



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

**Attorney General Opinion No. 19-IB65**

**November 25, 2019**

**VIA EMAIL**

Stephanie Lynch  
[Thelynchs3@gmail.com](mailto:Thelynchs3@gmail.com)

**RE: FOIA Petition Regarding Sussex County**

Dear Ms. Lynch:

We write in response to your Petition dated October 28, 2019, asking this Office to review your complaint that Sussex County (the "County") violated the Delaware 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. For the reasons set forth below, we find that Sussex County has not violated FOIA as alleged.

**BACKGROUND**

The Petition alleges that over a six week period, Sussex County improperly denied three separate FOIA requests seeking information, records, and data; and further alleges the County improperly rejected your proposal to offset the administrative fees required to collect and produce some of the documents you requested. Specifically, on August 15, 2019, you submitted the first FOIA request to the County seeking "internet usage reports for all county employees" as well as "any emails pertaining to the creating of internet usage reports for all employees."<sup>1</sup>

On September 6, 2019, the County denied your first FOIA request, indicating the request failed to adequately describe the records sought, that no responsive records existed, to the extent responsive records did exist they were contained within personnel files of County employees, and

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<sup>1</sup> FOIA Request from Stephanie Lynch to Sussex County, dated August 15, 2019.

that creating and disclosing the type of report you sought would compromise County security.<sup>2</sup> In response, you submitted your second FOIA request to the County that same day, as follows:

Please provide an internet usage report for all County employee[s] from May 1, 2019 – Augu[st] 13, 2019. Please remove ½ of the URL information on each report, so as not to compromise any secure information, though if there is such a risk of this information being compromised by a FOIA request, these types of sites should be accessed on a security server. All County network and information systems activity is property of Sussex County, and therefore, subject to release under those terms. If a denial is still being made based on security compromises, please provide the total number of pages of each employee's internet report, for the May 1, 2019 time period through the August 13, 2019 time period, as well as the total number of "active" hours spent online. You may exclude CAMA and MUNIS websites from this reporting. Also, I would like to specifically request the internet records or internet usage reports of Harold Godwin and Vance Daniels.<sup>3</sup>

By letter dated September 27, 2019, the County denied your second FOIA request, citing its inability to produce documents that do not exist, an unwillingness to produce records that could contain confidential financial information, refusing to provide documents that may exist but were contained in employee's personnel file, and raising the pending or potential litigation exemption to FOIA.<sup>4</sup> With respect to the request for internet usage reports of Harold Godwin, the County noted that Mr. Godwin did not work for the County during the time period set forth in the request.<sup>5</sup>

On September 6, 2019, you also submitted your third FOIA request to the County, seeking "a copy of all sheriff sale records (sales, stays of actions, notices) including Albert and Karen Brewington from 2005-Present."<sup>6</sup> On September 27, Sussex County responded to your third FOIA request, providing the requested documentation.<sup>7</sup> The County informed you that there may be additional responsive documents that were not available electronically and would need to be searched for manually.<sup>8</sup> The County estimated that the administrative cost for staff time beyond

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<sup>2</sup> Letter to Stephanie Lynch dated September 6, 2019, "Response to FOIA Request – Internet Usage Reports" from Sussex County.

<sup>3</sup> FOIA Request from Stephanie Lynch to Sussex County, dated September 6, 2019.

<sup>4</sup> Letter to Stephanie Lynch dated September 27, 2019, "Response to FOIA Request – Internet Usage Reports" from Sussex County.

<sup>5</sup> *Id.*

<sup>6</sup> FOIA Request from Stephanie Lynch to Sussex County, dated September 6, 2019.

<sup>7</sup> Letter to Stephanie Lynch dated September 27, 2019, "Response to FOIA Request – Sheriff's Sale Records for Albert and Karen Brewington" from Sussex County.

<sup>8</sup> *Id.*

the first hour would be \$362.57 to manually search and retrieve additional responsive documents. This estimate was based on 10 hours of administrative time at the hourly rate of the lowest paid employee capable of performing the task.<sup>9</sup> If you wanted to pay that amount to continue the search, the County requested that you respond within 5 business days, and further indicated it would move forward with the requested search once payment was received. The County volunteered that the additional information may be available more cost effectively and expeditiously through the Superior Court, and provided the court's address, telephone number, extension and the name of a contact person.<sup>10</sup> In response to this fee request to continue the search, you submitted the following proposal:

I would like the total active personal internet time from May 1, 2019-September 27, 2019 for the employees (Clerk III and Office Manager) whose time is estimated for the research into my FOIA request. It is imperative that they do not have personal internet usage time during this time period. If they do, I would like the money that I have paid for their salaries, as a tax paying citizen, during their personal internet time usage, transferred over to cover the estimated costs for the research. After I receive the internet usage reports, I will advise further.<sup>11</sup>

On September 30, 2019, the County replied declining your "unconventional request" to offset FOIA search time with personal internet time of County employees, while reaffirming that it would perform the additional research upon payment of the amount set forth in the Total Cost Estimate.<sup>12</sup> This Petition followed.

