

April 30, 2015

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Michael F. Krimmel, Esquire Deputy Prothonotary and Chief Clerk Pennsylvania Judicial Center 601 Commonwealth Avenue, Suite 2100 P.O. Box 69185 Harrisburg, PA 17106-9185

APR 3 n 2015

OFFICE OF OPEN RECORDS

Re:

Uniontown Newspapers, Inc. et al. v. Pa. DOC

No. 66 M.D. 2015

Dear Mr. Krimmel:

Please find enclosed for filing in the above-captioned matter is two (2) copies of Respondent's brief in support of preliminary objections. I have enclosed copies to be time-stamped and returned to me by way of the messenger.

Thank you for your attention to this matter.

Sincerely,

Chase M. Defelice

Assistant Counsel

Enclosures

cc: Charles Kelly, Saul Ewing LLP, One PPG Place, Suite 3010, Pittsburgh, PA 15222, (w/enclosures)

VKathleen A. Higgins, Esq., Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225 File

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

66 M.D. 2015

UNIONTOWN NEWSPAPERS, INC., ET AL.,

Petitioner,

v.

PA DEPT. OF CORRECTIONS

Respondent

RESPONDENT'S BRIEF IN SUPPORT OF PRELIMINARY OBJECTION TO THE PETITION FOR REVIEW

THERON R. PEREZ Chief Counsel

Pennsylvania Department of Corrections Office of Chief Counsel 1920 Technology Parkway Mechanicsburg, PA 17050 By: Chase M. Defelice Assistant Counsel Attorney I.D. No. 209135 Counsel for Respondent

Dated: April 30, 2015

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STATEMENT OF JURISDICTION

This Court has original jurisdiction over this matter pursuant to Section 761 of the Judicial Code, 42 Pa. C.S. § 761.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Preliminary objections "in the nature of a demurrer . . . admit all well-pleaded material facts and any inferences reasonably deduced therefrom, but not . . . legal conclusions." *Danysh v. Department of Corrections*, 845 A.2d 260, 262 (Pa. Cmwlth. 2004). In determining whether a preliminary objection based on a demurrer should be sustained, a court "need not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion." *Silo v. Ridge*, 728 A.2d 394, 398 (Pa. Cmwlth. 1999) (citing *Giffin v. Chronister*, 616 A.2d 1070, 1072 (Pa. Cmwlth. 1992)).

When ruling on a demurrer, a court may sustain the objections and dismiss the case only when such relief is clear and no doubt exists that the law will not permit a recovery. *Stone and Edwards Insurance Agency, Inc. v. Department of Insurance*, 616 A.2d 1060, 1063 (Pa. Cmwlth. 1992).

STATEMENT OF QUESTION INVOLVED

Is Petitioner entitled to peremptory mandamus relief where there is a material fact in dispute as to whether the records provided in response to the OOR's Final Determination are the only existing responsive records within the Department's possession?

Suggested Answer: No.

STATEMENT OF THE CASE

Before this Court is a preliminary objection in the nature of a demurrer to a Petition for Review filed by Uniontown Newspapers, Inc., d/b/a/, The Herald Standard, and Christine Haines ("Petitioner"). See Appendix A, Petition for Review (PFR), ¶ 7. Petitioner names as Respondent the Department of Corrections of the Commonwealth of Pennsylvania ("Department"). Id., ¶ 11.

Ms. Haines (Petitioner) field a Right-to-Know-Law (RTKL) request with the Department for:

. . . documentation of illnesses contracted and/or staff members at SCI-Fayette. I am not seeking identifying information, only the types of reported contracted illnesses and the number of inmates or staff members with those illnesses. I am particularly interested in various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported. If there is also information comparing the health at SCI-Fayette with the health at other state correctional facilities, that would also be helpful. Thank you Christine Haines, Herald-Standard 724-425-7223.

Id., ¶ 16 and Exhibit C.

On October 16, 2014, the Department denied the request. *Id.*, ¶ 19. On or about October 30, 2014, Ms. Haines appealed the denial to the Office of Open Records (OOR). *Id.*, ¶ 21. On or about November 4, 2014, the Department issued a response to the appeal with a declaration from Director of Bureau of Health Care Services Christopher Oppman, arguing that the records were part of a noncriminal

investigation. *Id.* Exhibit at J. On December 1, 2014, the OOR ordered the records be made available to Ms. Haines. *Id.* at ¶ 22, Exhibit A. Neither party appealed the Final Determination to the Commonwealth Court.

On December 31, 2015, the Department provided all responsive records within its possession. *Id.*, ¶ 26. ¹ A subsequent declaration was requested and was provided by Director Christopher Oppman stating that beyond the records previously provided, the Department did not have any other responsive records. *See Appendix A*, Petition for Review, Exhibit K. The Department indicated the only way to provide the requested information would be by reviewing medical records, which would require a creation of a new record or redacting identifying information from inmate medical records. *Id.* at Exhibit H.

Believing that records were being improperly withheld, Petitioner filed the Petition for Review in this Court's original jurisdiction. The Department filed a demurrer in response.

¹ A portion of the PFR should be considered moot because Petitioner received the number of cancer diagnosis by type at SCI Fayette. The records came from the Pennsylvania Cancer Registry, which the Department of Health has access to. The record was attached to the Department of Health's report that was provided to the Department in late January of 2015. A copy of the Department of Health report is available on the Department of Corrections public website, and has been provided to Petitioner.

http://www.cor.pa.gov/Documents/DOH%20Review%20of%20Cancer%20Burden %20at%20SCI%20Fayette%2012-29-2014.pdf

As relief, Petitioner seeks an order from this Court to compel the Department to produce all records within seven (7) days of the issuance of an Order, find the Department has willfully and/or wantonly disregarded Petitioner's request and the OOR's Final Determination, and award attorneys' fees and costs.

SUMMARY OF ARGUMENT

The Petitioner is asking this Court to enforce a final judgment, essentially Petitioner is seeking mandamus relief. Peremptory mandamus relief is not available to Petitioner because there is a disputed issue of material fact as to whether the records the Department provided to Petitioner pursuant to the OOR's Final Determination are the only responsive existing records that exist *vis-à-vis* Petitioner's RTKL request.

ARGUMENT

Petitioner is not entitled to peremptory mandamus relief where there is a material fact in dispute as to whether the records provided in response to the OOR's Final Determination are the only existing responsive records within the Department's possession.

The Petition sounds in mandamus, or alternatively, is seeking enforcement of the OOR Final Determination. Mandamus lies only where the petitioner "demonstrates a clear legal right to relief, a correspondingly clear duty on the part of the party against whom mandamus is sought, and the want of any other adequate remedy." See Equitable Gas v. City of Pittsburgh, 507 Pa. 53, 58, 488 A.2d 270, 273 (1985) (also finding that the petitioner must show "an immediate, specific, well defined and complete legal right to the thing demanded") (citing Purcell v. City of Altoona, 364 Pa. 396, 72 A.2d 92 (1950)). Mandamus is proper to "compel the performance of a ministerial duty and will not be granted in doubtful cases." Doxsey v. Pa. Bureau of Corrections, 674 A.2d 1173, 1174 (Pa. Cmwlth. 1996). Mandamus is not proper to establish legal rights; it is only appropriately used to enforce those rights that have already been established. See Waters v. Department of Corrections, 509 A.2d 430, 432 (Pa. Cmwlth. 1986).

The Department's position is that a portion of the responsive records exist, and they were provided to Petitioner, but the remaining responsive records do not exist. Further, the Department has *never* asserted the records exist, but are in a database, but rather, has stated "[w]e do not have any such records that are that

specific beyond going through every medical record." *Appendix at A*, PFR, Exhibit H.²

Under the RTKL, the Department is not required to create a record. 65 P.S. § 67.705. Further, under the RTKL a medical record is exempt. 65 P.S. § 67.708(b)(5). Therefore, copying an inmate's medical record, and redacting it would also be contrary to the RTKL. 65 P.S. § 67.706; Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

Petitioner alleges the Department has the requested records, but the Department complains it would be too burdensome to provide them. *Appendix at A*, PFR ¶ 40. To the contrary, beyond the records provided to Petitioner, the Department does not have any additional responsive records. To follow Petitioner's suggestion, the Department would be required to create records by examining the medical record for every inmate that is or once was at SCI Fayette and extrapolating information from those records to make a record. Although the request does not ask for medical records, nor could it because they are exempted under the RTKL, the request does expect the Department to create the records or search thousands of medical files and redact a medical record to avoid any identifying information. The RTKL does not

² The Department requests the Court to exercise Judicial Notice, pursuant to Pa. R. Evid. 201, and reference the Department's public website, which illustrates the current inmate population at SCI Fayette is 2,056 inmates. <a href="http://www.cor.pa.gov/Administration/Statistics/Documents/current%20monthly%20mont

require the creation of a record nor does it require the redaction of an exempt record. See 65 P.S. § 67.705; 65 P.S. § 67.706; Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

The mandamus remedy is available where there is no dispute of material fact. *Monroeville v. Effie's Ups and Downs*, 315 A.2d 342 (Pa. Cmwlth. 1974). If, as Petitioner claims, they have not received the record(s) to which they are entitled, Petitioner would have a clear right to those records based on the Final Determination from the OOR. However, if, as the Department claims, the records that were provided are the responsive documents and no other records exist, Petitioner does not have a clear right to the records because impossibility is a defense to an enforcement action. *Commonwealth v. United States Steel Corp.*, 325 A.2d 324 (Pa. Cmwlth. 1974). In other words, there is a material fact at issue, *i.e.* whether there are any remaining responsive records. Because there is a material fact at issue, peremptory mandamus relief is not available to Petitioner.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Court sustain the demurrer and decline to grant peremptory mandamus or enforcement relief on the present state of the record.

Respectfully Submitted,

Office of General Counsel

By:

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Dated: April 30, 2015

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEWSPAPERS, INC., d/b/a/ THE HEARLD STANDARD; AND CHRISTINE HAINES,

Petitioners,

v.

No. 66 M.D. 2015

PA DEPARTMENT OF CORRECTIONS,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am this day depositing in the U.S. mail a true and correct copy of the foregoing *Brief in Support of Respondent's Preliminary Objection* upon the person(s) in the above-captioned matter.

Service by first-class mail Addressed as follows:

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Dated: April 30, 2015

APPENDIX A PETITION FOR REVIEW

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEWSPAPERS, INC., d/b/a THE HERALD STANDARD; and CHRISTINE HAINES,) No.:			
Petitioners, v.) DETERMINATION OF OFFICE OF) OPEN RECORDS			
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,) Filed on Behalf of the Petitioners,) Uniontown Newspapers, Inc., d/b/a The) Herald Standard; and Christine Haines 			
Respondent.	Counsel of Record for this Party:			
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) SAUL EWING LLP) 30 th Floor, One PPG Place) Pittsburgh, PA 15222			
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Office of Open Records Docket No.: AP 2014-1695

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEWSPAPERS, INC., THE HERALD STANDARD; CHRISTINE HAINES,	d/b/a and)	No.:	,	
Petitioners,)			
PENNSYLVANIA DEPARTMENT CORRECTIONS,	OF)			
Respondent.		. ′			e .

PETITION FOR REVIEW AND ENFORCMENT OF FINAL DETERMINATION OF OFFICE OF OPEN RECORDS

AND NOW, come the Petitioners, Uniontown Newspapers, Inc., d/b/a The Herald Standard and Christine Haines, by and through their undersigned counsel, Saul Ewing LLP, and hereby submit their Petition for Review and Enforcement of Final Determination of Office of Open Records, as follows:

I. INTRODUCTION

- 1. Petitioners seek intervention from this Court to enforce a Final Determination of the Office of Open Records pursuant to the Pennsylvania Right to Know Law (see Exhibit "A", the "OOR Final Determination").
- 2. The OOR Final Determination became final and enforceable on December 31, 2014, the last date on which the Pennsylvania Department of Corrections could appeal to this Court from the OOR Final Determination, which mandated that the Department of Corrections produce all documents responsive to the Petitioners' open records request.
- 3. Despite the OOR Final Determination, which required the Respondent to fully comply with Petitioners' Right to Know Law request, Respondent has willfully failed to produce all documents it admits to exist, are in its possession or control, and that are responsive to the OOR Final Determination.

- 4. The documents that Petitioners requested, and have an immediate right to review, are subject to production as a matter of law and relate to an ongoing debate of public importance about environmentally-related illnesses at the Pennsylvania State Correctional Institution at Fayette ("SCI-Fayette").
- 5. SCI-Fayette, the subject of Petitioners' open records request, has been thrust into the public spotlight as a result of the alarming rate at which its inmates at the facility have experienced significant health problems. A recent report by the Abolitionist Law Center and Human Rights Coalition, for example, made the following findings:
 - a. "A 12-month investigation into the health impact of exposure to toxic coal waste on the prisoner population at State Correctional Institution (SCI) Fayette has uncovered an alarming rate of serious health problems.";
 - b. The facility is situated "in the midst of a massive toxic waste dump"; and
 - c. The facility has experienced an alarming rate of respiratory illnesses, pre-cancerous growths and cancers, among other serious health problems.

(See Exhibit "B", "No Escape: Exposure to Toxic Coal Waste at [SCI] Fayette").

6. For the reasons stated herein, the Respondent should be Ordered to comply fully with the Petitioners' request pursuant to the Right to Know Law and the clear mandates of the Final Determination of the Office of Open Records by producing responsive documents it has refused to produce as identified below; reimburse Petitioners for their legal fees and related costs pursuant to the Right to Know Law for having to bring this enforcement action; and pay other such penalties as are proper under the Right to Know Law.

II. THE PARTIES

- 7. Petitioner, The Herald Standard, is an independent family-owned media company located in Fayette County, Southwestern, Pennsylvania with circulation primarily throughout Uniontown, Pennsylvania and surrounding areas, and globally via its website. The Herald Standard is a venture of Uniontown Newspapers, Inc.
- 8. The Herald Standard operates its principal offices from 8 East Church Street, Uniontown, Pennsylvania 15410.
- 9. Petitioner, Christine Haines ("Ms. Haines"), is a reporter working for The Herald Standard.
 - 10. Collectively, The Herald Standard and Ms. Haines are referred to as "Petitioners".
- 11. Respondent, the Pennsylvania Department of Corrections (the "DOC" or "Respondent"), is the Pennsylvania governmental agency tasked with operating, coordinating and overseeing the various penal and correctional institutions throughout the Commonwealth.
- 12. The DOC is a Commonwealth Agency pursuant to Section 102 of the Pennsylvania Right to Know Law ("RTKL"). See 65 P.S. § 67.102.
- 13. The DOC keeps its central offices at 1920 Technology Parkway, Mechanicsburg, Pennsylvania 17050, and further operates through various offices, facilities and State Correctional Institutions ("SCI") throughout Pennsylvania, including SCI-Fayette (which was the subject of Petitioners' original open records request pursuant to the RTKL).

III. JURISDICTION

14. This Court has jurisdiction to enforce a Final Determination of the Pennsylvania Office of Open Records pursuant to, *inter alia*, 42 PA. Cons. STAT. Ann. § 761 (Original Jurisdiction of the Commonwealth Court) and § 763 (Direct Appeals to the Commonwealth Court from Governmental Agencies).

15. Additionally, this Court has jurisdiction to review Final Determinations of the Office of Open Records pursuant to Section 1301 of the RTKL. See 65 P.S. § 67.1301(a).

IV. FACTUAL AND PROCEDURAL HISTORY

- A. Petitioners' Initial RTKL Request and the DOC's Response.
- 16. On September 25, 2014, Petitioners, through Ms. Haines, made a request to the DOC pursuant to the RTKL. The substance of the request was as follows:

I am seeking documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette. I am not seeking identifying information, only the types of reported contracted illnesses and the number of inmates or staff members with those illnesses. I am particularly interested in various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported. If there is also information comparing the health at SCI-Fayette with the health at other state correctional facilities, that would also be helpful.

(the "Request," attached hereto as Exhibit "C") (emphasis added).

- sought information from the time frame encompassing the opening of SCI-Fayette (in or around August, 2003) until the present regarding illnesses contracted by individual inmates and staff, with a particular focus on the types of cancers and respiratory ailments diagnosed. Petitioners requested identification of the specific contracted illnesses by the inmates and staff as reported or diagnosed by SCI-Fayette, not a generic reference to a category of medicine, e.g., cancer, gastrointestinal or respiratory. Hence, the Petitioners did not request a list of "cancer" cases, in general, but identification of the types of cancer, e.g., lung cancer, throat cancer, colon cancer, for each such cancer contracted during the relevant period. Petitioners also clearly stated that they were not seeking the disclosure of any personal, identifying information.
- 18. The following day, on September 26, 2014, the DOC confirmed receipt of Petitioners' request, and further requested an additional thirty (30) days to comply.

- 19. On October 16, 2014, the DOC formally denied Petitioner's request for a variety of reasons, including the following alleged exemptions under the RTKL:
 - a. The records allegedly related to a non-criminal investigation;
 - b. The records allegedly fell within the personal security exemption;
 - The records allegedly could threaten public safety or protection activity;
 - d. The records allegedly related to medical information of individuals;
 - e. The records allegedly related to personal identification information;
 - f. The records allegedly related to internal deliberations of the DOC;
 - g. The records allegedly are protected by the deliberative process privilege;
 - h. The records allegedly are protected by the attorney-client privilege; and
 - The records allegedly related to the personal work product of public officials or agency employees.

(See DOC's final response and denial of Petitioners' Request, attached as Exhibit "D").

- 20. Notably, at no time did the DOC indicate that the records responsive to Petitioners' original Request were nonexistent, but instead the DOC merely contended that the documents were exempted from disclosure under the exclusions of the RTKL. (See Exhibit D).
 - B. Petitioners Appealed to the Office of Open Records, Which Issued a Final Determination Ordering the DOC to Produce All Responsive Documents.
- 21. Following the DOC's responses to Petitioners' Request (see Exhibit D), Petitioners timely appealed to the Pennsylvania Office of Open Records on or about October 30, 2014.
- 22. The Office of Open Records considered the DOC's response, rejected the DOC's alleged defenses to disclosure, and issued the OOR Final Determination on December 1, 2014 (attached hereto as Exhibit A).
- 23. The Office of Open Records held that the DOC failed to meet its burden to establish any defense to disclosure and, therefore, was required to comply with Petitioners' Request.

- 24. The Office of Open Records concluded, in relevant part, as follows: "the Requester's appeal is granted and the Department [of Corrections] is required to provide all responsive records to the Requester within thirty days. This Final Determination is binding on all parties." (See Exhibit A, at 9-10) (emphasis original).
 - C. The DOC Failed to Appeal the Office of Open Records Final Determination, and Further Failed to Comply with the Clear Terms of the Final Determination and/or Petitioners' Open Records Request.
- 25. The DOC failed to appeal the Office of Open Records' Final Determination within thirty (30) days of issuance of the same pursuant to the RTKL and, therefore, the Final Determination became binding on both of the parties.
- 26. The DOC has produced limited, nonresponsive documents and with one exception, constrained to the period to 2010-2013, not 2003-2013, per the Request.
- 27. For example, the DOC has provided documents relating to SCI-Fayette causes of death for cancer victims between 2003 and 2013 (see Exhibit "E"). Significantly, this document reflects that the DOC does have information relating to specific illnesses, contracted and reported, or diagnosed, on an individual patient basis at SCI-Fayette, and can readily convey such information and documents to Petitioners so as to comply with the DOC's duties under the OOR Final Determination, but has improperly refused to do so.
- 28. Likewise, it has provided a chart listing DOC cancer patients by SCI location for 2011-2014, reflecting twenty-two (22) cases at SCI-Fayette, albeit without information relating to the types of cancer, as in Exhibit E. (See Exhibit "F").
- 29. In addition, the DOC produced charts for the period 2010-2014 reflecting the total number of patients treated for pulmonary or gastrointestinal conditions. (See Exhibit "G").
- 30. While such general, generic data lumped under an umbrella categorization, e.g., gastrointestinal complaints, is of some nominal interest, it misses the point of the Request: it does

not directly respond to Petitioners' Request, to which the DOC must respond in light of the OOR Final Determination. Petitioners' Request sought a listing of each illness contracted and reported, i.e., diagnosed for an inmate residing and treated at SCI-Fayette for the period 2003 (when the facility opened) through 2013 (the last year for which Petitioners anticipated there would be complete records, given the late 2014 request date). Petitioners, of course, conceded that SCI-Fayette would, and should, not produce any patient-identifying information in response to the Request, such as name or social security number.

- 31. Simply put, Petitioners, with the exception of the two-page document attached as Exhibit E, have not received documents from the DOC reflecting illnesses contracted and reported, i.e., diagnosed, at SCI-Fayette, with particular focus on the specific, various cancer diagnoses and specific respiratory ailments diagnosed and reported, which was the basis of their Request.
- 32. Accordingly, and for example, Petitioners have not received documents reflecting diagnoses of cancers and respiratory illness by type, whether that means lung cancer or pulmonary embolism, or skin rash or chemical burn, the very types of conditions that might arise from living next to a toxic dump such as is the position of SCI-Fayette.
- 33. Rather than producing documents reflecting or listing the diseases physicians <u>had</u> diagnosed for inmates residing at SCI-Fayette between 2003 and 2013, the DOC produced aggregate statistical data of cases treated, on a generic basis, e.g., pulmonary or gastrointestinal cases, ignoring specific diagnoses, which was the clear substance of the Request.
- 34. Presumably, for the DOC to be able to create a tabulation of the number of pulmonary cases it had, the DOC must have drawn from a base of documents reflecting specific, diagnosed conditions or disease processes that could ultimately be lumped under a general category such as pulmonary/respiratory.

