

June 9, 2023

**FILED VIA PACFILE**

Michael Krimmel, Esq.  
Prothonotary  
Commonwealth Court of Pennsylvania  
Pennsylvania Judicial Center  
601 Commonwealth Avenue, Suite 2100  
Harrisburg, PA 17106-2575

**RE: Submission of Record in:**  
***Michael A. Michalski v. Pennsylvania Department of Corrections,***  
**No. 392 CD 2023**

Dear Mr. Krimmel:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, (“RTKL”), defines the Record on Appeal: “The record before a court shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all “evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2).” The record in this matter consists of the following:

**Office of Open Records Docket No. AP 2023-0438:**

1. The appeal filed by Michael Michalski (“Requester”) with the Office of Open Records (“OOR”), received February 28, 2023.
2. Official Notice of Appeal dated March 2, 2023, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Pennsylvania Department of Corrections’ (“Department”) Entry of Appearance received March 2, 2023.
4. Department’s submission dated March 7, 2023.
5. Requester’s submission received March 20, 2023.

6. The Final Determination issued by the OOR on March 28, 2023.

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kyle Applegate".

Kyle Applegate  
Chief Counsel

Attachments

cc: Michael A. Michalski (Requester)  
Tara J. Wikhian, Esq. (Department)

# Commonwealth of Pennsylvania

**Agency Docket Number: AP 2023-0438, GJ8047**

**Appellate Court Docket Number: 392 CD 2023**

I, Elizabeth Wagenseller, certify that the accompanying electronically transmitted materials are true and correct copies of all materials filed in the Office of Open Records and constitute the record for :

Michael A. Michalski,  
Petitioner

v.

Department of Corrections and  
Kimberly Grant (Office of Open  
Records),  
Respondent

\_\_\_\_\_  
/s/ Elizabeth Wagenseller

\_\_\_\_\_  
06/09/2023

Executive Director

Volumes:

Agency Record (2)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**MICHAEL A. MICHALSKI,**  
Petitioner,

v.

**PENNSYLVANIA DEPARTMENT OF  
CORRECTIONS and KIMBERLY GRANT,**  
Respondent.

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**No. 392 CD 2023**

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**CERTIFIED RECORD**

Kyle Applegate  
Chief Counsel  
Commonwealth of Pennsylvania  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2334  
Phone: (717) 346-9903  
Fax: (717) 425-5343  
Email: [Kyapplegat@pa.gov](mailto:Kyapplegat@pa.gov)

June 9, 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**MICHAEL A. MICHALSKI,**  
Petitioner,

v.

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CORRECTIONS and KIMBERLY GRANT,**  
Respondent.

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**No. 392 CD 2023**

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the Certified Record upon the following by First Class Mail, pre-paid or by Email at the address or email listed below:

Michael Michalski, GJ-8047  
SCI - Albion  
10745 Route 16  
Albion, PA 16475

Tara J. Wikhian, Esq.  
Pennsylvania Department of Corrections  
1920 Technology Pkwy.  
Mechanicsburg, PA 17050  
[tawikhian@pa.gov](mailto:tawikhian@pa.gov)



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Faith Henry, Administrative Officer  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17120-0225  
Phone: (717) 346-9903  
Fax: (717) 425-5343  
Email: [fahenry@pa.gov](mailto:fahenry@pa.gov)

Dated: June 9, 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL A. MICHALSKI,  
Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF  
CORRECTIONS and KIMBERLY GRANT,  
Respondent.

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No. 392 CD 2023

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RECORD

*Michael Michalski v. Pennsylvania Department of Corrections,*  
OOR Dkt. AP 2023-0438

**Office of Open Records Docket No. AP 2023-0438:**

1. The appeal filed by Michael Michalski (“Requester”) with the Office of Open Records (“OOR”), received February 28, 2023.
2. Official Notice of Appeal dated March 2, 2023, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Pennsylvania Department of Corrections’ (“Department”) Entry of Appearance received March 2, 2023.
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6. The Final Determination issued by the OOR on March 28, 2023.

# 00R Exhibit 1

FEB 28 2023

OFFICE OF OPEN RECORDS

TO: EXECUTIVE DIRECTOR, OFFICE OF OPEN RECORDS (OOR)

FROM: MICHAEL MICHALSKI GJ8047

DATE: 2/23/23

RE: APPEAL OF RTKL REQUEST DENIAL OF PA DOC REQUEST #0095-23

PLEASE ACCEPT THIS APPEAL OF THE ATTACHED RTKL REQUEST DENIAL I RECEIVED ON 2/23/23. THE ORIGINAL REQUEST WAS MAILED TO THE PA DOC AGENCY OPEN RECORDS OFFICER ON 1/25/23 AND WAS SUBSEQUENTLY ISSUED THE TRACKING #0095-23.

THE ORIGINAL REQUEST WAS FOR COPIES OF RECORDS PERTAINING TO THE RENTAL/VIEWING HISTORY OF EIGHT (8) SEPARATE DOC FACILITIES FOR SPECIFIC TIMEFRAMES. EACH OF THESE FACILITIES MAINTAINS AN ACTIVE NETFLIX SUBSCRIPTION WHICH THEY UTILIZE TO ORDER AND PLAY MOVIES FOR THEIR RESPECTIVE INSTITUTIONS.

