

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bruce L. Wishnefsky,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Department of	:	
Corrections,	:	No. 582 M.D. 2014
Respondent	:	Submitted: May 15, 2015

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: July 8, 2015

The Pennsylvania Department of Corrections (Department) filed a preliminary objection in the nature of a demurrer to Bruce L. Wishnefsky’s (Wishnefsky) pro se Amended Petition for Review in the Nature of Mandamus (Petition). Wishnefsky filed his Petition in this Court’s original jurisdiction seeking an order compelling the Department to provide access to commissary product sales reports in accordance with the Office of Open Records’ (OOR) March 19, 2014 Final Determination. The sole issue before the Court is whether Wishnefsky’s Petition states a claim upon which relief may be granted. After review, the Department’s preliminary objection is overruled.

Wishnefsky is an inmate at the State Correctional Institution at Laurel Highlands (SCI-Laurel Highlands). On December 27, 2013, Wishnefsky filed a request under the Right-to-Know Law (RTKL)¹ for copies of “any report that shows

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101–67.3104.

the amount received from [the Department's] inmates from the sale of commissary products during the last fiscal year, for all commissary products and for each of the following product categories[:] food, electronics, hygiene, footwear, miscellaneous, apparel, medical and office supplies, by the [Department]" (Request). Petition Ex. A; *see also* Petition ¶ 4.

On February 4, 2014, the Department granted Wishnefsky's request in part by providing him a letter from Pennsylvania Correctional Industries (PCI) Assistant Director Ralph Eckley (Eckley) which stated: "In response to your request for the amount of sales for last fiscal year, please note this information does not exist in one *single* report. The amount is \$37,732,857.80. Also, sales are not tracked by category." Petition Ex. A; *see also* Petition ¶ 6. The Department's response further noted:

To the extent that you are requesting information other than the enclosed, your request is denied for the following reason:

- The record(s) that you requested do not currently exist. When responding to a request for access, an agency is not required to create a record which does not currently exist or to compile, format or organize a public record in a manner in which it does not currently compile, format or organize the public record. 65 P.S. § 67.705; [*s*] *see Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010)('The Department cannot grant access to a record that does not exist. Because under the current RTKL the Department cannot be made to create a record which does not exist, the OOR properly denied [the] . . . appeal.');
- [*s*] *see also Barger v. Dep['t] of Labor [&] Indus[.]*, 720 A.2d 500 (Pa. Cmwlth. 1998).

Petition Ex. A; *see also* Petition ¶ 5.

By February 19, 2014 letter, Wishnefsky appealed from the Department's response, stating:

As the yearly breakdown by category that I received from the Department of General Services demonstrates, records are kept by the requested categories of how much is spent each year to purchase the items for which I am requesting the sales figures. Therefore[,] it is reasonable to infer that there are also sales figures by these same categories that are available. [The Department] should at[]least be required to provide an affidavit explaining why there are purchase figures by category but no sales figures by category.

Petition Ex. A; *see also* Petition ¶ 7.

On March 19, 2014, OOR issued a Final Determination granting Wishnefsky's Request and ordering the Department "to provide the requested information to [Wishnefsky] within thirty (30) days." Petition Ex. B at 5. OOR held:

The February 4, 2014 letter from [] Eckley to [Wishnefsky] states that the requested information 'does not exist in one *single* report.' Therefore, it stands to reason that, contrary to [] Eckley's general attestation that records do not exist, records do, in fact, exist. The Request does not seek a *single* report, rather it seeks 'any report' that reflects the requested information. The Department has not raised any ground for denial of the requested information. Therefore, the Department is required to provide all reports that reflect the requested information. [] OOR notes that 'pulling information from a database is not the creation of a record,' *Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. C[mwlth.] 2012), and the Department is required to provide the information 'in the same format that it would be available to agency personnel.' *Id.*

Petition Ex. B at 4; *see also* Petition ¶ 8. The Department did not appeal from the Final Determination. *See* Petition ¶ 9; *see also* Department Prelim. Obj. ¶ 6.