- 35. Through subsequent e-mails, Petitioners continued to request a listing of diagnoses made at SCI-Fayette on patients or staff residing or working there, but the DOC refused to comply with Petitioners' Request and, in turn, the OOR Final Determination. (See Exhibit "H", exchange between Petitioners and the DOC relative to the Request and OOR Final Determination).
- 36. The DOC withheld such relevant and responsive documents even though the DOC admitted, perhaps unwittingly, that the documents and information existed in a readily obtainable and "extensive database" that the DOC maintains in the normal course of business.
- 37. Indeed, on December 31, 2014, the DOC issued a Press Release admitting that the type of information requested by Petitioners, *i.e.*, diagnoses that permit for a specific identification of a specific disease or condition, was readily available:

The Department's Bureau of Health Care Services maintains an extensive database of all current cancer patients in state prison facilities... A more detailed analysis of the 11 cancer deaths at SCI Fayette from 2010 to 2013, revealed that four were transferred to SCI Fayette after they had been diagnosed with cancer at other institutions.

(See Exhibit "I", the subject DOC Press Release) (emphasis added).

- 38. More importantly, at the time that the DOC responded to the OOR in opposition to Petitioners' Request on November 4, 2014, the DOC admitted that it had documents that would reflect "each diagnosis" of "illnesses contracted at SCI-Fayette, by type and quantity." (Exhibit "J", Affidavit of Christopher Oppman, at Paragraph 3).
- 39. The DOC opposed not on the basis of non-existence, but because the "records requested by Ms. Haines are presently part of a noncriminal investigation" by the Department of Health. (Exhibit J, at Paragraph 4).
- 40. The DOC admitted, again, in an e-mail of January 6, 2015 to Ms. Haines that the information concerning each diagnosis of cancer or respiratory illnesses at SCI-Fayette resided in

the DOC's database, but collection of same "is not required" because it would require the DOC to search too many records, *i.e.*, would create some alleged burden on the DOC, which is simply not a defense under the RTKL, and one that the DOC was unwilling to accept. (See Exhibit H).

- 41. Of course, given the OOR Final Determination, the DOC is plainly mistaken and openly defying the binding nature of the OOR Final Determination, which required that the DOC produce all documents and information responsive to Petitioners' Request, whether the DOC believes compliance with the same is burdensome or not.
- 42. Furthermore, as reflected in Exhibit E, the DOC has produced at least one document that reflects specific diseases contracted and reported by an inmate. This production: (a) reflects the DOC's understanding of the extent of its obligation to produce responsive documents; and (b) establishes (along with the data in Exhibit F) that the DOC possesses the relevant information.
- Determination, the DOC finally, and contradictorily, stated that documents responsive to Petitioners' Request simply do not exist. (See Exhibit "K", January 7, 2015 Affidavit of Christopher Oppman). Such a stance is directly contradicted by the DOC's previous communications and sworn statements, which admitted that the documents exist, but were simply being withheld pursuant to alleged exemptions of the RTKL. The DOC has exemplified a clear course of conduct to stonewall Petitioners and the public from obtaining information vital for the transparency of the DOC, and welfare of its inmates and employees.
- 44. In short, the DOC has failed to produce all documents responsive to Petitioners' Request, which is in direct contravention of the OOR Final Determination and the RTKL.

- D. The DOC Operated in Bad Faith, and Willfully and Wantonly Denied Petitioners' Rights Pursuant to the RTKL and the Clear Mandates of the OOR Final Determination.
- 45. Not only did the DOC fail to comply with Petitioners' open records Request, as validated by the Final Determination of the Office of Open Records, but the DOC proceeded in a bad faith and improper manner. To the point: Petitioners, and this Court, have ample grounds to infer that the DOC does not want to produce documentation of cancer or respiratory illnesses diagnosed at SCI-Fayette for fear it will heighten the demand for transparency in a debate of public importance, *i.e.*, whether confinement at SCI-Fayette does have potentially devastating health consequences as the Abolitionist Law Center has alleged (see Exhibit A).
- 46. The DOC has no right, as a matter of law, to violate an OOR Final Determination; especially an OOR Final Determination that it never appealed to this Court.
- 47. Likewise, and even more emphatically, the DOC cannot violate a Final Determination of the OOR so it can manage an uncomfortable and potentially embarrassing public relations debate by withholding vital public documents.
- 48. When an agency, such as the DOC, willfully or wantonly disregards a requester's access to public records, or otherwise acts in bad faith under the RTKL, the requester is entitled to reimbursement of its attorneys' fees and litigation costs. 65 P.S. § 67.1304(a)(1).
- 49. Moreover, an agency's bad faith refusal to grant access to public records permits the imposition of civil penalties against the entity. 65 P.S. § 67.1305(a).
- 50. The DOC has admitted that it has the documents and information responsive to the Request, has not produced the same, and as of January 6, 2015, has taken the position, without citation to law, that it has no obligation to produce the responsive documents or information, notwithstanding the OOR Final Determination.

- 51. Therefore, not only are Petitioners entitled to the documents requested under the RTKL, but Petitioners are further entitled to reimbursement of their legal costs and the imposition of appropriate civil penalties pursuant to the RTKL for having to undertake this enforcement action.
 - 52. The DOC's conduct is particularly distressing since the very information it is declining to produce to Petitioners is the very same information it is accessing and using to wage its public relations battle with the Abolitionist Law Center. (See Exhibit I, the DOC Press Release apparently relying on the very information that it refuses to produce to Petitioners).
 - 53. The DOC's manipulation of public records to satisfy its current public relations strategy, including admitting the existence of the documents and information, relying on it to compile aggregate reports for its own benefit, and then denying their existence in recent days in an apparent attempt to thwart production, does not, and may not, trump its legal obligation as reflected in the OOR Final Determination and the RTKL.

V. CONCLUSION

- 54. For the reasons set forth above, the DOC clearly violated the provisions of the RTKL, and deprived Petitioners, and the public, of vital information.
- 55. The DOC willfully and wantonly disregarded and deprived Petitioners' of access to public records, and further acted in bad faith under the RTKL.
- 56. Additionally, the DOC relied on purported exemptions, exclusions and defenses that were not based on a reasonable interpretation of the RTKL.
- Exhibit K), this is simply not a basis to defy an unappealed Final Order of the OOR, as exists in this case. If this Court would entertain such an erroneous defense, after the fact, and despite the existence of the OOR Final Determination, it would open the floodgates for patent breaches of the public's right to access to records, and undermine the purpose and operation of the RTKL.

- 58. Moreover, the DOC never defended the Request before the OOR on the basis that relevant documents did not exist—since any such suggestion defies logic; diagnosis of conditions must and has occurred in the normal course of caring for the inmates. (See Exhibit E).
- 59. Therefore, Petitioners are entitled to any and all relief available under the RTKL, including immediate access to the information requested from the DOC; reimbursement for their attorneys' fees and related costs; and an imposition of civil penalties against the DOC.

WHEREFORE, the Petitioners, The Herald Standard and Christine Haines, respectfully request that this Honorable Court enter an Order of Court providing the following relief:

- 1. Directing the Pennsylvania Department of Corrections to produce all documents required to be produced pursuant to the Final Determination of the Office of Open Records within seven (7) days of issuance of the Order of Court;
- 2. Find that the Pennsylvania Department of Corrections willfully and/or wantonly disregarded Petitioners' open records request, and deprived Petitioners of their right of access to public records, and further acted in bad faith in violation of the Pennsylvania Right to Know Law;
- 3. Award Petitioners their attorneys' fees and costs incurred in this matter pursuant to Section 1304 of the Right to Know Law; and
 - 4. Provide any further relief that this Court deems appropriate under the circumstances.

Respectfully submitted,

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Filed 02/06/2015 Commonwealth Court 133 CD 2015

EXHIBITA



FINAL DETERMINATION

IN THE MATTER OF

CHRISTINE HAINES AND THE HERALD STANDARD, Requester

Docket No.: AP 2014-1695

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, Respondent

INTRODUCTION

Christine Haines, on behalf of the Herald Standard ("Requester"), submitted a request ("Request") to the Pennsylvania Department of Corrections ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 et seq., seeking documentation of illnesses contracted by inmates and staff members at SCI-Fayette. The Department denied the Request, asserting that responsive records are exempt under the RTKL because they relate to an ongoing noncriminal investigation. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is granted and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On September 25, 2014, the Request was filed, seeking "documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette." The Requester specifically stated that she was "not seeking identifying information, only types of reported contracted illnesses and

the number of inmates or staff members with those illnesses." The Requester further specified that "I am particularly interested in various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported" and added that "[i]f there is also information comparing the health at SCI-Fayette with the health at other state correctional facilities, that would also be helpful."

On September 26, 2014, the Department invoked a thirty day extension of time to respond to the Request pursuant to 65 P.S. § 67.902. On October 16, 2014, the Department denied the Request, stating that responsive records are not public under exemptions for noncriminal investigative records (65 P.S. § 67.708(b)(17)); personal security records (65 P.S. § 67.708(b)(1)); public safety records (65 P.S. § 67.708(b)(2)); medical records (65 P.S. § 67.708(b)(5)); personal identification information (65 P.S. § 67.708(b)(6)); internal, predecisional deliberations (65 P.S. § 67.708(b)(10)(i)(A)); and notes and working papers prepared by or for a public official or agency employee for that individual's own personal use (65 P.S. § 67.708(b)(12)). Additionally, the Department cites to the attorney-client privilege as a basis for denial.

On October 30, 2014, the Requester appealed to the OOR, challenging the denial and asserting grounds for disclosure. 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 pursuant to 65 P.S. § 67.1101(c). On November 4, 2014, the Department submitted a position statement, along with the declaration of Christopher Oppman, the Department's Director for the Bureau of Health Care Services, who attests that the requested records are part of a noncriminal investigation. On November 6, 2014, the Requester submitted a position statement, arguing that

she is seeking aggregated data, which is not subject to the majority of exemptions cited by the Department. See 65 P.S. § 67.708(d).

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." SWB Yankees L.L.C. v. Wintermantel, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." Bowling v. Office of Open Records, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), aff'd 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. Id.; Giurintano v. Dep't of Gen. Servs., 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. See 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond

within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. See 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as "such proof as leads the fact-finder ... 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 Dep't of Transp. v. Agric. Lands Condemnation Approval Bd., 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Department has not established that responsive records are exempt as noncriminal investigative records

On appeal, the Department argues that the records responsive to the Request constitute noncriminal investigative records and are therefore exempt from disclosure under Section 708(b)(17) of the RTKL. Section 708(b)(17) exempts from disclosure records of an agency "relating to a noncriminal investigation" including "[c]omplaints submitted to an agency" and "[i]nvestigative materials, notes, correspondence and reports." 65 P.S. § 67.708(b)(17)(i)-(ii). Additionally, Section 708(b)(17) exempts disclosure of "[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by the court." 65 P.S. § 67.708(b)(17)(vi)(A).

In order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. See Department of Health v. Office of Open Records, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). To constitute "a systematic or searching inquiry" or "a detailed examination," the investigation cannot be a "one time inquiry" and must instead involve "comprehensive, repeated," and "regular" examinations or inspections. Dep't of Public Welfare v. Chawaga, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014). Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties." Department of Health, 4 A.3d at 810-11; see also Johnson v. Pennsylvania Convention Center Authority, 49 A.3d 920 (Pa. Commw. Ct. 2012).

In the instant matter, Director Oppman attests that:

- 4. The records requested by [the Requester] are presently part of a noncriminal investigation that was started by the Department and now includes the Department of Health....
- 6. The Department has generated the records that [the Requester] requests; however, those records were created as part of an investigation that the Department of Health is conducting.
- 7. The Department of Health has yet to issue results to their investigation, thus this matter, along with the requested records, are still part of the investigation.
- 8. Providing the requested records would reveal the institution and the progress of the investigation being conducted by the Department and the Department of Health.

While Director Oppman generally concludes that the Department started a noncriminal investigation, the Department has not provided any evidence that an inquiry, examination, or official probe was conducted as part of the Department's official duties. Department of Health, 4 A.3d at 810-11; Johnson, 49 A.3d at 925. Not all agency fact-finding constitutes a "noncriminal investigation" subject to the protections of the RTKL. In Chawaga, the

Commonwealth Court held that a performance audit was not part of the Department of Public Welfare's legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department's public assistance services. 91 A.3d at 259. The Court noted that "[a] contrary determination of an 'official probe' would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure." *Id.* Recently, the Lackawanna County Court of Common Pleas held that an agency failed to meet its burden of proof when the records did not relate to the "official duties" of the agency and it was not established that the investigation that occurred was more than a "one-time inquiry." *Lackawanna County Government Study Commission v. The Scranton Times, L.P.*, No. 14-CV-4427, 2014 WL 5930128 (Lack. Com. Pl. Nov. 14, 2014) (citing *Chawaga*,).

The Department is the Commonwealth agency charged with overseeing the confinement of inmates, but now asserts that it has undertaken a noncriminal investigation into medical illnesses of inmates and its employees at SCI-Fayette. However, the Department has failed to provide any evidence that an inquiry, examination, or official probe was conducted and how such inquiry, examination or official probe was conducted as part of the Department's official duties regarding the incarceration of inmates. The Department's one-time investigation into medical illnesses of its inmates or staff members at SCI-Fayette is ancillary to the overall function and operation of the Department.

Further, Director Oppman attests that the records are part of an investigation that is now being conducted by the Pennsylvania Department of Health. The investigative exemptions under the RTKL generally have only been extended to protect the records of the agency carrying out the investigation, and not the agency that is being investigated. See Hayes v. Pennsylvania Department of Public Welfare, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530 ("[A]

review of case law interpreting the RTKL and its predecessor statute indicates that the investigative exemption has only been extended to protect the records of the agency carrying out an investigation"). Therefore, it is irrelevant if the Department of Health is now conducting its own investigation into the matter, even if the Department of Health's investigation is being conducted pursuant to its official duties. Accordingly, the Department has not shown that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted by the Department regarding a noncriminal matter, and therefore has not met its burden of proving that the requested records are exempt under Section 708(b)(17) the RTKL. See Department of Health, 4 A.3d at 810-11.

2. The Department has not its burden of proving that responsive records are exempt as medical records

In its response, the Department asserts that responsive records are exempt from disclosure under Section 708(b)(5) of the RTKL. Section 708(b)(5) exempts from disclosure:

A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

65 P.S. § 67.708(b)(5). The Department has not asserted what records are being withheld pursuant to this exemption, and has not provided any evidence on appeal to explain why these records fall under this exemption. See Carey v. Pennsylvania Department of Corrections, 61 A.3d 367 (Pa. Commw. Ct. 2013 ("[A]gencies must show the connection between the information and the grounds for protection"). Additionally, the Requester specifically states in her Request that she is not seeking any identifying information. Therefore, without any

additional evidence, the Department has not established that responsive records are exempt under Section 708(b)(5).

Additionally, there is no evidence that responsive records are protected by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). HIPAA states that "[a] covered entity may not use or disclose protected health information." 45 C.F.R. § 164.502(a), HIPAA defines a "covered entity" as "(1) A health plan; (2) A health care clearinghouse; (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 C.F.R. § 160.103. Here, the Department has not shown that it is a covered entity under HIPPA. See Pass v. Capital Area Transit, OOR Dkt. AP 2014-0173, 2014 PA O.O.R.D. LEXIS 247.

Even if the Department was a covered entity under HIPAA, the information sought in this appeal is not "individually identifiable health information" as protected by HIPAA. "Individually identifiable health information" is defined as:

Information that is a subset of health information, including demographic information collected from an individual, and;

- (1) Is created or received by health care provider, health plan, employer or health care clearinghouse; and
- (2) Relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or
 - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

See 45 C.F.R. § 160.103. The enactment of HIPAA was to address concerns about the confidentiality of patients' individually identifiable health information. Opis Mgmt. Res. LLC v.

Sec'y Fla. Agency for Health Care Admin., 713 F.3d 1291, 1294-95 (11th Cir. 2013); S.C. Med. Ass'n v. Thompson, 327 F.3d 346, 348 (4th Cir. 2003); Citizens for Health v. Leavitt, 428 F.3d 167, 172-74 (3d Cir. 2005) (detailing the history of the Privacy Rule's promulgation and explaining its requirements). In doing so, the Secretary of Health and Human Services promulgated privacy regulations addressing, among other things, individuals' rights to individually identifiable health information. S.C. Med Ass'n, 327 F.3d at 349.

The Department has not provided any evidence that HIPPA would apply to the requested records. Because the Department has not shown that it is a covered entity or provided any evidence that HIPPA would apply, particularly in light of the fact that the Request states that the Requester is not seeking identifying information, the OOR finds that the Department has not established that the Request seeks exempt medical records.

3. The Department has not met its burden of proving that any other exemption applies

In its response, the Department generally asserts that the requested records are subject to various other exemptions under the RTKL. On appeal, however, the Department failed to provide any evidentiary support or explanation concerning these exemptions, relying solely upon its argument that the records are exempt under 65 P.S. § 67.708(b)(17). Therefore, the Department has not met its burden of establishing that any other exemptions apply. See 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is granted and the Department is required to provide all responsive records to the Requester within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing 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 according to court rules as per section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: http://openrecords.state.pa.us.

FINAL DETERMINATION ISSUED AND MAILED: December 1, 2014

APPEALS OFFICER

KATHLEEN A. HIGGINS, ESQ.

Sent to: Christine Haines (via e-mail only);

Andrew Filkosky (via e-mail only); Chase Defelice, Esq. (via e-mail only)

EXHIBIT B

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No Escape:

Exposure to Toxic Coal Waste at State Correctional Institution Fayette



DUSTIN S. MCDANIEL Executive Director, Abolitionist Law Center

BRET GROTE

Legal Director, Abolitionist Law Center

BEN FIORILLO Human Rights Coalition

DEVON COHENHuman Rights Coalition

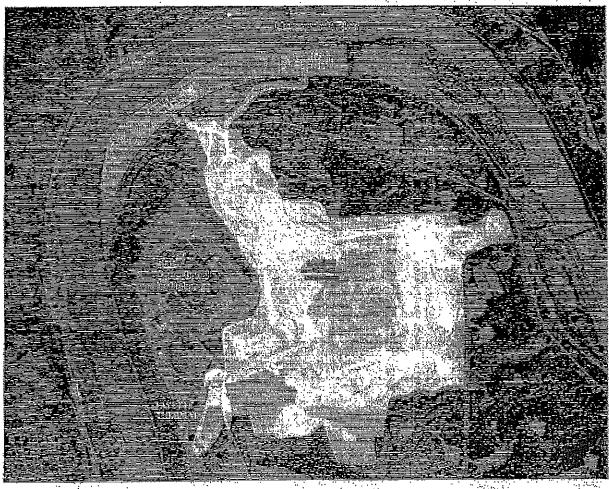
QUINN A. COZZENS Legal Intern, Abolitionist Law Center

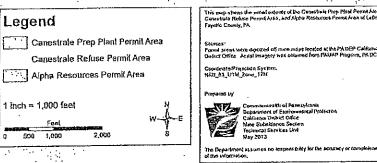
Special thanks to
Center for Coalfield Justice,
Three Rivers Community Foundation,
and to the prisoners of SCI Fayette whose
correspondence laid the foundation of this report.

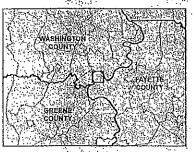


ABOLITIONIST LAW CENTER









I. OVERVIEW

I have four years left on my sentence and that could be a death sentence with the contamination here.1

Surrounded by "about 40 million tons of waste, two coal slurry ponds, and millions of cubic yards of coal combustion waste," SCI Fayette is inescapably situated in the midst of a massive toxic waste dump.

A 12-month investigation into the health impact of exposure to toxic coal waste on the prisoner population at State Correctional Institution (SCI) Fayette has uncovered an alarming rate of serious health problems. Surrounded by "about 40 million tons of waste, two coal slurry ponds, and millions of cubic yards of coal combustion waste," SCI Fayette is inescapably situated in the midst of a massive toxic waste dump.² Over the past year, more and more prisoners have reported declining health, revealing a pattern of symptomatic clusters consistent with

exposure to toxic coal waste: respiratory, throat and sinus conditions; skin irritation and rashes; gastrointestinal tract problems; pre-cancerous growths and cancer; thyroid disorders; other symptoms such as eye irritation, blurred vision, headaches, dizziness, hair loss, weight loss, fatigue, and loss of mental focus and concentration.

The Human Rights Coalition (HRC), Center for Coalfield Justice (CCJ), and the Abolitionist Law Center (ALC) launched this investigation in August 2013. The investigation is not only ongoing, but also is expanding, as HRC and ALC continue to document reports of adverse health symptoms and environmental pollution, interview current and former prisoners at SCI Fayette, and conduct research.

No Escape describes the preliminary findings from our investigation into the declining health of prisoners at SCI Fayette while providing context about the toxic environment surrounding the prison.

Our investigation found:

- More than 81% of responding prisoners (61/75) reported respiratory, throat, and sinus conditions, including shortness of breath, chronic coughing, sinus infections, lung infections, chronic obstructive pulmonary disease, extreme swelling of the throat, as well as sores, cysts, and tumors in the nose, mouth, and throat.
- 68% (51/75) of responding prisoners experienced gastrointestinal problems, including heart burn, stomach pains, diarrhea, ulcers, ulcerative colitis, bloody stools, and vomiting.
- 52% (39/75) reported experiencing adverse skin conditions, including painful rashes, hives, cysts, and abscesses.
- 12% (9/75) of prisoners reported either being diagnosed with a thyroid disorder at SCI Fayette, or having existing thyroid problems exacerbated after transfer to the prison.

 Eleven prisoners died from cancer at SCI Fayette between January of 2010 and December of 2013. Another six prisoners have reported being diagnosed with cancer at SCI Fayette, and a further eight report undiagnosed tumors and lumps.