ON 2/14/23, THE AGENCY OPEN RECORDS OFFICER, KIM GRANT, ISSUED THE DENIAL ON TWO SEPARATE GROUNDS — EACH OF WHICH I AM DISPUTING.

- DENIAL 1: "THE RECORD(S) THAT YOU REQUESTED DO NOT CURRENTLY EXIST IN THE POSSESSION OF THE DEPARTMENT OF CORRECTION, 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."



THE NETFLIX HISTORY IS PART OF EACH FACILITY'S NETFLIX SUBSCRIPTION. EACH FACILITY UTILIZES THIS SUBSCRIPTION ON FACILITY BASED COMPUTERS TO ORDER MOVIES/VIDEOS FOR THEIR INMATE POPULATION. THESE SUBSCRIPTIONS ARE FUNDED THROUGH EACH FACILITY'S INMATE GENERAL WELFARE FUND (IGWF). THE ORIGINAL REQUEST WAS TO PRINT THESE HISTORIES DIRECTLY FROM EACH FACILITY'S NETFLIX ACCOUNT, IN SPECIFIC DATE RANGES. THIS MEETS ANY DEFINITION OF A RECORD. FURTHER, I HAVE PREVIOUSLY REQUESTED AND RECEIVED COPIES OF SIMILAR NETFLIX ACCOUNT HISTORIES FROM PA DOC FACILITIES, ALBEIT IN A SMALLER TIMEFRAME (RTKL # 1108-21 AND/OR #1120-21). I SPECIFICALLY REQUESTED THESE RECORDS BE PRINTED DIRECTLY FROM NETFLIX AS IN PREVIOUS REQUESTS, SOME FACILITIES PROVIDED A TYPED RECORD FROM MICROSOFT WORD.

° DENIAL 2: "THE REQUESTED INFORMATION DOES NOT MEET THE STATUTORY DEFINITION OF A "RECORD" UNDER THE RTKL. IN ORDER TO QUALIFY AS A "RECORD," THE REQUESTED INFORMATION MUST HAVE A CLEAR NEXUS TO OFFICIAL DEPARTMENT TRANSACTIONS OR ACTIVITIES."

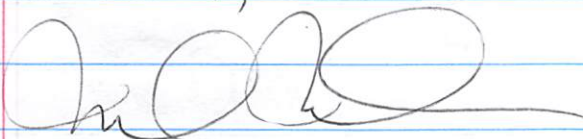
MUCH LIKE THE FIRST DENIAL, THE SECOND DENIAL IS NOT CONNECTED TO REALITY AS THE RECORDS REQUESTED ARE CLEARLY THE ACTIVITY OF AN AGENCY. AGAIN, EACH FACILITY, THROUGH ITS ACTIVITIES DEPARTMENT, HAVE A NETFLIX ACCOUNT/SUBSCRIPTION. THIS ACCOUNT IS FUNDED THROUGH/BY THE IGWF. CORRECTIONS ACTIVITIES SPECIALISTS OR CORRECTIONS ACTIVITIES MANAGERS ACCESS THIS ACCOUNT ON DEPARTMENT COMPUTERS, THROUGH THE NETFLIX WEBSITE. ONCE THERE, STAFF ADD MOVIES TO THE QUEUE

WHICH NETFLIX THEN SHIPS TO THE FACILITY. ONCE THE DISCS ARE RETURNED TO NETFLIX, MORE DISCS ARE SHIPPED AS ADDED TO THE QUEUE. AGAIN, SIMILAR RECORDS WERE REQUESTED AND RECEIVED PREVIOUSLY (RTKL # 1108-21 AND/OR # 1120-21).

IN THE ABOVE WRITTEN APPEAL, I HAVE CLEARLY AND CONVINCINGLY ESTABLISHED THAT; 1. THE RECORDS REQUESTED EXIST AND ARE IN POSSESSION OF THE DEPARTMENT AND, 2. THE RECORDS ARE IN FACT A "RECORD" AND ARE RELATED TO THE ACTIVITY OF AN AGENCY.

FINALLY, WITH THE NATURE OF THIS DENIAL, WHICH IS CLEARLY IN ERROR, SO MUCH SO THAT IT DOESN'T MAKE RATIONAL SENSE - I BELIEVE IT WAS AN INTENTIONAL ACT TO INTERFERE WITH MY ACCESS TO THE COURTS. I CURRENTLY HAVE A CLAIM BEING LITIGATED IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT, MICHALSKI V. LITTLE No. 1:22-CV-0262 WHICH CENTERS AROUND ISSUES DIRECTLY RELATED TO THE RECORDS REQUESTED. FURTHER INVESTIGATION WILL BE DONE RELATED TO THIS DENIAL.

SINCERELY,



MICHAEL MICHALSKI GJ8047

SMART COMMUNICATIONS / PA DOC

MICHAEL MICHALSKI, GJ8047

P.O. Box 33028

ST. PETERSBURG, FL 33733

**Pennsylvania Department of Corrections  
Right-to-Know Office  
Office of Chief Counsel  
1920 Technology Parkway  
Mechanicsburg, PA 17050  
Telephone 717-728-7763  
Fax 717-728-0312**

February 14, 2023

Smart Communications/PADOC  
Michael Michalski, GJ8047  
SCI-Albion  
PO Box 33028  
St Petersburg, FL 33733

Re: RTKL #0095-23

Dear Mr. Michalski:

This letter acknowledges receipt by the Department of Corrections (the Department) of your written request for records under the Pennsylvania Right-to-Know Law (RTKL). Your request was received by this office on January 31, 2023. On February 1, 2023 an interim response was sent to you extending the final response date to March 8, 2023. A copy of your request letter is enclosed.

