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

**Attorney General Opinion No. 17-IB66**

**December 29, 2017**

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

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

**RE: FOIA Petition Regarding Sussex County**

Dear Mr. Kramer:

We write in response to your correspondence, received in its entirety on December 11, 2017,<sup>1</sup> alleging that Sussex County ("County") violated the open meetings provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). We invited the County to submit a written response to the Petition. We received the County's response on December 14, 2017 ("Response Letter") and your reply ("Reply") on December 18, 2017. We have reviewed the Petition, the Response Letter, and the Reply. For the reasons set forth below, it is our determination that the County did not violate FOIA by denying your October 17, 2017 FOIA request.

**BACKGROUND**

The Sussex County Planning and Zoning Commission (the "Commission") met on October 12, 2017. During the meeting, the Commission held a hearing on the following conditional use application, among others: C/U 2103 Southern Delaware Therapeutic and Recreational Horseback Riding, Inc. ("Application"). Several individuals spoke in support of the

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<sup>1</sup> We received your initial correspondence on December 8, 2017. On December 11, 2017, we requested and received the correspondence referenced therein. As that supplemental correspondence was critical to our evaluation of your FOIA allegation, we deem your Petition received on December 11, 2017.

Application and no one opposed the Application. At the conclusion of the public hearing, Mr. Keller Hopkins moved that the Commission recommend approval of the Application. He provided several reasons for his recommendation and recited the proposed conditions. The Commission then voted unanimously in favor of forwarding the Application to the Sussex County Council with a recommendation for approval for the reasons stated.

On October 17, 2017, you submitted a FOIA request to the County for “a copy of the motion read by Keller Hopkins for the approval of C/U 2103 . . . on October 12, 2017.” That same day, you received an automated message from the Sussex County FOIA Records Center confirming receipt of your request. On November 7, 2017, the County responded to your request as follows:

Sussex County is unable to accommodate your request for a copy of the motion read by Planning & Zoning Commission member Keller Hopkins re: C/U 2103 during the Oct. 12, 2017, commission meeting. The requested document is not considered a “public record” under the Delaware FOIA statute (29 Del. C. § 10002(1)) because it was created for Commissioner Hopkins’ convenience only, and was never circulated nor intended to be circulated. Per the Delaware Freedom of Information Act Policy Manual for FOIA Coordinators, page 20 (citations omitted), “As a general rule, a draft document will not be a public record, unless it is circulated to a public body. Personal notes will not constitute public records provided that they are created for the convenience of an individual, and are not circulated or maintained in the public body’s files.”

The County informed you that the audio recording is available online and provided you a link to the recording. The County also informed you that the approved minutes are also available online.

On November 13, 2017,<sup>2</sup> you replied that your request was not closed and you requested a copy of “the on demand video recording of the entire Planning and zoning [sic] meeting held on on [sic] October 12, 2017.” You submitted a second request for the same recording on December 4, 2017. On December 6, 2017, the County responded with a link to the requested video and stated that it considered your request satisfied and closed.

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<sup>2</sup> In your Petition, you stated that you sent an email request for the video “immediately” after the County’s November 7, 2017 denial of your initial request. You did not include a copy of that email request with your Petition. However, the date of your initial request to the County for a copy of the video recording is not relevant to this determination, which is limited to the question of whether the County violated FOIA by denying your request for a copy of the motion read by Commissioner Hopkins at the October 12, 2017 Commission meeting.

## POSITIONS OF THE PARTIES

In your Petition, you allege that the document read by Commissioner Hopkins is a public record. As such, you allege that the County violated FOIA by denying your October 17, 2017 request for a copy thereof.

In its Response Letter, the County maintains that the requested record is not a public record because it is Commissioner Hopkins' personal notes:

The document that Mr. Kramer is requesting is not a motion; it is the handwritten personal notes that were prepared by Commissioner Hopkins in conjunction with Assistant County Attorney, Vince Robertson, and which were further modified by Commissioner Hopkins. Commissioner Hopkins used these notes to make a verbal motion at the Commission Meeting. The preparation of these notes was for his convenience, and his use of the notes was purely discretionary. After the meeting, Planning and Zoning staff picked up the notes, in case the notes were helpful in preparing their minutes (i.e., to clarify a mumbled word, etc.). Any review or use of the Commissioner's personal notes by the staff are purely discretionary, and those personal notes are routinely discarded sometime after the meetings.

