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## OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

### Attorney General Opinion No. 24-IB35

September 2, 2024

#### VIA EMAIL

Tamara Skis  
[tamara.mskis@gmail.com](mailto:tamara.mskis@gmail.com)

#### **RE: FOIA Petition Regarding the Town of Ellendale**

Dear Ms. Skis:

We write in response to your correspondence alleging that the Town of Ellendale violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we determine that the Town has not violated FOIA by denying access to the requested recording.

#### **BACKGROUND**

You submitted a FOIA request to the Town of Ellendale for the "full audio file for the June 5th Town Hall meeting that was recorded on Olympus Recorder #19 as indicated by the minutes given as evidence for the FOIA petition that was submitted on July 3rd, 2024."<sup>1</sup> When a response was not timely received, you filed this Petition.

On August 5, 2024, the Town, through its legal counsel, replied to the Petition and provided the affidavit of the Town Council President ("Response"). The Town asserts that it is unable to comply with this request. The Town Council President attests that he "believes that the requested

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<sup>1</sup> Petition.

recording no longer exists, as it was accidentally deleted or recorded over.”<sup>2</sup> The President further states under oath that the Town has changed its practices to prevent the accidental deletion of future recordings.

### **DISCUSSION**

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.<sup>3</sup> The public body has the burden of proof to justify its denial of access to records.<sup>4</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>5</sup> In this case, the Town replied to the request, and the Petition’s claim regarding timeliness is now moot.<sup>6</sup> The Town also alleges that it cannot comply with this request; the Town provided sworn statements supporting that the recording no longer exists, as it was accidentally deleted or recorded over. We find that the Town adequately supported that its denial of access to this recording is appropriate.<sup>7</sup>

### **CONCLUSION**

For the foregoing reasons, we conclude that the Town did not violate FOIA by declining to provide access to the requested recording.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

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<sup>2</sup> Response.

<sup>3</sup> 29 *Del. C.* § 10003(a).

<sup>4</sup> 29 *Del. C.* § 10005(c).

<sup>5</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>6</sup> See, e.g., *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*13 (Del. Ch. May 19, 1994); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, at \*2 (Jun. 7, 2018); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, n. 3 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at \*2 (Del. Ch. July 27, 1998)).

<sup>7</sup> *Del. Op. Att’y Gen.* 05-IB19, 2005 WL 2334347, at \*4 (Aug. 1, 2005) (“[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record.”) (citation omitted).

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: Liam N. Gallagher, Solicitor for the Town of Ellendale