Items 1, 2, and 3 of the enclosed RTK Request are denied for the following reason:

- The record(s) that you requested do not currently exist in the possession of the Department of Corrections. 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; *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."); *See also Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998). *See also McGowan v. Pennsylvania Department of Environmental Protection*, 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014) ("In the absence of any competent evidence that the agency acted in bad faith or that the agency records exist, 'the averments in the [d]epartment's affidavits should be accepted as true.'").
- The requested information does not meet the statutory definition of a "record" under the RTKL. 65 P.S. § 67.102 (*See* definitions for "record" and "public record"). In order to qualify as a "record," the requested information must have a clear nexus to official Department transactions or activities. Your request does not seek information that was created, received or retained pursuant to law or in connection with transactions, business or activities of the Department. *Id.* Accordingly, the information that you seek is not subject to disclosure under the RTKL. 65 P.S. § 67.506(d)(1) and § 67.701.

Item 4 of the enclosed RTK Request is granted. The granted information is enclosed at no charge. Please note that the granted records must be redacted to protect nonpublic and sensitive data. Insofar as redaction constitutes a denial to records, the basis for the denial and instructions for filing exceptions are outlined below in accordance with the law. Corrections Officers first names have been redacted for the following reasons:

- The requested records fall within the personal security exemption of the RTKL. 65 P.S. § 67.708(b)(1)(ii). That section exempts from access any record the disclosure of which would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual. *Id.* *See also Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998); *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa. Cmwlth. 1997). The disclosure of the first names or first initials of corrections officers is reasonably likely to result in threats, harassment, altercations or physical harm to corrections officers, their families and/or other residents of



Michael Michalski, GJ8047  
Page 2

their homes. Corrections Officers' first names or first initials are not routinely available to inmates. Disclosure of the first names or first initials will allow inmates and/or others to identify the officers, their residences and their families to orchestrate threats, harassment, altercations or physical harm. Accordingly, access to this information is exempt under the RTKL.

- The requested records fall within an exemption of the RTKL. Specifically, the RTKL excludes records maintained by an agency in connection with law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or a public protection activity. 65 P.S. § 67.708(b)(2). The requested records are records maintained by the Department in connection with its official law enforcement function of supervising the incarceration of inmates. The disclosure of the requested records would threaten public safety and the Department's public protection activities in maintaining safe and secure correctional institutions by allowing inmates or others to access information that can be used to undermine the Department's security procedures. Therefore, disclosure of these types of records is excluded under the RTKL. *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa.Cmwlth. 1997).
- The requested records fall within an exemption of the RTKL. Specifically, the RTKL exempts personal identification information from disclosure. 65 P.S. § 67.708(b)(6). Personal identification information includes, but is not limited to a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number, a spouse's name, marital status, beneficiary or dependent information or the home address of a law enforcement officer or judge. *Id.*
- Furthermore, employees have a constitutional right to privacy which would be violated by the disclosure of their first names or first initials, given the nature of their job and the dangers that such disclosure would present. See Pa. Cons. Art. 1, § 1; *Times Publishing Co. v. Michel*, 633 A.2d 1233 (Pa.Cmwlth. 1993).

You have a right to appeal the above denial of information in writing to the Executive Director, Office of Open Records (OOR), 333 Market Street, 16<sup>th</sup> Floor, Harrisburg, Pennsylvania 17101. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

1) this response; 2) your request; and 3) the reason why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Also, the OOR has an appeal form available on the OOR website at:

<http://www.openrecords.pa.gov/RTKL/Forms.cfm>.

Sincerely,

*Kim Grant*

Kim Grant  
Deputy Agency Open Records Officer

Enclosure  
cc: File

Received

JAN 31 2023



**pennsylvania**  
OFFICE OF OPEN RECORDS

Right-to-Know Office, Tracking #

0095-23

## Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: PA DOC (Attn: AORO)

Date of Request: 1/24/23 Submitted via: ☐ Email ☒ U.S. Mail ☐ Fax ☐ In Person

### PERSON MAKING REQUEST:

Name: MICHAEL MICHALSKI GJ8047 Company (if applicable): Smart Communications/PA DOC

Mailing Address: PO Box 33028

City: ST. PETERSBURG State: FL Zip: 33733 Email: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☐ Email ☒ U.S. Mail

**RECORDS REQUESTED:** Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.

SEE ATTACHED

DO YOU WANT COPIES? ☐ Yes, electronic copies preferred if available

☒ Yes, printed copies preferred

☐ No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☐ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☐ \$\_\_\_\_\_.