Unlike reports of health problems from prisoners at other Pennsylvania Department of Corrections (PADOC) prisons, most SCI Fayette prisoners discuss symptoms and illnesses that did not emerge until they arrived at SCI Fayette. The patterns of illnesses described in this report, coupled with the prison being geographically enveloped by a toxic coal waste site, point to a hidden health crisis impacting a captive and vulnerable population. Our investigation leads us to believe that the declining health of prisoners at SCI Fayette is indeed caused by the toxic environment surrounding the prison; however, the inherent limitations of the survey do not establish this belief at an empirical level. A substantial mobilization of resources for continued investigation will be required to confirm the relationship between prisoner health and pollution from coal refuse and ash.

Our findings raise serious constitutional questions as well. The investigation has uncovered significant evidence that SCI Fayette may be unconstitutional based on its location. Under the Eighth Amendment to the U.S. Constitution's prohibition against cruel and unusual punishment, prisons are forbidden from imposing conditions of confinement that deprive prisoners of basic human needs. Situating a prison in the midst of a massive toxic coal waste dump may be impermissible under the Constitution if it is shown that prisoners face a substantial risk of serious harm caused by exposure to pollutants from the dump.

In addition to evidence that conditions of confinement at SCI Fayette violate the Constitution due to the prison's proximity to the toxic coal dump, our investigation found that prisoners' rights to medical care under the Eighth Amendment to the Constitution are reportedly violated on a regular basis. Prison officials are required to provide necessary medical care to those in their custody, and deliberate indifference to a prisoner's serious medical needs is unconstitutional.

Health is a human right, and if the patterns that have emerged during our investigation are indicative of the harms and risks that accompany confinement at SCI Fayette, then it is imperative that the prison is shut down.

The preliminary findings discussed below are intended to shine a spotlight on a serious and growing injustice, as well as to highlight one of the ways that mass incarceration interacts with broader concerns about environmental health and justice. Prisoners at SCI Fayette need environmental justice: access to clean air and water, prompt diagnostic care, required surgical treatment, and all other necessary medical care. Health is a human right, and if the patterns that have emerged during our investigation are indicative of the harms and risks that accompany confinement at SCI Fayette, then it is imperative that the prison is shut down.

II. BACKGROUND ON THE LABELLE COAL REFUSE DISPOSAL AREA

LaBelle is a small rural-Pennsylvania community in Luzerne Township, Fayette County, which is defined by two major industries: a 506-acre coal ash dump and a maximum security state prison. The dump, operated by Matt Canestrale Contracting (MCC) since 1997, receives coal ash waste from coal-fired power plants throughout the region.³

Before MCC began dumping coal ash there in the late 90s, the site was one of the largest coal preparation plants in the world, where coal from nearby mines was washed and graded. The "cleaned" coal was then shipped overland and by barge on the Monongahela, while the remaining coal refuse was dumped on and around the site. By the mid-90s, an estimated 40 million tons of coal refuse were dumped at the site, over hundreds of acres and "at depths approaching 150 feet in some places."

In 1994, the former owner of the site filed for bankruptcy and abandoned operations, leaving numerous legacy waste issues over the extent of the 1,357-acre property. In 1996, MCC purchased the entire property and subsequently entered into an agreement with the Pennsylvania Department of Environmental Protection (DEP) to engage in coal refuse disposal for site reclamation. The dumpsite was later restricted to its current 506-acre footprint, in part through the transfer of 237 acres to the Commonwealth of Pennsylvania for the construction of SCI Fayette.

Operation of the Coal Ash Dump and Environmental Effects

As discussed above, "coal refuse" describes the waste produced when coal is cleaned and graded before it is burned. "Coal ash," on the other hand, describes the wastes produced by burning coal in power plants. MCC's reclamation plan is to "cap" the coal refuse dump by spreading flue gas desulfurization (FDG) sludge, a liquid form of coal ash, over the entire area to create a barrier preventing rainwater from leaching chemicals into soil, surface water, and groundwater. The FDG cap is then covered with a mixture of dry coal ash and topsoil. This mixture of coal ash and topsoil is also used to stabilize a dam holding back a large pond of coal slurry (Slurry Pond 3). This dam is categorized as a "high" hazard, meaning that its failure is "likely to cause loss of human life."

In the 17 years that MCC has been operating the dump, the company has routinely been in violation of state and federal law.

In the 17 years that MCC has been operating the dump, the company has routinely been in violation of state and federal law. ¹⁵ Most seriously from a public health standpoint, is MCC's perpetual violation of the Air Pollution Control Act, which prohibits allowing particulate matter to leave the boundaries of the dumpsite. ¹⁶ Ash is regularly seen blowing off the site

or out of haul trucks and collecting on the houses of local residents as well as the prison grounds at SCI Fayette. Tocal residents have filed numerous complaints to the DEP in recent years, but the DEP has done little more than issue notices of violation, and in rare instances assessed fines against MCC. 18

A series of tests performed by Citizens Coal Council (CCC), a national advocacy group which filed a lawsuit against MCC in 2013 for its violations of environmental regulations, revealed the presence of high levels of toxic metals associated with coal ash in the surface and ground water near the site. ⁴³ Samples were taken at streams, wells, and drainage pipes which tested at levels of dissolved iron over 60 times greater than the Pennsylvania standard, more than 5 times the Pennsylvania standard for manganese, and 10 times the standard for sulfate. ²⁰ The most recent tests performed by CCC also found levels exceeding state or federal standards for thallium (0.4µg/L), arsenic (15.1µg/L), cobalt (33µg/L), boron (2,550µg/L), aluminum (343µg/L), total dissolved solids (4,510mg/L), and both excessively high and low pH levels. ²¹ Testing for Stream 3, which marks the southern and eastern boundaries of SCI Fayette, found excessive levels of arsenic, boron, cobalt, iron, manganese, and sulfate. ²²

Luzerne had 170 heart-disease deaths from 2000 through 2008 — 26 percent higher than the national average.

In the nearby town of LaBelle, the most likely form of exposure to these toxins is inhalation of the particulate matter that blows off the site and the haul trucks.²³

Dust found on the properties of LaBelle residents reportedly included coal ash particles, which had "Mine Dump levels of antimony arsenic, chromium and lead consistent with levels found in ash."²⁴ Many

residents of LaBelle suffer from chronic headaches and fatigue, respiratory problems, kidney failure, and several forms of cancer.²⁵ In 2010 the Pittsburgh Post Gazette reported that in one section of LaBelle, "residents say there are nine cases of cancer in the 18 houses."²⁶ The report went on to say, "While there's no scientific proof that fly ash or other forms of pollution are causing [these] health problems, Luzerne Township has clevated mortality levels for diseases that have been linked to pollution exposure... Luzerne had 170 heart-disease deaths from 2000 through 2008 — 26 percent higher than the national average."²⁷

These problems are likely to get worse with more coal and coal ash planned for the dump and the nearby river docks. On June 24, 2014, DEP renewed MCC's air emissions permit, allowing it to transport and dump 416,000 tons of coal ash per year at LaBelle. However, MCC has reportedly entered into a "long-term agreement" with FirstEnergy to receive "more than 3 million tons of coal ash and smokestack scrubber waste each year," and dump it at the Labelle site beginning in 2017. The agreement allows FirstEnergy to dispose of ash that would have gone to the Little Blue Run dump in Beaver County, which was recently ordered to close due to the health threat it poses to nearby residents. Meanwhile, the U.S. Army Corps of Engineers is granting a permit to Alpha PA to build a new coal terminal at the Labelle Dock, while DEP has announced its intent to increase the permitted coal throughput of the facility from 3,500,000 tons per year to 10,000,000 tons per year. Alpha PA is a subsidiary of Alpha Natural Resources, which was recently assessed a record fine of \$227,500,000 for seven years of illegally discharging pollutants into the waters of Pennsylvania, Kentucky, Tennessee, Virginia, and West Virginia.

Public health experts recognize that coal ash contains numerous harmful constituents, including mercury, lead, arsenic, hexavalent chromium, cadmium, boron, and thallium. The chemicals in coal ash can cause or contribute to many serious health conditions including skin, eye, nose and throat irritation; asthma; emphysema; bypertension; anemia; heart problems; nervous system damage; brain damage; liver damage; stomach and intestinal ulcers; and many forms of cancer including skin, stomach, lung, urinary tract, and kidney cancers. In its 2010 report, "Coal ash: the toxic threat to our health and environment," Physicians for Social Responsibility summarized the risks posed by coal ash: "In short, coal ash toxics have the potential to injure all of the major organ systems, damage physical health and development, and even contribute to mortality."

Despite this, the U.S. Environmental Protection Agency (EPA) does not currently classify coal ash as a hazardous waste, though reclassification has been under consideration since 2010.³⁷ In Pennsylvania, coal ash is authorized for "beneficial use" in reclamation projects, such as at MCC's dump.³⁸ When authorized for "beneficial use" coal ash is intended to reduce leaching and balance the pH at coal refuse sites and abandoned coal mines. However, in attempting to solve these problems "beneficial use" creates new ones by increasing the toxicity of the leachate at reclamation sites,³⁹ while also causing air pollution as wind blows ash off the sites and the vehicles used to transport the material.⁴⁰ With this in mind, it does not appear that coal ash has a legitimate "beneficial use" that outweighs its negative environmental and health consequences. Rather, it seems the classification of coal ash for "beneficial use" is designed to evade the cost of safely regulating the massive volume of coal ash created by coal-fired power plants, which is the country's second largest waste stream.⁴¹

III. ILLNESS, NEGLECT, AND CANCER: FINDINGS OF PRELIMINARY INVESTIGATION INTO PRISONER HEALTH AT SCI FAYETTE

I have 37-months in on a five to ten year sentence and fear that I will not live to see my 13-year old son. 42

In August 2013, the Center for Coalfield Justice (CCJ), a Washington, PA-based environmental justice group, the Human Rights Coalition (HRC), a statewide prisoners' rights group, and the Abolitionist Law Center (ALC) launched an investigation into the health problems at SCI Fayette. The investigation team sent surveys to prisoners inquiring about health problems and environmental conditions at the facility. As of July 2014, the investigation team has sent 152 surveys, with 63 prisoners responding to the surveys, and another 12 prisoners writing us separately to share their stories about conditions at SCI Fayette. The investigation team also visited and interviewed 4 prisoners who were dealing with particularly severe symptoms.

Some prisoners have consented to having their names used and are identified below. Certain names have been withheld and dates have been altered in order to protect the identities of the people providing the information. All factual information pertaining to prisoner medical conditions, health care treatment, and evidence of pollution is shared exactly as reported.

When reviewing the findings described below it is important to recognize that under-reporting of health problems is common amongst the prisoner population. Prisoners may be reluctant to admit health problems for fear of being perceived as weak or vulnerable. Others may be unwilling to report their health condition or complain about medical care to an outside organization because they fear retaliation from prison staff. Some prisoners are too sick to correspond about their condition, others remain unaware that their symptoms may be caused by exposure to toxic coal waste, or that our investigation is occurring.

The investigation has found alarming patterns of illness. The conditions reported most frequently by prisoners are described below. In over 81 percent of cases (61/75), prisoners exhibited more than one symptom from the four main categories we used to organize the data: respiratory, throat, and sinus conditions; skin irritation, rashes, and hives; gastrointestinal problems; and cancers. Thus, the information below does not fully capture the severity of many cases in which prisoners have multiple overlapping symptoms. For example, the list of symptoms from Joshua Turner was typical of many reports we received from prisoners:

Pur writing to notify you of the severe problems I've been having since I have been in SCI Fayette for over 2 years. I'm going to give you a list of the problems I'm having: 1) hair loss; 2) [recurring] rashes; 3) diarrhea; 4) vomiting; 5) weakness and dizziness and sickness feelings in my stomach; 6) when I blow my nose blood comes out; 7) shormess of breath; 8) burning in my eyes; 9) throat problems; 10) headaches; 11) burning when I pec. 43

Correlation Between Hiness and Confinement at SCI Haverre

Unlike prisoners writing about health problems from other PADOC prisons, most prisoners from SCI Fayette discuss symptoms and illnesses that did not emerge until they arrived at the prison. The patterns of illnesses described below, coupled with the prison being geographically enveloped by "about 40 million tons of waste, two coal slurry ponds, and millions of cubic yards of coal combustion waste," suggest that environmentally toxic living conditions are causing prisoners to become sick.

Prisoner accounts of symptoms graphically illustrate this correlation:

I have been evaluated by medical when I came here and everything was fine and I was healthy. Since being here I get nosebleeds 2 to 3 times a week. I constantly got a headache. I have known that my vision has dropped a lot and it is hard to see, I wear glasses, and they are now not strong enough to see good.

I was also checked for asthma when I got here due to having it in the past, And I was fine. I haven't had no problems with breathing in years. More than 8 years [since] I have had to use an inhaler. Since being in this jail I am wheezing on a day to day basis. 45

In April 2013, Marcus Santos wrote:

ISlince transfer to this facility on February 14, 2012 I've had to endure numerous medical problems... I have required emergency medical treatment eight times due to the swelling in my face and throat.

[S]ince my transfer to this facility on February 14, 2012 I've had to endure numerous medical problems, ie: Rashes through out my body that hart and keeps me up all night. Extreme swelling of various parts including my throat making it difficult to breathe. My face would swell and pictures were taken showing the condition of my eyes and my vision still has not returned fully to them. I have required emergency medical treatment eight times due to the swelling of my face and throat. 46

This relationship between confinement at SCI Fayette and declining health was further reinforced when Marcus Santos was transferred to another prison. Since Marcus arrived at SCI Smithfield his symptoms subsided substantially or completely. He still suffers periodic swelling and outbreaks of rashes, though they are less frequent and less severe. He no longer experiences nausea or shortness of breath. He still suffers from dizzy spells, but these are also less frequent and less severe. His muscles still hurt, however, which is something else that began at SCI Fayette. 47

Another prisoner shared this story:

Second week of coming into SCI Fayette, I came down with flu-like symptoms. A few months later I maybe would eat dinner 3 times a week, I cut out breakfast and hunch altogether because I had no appetite, and was too fatigued to walk to the chow hall. I no longer had the strength to workout... Just constant headaches and loss of appetite and physical motivation. When I took showers, I noted that my eyes would be burning and my vision would be blurred for about 15 minutes, afterwards, and it would feel like sand was in my eyes. These symptoms have been going on almost since the time I came into Fayette, but now that I'm at [another prison] I'm eating every meal, working out every day, and experiencing no headaches... 48

The emergence of these symptoms upon arriving at a prison engulfed by toxic waste and the abruptness with which they subside upon being transferred strongly suggests a causal relationship. The patterns of illness uncovered during our investigation are also consistent with exposure to toxins found in coal ash and refuse.

Respiratory Throat and Sinus Conditions

Respiratory, throat and sinus conditions are the most commonly reported health problems. Over 81% (61/75) of prisoners reported one or more of the following symptoms: runny nose, nose bleeds, sinus infection, cough, sore throat, swollen

throat, shortness of breath, lung infections. In most cases these symptoms have become chronic conditions that cannot be explained as periodic colds.

One prisoner who has been incarcerated at SCI Fayette since 2004 reports a long history of respiratory and sinus problems that originated upon his arrival at the prison. His symptoms began with "throat and chest congestion" and "itchy red eyes." Then, "I started to have other symptoms, like when my lymph nodes in my neck swelled to the size of walnuts for no good reason... the development of a chronic sinus infection... followed by the cyst that grew under one of my teeth that led to it having to be pulled... I am currently fighting a lung infection for which I am on breathing treatments."

Lance Rucker reported "serious throat irritation" and chronic wheezing shortly after arriving at SCI Fayette, ⁵⁰ while another prisoner wrote of suffering from a severe cough for eight months that caused him to "cough so hard" that he developed "blood blisters" in the back of his throat.⁵¹ Michael Dean described throat irritation that was so severe he lost his voice:

In December of 2012, I lost my voice completely. My throat was in constant pain, yet all medical did was to try whatever drug they felt would cure what was wrong with me. I was given mostly drugs used to treat a sore throat. By February or March, I was given a drug called "Claritin," as they believed I was suffering due to "acid reflux." I was eventually taken to UPMC in Pittsburgh, where it was found I had a large growth on my vocal chords. I underwent surgery on April 27, 2013, where the growth was removed. I have regained some vocal abilities but I'm not the same as before. Also, I am still having sinus troubles as there seems to be a recurring growth in my right sinus. 52

Anthony Willingham reported a similar occurrence;

After six to nine mouths here, I began to develop more frequent shortness of breath and heavy

I was told by the medical department that it was just a "scratchy throat — gargle with warm water." A year later I found out it was far more than a scratchy throat!... Upon seeing a throat surgeon at UPMC... he put a camera down my throat...and showed me the polyps on my vocal chords.

inicus discharge. It became so chronic that I had to have breathing treatments daily—morning and evening. The cough became so violent that I developed a chronic hoarseness and scratchy throat. To this day I can barely talk. I was told by the medical department it was just a "scratchy throat—gargle with warm salt water."

A year later, I found out that it was far more than a scratchy throat! It was around this time that I discovered a growth, in my mouth, under my tongue. The dental surgeon removed it and sent it out for biopsy and it came back negative; however, the growth came back in two weeks, twice as big. This time after a second biopsy, it came back positive — I had cancer.

Upon seeing a throat surgeon at UPMC (Dr. Jonas Johnson) he explained to me the type and location of the canter; moreover, he questioned me about how long my voice was so

hoarse? I told him about a year-plus. He put a camera down my throat (still shaking his lead in disbelief) and showed me the polyps on my vocal chords. It wasn't just a scratchy throat!⁵³

Marcus Santos experienced swelling in his throat, as well as on his face, arms and legs, which became so severe that it restricted his breathing, causing him to fear for his life. A doctor outside the prison who examined Marcus recommended his transfer to another prison because his condition was life-threatening. Marcus reported:

I suffered almost everyday of the 15 months I was at that prison. I almost died due to throat swelling several times. Given turns for throat swelling and told that if I start choking there is nothing that he can do for me. At that point it became clear to me that I am being left for dead. With no other course to take or relief in sight I called my brother and told him that I don't believe I'm going to make it through the rest of my time and to please take care of my son. 54

52% (39/75) of prisoners report some type of skin condition. Many note that their skin is chronically dry and irritated, and a number report severe rashes and hives. Four weeks after being transferred to SCI Fayette, Roy Davis wrote, "My face began itching and burning about three days after being here and now it's completely inflamed and hurts to the touch." Soon after his arrival, Marcus Santos developed a rash on his left side with large welts that was so irritated it disrupted his sleep for months. 56

In another case, a prisoner developed a rash that covered three-quarters of his body with large bumps a half-inch in diameter. In 48 hours, "The bumps grew into one big mound on my arm. Almost my entire body was covered a week later. The bumps were the color of my skin. They leaked fluid. They are painful. They felt like needle pricks, some felt like needle stabs." Prison medical staff later diagnosed his condition as psoriasis. They have asked to describe any additional health problems, another prisoner reported "Abscesses (boils)... keeps comin and going first under my L armpit, then R, and then in my ear canal, and in my large intestine." A few prisoners also reported raised bumps or rashes that would bleed.

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Well over half (51/75; 68%) of prisoners reported problems with their stomachs and digestive tracts, including: heart burn, stomach and abdominal pain, vomiting, diarrhea, bloody stools, duodenal ulcers, ulcerative colitis, and intestinal polyps. For many prisoners, these symptoms have become chronic, lasting multiple years, and suggesting systemic problems, rather than common infections.

Five prisoners report persistent bloody stools. One prisoner wrote that he had "blood in feces and urine, as well as constant vomiting." These symptoms were accompanied by "headaches, severe skin dryness, blurry vision, kidney and liver

pain," and kidney stones. None of these symptoms were present before the prisoner arrived at SCI Fayette. Another prisoner wrote, "Since I've been here I've been unable to have a regular bowel movement."

Three prisoners have been diagnosed with ulcerative colitis, a rare disease in which ulcers form in the colon causing severe diarrhea and bloody stool. Some research suggests that environmental factors can contribute to the development of ulcerative colitis and other inflammatory diseases in the gastrointestinal tract. One of the prisoners with the disease explains:

I was having frequent bowel movements that consisted of nothing but diarrhea and blood...As time went by, my condition got worse to where I could not even drink water without having a bloody bowel movement... I was taken to Allegheny General Hospital's emergency room... and was diagnosed as bleeding internally and severely delightated. I was given a colonoscopy and was diagnosed with ulcerative colitis. 1643

eaners

Between January 2010 and December 2013, seventeen prisoners died while at SCI Fayette. Eleven of these deaths (64.7%) were due to cancer, four (23.5%) were caused by heart attacks or strokes, and two were caused by liver failure (11.7%). To the 75 prisoners we received responses from, six reported being diagnosed with cancer while at SCI Fayette (8%). Eight of the prisoners we communicated with reported undiagnosed tumors and polyps (10.6%).

Of the total diagnosed cases of cancer, both dead and living, the type and frequency of particular cancers were as follows: lung cancer (3); brain cancer (2); colon cancer (2); tongue cancer (2); liver cancer (2); tonsil cancer (1); stomach cancer (1); bladder cancer (1); prostate cancer (1); lymphoma (1); and leukemia (1). Prisoners reporting undiagnosed tumors and polyps mentioned the following affected areas: testicles (3); vocal chords (2); intestines (1); lungs (1); and unspecified (1).

Many prisoners report that prison medical staff delay diagnostic treatment, and are reluctant to conduct more expensive testing that may reveal the presence of cancer.

