to the incarcerated person's preferred communication technology, unlimited telephone use, every requested participant, or an abstract law-library service. An access-to-courts claim ordinarily requires actual injury to a nonfrivolous legal matter under Lewis v. Casey.

Actual injury is required for the access-to-courts claim addressed in Lewis. Lewis v. Casey, 518 U.S. 343 (1996)

No constitutional right to a particular means of access when meaningful access exists as a whole. Aswegan v. Henry, 981 F.2d 313 (8th Cir. 1992) (persuasive)

At the same time, unreasonable obstruction of attorney communication can violate protected rights. Tucker recognizes that severe or unreasonable telephone restrictions may state a claim. Benjamin treats unjustifiable interference with pretrial detainees' attorney access as constitutionally significant. These are persuasive, fact-dependent authorities; neither creates an unlimited conference-call entitlement.

Attorney-call restrictions may be actionable when unreasonable. Tucker v. Randall, 948 F.2d 388 (7th Cir. 1991) (persuasive)

Pretrial detainee attorney visitation/access and unjustifiable obstruction. Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) (persuasive)

7.2 The legal team is not necessarily one lawyer at one number

Legal representation may legitimately require co-counsel, supervising and local counsel, interpreters, paralegals, investigators, experts, litigation-support personnel, guardians, social workers, or common-interest participants. Procunier v. Martinez is important because the Supreme Court invalidated an absolute bar involving law students and paraprofessionals; a prison cannot define meaningful legal assistance as attorney-only merely by assertion.

Absolute restriction on law-student and paraprofessional legal access was unconstitutional on the record there. Procunier v. Martinez, 416 U.S. 396 (1974)

7.3 Applying the APA to alleged one-attorney, one-number, or no-three-way rules

If DOC consistently applies a categorical limit to future legal calls, it likely states a requirement or prohibition and guides future decisions. If authorized or ratified by DOC, it is a strong candidate for regulation status. A rule encoded in the telephone platform, visitor database, call-approval form, or staff script can have the same legal effect as a signed policy.

The merits then require a separate Turner analysis. A generalized statement that conference calls create “security concerns” is not the end of the inquiry. DOC should identify whether the concern is identity, call forwarding, unverified participants, witness contact, recording, fraud, contraband coordination, network capability, or staff burden—and explain why verification, preapproval, credentialing, or case-specific control is insufficient.

7.4 Model legal-communications standard

RECOMMENDED SUBSTANTIVE RULE

DOC should permit confidential, unmonitored communications with verified counsel and approved legal-team participants when reasonably necessary for representation. Multi-party communications should be available through advance verification and scheduling. Any denial should be individualized, written, tied to a specific risk or operational impossibility, time-limited, and subject to prompt review by an official not involved in the initial denial. The rule should not promise privileges that governing law does not recognize, and security setup may be supervised without monitoring legal substance.

Feature	Recommended rule	Security control
Participants	Attorney plus verified co-counsel or necessary legal-team member	Bar/organization verification, identity credential, role attestation.
Conference calls	Allowed when representation reasonably requires it	DOC-controlled bridge or preapproved numbers; participant roll call.
Confidentiality	No monitoring or recording of legal substance absent lawful exception	Staff may verify setup and disconnect after confidential channel begins.
Urgency	Expedited route for deadlines, hearings, and emergent representation needs	Counsel certification; short-duration interim approval.
Denial	Specific written reason, governing policy ID, duration, and review route	Sensitive detail may be separately protected; gist should permit review.

Feature	Recommended rule	Security control
Review	Prompt independent review and record preservation	Central tracking detects recurring threats and inconsistent facilities.

DO NOT OVERCLAIM

The existence and content of a particular DOC restriction remain factual questions. A court may uphold a carefully supported limitation, especially where meaningful alternatives exist. The expert point is narrower and stronger: categorical enforcement, secret provenance, and generalized security language are not substitutes for authority, APA classification, evidence, and individualized constitutional analysis.