### ITEMS BELOW THIS LINE FOR AGENCY USE ONLY.

Tracking: \_\_\_\_\_ Date Received: \_\_\_\_\_ Response Due (\$ bus. days): \_\_\_\_\_

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: \_\_\_\_\_) Actual Response Date: \_\_\_\_\_

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$\_\_\_\_\_

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: In most cases, a completed RTKL request form is a public record.  
More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Nov. 27, 2018

PLEASE PROVIDE COPIES OF THE FOLLOWING RECORDS DESCRIBED BELOW:

1) THIS REQUEST APPLIES TO EACH OF THE FOLLOWING INSTITUTIONS;

- |            |               |
|------------|---------------|
| a) ALBION  | e) FOREST     |
| b) BENNER  | f) FRACKVILLE |
| c) COAL    | g) SOMERSET   |
| d) FAYETTE | h) WAYMART    |

2) THE RANGE OF THIS REQUEST IS FOR NETFLIX MOVIES ORDERED/SHIPPED STARTING IN JUNE 2019 THROUGH AND ENDING WITH OCTOBER 31, 2021

3) THIS REQUEST SEEKS THESE RECORDS BE PRINTED DIRECTLY FROM THE NETFLIX HISTORY TAB AND INCLUDE THE PAGE RANGE IN THE PRINT DIALOG BOX FOR RANGES ASSOCIATED WITH THE ABOVE DATES.

4) A COPY OF THE MOST RECENT PA DOC COMMISSARY COMMITTEE MEETING MINUTES SINCE THE AUGUST 4, 2022 MEETING.

THANK YOU

Smart Communications/PADOC

SCI- Albion

Name MICHAEL MICHALSKI

Number GJ8047

PO Box 33028

St Petersburg FL 33733

Inmate Mail  
PA Dept of  
Corrections



US POSTAGE<sup>SM</sup> PITNEY BOWES



ZIP 16475 \$ 000.84<sup>0</sup>  
02 4W  
0000376338 FEB 24, 2023

EXECUTIVE DIRECTOR  
OFFICE OF OPEN RECORDS (OOR)  
333 MARKET STREET, 16TH FLOOR  
HARRISBURG, PA 17101

OPENED AT CMPC

1710132234 0005

OOR Exhibit Page 009

# OOR Exhibit 2



## **NOTICE OF DEADLINES**

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **March 30, 2023**.

**The timeline for this RTKL appeal may be extended by the OOR during the appeal.** This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **March 13, 2023**.

**If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.**

Due to delays in U.S. mail, we urge agencies and requesters to use email or the E-File Appeal Portal for all communications with the OOR to the extent possible.

Presently, the OOR is receiving postal mail on a limited basis. Accordingly, we urge agencies and requesters to use email for all communication with the OOR to the extent possible.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.

March 2, 2023

**Via First Class Mail Only:**

Michael Michalski, GJ8047  
SCI-Albion  
10745 Route 18  
Albion, PA 16475-0001

**Via Email Only:**

Andrew Filkosky  
Agency Open Records Officer  
Pennsylvania Department of Corrections  
1920 Technology Pkwy  
Mechanicsburg, PA 17050  
ra-docrightrighttoknow@pa.gov

**RE: OFFICIAL NOTICE OF APPEAL - Michalski v. Pennsylvania Department of Corrections  
OOR Dkt. AP 2023-0438**

Dear Parties:

**Review this information and all enclosures carefully as they affect your legal rights.**

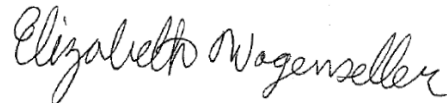
The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on February 28, 2023. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about deadlines.**

**Notes for both parties (more information in the enclosed documents):**

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,



Elizabeth Wagenseller  
Executive Director

Enc.: Description of RTKL appeal process  
Assigned Appeals Officer contact information  
Entire appeal as filed with OOR

# The Right-to-Know Law Appeal Process

**Please review this information carefully as it affects your legal rights.**

The Office of Open Records (“OOR”) has received the enclosed appeal, which was filed under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the notice of deadlines enclosed herein. If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

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**Submissions to the OOR** **Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer.** Please contact the Appeals Officer as soon as possible.

**Any information provided to the OOR must be provided to all parties involved in this appeal.** Information submitted to the OOR will not be considered unless it is also shared with all parties.

**Include the docket number on all submissions.**

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

It is strongly advised that attorneys and other party representatives **file an Entry of Appearance** by contacting the Appeals Officer or completing the form at <https://www.openrecords.pa.gov/Appeals/EntryOfAppearance.cfm>.

*NOTE TO AGENCIES: In cases assigned to the E-File Portal, if an Entry of Appearance is not filed, the AORO is responsible to inform attorneys and other party representatives of all docket activity.*

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

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**Agency Must Notify Third Parties** **If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer or completing the form at <https://www.openrecords.pa.gov/Appeals/DIPRequest.cfm>. (see 65 P.S. § 67.1101(c)).

The Commonwealth Court has held that “the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

**A third party's failure to participate in a RTKL appeal before the OOR**

**may be construed as a waiver of objections regarding release of requested records.**

*NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.*

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## Statements of Fact & Burden of Proof

**Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge.** Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, [openrecords.pa.gov](http://openrecords.pa.gov).

*Any evidence or legal arguments not submitted or made to the OOR may be waived.*

---

## Preserving Responsive Records

**The agency must preserve all potentially responsive records during the RTKL appeal process**, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

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## Mediation

**The OOR offers a mediation program as an alternative to the standard appeal process.** To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.