Some of these undiagnosed growths, tumors, and polyps have been surgically removed or recommended for surgery by outside medical experts, while others have yet to be seriously examined. Many prisoners report that prison medical staff delay diagnostic treatment, and are reluctant to conduct more expensive testing that may reveal the presence of cancer. Such reports reveal what amounts to a pattern of medical

neglect, where prison medical personnel consistently attribute prisoner complaints to minor ailments, which are then treated with antibiotics, antacids, allergy medication, antibiacterial lotions, aspirin, and ibuprofen. As a result, many of the cancer diagnoses reported to us were done only after the disease had progressed to the point that the prisoner needed emergency hospital care. For instance, an individual diagnosed with brain cancer wrote:

I've been asking medical for some type of CT scan for years because I was having headaches everyday. They keep telling me it was my sinus but I knew it was more than that. They sent me out for a CT scan and when I return, the medical staff here told me nothing was on my CT scan and they did not see anything. The day after that I passed out and was rush to Allegheny Hospital. They took another CT scan and found the cancer, it was at stage four and went to my skull.66

Two prisoners shared a similar story regarding the late Rafael Rivera, a prisoner who had been complaining of stomach pains for months only to be treated with heartburn medication. By the time he was "carried to medical where x-rays were finally taken [doctors found] a stomach cancer that was far along." Official PADOC records obtained via a Right-to-Know request confirm that Rafael Rivera died of stomach cancer at SCI Fayette on June 15, 2012.

In another report, Paul Kimble writes:

I have had surgery done at UPMC hospital and Westmoreland hospital one for a hernia and another at the other hospital for polyps in my intestines, where they had to go through my colon to have one cut out plus there is another one still there that will have to be cut out. I was bleeding in my stool here in this prison. I was two pints low in blood, when I was finally taken out to the hospital. 19

Anthony Willingham similarly reported having surgery to remove a cancerous growth from under his tongue, but being left with polyps that still need to be removed:

Dr. Johnson assured me that all would be well again. He would remove the cancer in one surgery and the polyps during the second. Be advised that the second surgery never happened. The Department of Corrections and or the medical contractor (Wexford Medical) refused to pay for the second surgery, stating that it was an elective procedure, not a life sustaining procedure. 70

David Ladlee reports that SCI Fayette prison officials have repeatedly denied a CT scan to monitor two undiagnosed masses found in his lungs, despite having been recommended by outside medical experts:

I am appealing Ms. Berrier's findings of the initial review response. She states that, "Your reports were reviewed for the past several years and there has been no change." This is not factually true. When I was at SCI Rockwiew in late 2009, a mass was found in 1 of my lungs. In 2011, I was sent to Westmoreland Hospital from here for treatment of pneumonia. While there, a CT scan was performed which showed not only the 1 mass but a 2nd mass was found. The treating doctor at Westmoreland Hospital had ordered a series of follow up CT scans to track the growth of these masses in my lungs.

There has been changes in the past several years and for Ms. Berrier to state that there has not been changes is mind blowing.

Ms. Berrier in the initial review had also stated that the CT scan, "is not medically necessary at this time." ... You can see the masses in my lungs by just looking. This is why CT scans are necessary. I realize this costs money but I am under your care, custody and control.

At sick-call in early summer of this year I was told that a CT scan was ordered. This past Seprember I had written a request inquiring about the CT scan in which a M. Hancock responded that, "The CT scan in August was cancelled." Ms. Berrier in the initial review response had also stated that the CT scan, "Is not medically necessary at this time." When is medically necessary, when I am dead? You can see the masses in my lungs by just looking. This is why CT scans are necessary. I realize this costs money but I am under your care, custody and control."

There are almost certainly more cases of cancer at SCI Fayette than our preliminary investigation has

uncovered. Along with the cases of undiagnosed growths, many prisoners report knowing of others who have cancer. The investigation received unconfirmed reports of three guards at SCI Fayette who have been diagnosed with kidney cancer in recent years, and another with throat cancer. It is possible that some prisoners who have become ill with cancer while at SCI Fayette were subsequently transferred to other prisons, complicating the process of counting people made ill at SCI Fayette. Prisoners report that the severely ill are often transferred to SCI Laurel Highlands, a prisonhospital, once they become so sick that death appears imminent.

Other Symptoms and Hinesses

Some prisoners report experiencing repeated instances of kidney stones for the first time while at SCI Fayette:

"A year ago I had surgery to have [kidney] stones removed, and once again in June 2013 (two surgeries). Now here it is no more than three months later and I was sent to Uniontown Medical Center for a CT scan and the pictures show I have more kidney stones than ever before."

Another prisoner writes: "[I]n my four years at Fayette, I had several bouts with passing stones. I never had any trouble prior to going to Fayette, but I've had trouble several times each year." Two other prisoners reported having their gallbladders removed, in one case due to gangrene.

Several prisoners report extreme weight loss. In one instance, a prisoner reported losing 54lbs in a month and a half. Another prisoner reported losing 40lbs over a period of three months. 77

Thyroid conditions were reported by 12% of prisoners (9/75). The range of symptoms reported by these prisoners included irritation and swelling in the throat, bloody noses, headaches, fatigue, dizziness, stomach pain, diarrhea, blurry vision, hair loss, ear pain and infections, problems with memory and concentration, numbness, muscle spasms, an inability to control arms and legs, and severe weight loss.

Nicholas Morrissey, a prisoner diagnosed with Graves Disease, which is an autoimmune disorder that causes hyperthyroidism, writes:

I am an immate at SCI Fayette. I've been here since March 2008. About a year ago my health went downhill. One day I woke up and it was difficult for me to walk and see. This continued for a couple of days and my symptoms got worse. I started getting dizzy and I couldn't keep my balance and I started getting a numbing feeling in the left side of my body... I started getting

I can't even control my body anymore... My life has been completely changed in the last year...

I went from a athletic and healthy person to a frail sickly man who can barely walk...

thore symptoms including loss of function in my arms and legs, blurry vision, confusion, memory loss, hair loss, laziness, diarrhea, tingling sensations in my face, arms, and legs, difficulty walking, extreme weight loss, and non stop rouscle spasms. I can't even control my body anymore... My life has been completely changed in the last year... I went from a athletic and healthy person to a fail sickly man who can barely walk... There are dozens of other innutes who have just recently come down with the same thyroid condition I have... 78

Another prisoner reports being told that there is no treatment for hyperthyroidism:

From March 2012 until June 2012 the medital staff here at SCI Fayette gave me a bloodtest at least 10 to 15 times. In April 2012 as a result of the bloodwork I was told that I have hyperthyroidism. The doctor also told me that there isn't any treatment for hyperthyroidism... that they can only treat hypothyroidism. Finally, I found a medical dictionary that states that there is two types of medication for hyperthyroidism. 79

Medical Care at SCI-Dayette

Prison medical care in Pennsylvania is notorious. Healthcare services in Pennsylvania prisons are sub-contracted to for-profit companies, which have an incentive to keep healthcare costs as low as possible. A recent report on privatized healthcare in PADOC prisons by the CLEAR coalition and SEIU Healthcare explains, "[C]ompanies cut costs by creating obstacles to care, hiring too few staff, employing inexperienced staff, and skimping on medication."

These problems are borne out in our survey. Prisoners are required to pay \$5 for every sick call, a significant expense for a prisoner making prison wages or receiving minimal support, if any, from a family member. One prisoner who has had chronic headaches and respiratory problems reported never making a sick call in his two and a half years at SCI-Fayette because, "rhey charge too much for sick call and don't do nothing for symptoms." §1

Those who do attempt to get care are often dismissed: "I went to medical for an emergency sick call one morning because my vision was so blurry that I could barely see and was harassed and deterred from seeking creatment by the RN," reports one prisoner. *2 The cases of cancer mentioned above in which prisoners were denied evaluation until the cancer was life-threatening are further evidence of the dangerous level of neglect exhibited by medical staff.

One of the prisoners with ulcerative colitis was prescribed a regimen of steroids by a doctor outside of the prison, which was repeatedly administered incorrectly by the prison: "The medical department failed to adhere to their instructions and abruptly stopped the medication. This caused a flare up of my ulcerative colitis and I had severe abdominal pains and rectal bleeding again."

"Shockingly, nursing staff, and almost with every inmate who is admitted into the infirmary, accuse those inmates of 'faking it.'" Many prisoners report that medical staff display hostility toward those seeking care. One prisoner wrote: "Shockingly, nursing staff, and almost with every inmate who is admitted into the infirmary, accuse those inmates of 'faking it.' I've seen guys literally vomiting, and nursing staff will say, 'oh he's just faking it.' My jaw has dropped open from shock so many times." Another prisoner wrote:

I had some sort of seizure one day and I went to medical, when the nurse came in I can see that the nurse was highly upset with my presence and slammed my file down and began to punch the desk. He then began to tell me "Man up" and to tell me I had AIDS from getting fucked in my ass and making fun of me. I don't have AIDS, he just wanted to make fun of me instead of treating me. 85

Darin Hauman wrote to us about the late Greg Yarbonet, who died of brain cancer in 2011***:

In his last few weeks of life certain nursing staff deliberately induced deliydration by simply refusing to assist him in drinking water. No hydration by way of intravenously either. With healthy humans it takes a short time being deliydrated for organs to be begin shutting down.

Regarding Greg, I would have to sneak into his ward area, I would have to dip my finger into water to moisten his lips as they were "glued" shut, then would have to drip a few drops of water onto his tongue just so he could use a straw to get a few sips of water. Of all things I was yelled at numerous times for doing this. This pisses me off each time I think of this. To deny a man a drink of water speaks volumes as to the ideology of this particular nursing staff. 87

Paul Kimble related an exchange with medical staff that underlines the apparent lack of empathy and professional ethics at the prison: "Doctor told me, during last physical, when asked if the lack of treatment meant that I would be left to die, "You said it, not me." **8

The only recourse for prisoners in such situations is to engage in a protracted grievance process that is designed to reject prisoner complaints and limit PADOC liability for unlawful conduct. All of the prisoners in the survey who reported filing grievances about medical care or environmental conditions at the prison had their grievances dismissed. This is consistent with official PADOC statistics demonstrating that in recent years more than 98% of prisoner grievances are denied on one basis or another.⁸⁰

SCI Fayette was designed to replace the maximum security state prison in Pittsburgh. At the time, however, Pennsylvania's prison population was growing rapidly under increasingly harsh sentencing for nonviolent offenders, and SCI Pittsburgh was re-opened shortly after the new prison began operation. State Representative Bill DeWeese, later convicted on corruption charges, pushed hard to bring the new prison to Fayette County, bailing it as an important form of economic development for the poorest county in the state.

In early 2000, MCC sold 237 acres of its 1,357-acre property to the Commonwealth of Pennsylvania, for the purpose of building SCI Fayette. According to the construction manager for the project, the decision to place the prison on top of a mined-out parcel of land with a legacy of coal waste dumping, and an operational coal ash dump nearby was "based on cost, scheduling and availability." The degree to which coal waste from the earlier Labelle Processing Plant was dumped on this land is unclear. What is clear is that the prison was built on top of a former coal mine, and it is directly adjacent to MCC's coal ash dump. Indeed, the western slope supporting Slurry Pond 3 looms over the prison, which is significantly lower in elevation, presenting a potential disaster should the dump lose structural integrity.

The prison was built between 2001 and 2003, and at 110 percent of its capacity, currently holds 2,021 prisoners. The total cost to build was around \$119,000,000. Prisoners report that parts of the prison are slowly sinking into the ground, likely due to subsidence caused by earlier mining at the site. As part of the design, it was decided to use boilers that burn coal waste to provide steam and hot water to the prison. The construction and management of the steam system was contracted out to Fayette Thermal, with the boilers being placed about a quarter mile from the prison. The resulting coal ash from the Fayette Thermal plant is one of several sources that are permitted for disposal on MCC's remaining acreage.

The related steam and water systems for the prison have broken down several times, according to prisoners, with periods without running water lasting up to a week. ¹⁰² In 2010, the pipes for the entire steam and hot water system were dug up and replaced, under a \$7,025,000 contract. ¹⁰³ In a testimonial posted to the contractor's website, the Facility Maintenance Manager for SCI Fayette expressed gratitude for "several emergency repairs," which were needed "to keep the poor system we have operating over the last 2+ years." ¹⁰⁴ According to the contractor's Technical Proposal, these emergency repairs were on a continuous basis from 2004 to 2010. ¹⁰⁵ The new pipes were hung off the sides of the prison buildings, perhaps to avoid corrosion of the pipes caused by coal waste in the surrounding soil. ¹⁰⁶

Signs of Polintian at SCI-Equili

black clouds of debris blowing off the dump site; black dust collecting in the prison yard, on window sills, and on freshly fallen snow; and black and gray dust building up around the vents *inside* prison cells.

A majority of prisoners in the survey reported visible signs of pollution in and around the prison. Almost all of their reports are the same: black clouds of debris blowing off the dump site; black dust collecting in the prison yard, on window sills, and on freshly fallen snow; and black and gray dust building up around the vents inside prison cells. These reports match descriptions provided by LaBelle residents of pollution blowing off the site and blanketing the town with black dust. For instance, prisoner Barry Alton reports:

From our yard we can see the dump trucks going up the road to dump the Fly Ash—Loads not covered—causing dust clouds even prior to dumping. Over the years we'd be outside and dust clouds would blow back towards the prison—couple times covered entire yards. This was not just from dumping but from moving piles of ash around area to level it out. 107

Joseph Frankenberry writes:

It seemed always that visible clouds of dust in the outdoor air existed on a daily basis and tables in the yards always had a blanket of dust as immates would carry tissue to wipe the tables daily to play cards...¹⁰⁸

Another prisoner writes:

I went to the eye doctor on Tuesday... The entire windshield of the van was covered in Coal Ash. The officers had to stop the wan and wipe the windshield off with paper towels because the Coal Ash would not come off with the windshield fluid and windshield wiper blades. 109

"There is black dust all over the walls on F.H. G. and E Block. There is always a chemical odor in the air. It is real bad by the staff parking lot next to the yard," writes one prisoner. 110 Another adds that there is "black dust in our cells. You clean it and about an hour later the dust is back. The black dust collects on cloth that inmates cover their vents with [.]" Another prisoner reports that the "ventilation system is always caked with thick dust."

Prisoners are nearly unanimous in reporting signs of water pollution. They report that the water often smells and tastes of sulfur. Others report that the water is frequently discolored. Michael McCole writes "I put a rag over showerhead and white rag turns to brown..." 113

Marcus Santos explains that the water gave him heartburn every time he drank it. As a consequence, he refrained from drinking water as much as possible. When Marcus arrived at SCI Smithfield he took a tiny sip of water. He waited 5–10 minutes for the onset of heartburn, and when it did not occur, he tried some more

water. When the heartburn failed to materialize, Marcus said he drank and drank and drank. Marcus had been depriving himself of water at SCI Fayette due to the heartburn, and he had lost a considerable amount of weight as well. Marcus said, "When I first got here [to SCI Smithfield] I was thirsty." 114

Several prisoners write about instances when the water was shut off for days at a time, with the most recently reported instance occurring in February 2014.¹¹⁵ One prisoner reports:

The plumbing or water system here is the worse. The drains back up because of the way they were installed. The pipes trap air and back up... Until yesterday we didn't have no hot water. It was off for almost a week, and the usually cloudy water was brown. It was so had that it literally made my t-shirt brown while I washed it out. 116

Christian Martinson reports:

Not only do I have experience with brown, stinking water, but also times where the prisoners had to go on lockdown without working water. Bottled water had to be shipped in and the toilets flushed minutally. Then they relocated the water pipes to an elevated level against the walls of the blocks...¹¹⁷

Another prisoner writes, "2006 to 2012 [underground] pipes kept breaking until above pipes were hung on side of blocks and building." These reports are verified by looking at publicly available contracts for repairs and replacement of the plumbing at SCI Fayette. 119

At this time, our investigation has not been able to confirm that the water at SCI Fayette is a source of coal waste or coal ash contamination in the prison. The prison receives water from a local water authority, which has frequently been cited for water quality violations in recent years, likely related to wastes from natural gas drilling in the area. ¹²⁶ However, it appears that the water intake for the area is upriver from SCI Fayette and the nearby coal ash dump, and is unlikely to be directly affected by pollution at these sites. ¹²¹

It is possible that subsidence, poor construction, and high levels of coal waste in the area contributed to corrosion and breaking of the plumbing system at SCI Fayette, and may have opened the pipes up to leachate from rain and snowmelt draining through the surrounding coal waste and soil. ¹²² This could explain why the plumbing system at the prison was in need of constant repair and was ultimately pulled out of the ground and elevated onto the walls of the buildings. Several prisoners also report a connection between rain and snowmelt, and times when the water is particularly discolored and bad smelling.

LEGAL FRAMEWORK

CRUEL AND UNUSUAL PUNISHMENT UNDER THE U.S. CONSTITUTION

While "the Constitution does not mandate comfortable prisons," and conditions may be "restrictive and even harsh," conditions that are inhumane are impermissible under the Eighth Amendment's prohibition against cruel and unusual punishment. List when the government deprives an individual of his or her liberty via incarceration it possesses a corresponding duty to provide for that person's basic human needs, including food, clothing, shelter, medical care, and safety. However, a prisoner claiming unconstitutional conditions of confinement must prove both an objective and a subjective element, before a court will enforce or protect these rights. 127

The objective element requires that an injury he "sufficiently serious," resulting in the deprivation of a single, identifiable human need such as health, safety, food, warmth or exercise. A condition that does not meet the objective requirement by itself may be considered in combination with other conditions if these produce a "mutually reinforcing effect" that causes deprivation of a single, identifiable human need. Being exposed to a substantial risk of harm may state a claim under the Constitution as well, as a prisoner does not "need to await a tragic event" in order to be granted relief from a court, as "the Eighth Amendment protects against future harm." 131

The subjective element, derived from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment," requires that a plaintiff demonstrate that a defendant possessed a "sufficiently culpable state of mind." In cases involving prison conditions the culpable state of mind is one of deliberate indifference to prisoner health or safety, ¹³⁴ as occurs when a prison official knows that prisoners face "a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." ¹³⁵

Under this standard, an injury to a prisoner's health caused by exposure to environmentally toxic living conditions such as those present at SCI Fayette meets the objective requirement of an Eighth Amendment claim, provided that the harm is "sufficiently serious." Chronic skin disorders, problems with liver and kidney functioning, asthma attacks and respiratory ailments, and cancer are all sufficiently serious. If the coal refuse and ash pollution surrounding SCI Fayette can be proven to a reasonable scientific certainty to be the cause of an individual's ill health, the objective requirement of an Eighth Amendment claim for exposure to environ – mentally toxic living conditions will be met.

If a body of evidence can be developed showing that any prisoner at SCI Fayette is being exposed to a substantial risk of scrious harm based on the possibility that he will develop a "sufficiently scrious" health problem, the state will be constitutionally

prohibited from confining prisoners at SCI Fayette. A class action suit on this scale requires substantial scientific expertise, including studies by epidemiologists and environmental toxicologists. Based on the evidence gathered to date, and the known harmful health effects of coal ash and other coal refuse, there is a sound basis for seeking financial and scientific resources that will enable prisoners and their advocates to develop evidence of the potential and actual harms imposed on them.

The subjective element of an Eighth Amendment claim requires proof that officials had knowledge of the risks to prisoners' health at SCI Fayette, and yet failed to take reasonable measures to eliminate those risks. PADOC officials' awareness that SCI Fayette was built on and around a toxic dump would demonstrate actual knowledge of a risk of adverse health consequences from imprisoning people at the site. Aggregated medical records may also show patterns of health problems consistent with exposure to environmentally toxic living conditions, establishing that PADOC officials knew or should have known that prisoners were being harmed by these toxins. Additionally, prisoner grievances and reports such as this one will also create a record of actual knowledge of the harms imposed upon prisoners at SCI Fayette.

At this stage it is uncertain what, if any, measures have been taken by PADOC officials to mitigate the existing harms at SCI Payette, but it does not appear that any measures have been taken to identify or address the problem. If the harms are of such a magnitude that prisoners cannot be held at SCI Fayette without imposing a substantial risk of serious harm, any measure short of closing the prison will be unreasonable. Thus, if prison officials fail to take any actions to remedy the harms imposed on a prisoner or a group of prisoners, or fail to take those actions that are necessary to end them, such as closing the prison, the subjective element of an Eighth Amendment claim will be met.

Madical Care

The U.S. Supreme Court has held that the Eighth Amendment is based on "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," that consequently forbids punishments that "involve the unnecessary and wanton infliction of pain," These premises "establish the government's obligation to provide medical care for those whom it is punishing by incarceration," since a prisoner "must rely on prison authorities to treat his medical needs," and failure to do so "may actually produce physical torture or a lingering death." ¹³⁸

In order to prevail on a claim of unconstitutional medical or mental health care, plaintiffs must prove that prison officials acted with "[d]eliberate indifference to serious medical needs of prisoners," causing "unnecessary and wanton infliction of pain." The Court recognized that medical and non-medical staff may be liable under this cause of action, and that deliberate indifference may result from denial or delay of a prisoner's medical care, or intentional interference with prescribed treatment. Deliberate indifference requires a higher standard of subjective intent than negligence, as "an inadvertent failure to provide adequate medical care cannot

be said to constitute an unnecessary and wanton infliction of pain[.]"¹⁴¹ The Third Circuit Court of Appeals has elaborated on this standard by observing that deliberate indifference is found when a doctor intentionally inflicts pain on a prisoner, when reasonable requests for medical treatment are denied causing "undue suffering or the threat of tangible residual injury," and "where knowledge of the need for medical care is accompanied by the intentional refusal to provide that care."¹⁴²

Those prisoners suffering health problems as a consequence of their exposure to environmentally toxic living conditions are entitled to medical care. If prison officials act with deliberate indifference to a prisoner's serious medical need at SCI Fayette by denying or delaying necessary treatment, or by intentionally inflicting harm, those officials are liable under the Eighth Amendment. If it can be proven that medical staff and prison officials are aware that a prisoner's illness is caused or exacerbated by his exposure to environmentally toxic conditions at SCI Fayette, failure to transfer the prisoner to another prison for medical reasons would constitute either denial of necessary treatment or intentional infliction of pain, or both.