8. How to prove the policy and the defect

8.1 Build the “operative rule” record

When the written policy is unavailable, proof should focus on repeated, consistent future-oriented enforcement and agency ratification. Preserve original formats and metadata where lawfully available.

- Every written denial, grievance response, message, form, kiosk notice, call log, screenshot, visitor entry, disciplinary charge, and appeal response quoting or applying the standard.
- Names, titles, facilities, dates, shifts, and exact words of employees who stated the rule.
- Comparable requests and outcomes showing repetition, categorical treatment, or cross-facility consistency.
- Training materials, post orders, bulletins, vendor configurations, telephone-platform rules, approval scripts, email directives, and change tickets.
- The policy number, revision history, issuer, signature, effective date, superseded policy, distribution list, and delegated authority.
- Registrar search results, Delaware Register notices, proposed and final orders, emergency findings, Attorney General notice, and regulatory-impact material.
- Commissioner-level security determination, risk assessment, incident support, alternatives considered, duration, and reassessment.
- Concrete prejudice: missed filing, lost consultation time, inability to use interpreter or expert, additional cost, delayed hearing, compromised confidentiality, or other actual effect.

8.2 Four separate legal questions for every piece of proof

Question	Best evidence	Potential theory
Did the agency formulate or promulgate a future standard?	Text, repeated application, training, system code, supervisor ratification	APA regulation under § 10102.
Did the issuer have authority?	Statute, organizational order, written delegation, signature authority	Ultra vires / invalid delegation.
Was the required adoption route followed?	Register notice, final or adopting order, filing record, emergency order	Subchapter II / § 1132 defect.
Is the restriction substantively lawful?	Risk evidence, alternatives, actual injury, timing, classification	Constitutional/statutory merits.

8.3 Public-record requests should be precise and separable

Request records by function and date range, not only by an unknown policy title. Ask for both the operative standard and its pedigree: adopting order, delegation, revision history, distribution, training, system configuration, and security designation. Expressly request reasonably segregable portions and a log or explanation sufficient to evaluate exemptions. A requester in DOC custody faces a specific FOIA exemption; counsel, a journalist, an organization, or another eligible requester should evaluate standing and requestor status independently.

If access is denied, do not let the FOIA petition clock expire while informally negotiating. Preserve the original request, proof of receipt, extensions, response, redactions, metadata, and claimed exemptions.

9. Remedies, procedure, and litigation risks

9.1 Regulation challenge under § 10141

A person aggrieved by a regulation may seek declaratory relief in Superior Court under § 10141. The court first requires final agency action. Invalidity may also be raised as a defense when the regulation is the subject of an enforcement action in court. Outside that defense, § 10141(d) requires the complaint within 30 days after the agency order concerning the regulation was published in the Register of Regulations. Counsel therefore must analyze publication, enforcement, standing, prejudice, and any claim involving an unpublished directive immediately rather than assume that a secret or old rule has no clock.

A regulation is presumed valid. The challenger bears the burden specified in § 10141—generally showing that it is substantially unlawful and that the challenger suffered

prejudice, or that it lacks a reasonable basis or is otherwise unlawful. Section 10144 governs stays and requires substantial issues or facts plus irreparable harm. Section 10145 governs service.

Declaratory review, validity standard, and timing. 29 Del. C. § 10141

9.2 Other potential routes

- Ultra vires or equitable relief. A directive issued without statutory or delegated authority may present a claim distinct from APA noncompliance; forum, sovereign immunity, and available relief require case-specific analysis.
- Constitutional relief. Federal or state constitutional claims may be available depending on actual burden, injury, defendant, immunity, exhaustion, and remedy. Section 1983 and the Prison Litigation Reform Act raise specialized pleading and exhaustion issues.
- FOIA. Section 10005 provides the Delaware remedy for improper denial of public records. Vanella is especially important for the burden of proof and partial disclosure.
- Mandamus. APA § 10143 is not among the provisions made applicable to DOC by § 10161(b). Any common-law mandamus theory must satisfy its own demanding requirements and should not be mislabeled as APA mandamus.
- Petition for rulemaking. Section 10114 offers a nonlitigation route to demand adoption, amendment, or repeal and to require a reasoned agency response.
- Internal grievance and preservation. Exhaustion may be required for some claims. Use the grievance process precisely, while stating that internal policy cannot create Superior Court appellate jurisdiction under Fatir.