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**APPEALS OFFICER:**

**Blake Eilers, Esq.**

**CONTACT INFORMATION:**

**Commonwealth of Pennsylvania  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234**

**FACSIMILE:**

**(717) 425-5343**

**EMAIL:**

**beilers@pa.gov**

**Preferred method of contact and  
submission of information:**

**EMAIL  
(Except cases assigned to the E-File  
Appeal Portal)**

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.  
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot  
speak to parties individually without the participation of the other party.**

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review  
prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff  
are also available to provide general information about the appeals process by calling (717) 346-9903.



IN THE MATTER OF

\_\_\_\_\_,  
Requester

v.

\_\_\_\_\_,  
Agency

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OOR Dkt. AP \_\_\_\_\_

Please accept my appearance for the \_\_\_\_\_ in the above captioned case.  
(Requester/Agency)

**PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.**

Attorney: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

Email: \_\_\_\_\_

Phone #: \_\_\_\_\_

**Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.**

## REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

**NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.**

OOR Docket No: \_\_\_\_\_

Today's date: \_\_\_\_\_

Name: \_\_\_\_\_

**PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.**

Address/City/State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Fax Number: \_\_\_\_\_

Name of Requester: \_\_\_\_\_

Address/City/State/Zip \_\_\_\_\_

Telephone/Fax Number: \_\_\_\_\_ / \_\_\_\_\_

E-mail \_\_\_\_\_

Name of Agency: \_\_\_\_\_

Address/City/State/Zip \_\_\_\_\_

Telephone/Fax Number: \_\_\_\_\_ / \_\_\_\_\_

E-mail \_\_\_\_\_

Record at issue: \_\_\_\_\_

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) \_\_\_\_\_

**I have attached a copy of all evidence and arguments I wish to submit in support of my position.**

Respectfully submitted, \_\_\_\_\_ (must be signed)

**Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.**



# OOOR Exhibit 3



**IN THE MATTER OF**

**MICHAEL MICHALSKI,  
Requester**

**v.**

**PENNSYLVANIA DEPARTMENT OF  
CORRECTIONS,  
Respondent**

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**Docket No.: AP 2023-0438**

Please accept my appearance for the Agency in the above captioned case.

Attorney: Tara Wikhian  
Firm: Pennsylvania Department of Corrections  
Address: Office of Chief Counsel  
1920 Technology Parkway  
Mechanicsburg, PA 17050  
Email: tawikhian@pa.gov  
Phone #: 717-728-7763

# 00R Exhibit 4

March 7, 2023

Blake Eilers, Esquire  
Appeals Officer  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234

Re: Appeal No.: 2023-0438  
*Michael Michalski v. PA Department of Corrections*

Dear Appeals Officer Eilers:

Please accept this correspondence both as my Entry of Appearance on behalf of the Pennsylvania Department of Corrections (“Department”) and also in support of its position in opposition to the above-referenced Right to Know Law (“RTKL”) Appeal, which was initiated by requester Michael Michalski. On January 31, 2023, the Department received an RTKL request from Mr. Michalski seeking, *inter alia*, the Netflix history for movies ordered/shipped, from June 2019 through October 31, 2021, for 8 specific institutions.<sup>1</sup> *See* Request. The Department’s Deputy Agency Open Records Officer (“Deputy AORO”) issued the Department’s Final Response on February 14, 2023, denying Mr. Michalski’s request as the records sought do not currently exist in the Department’s possession. *See* Final Response. Mr. Michalski subsequently initiated the within RTKL Appeal. *See* Appeal.

“Under the RTKL, an agency bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist.” *Dep’t of Labor & Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Cmwlth. 2015). “An affidavit may serve as sufficient evidence of the non-existence of requested records.” *Id.* Here, the Department attaches as *Exhibit A* the Declaration of Kimberly Grant, its Deputy AORO, attesting under penalty of unsworn falsification under Pennsylvania law that no responsive records exist. Specifically, Ms. Grant asserts in relevant part as follows:

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<sup>1</sup> Mr. Michalski’s RTKL Request also sought Commissary Committee Meeting Minutes. *See* Request. The request for access to those records were granted and are not raised in Mr. Michalski’s Appeal. *See* Appeal Documents.

4. In response to Mr. Michalski's request, a good faith effort was made to ascertain the existence of documents responsive to the request. I contacted each of the 8 listed institutions regarding this request. If the requested information exists, it would be maintained by each individual institution.

5. Jeffrey Bigam, SCI-Fayette's Corrections Activities, indicated that the information requested would have to come directly from Netflix's site, and is not a record the institution maintains.

6. Specifically, Mr. Bigam indicated that the information requested from the Netflix history was difficult to print off directly from the Netflix site and would require additional work on their end to convert the information into a new document.

7. Based on Mr. Bigam's response, I sent a follow-up email to the other 7 institutions informing them they did not need to create a document such as the one described by Mr. Bigam in response to the RTKL request.

8. Thus, I can state that after conducting a good faith search of the Department's records no responsive records currently exist within the Department's possession.

*See Exhibit A, ¶¶ 4-8.*

"In the absence of any evidence that the Department has acted in bad faith or that the records do, in fact, exist, 'the averments in [the affidavit] should be accepted as true.'" *Foster v. Pa. Dep't of Corr.*, 159 A.3d 1020, 1021 (Pa. Cmwlth. 2017). Here, Mr. Michalski has provided no evidence that the Department has acted in bad faith or that any responsive records do, in fact, exist. Rather, he simply asserts that he previously requested and received copies of similar records. However, Mr. Michalski's position simply does not overcome the Department's clear establishment of the nonexistence of records responsive to his request.