CONCLUSIONS AND NEXT STEPS

As previously mentioned, the inherent limitations of the survey make it impossible to empirically show that prisoners at SCI-Fayette are getting sick at an unusually high rate or that these illnesses are caused by pollution from the dump. However, we believe that the patterns that emerged in our survey are alarming and suggest a causal relationship between coal waste and prisoner health problems. The prevalence of respiratory problems is particularly telling because they are the most common symptoms associated with exposure to airborne toxins. There is also a consistent pattern of prisoners developing symptoms that they never before experienced shortly after entering SCI-Fayette, another telltale sign of exposure environmental toxins.

Prisoners retain constitutional and human rights to clean air and clean water.

At this stage, it is clear that the investigation into how prisoner's health is being harmed by exposure to toxic coal refuse must continue and expand. Prisoners retain constitutional and human rights to clean air and clean water. We will conclude with a concise list of how

individuals and organizations representing different constituencies can come together to address the urgent health crisis at SCI Fayette and the town of LaBelle.

Prisoners, their family members and supporters: Prisoners at SCI Fayette should continue to provide detailed information regarding health symptoms experienced at SCI Fayette, efforts to obtain medical treatment, and evidence of pollution at the prison. For those no longer at SCI Fayette, please provide information of ongoing health problems that arose while at SCI Fayette, as well as how your health may have improved since leaving the prison. Family members and supporters of prisoners can help by contacting the Human Rights Coalition to become involved in advocacy and organizing efforts in support of the health and human rights of prisoners at SCI Fayette and throughout the PADOC.

LaBelle residents, prison staff, and surrounding communities:

This report focuses primarily on the health conditions and treatment of prisoners at SCI Fayette, but the residents of LaBelle and prison staff are also exposed to pollutants from this site, and are reporting high rates of respiratory problems and cancer. Those who live and work in the area around the dump have a right to a clean environment, and have a common cause with those who are locked up at SCI Fayette. We know from our investigation that residents of LaBelle are fighting for the dump to be closed and for compensation for harms done to them. We would like to work in solidarity with residents and form strategies for protecting the health, safety, and human rights of all people living and working near this dump.

Environmental Organizations: Several environmental organizations have been supporting residents of LaBelle and advocating for tighter regulations or even closure of the site. We call on these and other groups to include prisoners in their understanding of who is impacted by this dump and to see the strategic importance of linking the grievances of everyone impacted by the site. More broadly we call on environmental groups to see prisoners everywhere as Environmental Justice (EJ) Communities. EJ communities are low-income communities and communities of color which are more likely to be targeted by polluting industries because of institutional forms of oppression and a lack of political and economic power.

The situation in LaBelle and SCI Fayette also highlights the need for more forceful federal regulation of coal ash, which has been a major focus of environmental NGOs for years. The inhumane situation of people held captive in close proximity to this dump provides a unique opportunity to prove a direct relationship between exposure to coal ash and adverse health impacts. The results of the kind of epidemiological studies we hope to undertake could bolster the demands of these national groups for coal ash to be strictly regulated by the EPA.

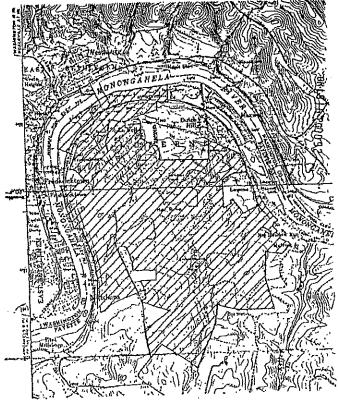
Medical Institutions and Organizations: Medical professionals are needed to advocate for and carry out epidemiological studies of the prisoner population at SCI Fayette and the town of LaBelle. Professional organizations should issue statements of support and assist in mobilizing professional and financial resources for investigative, advocacy, and legal efforts.

Legal Community: Lawyers, law clinics, law students, paralegals, and jailhouse lawyers should join with the ALC to assist in investigation and potential legal action in support of prisoners at SCI Fayette. Additionally, those prisoners in urgent need of medical care, especially diagnostic treatment and surgery to assess pre-cancerous and cancerous growths, need legal support. A lawyers' monitoring committee should be established in order to organize a network of attorneys to do pro bono work on individual cases that require immediate attention.

Principled and Strategic Cooperation: All of the above constituencies must work together in an integrated way that prioritizes the health and the rights of prisoners, who are the most impacted and the most vulnerable.

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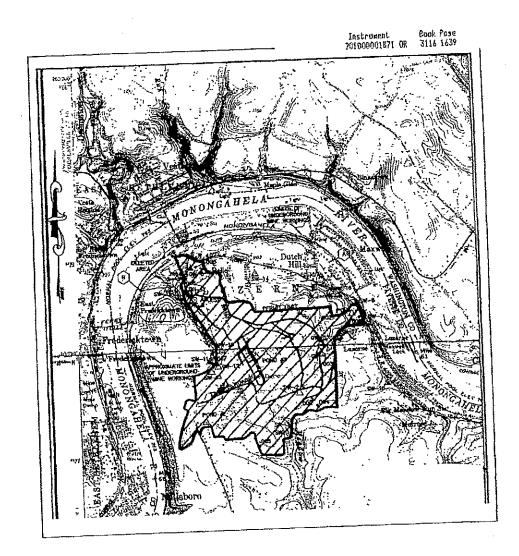


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undersigned, do hereby acknowledge that the crossbatched parcel personentu the ereperty course by Nott Constrain Contracting and upon which a coal refusa disposal operation for recination on represents the or and spon which will be conducted.

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The cross-hatched area, located in Luzerne Township, Fayette County, Pennsylvania is the area referred to in this Contractual Consent of Landowner Form.

Matt Canestrale Contracting, Inc.
Landowner

TAX MAP #19-02-0013

Matt Canestrale

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Lorraine Canestrale

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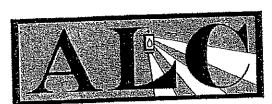


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Human Rights Coalition

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www.hrcoalition.org

EXHIBIT C

From: Haines, Christine [mailto:chaines@heraldstandard.com]

Sent: Thursday, September 25, 2014 4:08 PM

To: Filkosky, Andrew

Subject: Right to know request

Andrew, I am seeking documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette. I am not seeking identifying information, only the types of reported contracted illnesses and the number of inmates or staff members with those illnesses. I am particularly interested in various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported. If there is also information comparing the health at SCI-Fayette with the health at other state correctional facilities, that would also be helpful. Thank you, Christine Haines, Herald-Standard 724-425-7223.

EXHIBIT D

From: Filkosky, Andrew <afilkosky@pa.gov> Sent: Thursday, October 16, 2014 2:50 PM

To: Haines, Christine

Subject: RE: Right to know request/RTKL 1849-14

Dear Ms. Haines,

This email acknowledges receipt by the Department of Corrections of your written request for records under the Pennsylvania Rightto-Know Law (RTKL). Your request was received by this office on September 25, 2014. On September 26, 2014, an interIm response was sent to you extending the final response date to October 31, 2014.

Your requests for "documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette", "the types of reported contracted illnesses and the number of inmates or staff members with those illnesses", "various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported", and "information comparing the health at SCI-Fayette with the health at other state correctional facilities" are denied for the following reasons:

The RTKL exempts from disclosure records of an agency relating to a noncriminal investigation, including, but not limited to: complaints submitted to an agency; investigative materials, notes, correspondence and reports; records that include the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169), known as the Whistleblower Law; records that include information made confidential by law; work papers underlying an audit; and records that, if disclosed, would reveal the institution, progress or result of an agency investigation, deprive a person of the right to an impartial adjudication; constitute an unwarranted invasion of privacy, hinder an agency's ability to secure an administrative or civil sanction, or endanger the life or physical-safety of an individual. ...65 . P.S. . § . 67.708(b)(17). See Amro v Office of AG, 783 A.2d 897, (Pa. Cmwlth. 2001); Senk v. Commonwealth, 521 A.2d 532 (Pa. Cmwith. 1987). Your request implicates such information and access is denied.

- 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 Bargeron v. Department of Labor and Industry, 720 A.2d 500 (Pa. Cmwith. 1998); Weaver v. Department of Corrections, 702 A.2d 370 (Pa.Cmwith. 1997).
- 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 RTKL exempts records of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information. 65 P.S. § 67.708(b)(5). Hunt v. Pennsylvania Department of Corrections, 698 A.2d 147, 150 (Pa.Cmwlth. 1997); Neyhart v Department of Corrections, 721 A.2d 391 (Pa.Cmwlth, 1998). Your request implicates such records and access is denied.). Please note that the department policy does allow inmates to access specific staff members to discuss medical records and medical issues. Please refer to DC-ADM 003 for the procedures to make such a request or for further information.
- 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. Your request implicates such personal identification information and access is denied.
- The RTKL exempts from disclosure records that reflect the internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations. 65 P.S. § 67,708(b)(10)(i)(A); see also Lavalle v. Office of General Counsel, 769 A.2d 449 (Pa. 2001); Tribune-Review Publishing Co. v. Department of Community & Economic Development, 814 A.2d 1261, 1263-1264 (Pa. Cmwith. 2003); City Council v. Greene, 856 A.2d 217, 225 n.6 (Pa. Cmwlth. 2004). Your request implicates such information and access is denied.
- The requested records are also covered by the deliberative process privilege and are not public records under the law, 65 P.S. § 67.102 (See definitions of "public record" and "privilege"); 65 P.S. § 67.506(c). The deliberative process privilege applies to pre-decisional communications which reflect on legal or policy matters. Tribune-Review Publishing Co. v. Department of Community & Economic Development, 814 A.2d 1261, 1263-1264 (Pa. Cmwith. 2003); See also Lavalle v. Office of General Counsel, 769 A.2d 449 (Pa. 2001); City Council v. Greene, 856 A.2d 217, 225 n.6 (Pa. Cmwlth. 2004). Your request implicates such information and access is denied.
- The requested records are covered by the attorney client privilege and are not public records under the law. 65 P.S. § 67.102 (See definitions of "public record" and "privilege"); 65 P.S. § 67.506(c).
- The RTKL exempts from disclosure notes and working papers prepared by or for a public official or agency employee and used solely for that official's or employee's own personal use. 65 P.S. § 67.708(b)(12). Such records would include telephone message slips, routing slips and other materials that do not have an official purpose. Id. Your request implicates such information and access is denied.

You have a right to appeal this denial of information in writing to Terry Mutchler, Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. 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:

https://www.dced.state.pa.us/public/oor/appealformgeneral.pdf.

Sincerely,

Andrew Filkosky | Agency Open Records Officer Department of Corrections | Office of Chief Counsel 1920 Technology Parkway Mechanicsburg, PA 17050 Phone: 717.728.7770 | Fax: 717.728.0312 www.cor.state.pa.us

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From: Haines, Christine [mailto:chaines@heraldstandard.com]

Sent: Thursday, September 25, 2014 4:08 PM

To: Filkosky, Andrew

Subject: Right to know request

Andrew, I am seeking documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette, I am not seeking identifying information, only the types of reported contracted illnesses and the number of inmates or staff members with those illnesses. I am particularly interested in various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported. If there is also information comparing the health at SCI-Fayette with the health at other state correctional facilities, that would also be helpful. Thank you, Christine Haines, Herald-Standard 724-425-7223.

EXHIBIT E

Fayette Deaths 2003-2013

÷:

				2004 - No CA Deaths
	-	,		2000 NO CA Deaths
				אסמה אף כא הפאלהי
	!		-	
CA COLON	7 N	12/13/2007	FAYETTE	
CA LIVER, HEP C	N	6/25/2007	FAYETTE	
CA LUNG	N	5/31/2007	FAYETTE	
CA LIVER, HEP C		5/14/2007	FAYETTE	
CALUNG	N	4/17/2007	FAYETTE	
CA LUNG .	Z	4/3/2007	FAYEITE	
				,
CA KIDNEY	z	11/3/2009	FAYETTE	
HISTIOCYTOMA - MALIGNAN!	Z	7/5/2009	FAYETTE	
CA LUNG	Z	5/1/2009	FAYETTE	
CA LUNG		4/26/2009	FAYETTE	
CA TONSIL	z	10/17/2010	-AYETTE	
CA LIVER	Z	8/20/2010	FAYETTE	
CA TONGUE	z	8/18/2010	FAYETTE	
CA LUNG	z	5/8/2010	FAYETTE	
CA LUNG	z	2/3/2010	FAYETTE	
				•
CA COLON	N	12/2/2011	FAYETTE	
CA BRAIN		5/18/2011	FAYETTE	
CA LUNG	z	1/29/2011	FAYETTE	
CALIVER	2	9/18/2012	FAYETTE	
CA STOMACH	Z	6/15/2012	FAYETTE	
	-			
ACUTE LYMPHOCYTIC LEUKEMIA	z	4/29/2013	FAYETTE	
CAUSE OF DEATH	NASHU	DEATH	SCI	
				•

Fayette Deaths 2003-2013

2003 - No Deaths

EXHIBIT F

......

...... 1,

PA DOC CANCER PATIENTS									
2011-2014									
SITE	ADP	1*	2*	3*	TOTAL	PATIENTS PER 1000			
RET	1112	2	0	0	2	2			
QUE	448	0	0	1	1	3			
HOU	2530	4	3	2	9	4			
CAM	3503	6	8	2	16	5			
FRS	2240	1	6	4	1.1	5			
CBS	1039	4	2	0	6				
FRA	1162	1	4	1	6				
PNG	1077	. 1	5	0	6	 			
GRN	1736	4	. 2	6					
HUN	2144	4	. 8	. 2	 				
ALB	2281	6	9	5					
CHS	1258	5	4	2					
MER	1473	2	10	1	_				
BEN	2101	8	11	3		1			
FYT	2003	3	11	8					
EOA.	2336	12	13						
МАН	2494	11	11		5 2				
SMR	2344	5	21		2 2				
ROC	2426	11	15	1	5 3				
GRA	3749	20	25	<u> </u>	6 5				
SMI	1350	6	10		<u> </u>	8 14			
WAM	1396	8	9			9 14			
DAL	2146	7	. 20	<u> </u>	<u> </u>	2 15			
PIT	1931	14	9			8 15			
MUN	1452	12				16			
LAU	1535	6	<u> </u>	<u> </u>		32 21			
TOTAL	49266	163			4	39 10 10			

1* = Under Treatment: IV, PO, XRT

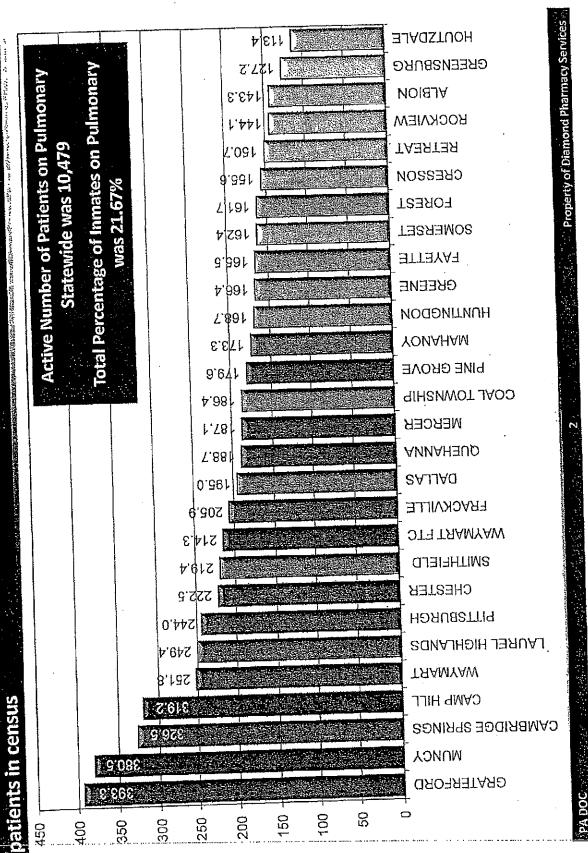
2* = Surveillance

3* = Refused, Paroled, or Deceased

EXHIBIT G

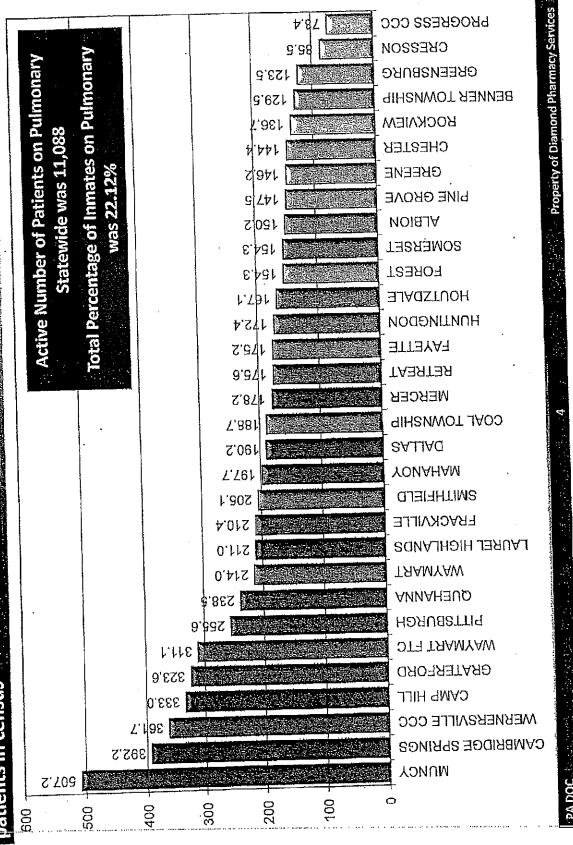
VEBION 17. HOUTZDALE 1208 Property of Diamond Pharmacy Percentage of Inmates on Pulmonary Active Number of Patients on Pulmonary FOREST 6'TST FAYETTE T'EST CKEENE Statewide was 10,776 S'LST**SOMERSET** \$.E91 was 22.81% TAHHTHE WEBCEB CKEZZON A DOC - 2010 - Number of Patients treated for Pulmonary per 1000 HUNTINGDON **BIME CHONE** CEEENSBURG COAL TOWNSHIP 0.181 **BOCKAIEM** 9.28I YONAHAM 6'S8T DALLAS £,88 ZWILHEIETD ₹'061 LAUREL HIGHLANDS 6'061 FRACKVILLE 7.291 WAYMART 6.202 CHEZLEK L'OLS. PITTSBURGH 6°S₹Z **WAYMART FTC** 6,0\$2 ОПЕНВИИВ 5,362 CAMP HILL · MINICA CAMBRIDGE SPRINGS GRATERFORD 20 100 150 200 300 250 350





A DOC - 2013 - Number of Patients treated for Pulmonary per 1000 atients in census

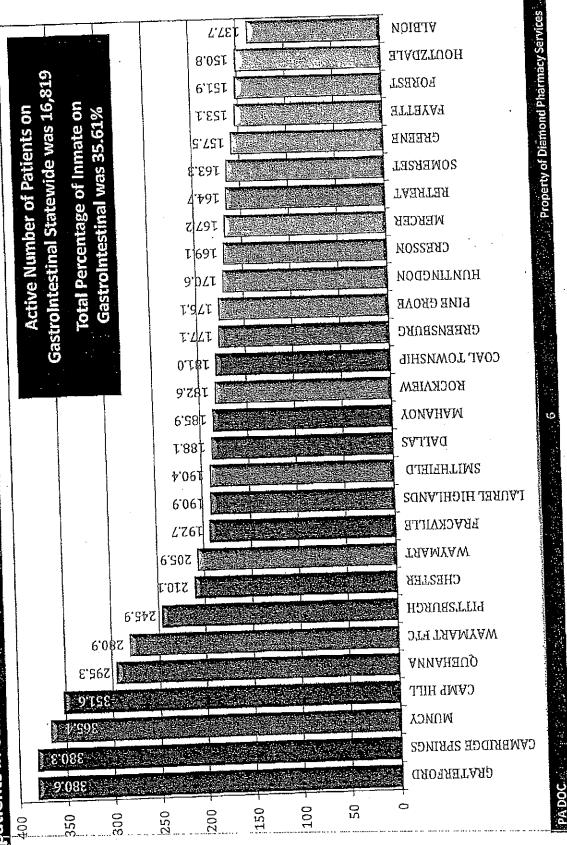




PROGRESS CCC 6.78 **BOCKNIEM** Percentage of Inmates on Pulmonary Active Number of Patients on Pulmonary PINE GROVE **BENNEK TOWNSHIP** CHESTER S, ra SOMERSET 0,281 WAYMART FTC 8,46) **FOREST** 34'6 **ALBION** 8.35 A DOC - 2014 - Number of Patients treated for Pulmonary per 1000 **WERCER** 0,041 **HOUTZDALE** 0.541 GREENE 1.841 **HAYETTE** 4.821 DALLAS 121 НПИШИСЕВОИ 7.52.A COAL TOWNSHIP £,631 **FRACKVILLE** 2.071 **TA39T39** 7.871 PITTSBURGH 2.771 SMITHFIELD **О**ИЕНРИИР 3,281 LAUREL HIGHLANDS 0.061 YONAHAM p'06 **TAAMYAW** 8,261 CAMP HILL tients in census **GRATERFORD MERNERSVILLE CCC** 192 CAMBRIDGE SPRINGS MNNCK 4043 0 100 50 250 200 300 350

