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

**Attorney General Opinion No. 24-IB43**

**October 17, 2024**

**VIA EMAIL**

Shannon McNaught  
[shannon.marvel@doverpost.com](mailto:shannon.marvel@doverpost.com)

**RE: FOIA Petition Regarding Sussex County**

Dear Ms. McNaught:

We write in response to your correspondence, alleging that Sussex County violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 (“FOIA”). We treat this 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. As discussed more fully herein, we determine that the County did not violate FOIA by denying access to the records you requested.

**BACKGROUND**

On September 9, 2024, you submitted a FOIA request to Sussex County for “any audio recordings and/or documents related to audio records that include Lewes Fire Department (including fire police) radio communications from between 5 and 6 p.m. [on] Aug 19, 2024.” The County provided a response on September 17, 2024, stating that the records requested are not public documents as they are investigatory files compiled for civil or criminal law-enforcement purposes.

This Petition followed, alleging that the County violated FOIA by denying access to any responsive documents. You contend that the Fire Commission’s investigation has since been closed and any files are no longer part of any investigation. You also allege that the requested information was not compiled for law enforcement purposes.

The County, through its legal counsel, replied to the Petition and enclosed the affidavit of the Director of the Department of Public Safety for Sussex County (“Response”). The Director attests that he received a subpoena from the Fire Prevention Commission of the State of Delaware seeking audio recording and radio identified for an incident that took place on or about August 19, 2024 at approximately 1750 hours involving Lewes Fire Department. In addition, the email and subpoena were attached to the affidavit.

### **DISCUSSION**

In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.<sup>1</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>2</sup> We find that the County sufficiently supported that its denial of access to the requested records was appropriate.

The County, through sworn affidavit, stated that the requested audio records were subject to a subpoena of the Delaware State Fire Commission, Investigation Division.<sup>3</sup> The County provided a copy of the subpoena as an attachment which includes an investigation identification number.<sup>4</sup> Your FOIA request is for audio records that are part of the Delaware State Fire Commission’s investigatory file as evidenced by the subpoena. The investigatory files exemption includes both civil and criminal law-enforcement files which would encompass the Delaware State Fire Commission’s investigation.<sup>5</sup> It is immaterial whether the investigation has since closed.<sup>6</sup> As such, the County appropriately invoked the investigatory files exemption and no violation of FOIA is found.

### **CONCLUSION**

For the reasons set forth above, we conclude that the County did not violate FOIA by denying access to the requested records.

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<sup>1</sup> 29 *Del. C.* § 10005(c).

<sup>2</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>3</sup> Response, Affidavit.

<sup>4</sup> Response, Attachment.

<sup>5</sup> 29 *Del. C.* § 10002(o)(3) (“[i]nvestigatory files compiled for *civil* or criminal law-enforcement purposes”) (emphasis added).

<sup>6</sup> The investigatory files exemption continues to apply after an investigation is closed. *News-Journal Co. v. Billingsley*, 1980 WL 3043, at \*2-3 (Del. Ch. Nov. 20, 1980) (determining that the investigatory files exemption attaches as soon as a public body is made aware of a potential issue and the exemption survives after the investigation is completed).

Very truly yours,

/s/ Victoria E. Groff

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Victoria E. Groff  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: J. Everett Moore, Jr., County Attorney