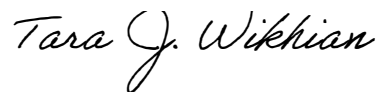
Moreover, the information sought by Mr. Michalski is not a record as defined by the RTKL. *See* 65 P.S. § 67.102. Specifically, the request does not seek information that is "created, received or retained pursuant to law or in connection

with a transaction, business or activity” of the Department. *Id.* As Deputy AORO Grant attests, the Netflix history sought by Mr. Michalski would have to come directly from Netflix’s site and is not a record the institutions maintain. *See Exhibit A*, ¶ 5. In fact, as evidenced by *Exhibit A* ¶ 6, the Netflix history report would require the Department to create a record which does not currently exist, which is strictly prohibited by the RTKL. *See* 65 P.S. § 67.705.

As discussed, Mr. Michalski’s Appeal contains no evidence that the Department has acted in bad faith or that responsive records do, in fact, exist. Therefore, the averments made by the Department’s Deputy AORO in the Declaration attached hereto as *Exhibit A* should be accepted as true, just as the OOR and the Commonwealth Court have done in numerous similar instances. *See Hodges v. Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011) (affidavit of agency's Open Records Officer was dispositive evidence that requested records did not exist); *Moore v. Office of Open Records*, 992 A.2d 907, 908-909 (Pa. Cmwlth. 2010) (agency's submission of sworn and unsworn affidavits that it was not in possession of requested records was sufficient to satisfy its burden of proving non-existence of record).

Based upon the foregoing, the Department respectfully requests that this Appeal be dismissed as the attached uncontested Declaration of the Department’s Deputy AORO serves as credible, sufficient evidence of the non-existence of any responsive records.

Sincerely,



Tara J. Wikhian  
Assistant Counsel

cc: Smart Communications/PA DOC, Michael Michalski, GJ8047, SCI-Albion  
(via regular mail)

## **DECLARATION OF KIMBERLY GRANT**

I, Kimberly Grant, hereby declare under the penalty of unsworn falsification, pursuant to 18 Pa. C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information, and belief:

1. Currently, the Pennsylvania Department of Corrections (“Department”) employs me as its Deputy Agency Open Records Officer (“Deputy AORO”).

1. I have been employed by the Commonwealth of Pennsylvania for over ten (10) years in total and was appointed to my current position as the Department’s Deputy AORO in September of 2021.

2. As Deputy AORO, I am responsible for logging in and issuing responses to all Right-to-Know Law (“RTKL”) requests received by the Department, as well as coordinating the research and information-gathering efforts in response to each request.

3. On January 31, 2023, the Department received an RTKL request from Michael Michalski, seeking, *inter alia*, the Netflix history for movies ordered/shipped, from June 2019 through October 31, 2021, for 8 specific institutions. *See Request.*

4. In response to Mr. Michalski’s request, a good faith effort was made to ascertain the existence of documents responsive to the request. I contacted each of the 8 listed institutions regarding this request. If the requested information exists, it would be maintained by each individual institution.

5. Jeffrey Bigam, SCI-Fayette’s Corrections Activities, indicated that the information requested would have to come directly from Netflix’s site, and is not a record the institution maintains.

6. Specifically, Mr. Bigam indicated that the information requested from the Netflix history was difficult to print off directly from the Netflix site and would require additional work on their end to convert the information into a new document.

7. Based on Mr. Bigam’s response, I sent a follow-up email to the other 7 institutions informing them they did not need to create a document such as the one described by Mr. Bigam in response to the RTKL request.

8. Thus, I can state that after conducting a good faith search of the Department's records no responsive records currently exist within the Department's possession.

*Kimberly Grant*

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Kimberly Grant  
Deputy Agency Open Records Officer  
Pennsylvania Department of Corrections

Date: March 7, 2023



# 00R Exhibit 5

RECEIVED

B. 1 of 3

MAR 20 2023

DEAR APPEALS OFFICER EILERS, OFFICE OF OPEN RECORDS

3/16/23

Re: APPEAL No.: 2023-0438

MICHAEL MICHALSKI V. PA DEPARTMENT OF CORRECTIONS

REQUESTER SUBMITS THIS INFORMATION AFTER THE RECORD WAS CLOSED PURSUANT TO GS P.S. § 1102(b)(3) (STATING THAT "THE APPEALS OFFICER SHALL RULE ON PROCEDURAL MATTERS OF JUSTICE, FAIRNESS, AND THE EXPEDITIOUS RESOLUTION OF THE DISPUTE") (SEE MICHALSKI V. GOVERNOR'S OFFICE OF ADMINISTRATION; DOCKET No.: AP 2014-0887).