DOC - 2010 - Number of Patients treated for GastroIntestinal per 1000

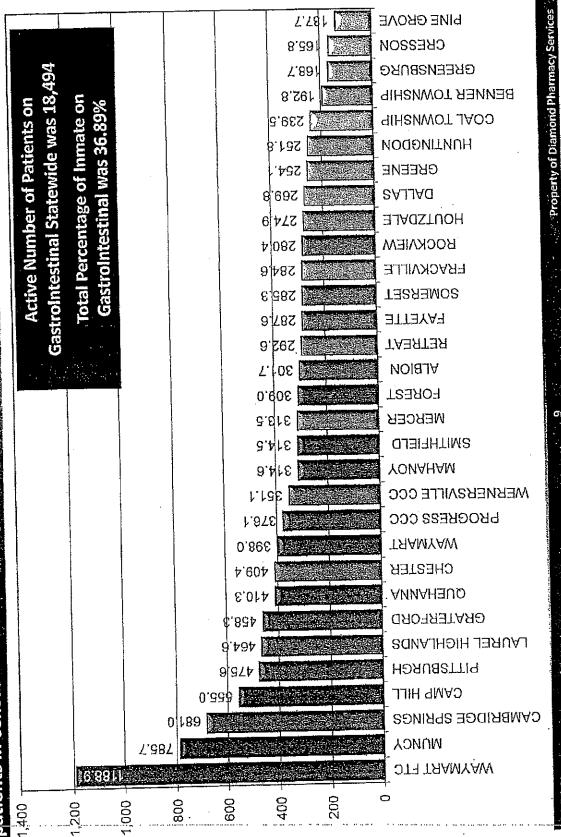




Property of Diamond Pharmacy Services PINE GROVE E.12 COAL TOWNSHIP 204,6 GastroIntestinal Statewide was 17,214 DALLAS 1,922 Total Percentage of Inmates on **HOUTZDALE** Active Number of Patients on GastroIntestinal was 35.60% P.862 ТАЗЯТЗЯ 138.4 **BOCKNIEM** 0.912 FOREST 3,682 PA DOC - 2011 - Number of Patients treated for GastroIntestinal per 1000 SOMERSET 7,882 **ETTEY** 2,092 **GREENE** 2,182 **GKEENSBURG** 8,182 **MOIBJA** НОИЛИВООИ **6,38**S FRACKVILLE 2.892 CEESON 1.482 YONAHAM 2.592 SMITHFIELD 323,5 MERCER 3,845 CHESTER 6,48€ **ANNAH3UD** .868 HDAUBSTTI9 **TAAMYAW** LAUREL HIGHLANDS ₽.**ф**£9 **GRATERFORD** 9.79B CAMP HILL atients in census 0.778 MUNGY 2,028 CAMBRIDGE SPRINGS **DTH TRAMYAW** 97876 90 200 300 500 400 909 700 900 800

DOC - 2013 - Number of Patients treated for GastroIntestinal per 1000 atients in census





DOC - 2014 - Number of Patients treated for GastroIntestinal per 1000 patients in census

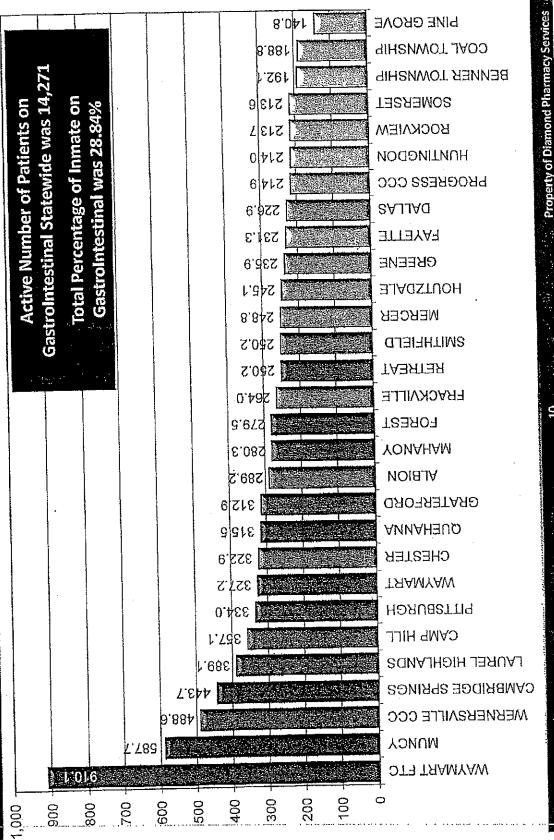


EXHIBIT H

Christine

Attached is an attestation from our Director of Bureau of Health Care Services.

Thank you

Chase M. Defelice, Assistant Counsel
Office of General Counsel
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050
Phone: 717.728.7763 Fax: 717.728.0312
www.cor.state.pa.gov | www.state.pa.gov

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Mark as unread

Defelice, Chase <chdefelice@pa.gov>

Wed 1/7/2015 1:33 PM 1 attachment

201501071259,pdf38 KB

I was told it was current treating patients.

Attached are statistics that are slightly outdated from November of 2014.

Haines, Christine

Wed 1/7/2015 1:13 PM

Chase, what is the date of this report? Christine Haines Reporter 0:724-425-7223 F: 724-439-7559 M: 724-691-5568 chaines@heraldstandard.com Herald-Standard www.heraldstandard.com Twitter; @CHwordsmith Calkins Media Incorportated www.calkins.com

Mark as unread

Defelice, Chase <chdefelice@pa.gov>

Wed 1/7/2015 12:56 PM 1 attachment

201501071244.pdf28 KB

Christine

Attached is a list from the database that is kept by our vendor regarding cancer patients. The list contains inmate names and inmate numbers, which I redacted. The list shows they are Fayette inmates. This list shows the number of inmates actively treating for cancer and type of treatment. The list does not contain the type of cancer being treated for. The statistics you are requesting do not exist. I will have a declaration stating the records do not exist to follow.

Chase

Mark as unread

Defelice, Chase <chdefelice@pa.gov>

Tue 1/6/2015 5:40 PM

I understand. We do not have any such records that are that specific beyond going through every medical record, which is not required. I am waiting on one of your requests to determine if a record exists pertaining to active cancer patients at SCI-Fayette. I was told I should know tomorrow. I will keep you posted and thank you for your patience.

Mark as unread

244

Haines, Christine

Sent Items

Thank you. I have received and reviewed the attached documents. Due to the snow today and limited removal of same, I took today off. Again, my RTK request was not necessarily specific to the allegations in the report. I remain interested in medical statistics since the prison opened, especially those related to diseases diagnosed among inmates after their arrival, with particular interest in cancers and kidney problems.

Christine Haines
Reporter
O:724-425-7223 F: 724-439-7559 M: 724-691-5568
chaines@heraldstandard.com

Herald-Standard
www.heraldstandard.com

Twitter: @CHwordsmith

Calkins Media Incorportated www.calkins.com
Mark as unread

Defelice, Chase <chdefelice@pa.gov>

Tue 1/6/2015 3:44 PM 1 attachment

201501061223.pdf4 MB

Christine

I left you a voicemail today. Based on the last line of your email below, I am awaiting any information I can gather. It is my understanding I should have that information tomorrow.

In the meantime, I am reattaching the records I provided with a few additional records that were gathered.

Thank you

Chase M. Defelice, Assistant Counsel
Office of General Counsel
Pennsylvania Department of Corrections

1920 Technology Parkway Mechanicsburg, PA 17050

Phone: 717.728.7763 Fax: 717.728.0312 www.cor.state.pa.gov | www.state.pa.gov

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Haines, Christine

Mon 1/5/2015 4:45 PM

Christine Haines Reporter 0:724-425-7223 F: 724-439-7559 M: 724-691-5568 chaines@heraldstandard.com Herald-Standard www.heraldstandard.com Twitter: @CHwordsmith Calkins Media Incorportated www.calkins.com

Mark as unread

Haines, Christine

Sent Items

1/5/2015

Chase,

I am following up on our conversations last week regarding the partial response to my Open Records Request. As we discussed, my request was for documentation of the types of illnesses contracted by inmates at SCI-Fayette, including the various types of cancer, since its opening, as well as a comparison to other prisons within the state system. That request was made Sept. 25, 2014 and denied by the DOC on Oct. 16 for a variety of reasons, none of which was a lack of such documentation. In addition, there was no affidavit attached to the Open Records response indicating that the requested documents do not exist.

The reasons given by the DOC were found to be without basis by the Office of Open Records, which ordered that the information be released within 30 days of the Dec. 1, 2014 ruling. On Dec. 31, I received an email with various attachments: Deaths at the SCI's from cancer from 2010-2013, Number of Patients in the system, by prison, treated for gastrointenstinal issues 2010, 2011, 2012, 2013, 2014 as reported by Diamond Pharmacy Services, the number of inmates, by facility, with pulmonary conditions 2010, 2011, 2012, 2013, 2014, and a page I assume is a compilation from that time period.

In our conversation on 12/31, you indicated that you would attempt to get the medical information for the remaining years which I had requested (for as we both know, SCI-Fayette opened in August 2003.)

On that same day the DOC put out a news release, though it was not sent to the Herald-Standard offices or to me, though I was informed the next day by you that it was available on the department's web site, refuting a report from an activists' group about environmental conditions causing unsafe health conditions at the prison. The news release states that "the Department's Bureau of Health Care Services maintains an extensive database of all current cancer patients in state prison facilities.....A more detailed analysis of the 11 cancer deaths at SCI Fayette from 2010 to 2013, revealed that four were transferred to SCI Fayette after they had been diagnosed with cancer at other institutions." It seems from that statement that my request for information about the number of inmates diagnosed at SCI-Fayette with cancer and the types of cancer diagnosed should be readily available in the DOC database. I look forward to receiving this information at your earliest convenience, as per the Dec. 1 OOR order.

Christine Haines

Christine Haines
Reporter
O:724-425-7223 F: 724-439-7559 M: 724-691-5568
chaines@heraldstandard.com

Herald-Standard www.heraldstandard.com

Twitter: @CHwordsmith

Calkins Media Incorportated www.calkins.com

EXHIBIT



Review of Environmental/Medical Allegations at the State Correctional Institution at Fayette

December 31, 2014

After a comprehensive review following complaints of dangerous environmental conditions at the State Correctional Institution (SCI) at Fayette, the Department of Corrections has found no credible evidence of any unsafe environmental conditions at the facility or of any abnormalities with regard to the safety and health of inmates at the prison.

The Department was made aware of reports alleging that unsafe levels of coal waste in the vicinity of SCI Fayette were connected to purported medical problems for inmates at the facility. The Department takes concerns regarding the safety and welfare of its inmates very seriously. As a result, the Department initiated environmental tests and medical reviews to examine the conditions at the prison. The Department found no evidence of any unsafe environmental conditions or any related medical issues.

Initial complaints contained conclusory allegations that coal waste in the vicinity of SCI Fayette had contaminated the environment. In response, the Department commissioned independent tests of its water supply to be performed in August 2014. Analysts concluded that the water met all drinking water standards and guidelines; there was no determination of any chemical concentrations that would cause adverse health conditions.

In addition, the Department appointed a medical review team to examine medical records and data to identify any irregularities for residents of SCI Fayette. Studies comparing the facility to other state institutions clearly confirmed no significant difference in the number and types of health issues raised by residents at SCI Fayette when compared to other Pennsylvania prisons. The medical review team examined the medical records of individual inmates who complained of symptoms at the facility, as well as their subsequent treatment. The team found that in many of these cases, the individuals' symptoms were treated and resolved by medical personnel after a single sick call visit.

The Department reviewed rates of cancer at SCI Fayette and found no irregular results. The Department's Bureau of Health Care Services maintains an extensive database of all current cancer patients in state prison

facilities. SCI Fayette has a cancer rate of 11 cancer patients per 1,000 inmates. Compared to the other state prison institutions, SCI Fayette's rate falls exactly in the middle.

The Bureau of Health Care Services also maintains a database on all mortalities within the state institutions. For the period 2010-2013, the statewide average number of cancer deaths per 1,000 inmates was 1.09. SCI Fayette had 1.34 cancer deaths per 1,000 inmates, ranking it seventh in the state behind Laurel Highlands, Smithfield, Waymart, Graterford, Pittsburgh and Rockview.

A more detailed analysis of the 11 cancer deaths at SCI Fayette from 2010 to 2013, revealed that four were transferred to SCI Fayette after they had been diagnosed with cancer at other institutions. Two patients were diagnosed with lung cancer while at SCI Fayette during this four-year time frame.

The Department also reviewed whether there was an increased incidence of respiratory diseases at SCI Fayette by reviewing the administration of pulmonary medications ordered at the prison. For the period of 2010-2013, the Department found that SCI Fayette's administration of pulmonary medications was in the middle or slightly lower than that of other institutions.

This finding is corroborated by a review of inmates enrolled in Pulmonary Chronic Care Clinic, Inmates who have chronic respiratory diseases are followed every six months in the Pulmonary Chronic Care Clinic. A review of the number of patients per 1,000 currently being clinically followed places SCI Fayette right in the middle of state correctional institutions.

Finally, the Department reviewed the administration of gastrointestinal medications ordered from 2010 to 2013 at SCI Fayette and found the prison to be ranked in the middle of the total number of state facilities.

In conclusion, by all of the measures reviewed, the Department has found no scientific data to support claims of any unsafe environmental conditions or any related medical issues to exist at SCI Fayette.

Although the Department is satisfied with its internal review, it has also submitted the matter to the Pennsylvania Department of Health for additional review.

EXHIBIT J



November 4, 2014

Kathleen Higgins, Esquire Appeals Officer Office of Open Records Commonwealth Keystone Building 400 North Street, 4th Floor Harrisburg, PA 17120-0225

Re: Appeal No.: 2014-1694 (Christine Haines v. PA DOC)

Dear Ms. Higgins:

Please accept this correspondence in support of the Department of Corrections' ("Department") position in this appeal filed by Christine Haines. Ms. Haines Right to Know Law ("RTKL") request (No. 1849-14) received by the Department's Agency Open Records Officer ("AORO") on September 25, 2014, sought access to "report of the illnesses contracted at SCI Fayette, by type and quantity (i.e. how many cases of each diagnosis) and comparison of illness rates at other SCI's." See Request. On September 26, 2014, the AORO filed an interim response extending the final response to October 31, 2014. On October 16, 2014, the Department denied the request. See Response. Subsequently, Ms. Haines filed this appeal. See Appeal.

The Department submits that the requested records are exempt pursuant to 65 P.S. § 67.708(b)(17), which exempts from public disclosure in pertinent part:

A record of an agency relating to a noncriminal investigation, including:

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- (iv) A record that, if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

The RTKL does not define "noncriminal" and "investigation." The Commonwealth Court has interpreted "noncriminal" to indicate the exemption of investigations other than those that are criminal in nature. Department of Health v. Office of Open Records, 4 A. 3d 803, 810 (Pa. Cmwlth. 2010). Further, the Commonwealth Court has found the term "investigation" in this exemption to mean "a systematic or searching inquiry, detailed examination, or an official probe." Id. at 811.

The Department submits the Declaration of the Director of the Bureau of Health Care Services, Christopher Oppman to set forth that the records requested by Ms. Haines are part of an ongoing noncriminal investigation. See Declaration of Christopher Oppman, attached hereto as Exhibit "A." The noncriminal investigation is being conducted by the Department and by the Department of Health. Id. The records requested have been generated by the Department and provided to the Department of Health's for investigation on the matter. Id. At this time, the Department of Health has not issued any results regarding the investigation. Thus, providing the requested records that are clearly investigative materials, notes, and reports, would reveal the institution and the progress of the investigation being conduct. Id.

For the foregoing reasons, the Department's denial of Ms. Haines' request was proper. The appeal is without merit and should be dismissed.

Sincerely,

Chase M. Defelice Assistant Counsel

cc: Christine Haines, Herald Standard, 8 East Church Street, Uniontown, PA 15401 (via regular mail)

DECLARATION OF CHRISTOPHER OPPMAN

- I, Christopher Oppman, hereby declare under the penalty of perjury, 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 Department of Corrections of the Commonwealth of Pennsylvania ("Department") employs me as the Director for the Bureau of Health Care Services ("BHCS").
- 2. In my capacity as Director of BHCS, I, inter alia, oversee the administration of medical, mental health and dental services to the immate population; oversee and ensure contract compliance with vendors of professional medical services; supervise quality of the delivery of medical services; develop, monitor and supervise the application of policy as it pertains to the delivery of medical services within the Department, including the administration and enforcement of security as it relates to those policies and the BHCS.
- 3. I am aware of Christen Haines request pursuant to the Right-to-Know Law for "report of the illnesses contracted at SCI Fayette, by type and quantity (i.e. how many cases of each diagnosis) and comparison of illness rates at other SCI's."
- 4. The records requested by Ms. Haines are presently part of a noncriminal investigation that was started by the Department and now includes the Department of Health.



5. The request seeks reports of the number and type of illnesses that have been contracted at SCI-Fayette, and also comparison reports with other State Correctional Institutions.

6. The Department has generated the records that Ms. Haines requests; however, those records were created as part of an investigation that the Department of Health is conducting.

7. The Department of Health has yet to issue results to their investigation, thus this matter, along with the requested records, are still part of the investigation.

8. Providing the requested records would reveal the institution and the progress of the investigation being conduct by the Department and the Department of Health.

Respectfully submitted,

Christopher Oppman, Director Bureau of Health Care Services

Pennsylvania Department of Corrections

Date: November 4, 2014

EXHIBIT K

DECLARATION OF CHRISTOPHER OPPMAN

- I, Christopher Oppman, hereby declare under the penalty of perjury, 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 Department of Corrections of the Commonwealth of Pennsylvania ("Department") employs me as the Director for the Bureau of Health Care Services ("BHCS").
- 2. In my capacity as Director of BHCS, I, inter alia, oversee the administration of medical, mental health and dental services to the immate population; oversee and ensure contract compliance with vendors of professional medical services; supervise quality of the delivery of medical services; develop, monitor and supervise the application of policy as it pertains to the delivery of medical services within the Department, including the administration and enforcement of security as it relates to those policies and the BHCS.
- 3. I am aware of Christine Haines requested pursuant to the Right-to-Know Law for "report of the illnesses contracted at SCI Fayette, by type and quantity (i.e. how many cases of each diagnosis) and comparison of illness rates at other SCI's."
- 4. The Department as previously provided records to Ms. Haines regarding this request.

- 5. I have reviewed the records that were provided to Ms. Haines.
- 6. Beyond the records previously provided to Ms. Haines, the Department does not have within its custody, possession, or control, reports of illnesses contracted at SCI-Fayette, by type and quantity and comparison of illness rates at other state correctional institutions.

Respectfully submitted,

Christopher Oppinan, Director Bureau of Health Care Services

Pennsylvania Department of Corrections

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEWSPAPERS, INC., d/b/a) No.: THE HERALD STANDARD; and) CHRISTINE HAINES,)
Petitioners,) v.
PENNSYLVANIA DEPARTMENT OF) CORRECTIONS,
Respondent.
ORDER OF COURT
AND NOW, to-wit, this day of, 20, upon
consideration of the Petition for Review and Enforcement of Final Determination of Office of Open
Records filed on behalf of the Petitioners, The Herald Standard and Christine Haines, it is hereby
ORDERED, ADJUDGED and DECREED that said Petition is GRANTED, as follows:
1. The Pennsylvania Department of Corrections shall produce all documents required to be produced pursuant to the Final Determination of the Office of Open Records and responsive to Petitioners' open records request within seven (7) days of issuance of this Order of Court;
2. The Pennsylvania Department of Corrections willfully and/or wantonly disregarded Petitioners' open records request, and deprived Petitioners of their right of access to public records, and further acted in bad faith in violation of the Pennsylvania Right to Know Law;
3. Petitioners are awarded their attorneys' fees and costs incurred in this matter pursuant to Section 1304 of the Right to Know Law;
4. Petitioners shall provide the Commonwealth Court with proof of legal fees incurred in this matter within thirty (30) days of issuance of this Order of Court.
BY THE COURT:
J.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition for Review and Enforcement of Final Determination of Office of Open Records filed on behalf of the Petitioners, The Herald Standard and Christine Haines, was served upon the following parties via United States Mail:

Commonwealth of Pennsylvania
Office of Open Records
Attn: Kathleen A. Higgins, Esq.
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Pennsylvania Department of Corrections
Attn: RTKL Office
1920 Technology Parkway
Mechanicsburg, PA 17050
Chase Defelice, Esq. (via e-mail) (chdcfelice@pa.goy)
Andrew Filkosky (via e-mail) (afilkosky@pa.gov)

Respectfully submitted,

Charles Kelly (Pa IP) No. 51942)

SAUL EWING LLP

One PPG Place, Suite 3010

Pittsburgh, PA 15222

(412) 209-2500

Michael J. Joyce (Pa ID No. 311303)

SAUL EWING LLP

One PPG Place, Suite 3010

Pittsburgh, PA 15222

(412) 209-2500

Counsel for Petitioners, The Herald Standard and Christine Haines

APPENDIX B PRELIMINARY OBJECTIONS

Time/Date Stamp

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEWSPAPERS, INC., d/b/a/ THE HEARLD STANDARD; AND CHRISTINE HAINES,

Time./-

Petitioners,

v.

No. 66 M.D. 2015

[5 & _____

PA DEPARTMENT OF CORRECTIONS,

Respondent

PRELIMINARY OBJECTION TO PETITION FOR REVIEW

NOW, comes Chase M. Defelice, Assistant Counsel for the Pennsylvania Department of Corrections, and files the following Preliminary Objection to the Petition for Review ("PFR") filed by Petitioners':

I. BACKGROUND

- 1. Petitioner is the Uniontown Newspapers, Inc., The Herald Standard, and Christine Haines. See Petition for Review (PFR), ¶¶ 7-10.
- 2. Respondent is the Pennsylvania Department of Corrections (Department). Id., ¶ 11.
- 3. Petitioner seeks to enforce a Final Determination issued by the Office of Open Records (OOR) against the Department. *Id.* at Exhibit A.

