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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB59

October 28, 2019

VIA EMAIL

Robert "Buddy" Lynch
Thelynchs3@gmail.com

RE: FOIA Petition Regarding Sussex County

Dear Mr. Lynch:

We write in response to your correspondence alleging that Sussex County violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") regarding your spouse's four requests for records. 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. For the reasons set forth below, we find that you lack standing to file a Petition regarding these requests. Because we appreciate that lack of standing may be an unanticipated result under the circumstances, we will extend the time for your spouse to submit a petition in her name through November 1, 2019.

BACKGROUND

We received your Petition on September 27, 2019, via electronic mail. Your Petition alleges that over the past month, Sussex County has denied four separate FOIA requests seeking information, records, and data. You allege that the first was denied based on "very shaky legal logic" and the other three are now past the 14 day time limit. The concluding paragraph of your email to this Office states: "If you have any questions please feel free to contact me by email. All requests to Sussex County were submitted under my email (thelynchs3@gmail.com), which is under my wife's name (Stephanie Lynch)." Your September 27, 2019 email to this Office concludes: "Sincerely, Robert 'Buddy' Lynch."

All of the documents you provided with your Petition indicate that the FOIA requests and correspondence at issue in your Petition were submitted to Sussex County by Stephanie Lynch.

For example, an email you submitted that is timestamped as “Fri, Sep. 27 2019 at 3:51 PM” and was directed to Sussex County states:

In an effort to deny my husband’s right to due process, and not provide the requested information, that is for the greater good of the public, you have stalled it long enough that there is pending litigation, and further requests for information will be handled through those proper channels.

While you refer to me as my husband’s surrogate, I am also a tax payer of several properties within Sussex County.

Sussex County’s counsel responded to your Petition on October 8, 2019, (“Response”). The Response includes 14 exhibits, designated as exhibits A through N, documenting the FOIA requests and responses pertinent to your Petition. A review of Sussex County’s electronic FOIA submission shows that in addition to an email address, a requestor must input their name when requesting records from the County.¹ All of the document requests the County provided were submitted by Stephanie Lynch.² Sussex County’s Response points out that although you submitted this FOIA Petition in your name, “it is important to note that all FOIA requests at issue were actually submitted by Stephanie Lynch, his wife.”³ The Response further claims that because the FOIA requests were submitted by Mrs. Lynch, Mr. Lynch lacks standing to assert any FOIA violations.

FOIA PROVISIONS

The enforcement provisions of Delaware’s FOIA, 29 *Del. C.* § 10005, reads in pertinent parts:

(b) *Any citizen denied access* to public records as provided in this chapter may bring suit within 60 days of such denial. * * * Notwithstanding the foregoing, *a person denied access to public records* by an administrative office or officer, a department head, commission, or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of this title must within 60 days of denial, present a petition and all supporting documentation to the Chief Deputy as described in subsection (e) of this section. Thereafter, the petitioner or public body the Attorney General is otherwise obligated to represent

¹ Response Exhibits A, C, G, and K.

² Response Exhibit A documents FOIA request dated August 15, 2019, regarding internet usage. Response Exhibit C documents a FOIA request dated September 6, 2019, regarding internet usage. Response Exhibit G documents a FOIA request dated September 6, 2019, regarding Sheriff sale records. Response Exhibit I documents a FOIA request dated September 27, 2019, regarding tax payment records.

³ Response.

may appeal an adverse decision on the record to the Superior Court within 60 days of the Attorney General's decision.

(e) Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur. The petition shall set forth briefly the nature of the alleged violation. *** *If the Attorney General finds that a violation of this chapter has occurred or is about occur, the citizen may: (1) File suit as set forth in this chapter;* or (2) request in writing that the Attorney General file suit on the citizen's behalf.

(emphases added).

DISCUSSION

The only method to seek redress for a violation of FOIA is set out in 29 *Del. C.* § 10005(b), which allows “any citizen denied access to public records” to “bring suit.” The plain language of the statute ties the ability to bring suit to “the citizen denied access.” Subsection (d) of the same provision reads that “any citizen may petition the Attorney General.”⁴ On first blush one may read the language to infer that a citizen other than the one denied access to the public records may petition the Attorney General, because that language lacks the qualifying words “denied access.” However, the context of the rest of the paragraph makes clear that the standing to sue is also tied to the ability to petition the Attorney General.

After the review by the Attorney General provided for in 29 *Del. C.* § 10005(e), the statute then sets out the citizen's options for filing suit:

If the Attorney General finds that a violation of this chapter has occurred or is about occur, the citizen may: (1) File suit as set forth in this chapter; or (2) request in writing that the Attorney General file suit on the citizen's behalf.

It follows that the Delaware courts would not recognize your standing to bring a suit on behalf of your spouse for her denied FOIA requests. The language “file suit as set forth in this chapter” can only refer to the language of subsection (b) which gives the “citizen denied access to public records” the ability to bring suit. Since the statute only provides for filing of a suit by a “citizen denied access,” the right to petition the Attorney General is also inherently limited to the “citizen denied access.”

⁴ 29 *Del. C.* § 10005(d).

CONCLUSION

Accordingly, we find that you do not have standing to petition the Attorney General to review the denial of the four FOIA requests submitted to Sussex County by Stephanie Lynch. Notwithstanding our determination that you lack standing, the Department will entertain the merits of your petition if it is resubmitted to us by Stephanie Lynch on or before November 1, 2019.

Very truly yours,

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: J. Everett Moore, Jr., Esquire
Attorney for Sussex County (via email)