REFERENCE COUNSEL WIKHIAN'S POSITION STATEMENT AND DEPUTY AORO GRANT'S DECLARATION, REQUESTER PROVIDES THE FOLLOWING INFORMATION:

- 1) COUNSEL WIKHIAN AND DEP. AORO GRANT ADMIT, CLEARLY, THAT A RECORD EXISTS IN THEIR POSITION STATEMENT, THEN LATER IN THE STATEMENT, SAY IT DOESN'T EXIST BECAUSE IT IS DIFFICULT TO PRINT.
- 2) DEP. AORO GRANT, FURTHER STATES THAT SHE EMAILED EACH OF THE 7 OTHER INSTITUTIONS AND TOLD THEM NOT TO PRINT THE RECORDS BECAUSE ONE INSTITUTION (SCI-FAYETTE) HAD TROUBLE PRINTING.
- 3) AS EVIDENCED IN THE APPEAL, AND NOTED IN THE POSITION STATEMENT, I HAVE RECEIVED THESE RECORDS PREVIOUSLY AND MANY WERE PRINTED DIRECTLY FROM THE SITE.
- 4) AS RELATED TO 'CONSTRUCTIVE POSSESSION' § 901, THE REQUEST DOCUMENTS

A TRANSACTION OF AN AGENCY; PA DOC ↔ NETFLIX.

5) § 67.506, (d) AGENCY POSSESSION, (1) STATES: "A PUBLIC RECORD THAT IS NOT IN THE POSSESSION OF AN AGENCY BUT IS IN THE POSSESSION OF A PARTY WITH WHOM THE AGENCY HAS CONTRACTED TO PERFORM A GOVERNMENTAL FUNCTION ON BEHALF OF THE AGENCY, AND WHICH DIRECTLY RELATES TO THE GOVERNMENTAL FUNCTION AND IS NOT EXEMPT UNDER THIS ACT, SHALL BE CONSIDERED A PUBLIC RECORD OF THE AGENCY FOR PURPOSES OF THIS ACT." IT CANNOT BE ARGUED THAT THERE IS A FINANCIAL AGREEMENT BETWEEN THE PA DOC AND NETFLIX FOR NETFLIX TO PROVIDE A SERVICE, RECORDS RELATED TO THE SERVICE ARE A TRANSACTION OF THE PA DOC AND ARE NOT EXEMPT.

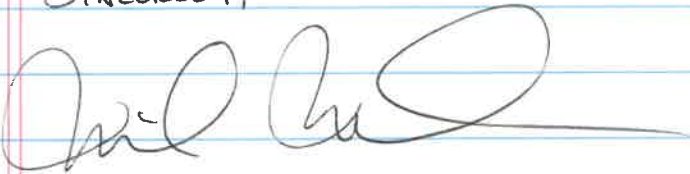
6) THE NETFLIX HISTORY IS A DATABASE OF ALL TRANSACTIONS BETWEEN THE PA DOC AND NETFLIX. THE NETFLIX HISTORY CAN ALSO BE DOWNLOADED FROM THE NETFLIX WEBSITE IN A .CSV FILE AND OPENED WITH MICROSOFT EXCEL AS A DATABASE IF IT IS UNABLE TO BE PRINTED DIRECTLY FROM THE WEBSITE. "DRAWING INFORMATION FROM A DATABASE DOES NOT CONSTITUTE CREATING A RECORD UNDER THE PA RTKL, 65 PA STAT. ANN. §§ 67.101-67.3104." "AN AGENCY CAN BE REQUIRED TO DRAW INFORMATION FROM A DATABASE, ALTHOUGH THE INFORMATION MUST BE DRAWN IN FORMATS AVAILABLE TO THE AGENCY. IN SHORT, TO THE EXTENT REQUESTED INFORMATION EXISTS IN A DATABASE, IT MUST BE PROVIDED; AN AGENCY CANNOT CLAIM OTHERWISE UNDER § 705 OF THE PA RTKL, 65 PA. STAT. ANN. §§ 67.101-67.3104, 65 PA. STAT. ANN. § 67.705" (COMMONWEALTH OF PA DEP V. VERA COLE 9/12/12 LEXISNEXIS HEADNOTES). WHETHER PRINTED DIRECTLY FROM

THE NETFLIX SITE OR PRINTED FROM THE DOWNLOADABLE .CSV  
FILE THROUGH MICROSOFT EXCEL IN THE RANGES REQUESTED, THIS  
DATABASE INFORMATION MUST BE PROVIDED.

IT IS CLEAR THAT THE PA DOC IS TRYING TO DENY RECORDS CONTRARY  
TO THE PA RTKL, IF THIS WASN'T CLEAR THROUGH THE INITIAL DENIAL  
AND APPEAL, THE PA DOC'S POSITION STATEMENT MAKES IT CLEAR.

CC: COUNSEL WIKHIAN, AORO GRANT

SINCERELY,

A handwritten signature in black ink, appearing to read 'Michael Michalski', with a large, stylized loop at the end.

MICHAEL MICHALSKI GJ8047

SMART COMMUNICATIONS/PA DOC

MICHAEL MICHALSKI GJ8047

PO BOX 33028

ST. PETERSBURG, FL 33733

Smart Communications/PADOC

SCI- ALBION

Name MICHAEL MICHALSKI

Number GJ8047

PO Box 33028

St Petersburg FL 33733

Inmate Mail  
PA Dept of  
Corrections



US POSTAGE PAID BY PITNEY BOWES



ZIP 16475 \$ 000.60<sup>0</sup>  
02 4W  
0000376338 MAR 17, 2023

BLAKE EILERS, ESQ. (APPEALS OFFICER)

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF OPEN RECORDS

333 MARKET STREET, 16<sup>TH</sup> FLOOR

HARRISBURG, PA 17101-2234

1710132210 C005



# 00R Exhibit 6



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**MICHAEL MICHALSKI,  
Requester**

**v.**

**PENNSYLVANIA DEPARTMENT OF  
CORRECTIONS,  
Respondent**

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**Docket No: AP 2023-0438**

### **FACTUAL BACKGROUND**

On January 31, 2023, Michael Michalski (“Requester”), an inmate at SCI-Albion, filed a request (“Request”) with the Pennsylvania Department of Corrections (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the movies ordered from and shipped by Netflix to each one of eight specified correctional institutions between June of 2019 and October 31, 2021. The Request specified that it “seeks these records [to] be printed directly from the Netflix history tab...”.<sup>1</sup> On February 14, 2023, after invoking an extension to respond, *see* 65 P.S. § 67.902(b), the Department denied the Request, arguing that the requested histories are not records of the Department and, as such, do not exist in the Department’s possession, custody or control.