4. Petitioner had filed a Right-to-Know-Law (RTKL) request with the Department for:

. . . documentation of illnesses contracted and/or staff members at SCI-Fayette. I am not seeking identifying information, only the types of reported contracted illnesses and the number of inmates or staff members with those illnesses. I am particularly interested in various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported. If there is also information comparing the health at SCI-Fayette with the health at other state correctional facilities, that would also be helpful. Thank you Christine Haines, Herald-Standard 724-425-7223.

Id., \P 16 and Exhibit C.

- 5. On September 26, 2014, the Agency Open Records Officer (AORO) filed an interim response extending the final response to October 31, 2014. *Id.*, ¶ 18.
 - 6. On October 16, 2014, the Department denied the request. Id., ¶ 19.
- 7. On or about October 30, 2014, Ms. Haines appealed the denial to the OOR. *Id.*, ¶ 21.
- 8. On or about November 4, 2014, the Department issued a response to the appeal with a declaration from Director of Bureau of Health Care Services Christopher Oppman, arguing that the records were part of a noncriminal investigation. *Id.* Exhibit at J.

- 9. On December 1, 2014, the OOR ordered the records be made available to Ms. Haines. *Id.* at ¶ 22, Exhibit A.
- 10. Neither party appealed the Final Determination to the Commonwealth Court.
- 11. On December 31, 2014, undersigned counsel provided the records in the Department's possession that were responsive to Ms. Haines request. *Id.*, ¶ 26.
- 12. Admittedly, all the records Ms. Haines requested were not provided.

 Id. at ¶ 26.
- 13. A subsequent declaration was submitted by Director Oppman stating "[b]eyond the records previously provided to Ms. Haines, the Department does not have within its custody, possession, or control, reports of illnesses contracted at SCI-Fayette, by type and quantity and comparison of illness rates at other state correctional institutions." *Id.* at Exhibit K.

 $\frac{\text{http://www.cor.pa.gov/}Documents/DOH\%20Review\%20of\%20Cancer\%20Burden}{\%20at\%20SCI\%20Fayette\%2012-29-2014.pdf}$

¹ A portion of the PFR should be considered moot because the Petitioner received the number of cancer diagnosis by type at SCI Fayette. The records came from the Pennsylvania Cancer Registry, which the Department of Health has access to. The record was attached to the Department of Health's report that was provided to the Department in late January of 2015. A copy of the Department of Health report is available on the Department of Corrections public website, and has been provided to Petitioner.

- 14. The Department's position is that a portion of the responsive records exist, and they were provided to Petitioner, but the remaining responsive records do not exist, and never did exist.
- 15. Petitioner's position is that the Department has the records, but does not want to provide them.
- 16. Petitioner posits that the Department has a "database, but the collection of same 'is not required." *Id.*, ¶ 40, citing Exhibit H.
- 17. The Department has not asserted that the records exist, but they are in a database, but rather has stated "[w]e do not have any such records that are that specific beyond going through every medical record." *Id.*, Exhibit H.²
- 18. Further, Petitioner submits that Director Oppman's first declaration indicates the Department is in possession of *all* of the responsive records. *Id.*, ¶ 38.
- 19. Moreover, Petitioner submits the subsequent declaration of Director Oppman is merely an "attempt to silence" the Petitioner. *Id.*, ¶ 43.
- 20. Admittedly, the first declaration of Director Oppman was poorly worded and was not intended to suggest that the Department possessed *all* of the records within the very broad request. However, the Department is aware of how

² The Department requests the Court to exercise Judicial Notice, pursuant to Pa. R. Evid. 201, and reference the Department's public website, which illustrates the current inmate population at SCI Fayette is 2,056 inmates. <a href="http://www.cor.pa.gov/Administration/Statistics/Documents/current%20monthly%20mont

one could view the declaration to read in that way. As a result, the Department had subsequent email exchanges with Petitioner as an attempt to remedy the discrepancy. *Id.*, Exhibit H.

21. Consequently, as relief, Petitioner seeks an order from this Court to compel the Department to produce the records pursuant to the Final Determination within seven (7) days of this Court's Order. Also, Petitioner is seeking an order that the Department acted in bad faith, and is responsible for Petitioner's legal fees.

II. DEMURRER

- 22. A preliminary objection in the nature of a demurrer admits as true all well and clearly pleaded material, relevant factual averments, and all inferences fairly deducible there from. *Barndt v. Pennsylvania Department of Corrections*, 902 A.2d 589 (Pa. Cmwlth. 2006).
- 23. In determining whether a preliminary objection based on a demurrer should be sustained, a court "need not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion." Silo v. Ridge, 728 A.2d 394, 398 (Pa. Cmwlth. 1999) (citing Giffin v. Chronister, 151 Pa. Cmwlth. 286, 289, 616 A.2d 1070, 1072 (1992)).
- 24. When ruling on a demurrer, a court may sustain the objections and dismiss the case only when such relief is clear and no doubt exists that the law will

not permit a recovery. Stone and Edwards Insurance Agency, Inc. v. Department of Insurance, 151 Pa. Cmwlth. 266, 271, 616 A.2d 1060, 1063 (Pa. Cmwlth. 1992).

- 25. Petitioners' filed a petition for review, which undersigned counsel interprets as a petition seeking mandamus relief, or alternatively, for enforcement of the OOR order.
- 26. Mandamus is proper to "compel the performance of a ministerial duty and will not be granted in doubtful cases." *Doxsey v. Pa. Bureau of Corrections*, 674 A.2d 1173, 1174 (Pa. Cmwlth. 1996).
- 27. Mandamus lies only where the petitioner "demonstrates a clear legal right to relief, a correspondingly clear duty on the part of the party against whom mandamus is sought, and the want of any other adequate remedy." Id. See also Equitable Gas Company v. City of Pittsburgh, 507 Pa. 53, 58, 488 A.2d 270, 273 (1985) (also finding that the petitioner must show "an immediate, specific, well defined and complete legal right to the thing demanded") (citing Purcell v. City of Altoona, 364 Pa. 396, 72 A.2d 92 (1950)).
- 28. Mandamus is not proper to establish legal rights; it is only appropriately used to enforce those rights that have already been established. See Waters v. Department of Corrections, 97 Pa. Commw. 283, 286, 509 A.2d 430, 432 (1986).

- 29. The mandamus remedy is available where there is not dispute of material fact. *Monroeville v. Effie's Ups and Downs*, 315 A.2d 342 (Pa. Cmwlth. 1974).
- 30. If, as the Petitioner claims, the records requested existed, Petitioner would have a clear right to those records based on the Final Determination from the OOR.
- 31. However, if, as the Department claims, the records do not exist, Petitioner does not have a clear right to the records because impossibility is a defense to an enforcement action. *Commonwealth v. United States Steel Corp.*, 325 A.2d 324 (Pa. Cmwlth. 1974).
- 32. There is a material fact at issue, i.e. whether the remaining responsive records exist.
- 33. Under the RTKL 65 P.S. § 67.705, Creation of Record, "an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain formant or organize the record." 65 P.S. § 67.705.
- 34. In email correspondence attached to the PFR, the Department explains that the records can only be gleaned from reviewing medical records, which

correlates to every inmate medical file from 2003 to the present that has touch SCI Fayette.

- 35. Admittedly, Director Oppman's first declaration gives the impression that the Department possesses every record requested by Ms. Haines; however, that was not the intent of the declaration. This can be seen by the records provided, the email communications with Ms. Haines, the Department's press release, and the second declaration from Director Oppman. See PFR, Exhibits H, I, and K.
- 36. Since there is a material fact at issue, peremptory mandamus relief is not available to Petitioner.

III. CONCLUSION

WHEREFORE, in light of the foregoing, Respondent requests that the Court sustain the demurrer and decline to grant peremptory mandamus or enforcement relief on the present state of the record.

Respectfully submitted,

By:

Chase M. Defelice

Assistant Counsel

Attorney I.D. No. PA 209135

Pennsylvania Department of Corrections

Office of Chief Counsel

1920 Technology Parkway

Mechanicsburg, PA 17050

(717) 728-7763

Dated: March 9, 2015

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEWSPAPERS, INC., d/b/a/ THE HEARLD STANDARD; AND CHRISTINE HAINES,

Petitioners,

v.

No. 66 M.D. 2015

PA DEPARTMENT OF CORRECTIONS,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am this day depositing in the U.S. mail a true and correct copy of the foregoing Respondent's Preliminary Objection to Petition for Review upon the person(s) in the above-captioned matter.

Service by first-class mail Addressed as follows:

Charles Kelly, Esq. Saul Ewing One PPG Place, Suite 3010 Pittsburgh, PA 15222 Kathleen A. Higgins, Esq. Office of Open Records

Commonwealth Keystone Building

400 North Street, 4th Floor

Harrisburg, PA 17120-0225

Shelly R. Holley

Legal Assistant II

Pennsylvania Department of Corrections

Office of Chief Counsel

1920 Technology Parkway

Mechanicsburg, PA 17050

(717) 728-7763

Dated: March 9, 2015

APPENDIX C PETITIONER'S RESPONSE TO PRELIMINARY OBJECTIONS

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE HERALD CHRISTINE HAINES)	No.: 66 M.D. 2015 PETITIONERS' RESPONSE TO PRELIMINARY OBJECTION TO PETITION FOR REVIEW
Petition	iers,)	TO PETITION FOR REVIEW
v. PENNSYLVANIA CORRECTIONS,	DEPARTMENT OF)	Filed on Behalf of the Petitioners, Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines
Respor	ndent.)	Counsel of Record for this Party:
			Charles Kelly, Esq. Pa ID No. 51942 ckelly@saul.com Michael J. Joyce, Esq. Pa ID No. 311303 mjoyce@saul.com SAUL EWING LLP 30 th Floor, One PPG Place Pittsburgh, PA 15222 Telephone: (412) 209-2539 Facsimile: (412) 209-2585

Office of Open Records Docket No.: AP 2014-1695

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEW THE HERALD CHRISTINE HAINES	STANDARD;	d/b/a and) No.: 66 M.D. 2015)))
Petition	ners,)
V.) }
PENNSYLVANIA CORRECTIONS,	DEPARTMENT	OF))
Respo	ndent.		j

PETITIONERS' RESPONSE TO RESPONDENT'S PRELIMINARY OBJECTION TO PETITION FOR REVIEW

AND NOW, come the Petitioners, Uniontown Newspapers, Inc., d/b/a The Herald Standard and Christine Haines, by and through their undersigned counsel, Saul Ewing LLP, and hereby submit their Response to Respondent's Preliminary Objection to Petition for Review, as follows:

I. <u>BACKGROUND</u>

- 1. Denied as stated. Petitioners in this matter are Uniontown Newspapers, Inc., d/b/a
 The Herald Standard, and Christine Haines (collectively referred to as "Petitioners"). Petitioners
 incorporate by reference their Petition for Review.
 - 2. Admitted. Petitioners incorporate by reference their Petition for Review.
- Admitted that one form of relief that Petitioners seek through their Petition for Review is enforcement of the subject Final Determination of the Office of Open Records. Petitioners further seek production of relevant documents; a finding that Respondent, the Pennsylvania Department of Corrections ("Respondent" or the "DOC") acted in a willful and wanton manner to deprive Petitioners access to public records; a finding that Respondent acted in bad faith; an award of attorneys' fees and costs; and any other relief that this Court deems appropriate. Petitioners incorporated by reference their Petition for Review, which sets forth the relief requested in this action, and Petitioners' entitlement to the same.

- 4. Petitioners' request pursuant to the Pennsylvania Right to Know Law ("RTKL") is a document which speaks for itself, and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with Petitioners' RTKL request.
- 5. This Paragraph refers to and paraphrases a written document, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document.
- 6. Admitted. By way of further response, Respondent's denial of Petitioners' RTKL request was in bad faith, and otherwise in willful and wanton disregard of Petitioners', and the public's, rights to access to public records under the RTKL.
 - 7. Admitted. Petitioners incorporate by reference their Petition for Review.
 - 8. Admitted. Petitioners incorporate by reference their Petition for Review.
- 9. This Paragraph refers to and paraphrases a written document, the Office of Open Records Final Determination, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document. By way of further response, the DOC has failed to comply with the clear direction of the Final Determination of the Office of Open Records.
- Determination because the Office of Open Records entered the full relief requested by Petitioners at that stage of this dispute (i.e., requiring Respondent to fully comply with Petitioners' RTKL request). Respondent, however, has failed to comply with the clear and mandatory terms of the Final Determination, and, therefore, the RTKL itself.
- 11. Denied as stated. Although following the Final Determination, the DOC provided limited, additional documents, the DOC has failed to fully comply with Petitioners' RTKL request, and the clear terms of the Final Determination. Upon information and belief, additional documents

and information within the possession, custody and/or control of the DOC still exist which: (a) are responsive to Petitioners' RTKL request; and (b) have not been produced by the DOC to Petitioners.

- 12. Admitted. By way of further response, the DOC has failed to fully comply with Petitioners' RTKL request, the Final Determination and the provisions of the RTKL.
- 13. This Paragraph refers to and paraphrases a written document, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document.
- 14. Denied. The DOC has failed to fully comply with Petitioners' RTKL request, the Final Determination and the provisions of the RTKL. Petitioners incorporate by reference their Petition for Review, which more fully sets forth their positions relative to the DOC's failure to comply with Petitioners' RTKL request, the Final Determination and the RTKL.
- 15. Denied as stated. Petitioners filed their Petition for Review, which is incorporated by reference, because, *inter alia*, the DOC has failed to fully comply with Petitioners' RTKL request, the Final Determination and the provisions of the RTKL.
- 16. This Paragraph refers to and paraphrases a written document, Petitioners' Petition for Review, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document.
- 17. This Paragraph refers to and paraphrases a written document, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document. By way of further response, the DOC has failed to fully comply with Petitioners' RTKL request, the Final Determination and the provisions of the RTKL. Petitioners incorporate by reference their Petition for Review, which more fully sets forth their positions relative to the DOC's conduct.

- 18. This Paragraph refers to and paraphrases a written document, Petitioners' Petition for Review, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document.
- 19. This Paragraph refers to and paraphrases a written document, Petitioners' Petition for Review, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document.
- 20. This Paragraph refers to and paraphrases a written document, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document. By way of further response, the DOC has failed to fully comply with Petitioners' RTKL request, the Final Determination and the provisions of the RTKL.
- 21. This Paragraph refers to and paraphrases a written document, Petitioners' Petition for Review, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document.

II. RESPONDENT'S DEMURRER

- 22. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.
- 23. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.
- 24. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.

- 25. This Paragraph refers to and paraphrases a written document, Petitioners' Petition for Review, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document. Additionally, this Paragraph contains legal conclusions, to which no response is required. By way of further response, the Petition for Review seeks enforcement of the Final Determination, among other monetary and non-thonetary relief requested therein and permitted pursuant to the RTKL.
- 26. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.
- 27. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.
- 28. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.
- 29. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.
 - 30. Admitted.
- 31. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.
- 32. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied

that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection. In fact, assuming this Paragraph as true, the existence of an issue of fact renders a ruling on the DOC's Preliminary Objection, which is in the nature of a demurrer, improper as a matter of law.

- 33. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied. It is further specifically denied that the DOC is entitled to any of the relief requested in the DOC's Preliminary Objection.
- 34. This Paragraph refers to and paraphrases a written document, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document. By way of further response, this Paragraph admits what Petitioners have always asserted: the documents and information responsive to Petitioners' RTKL request exist, but the DOC continues its refusal to produce the same. The DOC improperly views the collection of the responsive information and, in turn, compliance with the Final Determination and the RTKL, too burdensome. The DOC, however, never before objected to the alleged burden of responding to Petitioners' RTKL request. Additionally, the alleged burden upon the DOC does not relieve the DOC of its duty to comply with the Office of Open Records Final Determination and the RTKL, and further does not outweigh the paramount interests of the public (through Petitioners) in the transparent operation of Commonwealth agencies, including the DOC.
- 35. This Paragraph refers to and paraphrases a written document, which speaks for itself and is incorporated herein by reference. This Paragraph is denied to the extent that it conflicts in any way with the subject document.
- 36. This Paragraph contains legal conclusions to which no response is required. To the extent that any further response is required, this Paragraph is denied.

Each and every allegation of the DOC's Preliminary Objection not specifically depied above is hereby denied in its entirety.

Ш. CONCLUSION

WHEREFORE, the Petitioners, The Herald Standard and Christine Haines, respectfully request that this Honorable Court overrule Respondent's, the Pennsylvania Department of Corrections', Preliminary Objection to Petition for Review; and provide any further such relief that this Court deems appropriate under the circumstances.

Respectfully submitted,

Charles Kelly (Pa IP No. 51942) SAULEWING LP

One PPG Place, Suite 3010

Pittsburgh, PA 15222

(412) 209-2500 .

Michael J. Joyce (Pa ID No. 311303) SAUL EWING LLP One PPG Place, Suite 3010

Pittsburgh, PA 15222

(412) 209-2500

Counsel for Petitioners, The Herald Standard and Christine Haines

CERTIFICATE OF SERVICE.

I hereby certify that a true and correct copy of the Response to Respondent's Preliminary Objection to Petition for Review filed on behalf of the Petitioners, The Herald Standard and Christine Haines, was served upon the following parties on this 7th day of April, 2015:

Commonwealth of Pennsylvania
Office of Open Records
Attn: Kathleen A. Higgins, Esq.
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
(Via U.S. Mail)

111

Chase M. Defelice, Assistant Counsel
Pennsylvania Department of Corrections
Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050
(Counsel for Respondent, Pennsylvania
Department of Corrections)
(Via U.S. Mail and through the Court's
Electronic Filing System)

Respectfully submitted,

Charles Kelly (Part) No. 51942)

SAUL EWING LLP

One PPG Place, Suite 3010

Pittsburgh, PA 15222

(412) 209-2500

Michael J. Joyce (Pa ID No. 311303) SAUL EWING LLP One PPG Place, Suite 3010 Pitteburgh, PA 15222

Pittsburgh, PA 15222 (412) 209-2500

Counsel for Petitioners, The Herald Standard and Christine Haines

APPENDIX D PETITIONER'S BRIEF IN SUPPORT

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEWSPAPERS, INC., d/b/a THE HERALD STANDARD; and CHRISTINE HAINES, Petitioners, v.) No.: 66 M.D. 2015) PETITIONERS' BRIEF IN) OPPOSITION TO RESPONDENT'S) PRELIMINARY OBJECTION TO) PETITION FOR REVIEW
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,	 Filed on Behalf of the Petitioners, Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines
Respondent.	Herald Standard; and Christine Haines Counsel of Record for this Party: Charles Kelly, Esq. Pa ID No. 51942 ckelly@saul.com Michael J. Joyce, Esq. Pa ID No. 311303 mjoyce@saul.com SAUL EWING LLP 30 th Floor, One PPG Place Pittsburgh, PA 15222 Telephone: (412) 209-2539
) Facsimile: (412) 209-2585

Office of Open Records Docket No.: AP 2014-1695

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UNIONTOWN NEWSPATHE HERALD ST. CHRISTINE HAINES,		/a) nd)))	No.: 66 M.D. 2015
Petitioners,).	•
V ₄ :)	
PENNSYLVANIA DEF CORRECTIONS,	PARTMENT ())))	
Respondent),	

PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENT'S PRELIMINARY OBJECTION TO PETITION FOR REVIEW

AND NOW, come the Petitioners, Uniontown Newspapers, Inc., d/b/a The Herald Standard and Christine Haines, by and through their undersigned counsel, Saul Ewing LLP, and hereby submit their Brief in Opposition to Respondent's Preliminary Objection to Petition for Review:

I. INTRODUCTION

Respondent's Preliminary Objection is simply another step in its attempts to circumvent the clear terms of the Pennsylvania Right to Know Law, avoid compliance with the mandates of the Final Determination of the Office of Open Records compelling it to produce all documents requested by Petitioners, and to further delay and deny Petitioners' (and, more importantly, the public's) access to vital public records. Throughout the open records process, Respondent has taken various and often conflicting positions relative to Petitioners' request for documents: that the documents are exempt from disclosure; that the documents do not exist; that the documents exist, but are too burdensome to actually collect and produce; and that Respondent is otherwise under no duty to produce the requested information. For the reasons set forth below, together with those stated in Petitioners' Petition for Review and Response to Preliminary Objection, Respondent's Preliminary Objection should be overruled, and Respondent should be immediately ordered to produce the documents and information that Petitioners are clearly entitled to, among other relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners seek the intervention from this Commonwealth Court to enforce a Final Determination of the Office of Open Records pursuant to the Pennsylvania Right to Know Law (see Exhibit A to Petitioners' Petition for Review, "PFR", the Office of Open Records Final Determination, "OOR Final Determination"). The OOR Final Determination became final and enforceable on December 31, 2014, the last date on which the Respondent, the Pennsylvania Department of Corrections ("Respondent" or the "DOC"), could appeal to this Court from the OOR Final Determination. The OOR Final Determination mandated that the DOC produce all documents responsive to the Petitioners' sufficiently tailored open records request, which requested information regarding cancerous and other serious health conditions from a specific timeframe from a single DOC facility. (See PFR, at ¶ 1-2, 21-25, and Exhibit A). The DOC, however, never appealed the OOR Final Determination, but instead merely refused to fully comply with the direction of the same and, in turn, the clear requirements of the Pennsylvania Right to Know Law ("RTKL").