9.3 Claims that should be avoided without proof

- “Every DOC policy is a regulation.” False; DeMatteis, § 10113(b), and the specific-detailed-statute doctrine require classification.
- “Every confidential policy is invalid.” False; security-sensitive details can lawfully be confidential, and old cases recognize strong protection in appropriate settings.
- “Security is never enough.” False; specific, decisionmaker-supported risks can justify withholding or restriction.
- “A policy page with no visible list proves secret policy.” It does not. The absence may support further inquiry but not the conclusion.
- “APA noncompliance automatically wins the constitutional case.” It does not; procedure and merits are distinct.
- “There is an absolute right to three-way attorney calls.” The cited cases support meaningful access and calibrated review, not that categorical proposition.

10. Proposed solution: DOC Policy Legality and Publication Protocol

10.1 Immediate Commissioner's order

The Commissioner should issue an implementation order, effective immediately, with the following terms:

1. No employee may create or enforce a new externally binding, generally applicable directive unless it has a Policy Legality ID and approved classification.
2. True incident commands remain available. Any command applied beyond the incident or used as a future standard must enter the classification process within two business days.
3. No existing directive is declared invalid by the inventory alone. But any directive lacking identified authority and classification is flagged for expedited legal review and may not be expanded.
4. The Commissioner retains approval of substantive external rules and Commissioner-only security judgments; delegation must be written, limited, and recorded.
5. The public must be able to identify the governing legal standard, authority, effective date, and review route even when a confidential annex protects tactics.

10.2 Central Policy Review Officer and register

Create a Policy Review Officer in the Commissioner's office, supported by agency counsel, the FOIA coordinator, a Registrar liaison, operations/security, accessibility, and an affected-program representative. The officer maintains one authoritative register—not a collection of disconnected facility folders.

Required register field	Purpose
Policy Legality ID; title; version; superseded item	Prevents oral or duplicate "rules."
Issuer; approval; delegation; legal authority	Establishes power and accountability.
Scope; affected persons; facilities; systems	Reveals external and statewide effect.
Classification and legal memorandum	Records why it is regulation, § 10113(b), emergency, operational, or nonrule.
Adoption path; Register citations; orders; effective date	Proves legal adoption and current status.
Public text; confidential annex; redaction basis	Separates law from protected tactics.
Security finding; decisionmaker; evidence; review date	Prevents generic or stale security claims.
Owner; training; audit; complaints; expiration/review	Makes enforcement consistent and testable.

10.3 The classification decision tree

Step	Decision or action
1	Does the directive contain a statement of law, procedure, policy, right, requirement, or prohibition?
2	Has DOC formulated, approved, ratified, trained, encoded, or regularly enforced it?
3	Will it guide future decisions or repeated classes of cases?
4	If yes to all three: presume regulation. If substantive or otherwise outside § 10113(b), use formal rulemaking.
5	If within § 10113(b), create an adopting order and file both the regulation and order with the Registrar.
6	If immediate action is essential because of imminent peril, use § 10119, record reasons and duration, and begin ordinary rulemaking if a continuing standard is needed.
7	If it contains tactical security information, prepare public operative text and a confidential annex; obtain the Commissioner's § 4322(d) determination.
8	If it is a one-time operational command or unauthorized act, document that status, prevent future standardization, and address affected decisions.

10.4 Public rule / confidential annex architecture

Public operative rule	Confidential annex
Who is covered and what conduct is allowed, required, or prohibited.	Specific vulnerabilities, response tactics, deployment details, system credentials.
Eligibility criteria, evidence required, timelines, denial grounds.	Threat indicators whose disclosure would enable evasion.
Decisionmaker, review route, recordkeeping, effective date.	Detailed staffing patterns or technical controls.