In response to the Final Determination, by April 14, 2014 letter, the Department informed Wishnefsky: "Pursuant to the Final Determination of Docket No. AP-2014-0278, please find attached hereto a copy of the report that lists the total

sales per month of commissary products to inmates for fiscal year 2012/13 [Sales Report]. As previously indicated, commissary sales are not tracked by category.” Petition Ex. C; *see also* Petition ¶ 10. The Sales Report reflected, in pertinent part:

Jul-12	2,992,323.76
Aug-12	3,240,704.62
Sep-12	2,466,537.30
Oct-12	3,378,106.15
Nov-12	2,872,392.02
Dec-12	2,957,196.36
Jan-13	3,115,630.62
Feb-13	3,074,869.43
Mar-13	3,503,278.08
Apr-13	3,504,880.70
May-13	3,272,185.31
Jun-13	3,377,621.40
Internal Sales	(22,867.95)
Total	37,732,857.80

Petition Ex. D; *see also* Petition ¶ 11. According to the Petition, Wishnefsky has written to the Department “in an effort to resolve this issue, but no response has been received.” Petition ¶ 12. He further claims in the Petition that he “has a right to receive all reports that reflect the required information in the same format that information would be available to [Department] personnel, by virtue of OOR’s March 19, 2014[] Final Determination.” Petition ¶ 13.

On January 13, 2015, Wishnefsky filed the Petition requesting this Court to require the Department to comply with OOR’s Final Determination. By January 13, 2015 order, this Court directed Wishnefsky to file and serve Petition Exhibit A (Wishnefsky’s Request, the Department’s response and Wishnefsky’s appeal) and Petition Exhibit B (OOR’s Final Determination) upon the Department within 14 days of the order. Wishnefsky complied with said order. By January 27, 2015 order, this Court directed the Department to file an answer to the Petition or otherwise plead within 30 days of the order. On January 28, 2015, the Department filed its

preliminary objection in the nature of a demurrer to Wishnefsky's Petition. On February 23, 2015, Wishnefsky opposed the Department's preliminary objection.

This Court's review of preliminary objections is limited to the pleadings. *Pa. State Lodge, Fraternal Order of Police v. Dep't of Conservation & Natural Res.*, 909 A.2d 413 (Pa. Cmwlth. 2006), *aff'd*, 924 A.2d 1203 (Pa. 2007).

In considering preliminary objections, we must consider as true all well-pleaded material facts set forth in the petition and all reasonable inferences that may be drawn from those facts. Preliminary objections will be sustained only where it is clear and free from doubt that the facts pleaded are legally insufficient to establish a right to relief. We need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.

Wilson v. Pa. Bd. of Prob. and Parole, 942 A.2d 270, 272 (Pa. Cmwlth. 2008) (citation omitted).

The Department objects to Wishnefsky's Petition on the basis that since it has complied with OOR's Final Determination, Wishnefsky has no clear right to relief and, therefore, the Petition fails to state a valid mandamus claim. We disagree.

Mandamus is an extraordinary writ designed to compel performance of a ministerial act or mandatory duty where there exists a **clear legal right** in the petitioner, a **corresponding duty** in the respondent, and **want of any other adequate and appropriate remedy**. Mandamus is not available to establish legal rights, but is appropriate only to enforce rights that have been established.

Wilson, 942 A.2d at 272 (citation omitted; emphasis added).

Here, Wishnefsky asks this Court to compel the Department to provide him with the very items OOR ordered it to produce – “all reports that reflect the requested information . . . ‘in the same format that it would be available to agency personnel.’” Petition Ex. B at 4. OOR held that “contrary to [] Eckley's general attestation that records do not exist, records do, in fact, exist. The Request does not

seek a single report, rather it seeks ‘any report’ that reflects the requested information.” Petition Ex. B at 4. The Department contends that Wishnefsky “is now seeking reports used to compile the annual sales figures.” Department Br. at 6. However, it is OOR’s order rather than the Request that is before us. The Department nevertheless continues to assert that its production of a single record satisfies its obligation. The Department stated in its brief: “However, if, as the Department claims, the record that was provided is **the** responsive document and no other records exist, [Wishnefsky] does not have a clear right to the records because impossibility is a defense to an enforcement action.” Department Br. at 9.