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<sup>1</sup> The Request also sought the meeting minutes from the most recent Department Commissary Committee meeting. The Department provided these records, redacted of the first names of corrections officers, and the Requester does not challenge this aspect of the Department’s response on appeal. As a result, the Requester has waived any objections to the Department’s response to this item of the Request. *See Pa. Dep’t of Corr. v. Off. of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

On February 28, 2023, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The Requester argues that each of the identified correctional institutions paid for a Netflix subscription out of each institution’s Inmate General Welfare Fund and that the institutions access Netflix on Department computers. Further, the Requester argues that the Department has previously provided Netflix histories to him, although he acknowledges that some of the institutions had provided a Word document with the requested information. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On March 7, 2023, the Department submitted a position statement, reiterating its arguments. In support, the Department provided the statement made under the penalty of unsworn falsification to authorities by its Deputy Open Records Officer, Kimberly Grant. On March 17, 2023, the Requester mailed a response to the evidence submitted by the Department, arguing that the Department’s acknowledgment that the histories do exist is inconsistent with the argument that no record exists, especially because the basis of the latter argument appears to be that the histories are difficult to print. The Requester argues that the histories are records of the Department because they document a transaction of the Department; alternatively, they are accessible through Section 506(d) of the RTKL. *See* 65 P.S. § 67.506(d). Further, the Requester argues that the histories can be downloaded from Netflix as a .csv file and opened with Microsoft Excel; this belies the Department’s argument that they are hard to print. Moreover, drawing information from a database does not constitute the impermissible creation of a record. *See* 65 P.S. § 67.705.



## LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the factfinder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Department argues that the Netflix histories are not records of the Department. The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency?” and 2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency?” *See* 65 P.S. § 67.102; *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. *See A Second Chance*, 13 A.3d at 1034; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*13 (Pa. Commw. Ct. Jan. 12, 2012) (“[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]”). In *A Second Chance*, the Commonwealth Court interpreted the word “documents”

as meaning “proves, supports [or] evidences” and held that certain requested information met the first part of the definition of a record because it documented the existence of a governmental action. 13 A.3d at 1034.

Here, the Grant attestation provides that:

4. In response to [the R]equest, a good faith effort was made to ascertain the existence of documents responsive to the [R]equest. I contacted each of the 8 listed institutions regarding this [R]equest. If the requested information exists, it would be maintained by each individual institution.
5. Jeffrey Bigam, SCI-Fayette’s Corrections Activities [sic], indicated that the information requested would have to come directly from Netflix’s site, and is not a record the institution maintains.
- ...
8. Thus, I can state that after conducting a good faith search of the Department’s records no responsive records currently exist within the Department’s possession.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’t Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the Request facially seeks documents from Netflix’s website. The Requester argues that the Department can download the histories as .csv files. However, agencies are not required to create records, and the fact that some correctional institutions may have provided this information to the Requester in the past is inconsequential to this analysis. *See* 65 P.S. § 67.705. Nevertheless, as the Requester points out, the histories document the Department’s activity of ordering movies for inmates to watch. The question then become whether they are maintained in

connection with this activity. As the Grant attestation establishes, they are not. Accordingly, the Department has met its burden of proving that the Netflix histories are not records of the Department. *See* 65 P.S. § 67.305.

The Requester argues that the records are accessible under Section 506(d) of the RTKL, which provides that *public records* that are not in the possession of the agency but are in the possession of a third party are accessible if certain conditions are satisfied. *See* 65 P.S. § 67.506(d)(1) (emphasis supplied); *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (citation omitted), *aff'd*, 124 A.3d 1214 (Pa. 2015). The RTKL defines “public record” as a record of a Commonwealth or local agency. *See* 65 P.S. § 67.102. However, as established above, the Netflix histories are not records of the Department, nor is there any evidence that they are records of any other local or Commonwealth agency. Rather, the Request seeks records from the Netflix’s website; while Netflix is a publicly traded corporation, it is plainly not a local or a Commonwealth agency. *See id.* (defining “local agency” and “Commonwealth agency”); <https://www.forbes.com/companies/netflix/?sh=fe2452c8541f> (last accessed March 24, 2023). As such, Section 506(d) does not apply to the Netflix histories, and the OOR need not assess whether the conditions required to access records under Section 506(d) are satisfied in this instance.

## CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Department is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of

the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: March 28, 2023**

/s/ Blake Eilers  
Blake Eilers, Esq.  
Appeals Officer

Sent to: Michael Michalski, GJ8047 (via regular mail);  
Tara Wikhian, Esq. and Andrew Filkosky (via portal access only)

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<sup>2</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).