Public operative rule	Confidential annex
General explanation of legitimate objective and safeguards.	Content supported by Commissioner's documented jeopardy judgment.

10.5 No-secret-rule denial notice

Every denial based on policy should state:

- Policy Legality ID, public title, version, and effective date.
- Legal authority and adopting path or operational classification.
- Decisionmaker and whether the denial is categorical or case-specific.
- Facts relied on, stated at the greatest level consistent with lawful security.
- Duration, conditions for reconsideration, and prompt review route.
- Preservation notice for logs and supporting records.

11. Ninety-day implementation plan

Period	Required work	Deliverable
Days 0–15	Commissioner order; appoint Policy Review Officer; freeze expansion of unclassified external rules; establish register and intake forms.	Signed order, named team, register schema, staff notice.
Days 16–30	Collect statewide, bureau, facility, vendor, system, training, post-order, and oral-custom candidates.	Complete inventory with owners and enforcement status.
Days 31–45	Classify high-impact rules first: discipline, legal access, visitation, communication, release, health, disability, property, fees, classification.	Legal classification memoranda; red/yellow/green risk list.
Days 46–60	Publish existing lawful public standards; split confidential annexes; obtain Commissioner security findings; suspend clearly unauthorized external enforcement where safely possible.	Public index, security log, interim corrective notices.

Period	Required work	Deliverable
Days 61–75	File § 10113(b) items and adopting orders; initiate formal or emergency rulemaking where applicable; issue individualized reconsideration process.	Registrar filings, proposed regulations, cure docket.
Days 76–90	Audit training and system configuration; certify facility compliance; report unresolved items and timelines.	Public compliance report and Commissioner certification.
Quarterly	Sample denials, compare facilities, review security designations, expire stale directives, and track petitions/complaints.	Quarterly policy-legality dashboard.

11.1 Priority rules for immediate review

Begin with rules that impose liberty, access, deadline, financial, disciplinary, or constitutional consequences. Legal communications should be a first-wave category because delay can cause irreparable litigation harm and because facility-by-facility variation is especially damaging.

11.2 Metrics that reveal whether the reform works

- Percentage of active directives with identified authority, classification, approval, and current version.
- Number of unclassified directives discovered, suspended, formally adopted, informally filed, narrowed, or retired.
- Percentage of denials citing a public rule and a specific reason rather than “security” alone.
- Facility variance in comparable legal-access decisions.
- Average time for urgent attorney-access review and ordinary policy reconsideration.
- Number and age of confidential annexes lacking a current Commissioner determination.
- Rulemaking petitions received, response time, disposition, and reasons.
- Corrective action for system or vendor code that diverges from governing policy.

12. Model forms

Form A — Policy Intake and APA Classification

Field	Entry / instruction
Proposed title and Policy Legality ID	_____ _____
Originator / approving official	Name, title, bureau/facility, written delegation.
Statutory authority	Exact citation and explanation of delegated choice.
Statement and medium	Attach text, screen, script, form, post order, code rule, or oral-custom proof.
Future effect	Who is governed; frequency; facilities; consequences.
External/substantive effect	Conduct allowed/required/forbidden; access/benefit/sanction.
Classification	☐ Formal regulation ☐ § 10113(b) ☐ § 10119 emergency ☐ Operational/nonrule ☐ Ultra vires—do not enforce
Adoption record	Register issue, proposed/final or adopting order, AG notice, impact statement, effective date.
Security architecture	☐ Fully public ☐ Public rule + annex ☐ Fully confidential; attach Form B.
Constitutional review	Rights affected, actual alternatives, evidence, narrower options.
Approval	Policy Review Officer / agency counsel / Commissioner, dates.

Form B — Commissioner Security Designation

Required finding	Documented answer
Exact content at issue	Identify portions, not just document title.
Specific threat	Institutional, staff, offender, or public safety/security risk.
Causal mechanism	How content disclosure or requested access could enable harm.