The County responded to your Petition on November 6, 2019 ("Response"). The County asserts that you are the wife of a recently terminated Sussex County employee, Robert "Buddy" Lynch.<sup>13</sup> Mr. Lynch has requested a hearing before the Personnel Board regarding his termination from County employment.<sup>14</sup> The County states that your FOIA requests were submitted following Mr. Lynch's termination, but prior to his Personnel Board hearing.<sup>15</sup> The County explains that all

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Email from Stephanie Lynch to Sussex County, dated September 27, 2019.

<sup>12</sup> Letter to Stephanie Lynch dated September 30, 2019, re Response to FOIA Request – Sheriff's Sale Records for Albert and Karen Brewington from Sussex County.

<sup>13</sup> Response.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

of your requests for records seek documents that your husband intends to use in his termination dispute with the County.<sup>16</sup>

## DISCUSSION

FOIA requires public bodies make available public records for inspection by requesting citizens. However, the FOIA statute exempts from the definition of “public records” certain classes of documents.<sup>17</sup> The County asserts in its Response that by the time of your September 6, 2019 FOIA request, it was clear that any potentially responsive documents were related in subject matter to Robert Lynch’s pending or potential litigation against the County. Documents “pertaining to pending or potential litigation which are not records of any court” are not public documents required to be disclosed under FOIA.<sup>18</sup>

Here, prior to its September 27, 2019 response to you, the County was notified that your husband retained legal counsel and had filed for a hearing with the County’s Personnel Board.<sup>19</sup> In your September 27, 2019, email to the County’s attorney, you acknowledge your records requests were for the specific purpose of furthering your husband’s litigation:

Please note that when I requested this information on August 15, there was no pending litigation at that time. 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.<sup>20</sup>

A two-pronged test is used to determine if the “potential litigation” exemption would justify a records denial under FOIA: “(1) litigation must be likely or reasonably foreseeable; and (2) there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.”<sup>21</sup> Indicators of “potential litigation” might include “previous or preexisting litigation

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<sup>16</sup> *Id.*

<sup>17</sup> 29 Del. C. § 10002.

<sup>18</sup> 29 Del. C. § 10002(9).

<sup>19</sup> Response.

<sup>20</sup> Petition. On September 27, 2019, Mr. Robert Lynch filed a Petition with this Office, attempting to contest the County’s denial of your FOIA requests. This Petition was dismissed for lack of standing. In his September 27, 2019 Petition, Mr. Lynch represented that he is a former County employee in the process of “fighting” his termination.

<sup>21</sup> *ACLU v. Danberg*, 2007 WL 901592, at \*4 (Del. Super. Mar. 15, 2007).

between the parties or proof of ongoing litigation concerning similar claims or proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.”<sup>22</sup>

Here, the first prong of the test has been met as counsel has not only been retained, but an appeal has been filed with the Personnel Board.<sup>23</sup> The second prong requires a clear nexus between the documents requested and the potential litigation. On October 4, 2019, Mr. Lynch’s legal counsel submitted a letter to the County, also seeking County employees’ internet usage reports.<sup>24</sup> Further, your communications with the County have expressly stated your intended purpose was for use in litigation and your husband’s attorney has requested the same records in anticipation of the pending hearing before the Personnel Board.<sup>25</sup> Accordingly, we find the County was correct in its assessment that the records you sought were not “public” insofar as—to the extent they exist—they constitute records of pending or potential litigation.

Finally, we find no error in the County’s denial of your request for the “total active personal internet time” of employees who would be required to research additional documents to respond to your September 6 FOIA request to be quantified into dollars and subtracted from their detailed invoice of anticipated time to produce the records.

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<sup>22</sup> *Id*; see also *Del. Op. Att’y Gen.* 16-IB15, 2016 WL 3462346 (Jun. 10, 2016) (finding that litigation initiated after an agency denied a FOIA request, before this Office issued an opinion, constituted “pending” litigation for purposes of a FOIA analysis).

<sup>23</sup> This Office has recognized quasi-judicial proceedings, including those before an administrative body, constitute “litigation” for purposes of FOIA. See *Del. Op. Att’y Gen.* 04-IB04 (Feb. 5, 2004) (arbitration proceedings); *Del. Op. Att’y Gen.* 03-IB26 (Nov. 13, 2003) (New Castle County Planning Board); *Del. Op. Att’y Gen.* 03-IB10 (May 6, 2003) (same).

<sup>24</sup> Response.

<sup>25</sup> Response.

**CONCLUSION**

Accordingly, we find that Sussex County did not violate FOIA as alleged.

Very truly yours,

/s/ Valerie Edge

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Valerie Edge, Deputy Attorney General

Approved:

A handwritten signature in black ink, appearing to read 'A. Goldstein', with a horizontal line extending from the end of the signature.

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Aaron R. Goldstein  
State Solicitor

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