In the alternative, the County argues that the requested record is a draft document and is exempted from FOIA because it was not presented to a public body. The County notes that the terms of the verbal motion are reflected in the audio recording and the minutes, which are both publicly available.

In your Reply, you allege that the "Assistant County Attorney Vince Robertson wrote the entire motion (3 pages) that Commissioner Hopkins read." You question why Commissioner Robert Wheatley asked Mr. Robertson if he had time to write the motion if it is not in fact a motion, as argued by the County.

## DISCUSSION

As an initial matter, we agree with the Commission's position that personal notes are not a public record as defined by FOIA. The question presented here is whether the record at issue qualifies as a personal note. Under the circumstances, we believe that it does.

The County cites to this Office's prior opinion in *Del. Op. Att'y Gen.* 02-IB30<sup>3</sup> and *Del. Op. Att'y Gen.* 02-IB34<sup>4</sup> in support of its position that the requested records are personal notes

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<sup>3</sup> 2002 WL 31867904 (Dec. 2, 2002).

<sup>4</sup> 2002 WL 34158593 (Dec. 21, 2002).

and are therefore not public records as contemplated by FOIA. In *Del. Op. Att’y Gen.* 02-IB30, we determined that personal notes prepared by the New Castle County Land Use General Manager and maintained in his personal files were *not* a public record. We reasoned that personal notes “are generally created *solely* for the individual’s convenience and to refresh the writer’s memory, are maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer’s sole discretion.”<sup>5</sup> Similarly, in *Del. Op. Att’y Gen.* 02-IB34, we determined that a Councilman’s personal notes were not a public record, reasoning that they were not made part of the meeting minutes or submitted to the Town Manager to be made a part of the town’s official records.<sup>6</sup>

Here, the County has represented that the document at issue is handwritten personal notes that Commissioner Hopkins prepared for his own convenience and subsequently used to make a verbal motion at a meeting. As the meeting was recorded, the exact language of the motion is available verbatim in audio and video form. Under the circumstances, we believe that Commissioner Hopkins retained discretion to discard these personal notes at any time.<sup>7</sup> He did not exercise that discretion here and, as the County acknowledges, a staff member collected them following the meeting. While we caution against such a practice,<sup>8</sup> and our analysis *might* have been different if Commissioner Hopkins specifically provided the notes to the staff member for a particular purpose,<sup>9</sup> we are not persuaded that the collecting of the notes by the staff member for the sole purpose of assisting that staff member in performing the ministerial act of preparing accurate minutes transformed an otherwise non-public document into a public record. As such, it is our determination that the County did not violate FOIA by denying your request.<sup>10</sup>

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<sup>5</sup> 2002 WL 31867904, at \*2 (Dec. 2, 2002) (quoting *Yacobellis v. City of Bellingham*, 780 P.2d 272, 275 (Wash. App. 1989) (emphasis added).

<sup>6</sup> 2002 WL 34158593, at \*4-5.

<sup>7</sup> *See Del. Op. Att’y Gen.* 02-IB30, 2002 WL 31867904, at \*2.

<sup>8</sup> We note the possibility of error if a public body relies on personal notes in preparing minutes, rather than what was actually said at a public meeting.

<sup>9</sup> For example, we have previously implied that personal notes might qualify as a public record if submitted to the Town Manager to be made part of the town’s official records. *See Del. Op. Att’y Gen.* 02-IB34, 2002 WL 34158593, at \*5.

<sup>10</sup> Having made this determination, we need not consider the County’s alternative argument that the records are exempted from FOIA as draft documents.

CONCLUSION

Based on the foregoing, it is our determination that the County did not violate FOIA as alleged.

Very truly yours,



Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



Stacey X. Stewart, Deputy Attorney General  
on behalf of Aaron R. Goldstein, State Solicitor

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