Required finding	Documented answer
Support	Incidents, logs, audit, technical assessment, documented experience.
Narrower alternatives	Redaction, delay, verification, supervision, allowlist, individualized screening.
Public gist	State the operative standard and reason at a reviewable level.
Duration / review	Expiration or reassessment date; changed circumstances.
Commissioner judgment	I have reviewed the identified content and determine under 11 Del. C. § 4322(d) that it could jeopardize safety or security. Signature/date.

Form C — Policy-Based Denial and Prompt Review

Field	Required content
Request / date / requester	Identify the request precisely.
Decision	Approved / approved with conditions / denied in part / denied.
Governing authority	Policy ID, public text, statutory authority, effective date.
Facts and reason	Specific, reviewable explanation; separate protected tactics.
Alternative offered	Different time, method, verified participant, partial access, or other accommodation.
Duration	One-time, temporary until date, or continuing with review date.
Review	Official, submission method, urgent timeline, ordinary timeline.
Record preservation	Logs, communications, system data, decision materials retained.

13. Draft Commissioner policy language

MODEL — FOR COUNSEL REVIEW AND APA CLASSIFICATION BEFORE ISSUANCE

1. Purpose. The Department shall ensure that every directive is issued by an authorized official, classified under the Delaware Administrative Procedure Act, lawfully adopted and filed when required, publicly identifiable to the extent allowed by law, and supported by a reviewable security determination when access is restricted.

2. Covered directive. “Directive” includes any written, oral, electronic, coded, vendor-implemented, trained, or customary statement used as a rule, standard, requirement, prohibition, eligibility criterion, sanction basis, or guide for future decisions.

3. Approval gate. No employee shall enforce a new generally applicable directive affecting an incarcerated person or nonemployee unless the directive bears an active Policy Legality ID. An incident-specific command may be issued within lawful authority but shall not become a continuing standard without review.

4. Classification. The Policy Review Officer and agency counsel shall classify each directive as: formal regulation; informally adoptable regulation under 29 Del. C. § 10113(b); emergency regulation under § 10119; authorized operational/nonregulatory instruction; or unauthorized action. The classification and reasons shall be recorded.

5. Formal and informal adoption. Regulations shall follow the applicable notice, comment, order, filing, publication, Attorney General review, and regulatory-impact requirements. A regulation adopted under § 10113(b) and its adopting order shall be filed with the Registrar of Regulations.

6. Security information. When a directive contains information that could jeopardize safety or security, the Department shall separate the public operative standard from sensitive tactics to the maximum reasonable extent. Confidentiality under 11 Del. C. § 4322(d) requires the Commissioner’s dated judgment identifying the content, risk, and reassessment date. General security labels are insufficient.

7. Denials. A denial based on a directive shall identify the Policy Legality ID, public authority, facts, duration, alternative offered, and review method. The Department may protect tactical detail but shall provide a sufficient public explanation to permit meaningful review, unless law specifically forbids it.

8. Legal communications. The Department shall provide a process for confidential communications with verified counsel and reasonably necessary verified legal-team participants, including a process for multi-party communications. Restrictions shall be individualized when feasible, rationally connected to a defined legitimate penological interest, supported by evidence or an apparent common-sense connection, no broader than reasonably necessary, and promptly reviewable.

9. Existing directives. The Policy Review Officer shall inventory, classify, and cure existing directives under the ninety-day plan. Later adoption is prospective unless governing law clearly permits another result. The Department shall separately consider prejudice from prior enforcement.

10. Audits and accountability. Facilities, bureaus, contractors, and technology vendors shall implement only the current registered version. Quarterly audits shall compare enforcement across facilities, review confidential annexes, test system configurations, and report corrective actions to the Commissioner.

14. Authorities and source guide

The sources below are coded by function. Links point to official Delaware materials where available; case links are public reproductions unless an official court link was the more practical source. Pinpoint citations should be verified in the final reporter or official PDF before filing.