We acknowledge that the Department is not required to create non-existent documents, and the fact that it does not possess the requested records is an appropriate ground for denial. Section 705 of the RTKL, 65 P.S. § 67.705; *see also Moore v. Office of Open Records*, 992 A.2d 907 (Pa. Cmwlth. 2010). However, the Department has the burden of proving that the requested records do not exist. 65 P.S. § 67.705; *see also Hodges v. Dep’t of Health*, 29 A.3d 1190 (Pa. Cmwlth. 2010). In similar cases, the Department has provided either sworn or unsworn affidavits in order to satisfy its burden of proving it does not possess requested records. *See Sturgis v. Dep’t of Corr.*, 96 A.3d 445 (Pa. Cmwlth. 2014); *see also Moore*. At no time relative to Wishnefsky’s Request or the OOR’s Final Determination has the Department provided either sworn or unsworn affidavits or any other evidence that the reports do not exist. Instead, the Department’s denial evasively responded that the requested information “does not exist in one *single* report.” Petition Ex. A. Again, after the OOR’s directive to produce “‘any report’ that reflects the requested information” (Petition Ex. B at 4), the Department merely stated that “commissary sales are not tracked by category” (Petition Ex. C). Under circumstances in which the Department has been far less than clear about commissary sales documents available

to its personnel, the Department cannot now claim that Wishnefsky's Petition should be dismissed because there is a material factual dispute.

Moreover, the Department cites *Borough of Monroeville v. Effie's Ups and Downs*, 315 A.2d 342 (Pa. Cmwlth. 1974), to support its position that "the mandamus remedy is available where there is no[] dispute of material fact" regarding whether there are responsive records remaining to be produced. Department Br. at 9. However, the *Monroeville* Court held that questions of fact precluded summary judgment, not mandamus. Further, there is no factual dispute in the instant case. In the Final Determination, OOR stated that the requested "records do, in fact, exist" and consist of "'any report' that reflects the requested information." Petition Ex. B at 4. The Department did not appeal from or seek reconsideration of the OOR's Final Determination. Thus, based upon the Petition's well-pled facts and inferences drawn therefrom, Wishnefsky's Petition establishes that he has a clear legal right and the Department has a corresponding duty.

Further, the Department's failure to produce the records has left Wishnefsky no option but to have the Final Determination enforced. OOR's website instructs requestors that if a Commonwealth agency fails to comply with a final determination, "the requestor must file an enforcement action in the Commonwealth Court."² Moreover, mandamus has been a vehicle under which final determination enforcement actions have been brought. *See Crockett v. Se. Pa. Transp. Auth.* (Pa. Cmwlth. No. 2295 C.D. 2011, filed September 11, 2012).³

²http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/enforce_a_final_determination/933869. Enforcement against local agencies must occur in the common pleas courts. *Id.*

³ This Court's unreported memorandum opinions may be cited "for [their] persuasive value, but not as a binding precedent." Section 414 of the Commonwealth Court's Internal Operating Procedures.

Because the facts as pled are legally sufficient to establish a right to relief, we overrule the Department's preliminary objection.

ANNE E. COVEY, Judge

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ORDER

AND NOW, this 8th day of July, 2015, the Pennsylvania Department of Corrections' (Department) preliminary objection to Bruce L. Wishnefsky's Amended Petition for Review in the Nature of Mandamus (Petition) is overruled. The Department shall file an answer to the Petition within thirty (30) days of the date of this order.

ANNE E. COVEY, Judge