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

**Attorney General Opinion No. 17-IB59**

**November 20, 2017**

**VIA U.S. MAIL & EMAIL**

Daniel J. Kramer  
8041 Scotts Store Rd  
Greenwood, DE 19950  
[djmjkramer@gmail.com](mailto:djmjkramer@gmail.com)

**RE: November 2, 2017 FOIA Petition Regarding Sussex County Council**

Dear Mr. Kramer:

We write in response to your correspondence, dated November 2, 2017, alleging that Sussex County Council violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in connection with your September 27, 2017 request for records. We treat your correspondence as a petition for determination pursuant to 29 *Del. C.* §10005(e) regarding whether the Council violated FOIA ("Petition"). We invited the Council to submit a written response to the Petition. We received the Council's response ("Response Letter") on November 14, 2017. For the reasons set forth below, we conclude that County Council did not violate FOIA as alleged.

**BACKGROUND**

On September 27, 2017, you requested "minutes" from the Council. On October 18, 2017, the Council provided you with records responsive to your request. The Council indicated that it was also mailing hard copies of the requested records as a courtesy. The Council also stated: "Please be advised, minutes for the Nov. 15, 2016, executive session are provided in redacted form, as the land acquisition matter discussed in that session remains an ongoing issue; releasing the contents of that discussion would negate the purpose of holding the executive sessions, which is permissible under 29 Del. Code §10004 (b)." Specifically, the content below the section heading "Land Acquisition – Land 2016-9" was fully redacted. On October 30, 2017, you requested a copy of an unredacted version of the minutes. That same day, the Council

denied your request on the basis that releasing the redacted information would defeat the purpose of the executive session.

### **POSITIONS OF THE PARTIES**

In your Petition, you appear to allege that the redactions are no longer proper, as “this issue is close to a year old.” In its Response Letter, the Council notes that FOIA permits public bodies to convene an executive session to discuss land acquisition matters pursuant to 29 *Del. C.* §10004(b)(2).<sup>1</sup> The Council acknowledges that executive session minutes may be withheld from public disclosure only so long as public disclosure would defeat the lawful purpose of the executive session.<sup>2</sup> However, the Council, though its attorney, states that discussions regarding land acquisition 2016-9 are still ongoing and maintains that disclosure of the redacted information could be detrimental to the County’s bargaining position.<sup>3</sup>

### **RELEVANT STATUTES**

Delaware’s FOIA provides that “[e]very meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of [section 10004].”<sup>4</sup> Pursuant to 29 *Del. C.* §10004(b), a public body may call for an executive session closed to the public for one of nine specific purposes. For example, a public body may call for an executive session for “[p]reliminary discussions on site acquisitions for any publicly funded capital improvements, or sales or leases of real property.”<sup>5</sup>

Delaware’s FOIA also requires public bodies to “maintain minutes of all meetings, including executive sessions” and to “make such minutes available for public inspection and copying as a public record.”<sup>6</sup> “Such minutes or portions thereof, and any public records pertaining to executive sessions conducted . . . may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose of the executive session, but no longer.”<sup>7</sup>

When a public body receives a FOIA request, it “shall respond . . . as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to

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<sup>1</sup> Response Letter at 1-2.

<sup>2</sup> Response Letter at 2 (citing 29 *Del. C.* §10004(f)).

<sup>3</sup> Response Letter at 2-3.

<sup>4</sup> 29 *Del. C.* § 10004(a).

<sup>5</sup> 29 *Del. C.* § 10004(b)(2).

<sup>6</sup> 29 *Del. C.* §10004(f).

<sup>7</sup> *Id.*

the requested records, denying access to the records or parts of them, or by advising that additional time is needed . . . .”<sup>8</sup> “If the public body denies a request in whole or in part, the public body’s response shall indicate the reasons for the denial.”<sup>9</sup>

## DISCUSSION

As an initial matter, we note that Delaware’s FOIA does not require this Office – or the courts – to conduct an investigation or an *in camera* review of records that a public body has withheld in response to a FOIA request.<sup>10</sup> Rather, as the Superior Court has recently made clear, FOIA *only* requires a determination of whether the Council provided sufficient *reasons* for withholding the redacted information to satisfy its burden of proof.<sup>11</sup>

Here, the Council provided a timely response to your request and, in that response, included a reason for its denial with respect to the redacted portion of the November 15, 2016 executive session minutes. Specifically, the Council indicated that the redacted portion related to a land acquisition which remains ongoing and that releasing the redacted portion of the minutes at this time would defeat the purpose of the executive session. In its Response Letter, and through its counsel,<sup>12</sup> the Council reiterated this position, but also made clear that it understands that it may withhold the redacted information only so long as disclosure would defeat the lawful purpose of the executive session.<sup>13</sup> Under the circumstances, we are satisfied that the Council has provided sufficient reasons for withholding the redacted information to satisfy its burden of proof.<sup>14</sup> Indeed, the Council applied a permissible basis for withholding the redacted information

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<sup>8</sup> 29 Del. C. § 10004(h)(1).

<sup>9</sup> 29 Del. C. § 10004(h)(2).

<sup>10</sup> *Flowers v. Office of the Governor*, 167 A.3d 530, 548-49 (Del. Super. 2017).

<sup>11</sup> *Id.* at 549.

<sup>12</sup> Pursuant to the Delaware Lawyers’ Rules of Professional Conduct, “[a] lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall . . . conform to the provisions of Rules 3.3(a) through (c) . . . .” Del. Lawyers’ R. Prof’l Conduct 3.9. Rule 3.3(a) provides that a lawyer shall not knowingly make a false statement of law or fact. The reasoning behind this duty of candor is that “[t]he decision-making body, like a court, should be able to rely on the integrity of the submissions made to it.” Del. Lawyers’ R. Prof’l Conduct 3.9 cmt. 1. As such, the factual representations made by Counsel to the Council regarding the status of the land acquisition at issue and the impact that releasing the information would have on negotiations with respect thereto serve to satisfy the County’s burden.

<sup>13</sup> See Response Letter at 2.

<sup>14</sup> See *Flowers*, 167 A.3d at 549.

with a clear understanding of its scope.<sup>15</sup> As such, it is our determination that the Council did not violate FOIA as alleged.<sup>16</sup>

### CONCLUSION

For the reasons discussed above, it is our determination that Council did not violate FOIA by withholding information relating to Land Acquisition 2016-9 from its response to your September 27, 2017 FOIA request.

Very truly yours,



Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: J. Everett Moore, Esq. (via email)

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<sup>15</sup> *See id.*

<sup>16</sup> Of course, as the record demonstrates that the Council is aware, the redacted information “may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, *but no longer.*” 29 *Del. C.* § 10004(f) (emphasis added); *see also Del. Op. Att’y Gen.* 02-IB27, 2002 WL 31867901, at \*1 (Nov. 4, 2002) (“At some point after the County has purchased property, the minutes of prior executive sessions regarding the purchase of the property *may* become subject to FOIA because disclosure would no longer ‘defeat the lawful purpose for the executive session.’ At that time, you could renew your request.”) (emphasis added) (citation omitted) (quoting 29 *Del. C.* § 10004(f)).