A. Delaware statutes and regulations

29 Del. C. §§ 10101–10102 [APA-1] — policy, agency, agency action, regulation, and substantive-regulation definitions. [source]

29 Del. C. §§ 10111–10119 [APA-2] — organization disclosure; public records; formal and informal adoption; petitions; notice; comment; hearings; final orders; emergency rules. [source]

29 Del. C. §§ 10141, 10144–10145 [APA-3] — declaratory review of regulations; stay; service. [source]

29 Del. C. § 10161 [APA-4] — DOC's limited APA coverage: Subchapters I and II and §§ 10141, 10144, 10145. [source]

29 Del. C. §§ 1131–1135 [REG-1] — Registrar; official regulation; Register publication; agency contact and organization material. [source]

29 Del. Admin. C. § 101 [REG-2] — current filing and publication requirements, effective July 11, 2026. [source]

29 Del. C. § 605 [AG-1] — Attorney General notice before effectiveness concerning potential takings. [source]

29 Del. C. ch. 104 [RFA-1] — Regulatory Flexibility Act; DOC coverage; impact/flexibility and periodic review. [source]

11 Del. C. §§ 6516–6517 [DOC-1] — Commissioner's executive, administrative, rulemaking, organization, custody, discipline, and management authority. [source]

11 Del. C. §§ 6502, 6504 [DOC-2] — Departmental purposes and care/control framework. [source]

11 Del. C. §§ 6535, 6537 [DOC-3] — discipline rules and access to applicable portions; visits and correspondence under reasonable conditions. [source]

Ross v. Department of Correction, 722 A.2d 813 (Del. 1998) [CASE-DOC-1] — 1998 amendments mooted the former personal-copy claim; current § 6535 provides reasonable access. [source]

11 Del. C. § 4322(c)–(d), (j) [SEC-1] — manuals and policy confidentiality; Commissioner judgment; § 10005 relief. [source]

83 Del. Laws ch. 467 / HB 394 [SEC-2] — 2022 narrowing of categorical DOC policy confidentiality. [source]

29 Del. C. ch. 100 [FOIA-1] — public-record definitions, exemptions, access, and enforcement. [source]

B. Delaware administrative-law cases

DeMatteis v. RiseDelaware, Inc., 320 A.3d 1025 (Del. 2024) [CASE-DE-1] — current three-element regulation analysis; not every policy is a regulation. [source]

Baker v. DNREC, Del. Super. Ct. (2015) [CASE-DE-2] — mandatory technical criteria can be regulations despite labels or document placement. [source]

Free-Flow Packaging Int'l, Inc. v. DNREC, 861 A.2d 1233 (Del. 2004) [CASE-DE-3] — specific and detailed statutory direction; not every agency act is a rule or case decision. [source]

Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632 (Del. 2017) [CASE-DE-4] — agency power derives from statute and extends no further than reasonably necessary. [source]

Bernie's Conchs, LLC v. DNREC, Del. Super. Ct. (2007) [CASE-DE-5] — reasonable evidentiary basis, counterarguments, and conjecture. [source]

Fatir v. Phelps, Del. Super. Ct. (2018) [CASE-DE-6] — DOC case decisions not appealable under § 10142; separate § 10141 regulation theory. [source]

C. Security, confidentiality, and transparency

Jackson v. Danberg, Del. Super. Ct. (2008), aff'd, Del. (2008) [CASE-SEC-1] — old-law categorical confidentiality and lethal-injection protocol. [source]

Hall v. Coupe, Del. Ch. (2016) [CASE-SEC-2] — old-law internal classification/housing procedures and publication claim. [source]

Delaware Attorney General Opinion 24-IB09 [OP-SEC-1] — Commissioner-judgment proof under § 4322(d); specific alternative security evidence. [source]

Vanella v. Duran, Del. Supr., No. 419, 2025 (Aug. 24, 2026) [CASE-SEC-3] — generalized officer-safety concerns insufficient under the applicable FOIA burden; partial disclosure. [source]

Gannett Co. v. Board of Managers of DELJIS, 840 A.2d 1232 (Del. 2003) [CASE-SEC-4] — generalized officer-safety concern did not establish the asserted FOIA basis. [source]

Executive Order No. 3 (Jan. 22, 2025) [EO-1] — executive-branch transparency and compliance review; policy support, not an independent private cause of action. [source]

D. Federal constitutional authorities

Turner v. Safley, 482 U.S. 78 (1987) [US-1] — four-factor prison-regulation test; rational connection cannot be arbitrary or irrational. [source]

Overton v. Bazzetta, 539 U.S. 126 (2003) [US-2] — substantial correctional deference within Turner framework. [source]

Jones v. Brown, 461 F.3d 353 (3d Cir. 2006) [3C-1] — more than conclusory security assertion when rational connection is not apparent. [source]

Monroe v. Beard, 536 F.3d 198 (3d Cir. 2008) [3C-2] — Turner application and record-supported security restriction. [source]

Procunier v. Martinez, 416 U.S. 396 (1974) [US-3] — absolute restrictions on law-student/paraprofessional legal assistance. [source]

Lewis v. Casey, 518 U.S. 343 (1996) [US-4] — actual-injury requirement for the access-to-courts claim addressed there. [source]

Aswegan v. Henry, 981 F.2d 313 (8th Cir. 1992) [PERS-1] — no right to a preferred or unlimited telephone method where access is meaningful as a whole. [source]

Tucker v. Randall, 948 F.2d 388 (7th Cir. 1991) [PERS-2] — unreasonable attorney-call restrictions may implicate protected rights. [source]

Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) [PERS-3] — pretrial detainee attorney access and unjustifiable obstruction. [source]

E. Administrative resources

Delaware Registrar of Regulations Style Manual [RES-1] — current drafting and filing guidance. [source]

Delaware Regulations — Citizen Participation [RES-2] — public rulemaking participation and Register access. [source]

DOC Policies and Regulations webpage [RES-3] — current public DOC landing page; the page alone does not establish the existence or absence of a particular policy. [source]

DOC Policy 5.1 [RES-4] — DOC policy identifying access to counsel/courts and grievance among offender-rights topics; agency policy does not itself create judicial appellate jurisdiction. [source]

15. Final expert assessment

The legally sound position is neither “DOC may keep any security policy secret” nor “every staff instruction must undergo notice and comment.” Delaware law requires classification based on function, authority, and effect. A DOC-created statement that operates as a future standard is presumptively within the APA definition of regulation. A substantive rule ordinarily requires proposal, public comment, findings, final order, filing, publication, and related review. A rule within § 10113(b) may skip proposal and comment but not the adopting order and Registrar filing. A true imminent-peril rule must use § 10119. A one-time operational command may remain outside rulemaking, but it cannot quietly harden into a continuing, externally binding standard.

Security changes what may be disclosed and what restrictions may be justified; it does not eliminate the need to identify the decisionmaker, the authority, the governing standard, and the evidentiary connection. Current § 4322(d) calls for the Commissioner’s judgment. Opinion 24-IB09 shows that a subordinate’s affidavit does not automatically prove that

judgment. Vanella and Jones demonstrate, in their respective statutory and constitutional settings, why generalized safety allegations may be insufficient. A public rule paired with a confidential tactical annex is the cleanest reconciliation of transparency, security, and enforceability.

For alleged attorney-call restrictions, the next expert step is evidentiary: obtain or prove the operative standard, map its adoption pedigree, identify repeated application and prejudice, and demand the actual security mechanism and alternatives analysis. The proposed 90-day protocol solves the institutional defect prospectively while preserving case-specific review of past harm. It gives staff a lawful way to act quickly, gives the Commissioner accountable control, protects genuine security information, and makes the rules governing people's rights knowable and reviewable.

RESEARCH LIMITATION

Law and web materials were reviewed through August 28, 2026. This report is an expert research framework, not legal advice. Before litigation or a formal petition, counsel should verify official reporter citations, current statutory text, the actual DOC directive and delegation, facility facts, exhaustion, standing, immunity, limitations periods, and available remedies.