Despite the OOR Final Determination, which required the Respondent to fully comply with Petitioners' RTKL request, Respondent has willfully failed to produce all documents it admits to exist, are in its possession or control, and that are responsive to the OOR Final Determination. (See PFR, at ¶ 25-53). The documents that Petitioners requested, and have an immediate right to review, are subject to production as a matter of law and relate to an ongoing debate of public importance about environmentally-related illnesses at the Pennsylvania State Correctional Institution at Fayette ("SCI-Fayette"). (See PFR, at ¶ 4-5). Simply, the DOC has no valid defenses to production of the requested documents, and the DOC must be required to comply with the OOR Final Determination.

On February 6, 2015, Petitioners filed their Petition for Review and Enforcement of Final Determination of Office of Open Records with this Court. Throughout their PFR, Petitioners describe their initial RTKL request (PFR, at § 16-17); the DOC's evasive and boilerplate responses

to the same (id. at ¶ 18-20); Petitioners' appeal to the Office of Open Records, which determined that the DOC failed to meet its burden of establishing any defense to disclosure, and ordered the DOC to produce all records responsive to Petitioners' RTKL request (id. at ¶ 21-24); the DOC's bad faith conduct following the OOR Final Determination, along with its willful and wanton refusal to comply with the OOR Final Determination or the RTKL (id. at ¶ 25-44); and Petitioners' clear entitlement to various relief under the RTKL (id. at ¶ 45-53).

In response, on March 9, 2015, the DOC filed its Preliminary Objection to the PFR. Within its Preliminary Objection, the DOC mistakenly construes the PFR as a request for this Court to exercise mandamus over the DOC, and apparently objects to the relief requested by Petitioners through the PFR. More importantly, the DOC makes a series of admissions in its Preliminary Objection that further bolster Petitioners' entitlement to the relief requested in the PFR:

- 1. The DOC admits that it has not satisfied Petitioners' RTKL request: "Admittedly, all records Ms. Haines requested were not provided." (see Respondent's Preliminary Objection, at ¶ 12);
- 2. Respondent's first declaration of DOC Director Oppman (see PFR, at ¶ 38-39, and Exhibit J), was, at the very least, "poorly worded" by the DOC's own admission (see Respondent's Preliminary Objection, at ¶ 20);
- 3. Even the DOC agrees that Director Oppman's first declaration could at least be construed as admitting that the DOC possessed all documents responsive to Petitioners' RTKL request (id. at ¶ 20);
- 4. If records responsive to Petitioners' RTKL request exist, the DOC agrees that "Petitioner[s] would have a clear right to those records based on the Final Determination from the OOR" (id. at ¶ 30);
- 5. The DOC admits that the information requested by Petitioners is obtainable: "[T]he Department [of Corrections] explains that the records can only be gleaned from reviewing medication records...." (id. at ¶ 34); and
- 6. The DOC reiterates that its declarations give at least the impression that responsive information exists: "Admittedly, Director Oppman's first declaration gives the impression that the Department [of Corrections] possesses every record requested by [Petitioners]" (id. at ¶ 35).

Therefore, the DOC not only admits that Petitioners' stance regarding their RTKL request and the DOC's responses to the same is reasonable and logical, but the DOC further admits that the information responsive to the RTKL request is available (albeit following a review of medical records) and that the DOC has failed to fully comply with Petitioners' RTKL request.

For the reasons set forth below, Respondent's Preliminary Objection should be overruled, and Respondent should be immediately ordered to produce the documents and information that Petitioners are clearly entitled to, among other relief.

III. STANDARD OF REVIEW

Pursuant to Pennsylvania Rules of Appellate Procedure 1516(b) and 1517, when an action is commenced in a Pennsylvania appellate court by petition for review pursuant to such court's original jurisdiction, pleadings and related procedure are controlled by the Pennsylvania Rules of Civil Procedure. Pennsylvania Rule of Civil Procedure 1028(a)(4) permits a party to file preliminary objections asserting, *inter alia*, the legal insufficiency of a pleading (i.e., a demurrer).

This Court has described the standard on demurrer as follows:

Preliminary objections in the nature of a demurrer admit as true all well and clearly pleaded material, relevant factual averments, and all inferences fairly deducible therefrom. However, conclusions of law and unjustified inferences are not so admitted. A demurrer will not be sustained unless the face of the pleadings shows that the law will not permit recovery, and any doubts should be resolved against sustaining the demurrer.

Barndt v. Pa. Depit of Corr., 902 A.2d 589, 592 (Pa. Commw. Ct. 2006) (citations omitted).

IV. LEGAL-ARGUMENT

A. Overview of the RTKL, and Judicial Supervision of the Office of Open Records.

Pennsylvania courts have consistently reiterated that "the objective of the RTKL 'is to empower citizens by affording them access to information concerning the activities of their government.'" <u>Barnett v. Pennsylvania Dep't of Pub. Welfare</u>, 71 A.3d 399, 403 (Pa. Commw. Ct.

2013) (quoting Levy V. Schäte of Pennsylvania, 65 A.3d 361, 381 (Pa. 2013)). Therefore, "courts should liberally construe the RTKL to effectuate its purpose of promoting 'access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." Id.

The RTKL provides a multi-step process for a party requesting documents: (1) the initial request for documents and information, 65 P.S. § 67.702; (2) the agency's response to the request, 65 P.S. § 67.907 – 67.905; (3) appeals to the Office of Open Records, 65 P.S. § 67.1101 – 67.1102; and (4) judicial review of determinations of the Office of Open Records. 65 P.S. § 67.1301 – 67.1310. Following a determination of the Office of Open Records, the RTKL vests courts with broad remedial powers: to reverse Office of Open Records decisions, 65 P.S. § 67.1304(a); to impose sanctions, including attorneys' fees and litigation costs, 65 P.S. § 67.1304(a)-(b); and to impose civil penalties. 65 P.S. § 67.1305. Overall, the Commonwealth Court possesses "the broadest scope of review" following a Final Determination of the Office of Open Records. Coulter w. Pennsylvania: Bd. of Prob. & Parole, 48 A.3d 516, 518 (Pa. Commw. Ct. 2012) (quoting Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Commw. Ct. 2010)).

B. An Enforcement Action is Appropriate under the RTKL, and Mandamus is a Possible Means of Achieving Relief Pursuant to the RTKL.

The instant matter differs slightly from the apparently more common scenario of an appeal from an Office of Open Records Final Determination. In this case, neither party appealed the Final Determination (which rendered it final, and binding, following the passing of

[&]quot;There have been a number of successful actions seeking to enforce final orders of the OOR or of a reviewing court related to the RTKL, and several office cases seeking enforcement are pending below various courts. Based on the agency involved, an action seeking enforcement of such an order would take place in the Commonwealth Court for Commonwealth agencies and in the applicable county court of common pleas for local agencies. Such actions could include an action in mandamus, and an application or a petition to enforce the Final Determination, among other possibilities. This is an especially important, yet undeveloped area of the law . . ." Nathanael Byerly, Esquire & J. Chadwick Schnee, Esquire, What Every Lawyer Needs to Know About the Right-to-Know Law, 83 Pa. B.A. Q. 116, 127 (2012) (emphasis added).

the thirty day appeal period), but the DOC simply failed to comply with the clear mandates of the same. At least one trial court in Pennsylvania has posited that mandamus is likely the appropriate remedy for a local agency that refuses to comply with a Final Determination, despite the DOC's Preliminary Objection to the contrary:

The more appropriate procedural device for commencing an action to enforce the OOR's decision and to secure the requested public records would appear to be the filing of a complaint in mandamus pursuant to Pa. R.C.P. (093(1) and 1095; seeking to compel the local agency's Open Records Officer to produce the relevant The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty, as opposed to a discretionary one, and may issue if the petitioner has "a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists. Fagan v. Smith, 41 A 3d, 816, 818 (Pa; 2012). If the OOR has issued a final determination which has not been timely appealed by the local agency under 65 P.S. § 69.1302, the requester would have a clear legal right to the records at issue and the local agency's Open Records Officer would have a concomitant statutory obligation to produce those materials. The performance of that stability duty would be mandatory, rather than discretionary. Furthermore; since the RTKE does not expressly provide a successful requestor with a designated means to enforce compliance with an OOR final determination, an available remedy at law does not exist

Ledeke v. County of Lackawanna, No. 12-6701, 2013 WL 504447 (C.P. Lackawanna Feb. 7, 2013) (attached as Exhibit "A") (emphasis added). See also Nathanael Byerly, Esquire & J. Chadwick Schnee, Esquire, What Every Lawyer Needs to Know About the Right-to-Know Law, 83 Pa. B.A. Q. 116, 127 (2012) (enforcement actions could sound in, for example, mandamus). Even the Office of Open Records itself suggests that an enforcement action is appropriate, but does not suggest the specific, appropriate remedy. See Pennsylvania Office of Open Records, Information Regarding Enforcement Action of an OOR Final Determination, available at http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/enforce_a_final_deter

mination/933869 ("If the agency does not appeal the OOR's FD, the OOR's FD becomes enforceable on the 31st day after the FD is mailed. As of this date, if the agency has not provided the documents, the requester or the OOR may seek to enforce the order with a Court.").²

"A writ of mandamus is an extraordinary remedy which seeks to compel official performance of a ministerial act or mandatory duty, as opposed to a discretionary act." Barridt v. Pennsylvania Depit of Corr., 902 A.2d 589, 592 (Pa. Commw. Ct. 2006). "The purpose of mandamus is not to establish legal rights, but to enforce those rights already established beyond peradventure. A writ of mandamus may be issued, only where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and lack of any other appropriate and adequate remedy." Africa v. Horn, 701 A.2d 273, 275 (Pa. Commw. Ct. 1997).

Here, this Court must possess the power to compel the DOC to produce the documents relevant to Petitioners' RTKL request. First, the DOC has a clear, mandatory duty to comply with the terms of the RTKL, and this Court has the power to police Final Determinations of the Office of Open Records. See 65 P.S. § 67.1301 – 67.1310. In fact, the Commonwealth Court has the power to issue civil penalties for non-compliance with orders under the RTKL. See 65 P.S. § 67.1305(b). Moreover, the DOC itself admits that, assuming responsive information exists (which the DOC further admits that the requested information can be discovered following a review of inmate medical records, see DOC Preliminary Objection, at ¶ 34): "Petitioner[s] would have a clear right to those records based on the Final Determination from the OOR." (DOC Preliminary Objection, at ¶ 30). Therefore, not only does the DOC have a mandatory duty to comply with the RTKL and the Final Determination, but Petitioners further have a clear right to the relief requested. Mandamus relief is, accordingly, appropriate in this case. Second, as stated in

At least one enforcement action was filed with the Commonwealth Court. That matter, however, was terminated because the petitioner failed to file a statement of intention to proceed. See <u>Johnson v. Pa. Convention Ctr. Anth.</u>, No. 379 MD 2011 (filed on Aug. 17, 2011).

Ledcke (see Exhibit A), mandamus may be the only remedy available to enforce an unappealed Final Determination, such as the one in this case, further rendering exercise of mandamus jurisdiction appropriate in this dispute.

Therefore, despite the DOC's Preliminary Objection suggesting the contrary, this Court has the power to compel the DOC to comply with the clear mandatories of the OOR Final Determination pursuant to its mandamus jurisdiction.

C. Regardless of the Form of Relief, this Court Must Have the Power to Enforce the OOR Final Determination Against the DOC.

Regardless of the procedure for enforcement, whether derived from the RTKL itself or the more general mandamus power of this Court, unless this Court has the power to enforce a Final Determination of the Office of Open Records, the entire RTKL statutory scheme would be significantly undermined, if not completely vitiated. If the Court lacks such enforcement power, Commonwealth agencies could escape their obligations under the RTKL, and thwart the public's right to access to vital, public information, merely by bringing every RTKL request to the Final Determination stage. The RTKL clearly vests power in the judiciary to oversee and enforce the Office of Open Records proceedings, see 65 P.S. § 67.1301 – 67.1310, and the Court should exercise its power in this case to further bind the DOC to the OOR Final Determination.

Therefore, this Court has the power to enforce the OOR Final Determination in this case, and compel the DOC to produce all responsive documents to Petitioners' RTKL request (whether termed under the judicial police powers of the RTKL, of an exercise of mandamus jurisdiction). In that regard, considering the significant lapse of time from Petitioners' original RTKL request (September 25, 2014), and from the OOR Final Determination (December 1, 2014), this Court should require the DOC to produce all responsive documents within seven days of entry of an appropriate Order of Court. Accordingly, the DOC's Preliminary Objection should be overruled.

V. CONCLUSION

For the reasons set forth above, together with those stated in Petitioners' Petition for Review and Response to Preliminary Objection, Respondent's Preliminary Objection should be overruled, and Respondent should be immediately ordered to produce the documents and information that Petitioners are clearly entitled to, among other relief.

WHEREFORE, the Petitioners, The Herald Standard and Christine Haines, respectfully request that this Honorable Court overrule Respondent's, the Pennsylvania Department of Corrections', Preliminary Objection to Petition for Review; and provide any further such relief that this Court deems appropriate under the circumstances.

Respectfully submitted,

Charles Kelly (Pall) No. 51942)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief in Opposition to Respondent's Preliminary Objection to Petition for Review filed on behalf of the Petitioners, The Herald Standard and Christine Haines, was served upon the following parties on this 7th day of April, 2015:

Commonwealth of Pennsylvania
Office of Open Records
Attn: Kathleen A. Higgins, Esq.
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Harrisburg, PA 17120-0225
(Via U.S. Mail)

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Pennsylvania Department of Corrections
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Electronic Filing System)

Respectfully submitted,

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BXHBIIA

2013 WL 504447 (Pa.Com.Pl.) (Trial Order) Court of Common Pleas of Pennsylvania. Lackawanna County

Shawn Michael LEDCKE, Petitioner,

COUNTY OF LACKAWANNA, Respondent.

No. 12 CV 6701. February 7, 2013.

Order.

Shawn Michael Ledcke, ID # 18807-424, USP Florence - High, United States Penitentiary, P. O. Box 7000, Florence, CO 81226-7000, Pro se.

Donald J. Frederickson, Jr., Esq., County Solicitor, Lackawanna County Administration Building, 6th Floor, 200 Adams Avenue, Scranton, PA 18503, Counsel for County of Lackawanna.

Terrence R. Nealon, Judge.

Petitioner, Shawn Michael Ledcke ("Ledcke"), has filed a petition seeking to enforce a final determination of the Office of Open Records ("OOR") relative to records and materials in the custody of the Lackawanna County Prison that the OOR found to be discoverable under the Pennsylvania Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104. (Docket Entry No. 1). Defendant, County of Lackawanna ("the County"), filed a response to Ledcke's petition, and an evidentiary hearing was conducted on January 31, 2013. (Docket Entry No. 6). For the reasons set forth below, Ledcke's petition to enforce will be dismissed as moot and his request for an award of fees and expenses will be denied.

Factual Background

On April 9, 2012, Ledcke submitted a RTKL request to the County seeking fifteen itemized categories of digital, paper and electronic records pertaining to his incarceration at the Lackawanna County Prison between June 15, 2010, and September 10, 2010. ¹ More specifically, Ledcke demanded access to records concerning an incident in which he was involved at the County Prison on August 9, 2010, as well as his subsequent disciplinary hearing on August 19, 2010. (See Ledcke letter to OOR Appeals Officer, Kyle Applegate, Esq., dated 9/27/12, pp. 2-4). Ledcke's RTKL request also sought copies of his "medical records" and "psycology (sic) & psyciatrist (sic) records" that were "developed at L.C.P. [Lackawanna County Prison] between 6/1/10 & 9/30/10," ² (Id. at p. 3).

The County did not respond to Ledcke's RTKL request, nor did it request an extension of time within which to answer pursuant to 65 P.S. § 67.902, as a result of which Ledcke's request was deemed denied under Section 901 of the RTKL. See 65 P.S. § 67.901 ("The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied."). On May 7, 2012, Ledcke filed an appeal of the County's deemed denial with the OOR in accordance with Section 1101 of the RTKL. See 65 P.S. § 67.1101(a)(1) ("If a written request for access to a record is... deemed denied, the requester may file an appeal with the Office of Open Records... within 15 business days of a deemed denial."). Upon receipt of Ledcke's appeal, the OOR Appeals Officer "invited both parties to supplement the record," but "[n]either party did so." (OOR Final Determination dated 6/6/12 at p. 2).

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On June 6, 2012, the OOR issued a Final Determination granting Ledeke's appeal in part and denying it in part. Noting that local agency records are presumed to be public and accessible unless they are exempt by federal or state law, regulation or decree, see 65 P.S. § 67.305, the Appeals Officer found "that the County did not meet its burden under the RTKL of proving that the requested records are exempt from disclosure." (Id. at p. 3 (citing 65 P.S. § 67.708(a)(1)). Nevertheless, the OOR concluded that "[n]otwithstanding the County's failure to meet its burden of proof under the RTKL, [Ledeke's] medical records are exempt from disclosure under the Health Insurance Portability and Accountability Act of 1996 ('HIPAA')" and the regulations promulgated under HIPAA. (Id. at pp. 3-4 (quoting 45 C.F.R. § 164.502(a)). The Appeals Officer further reasoned that Ledeke's request for his "mental health treatment" records sought documents that must "be kept confidential" and are, therefore, exempt from disclosure by Section 111 of the Mental Health Procedures Act ("MHPA"), 50 P.S. § 7111. (Id. at p. 4). Thus, the Appeals Officer held that "to the extent [Ledeke] seeks records relating to medical and mental health treatment, the appeal is denied." (Id.). As a consequence, the OOR directed the County "to provide all responsive records, with the exception of [Ledeke's] medical and mental health records, to [Ledeke] within thirty (30) days." (Id.).

The County failed to produce those records which the OOR had determined were discoverable, and as a result, Ledcke filed the instant "Petition to Enforce Final Determination of Office of Open Records Pursuant to Section 1302 of the Pennsylvania Right-To-Know Law, 65 Pa.C.S. § 67.1302" seeking the prompt production of those records and the assessment of fees and costs against the County pursuant to 65 P.S. § Ledcke's requested relief should not be granted, and an evidentiary hearing was scheduled for December 11, 2012. (Docket Entry No. 1). After that Order was served upon the County, the Open Records Officer for the County filed a "Final Determination Affidavit" attesting that the County had forwarded all the responsive records to Ledcke via the Federal Correctional Institution in Talladega, Alabama. (Docket Entry No. 4, Exhibit A). The County filed a response to Ledcke's petition on November 16, 2012, and at the request of the County, the hearing was continued to January 31, 2013. (Id. Nos. 4, 6).

At the time of the evidentiary hearing, the County represented that once Ledeke filed his change of address of record, (*Id.* No. 5), it resent the responsive materials to Ledeke at the federal penitentiary in Florence, Colorado. The County Solicitor stated that Ledeke subsequently contacted him by telephone and indicated that the prison officials in Colorado were not granting him access to the County's RTKL response and records. At Ledeke's request, the County Solicitor forwarded a third set of responsive materials to Ledeke's relative, Lacrsa Williams, in Sydney, Ohio. Neither the County nor the court has received any further communication or filing from Ledeke.

Validity of "Petition to Enforce"

Ledeke instituted this action by filing a "Petition to Enforce Final Determination of Office of Open Records" pursuant to 65 P.S. § 67.1302. Section 1302 of the RTKL governs the jurisdiction of common pleas courts in RTKL disputes following a final determination by the OOR relating to records of local agencies, and states that "[w]ithin 30 days of the mailing date of the final determination of the [OOR] relating to a decision of a local agency issued under section 1101(b), or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located." 65 P.S. § 67.1302(a). By its plain language, Section 1302 only authorizes the filing of "a petition for review or other document as required by rule of court" as the appropriate procedural device for invoking common pleas court jurisdiction, and does not provide for the filing of a civil action by way of a "petition to enforce."

Under Pennsylvania Rule of Civil Procedure 1007, a civil action may be commenced solely by the filing of a complaint or a praccipe for a writ of summons. See Pa.R.C.P. 1007. An action may be instituted by the filing of a petition and rule to show cause only if it is expressly authorized by statute or rule of court. Petition of Tax Claim Bureau of Westmoreland County, 149 Pa. Cmwlth. 532, 539, 613 A.2d 634, 638 (1992), app. denied, 533 Pa. 615, 618 A.2d 404 (1992); Rusbarsky by Rusbarsky v. Rock. 324 Pa. Super. 28, 31, 471 A.2d 107, 108 (1984). For example, a party may initiate a civil proceeding by the filing of a petition to enforce an order of the Pennsylvania Labor Relations Board pursuant to 42 P.S. § 1101.1501, see Lawrence

County v. Com., Pennsylvania Labor Relations Bd., 79 Pa. Cmwlth. 14, 20-21, 469 A.2d 1145, 1147-1148 (1983), a petition to enforce and confirm an arbitration award under 42 Pa.C.S.A. § 7315, see Borough of Dunmore v. Dunmore Police Department, 106 Cmwlth. 461, 464-465, 526 A.2d 1250, 1252-1253 (1987), app. denied, 518 Pa. 614, 540 A.2d 535 (1988), a petition to enforce subpoenas issued by the Pennsylvania Securities Commission under 70 P.S. § 1-510(b), see In re American Bank and Trust Company of Pennsylvania, 23 Pa. Cmwlth. 434, 438-439, 332 A.2d 858, 861 (1975), a petition to enforce an arbitration agreement, see Messa v. State Farm Insurance Company, 433 Pa. Super. 594, 596, 641 A.2d 1167, 1168 (1994), a judgment creditor's petition to enforce a judgment against a school district pursuant to 24 P.S. § 6-611, see Coco Brothers, Inc. v. Board of Public Education of School District of Pittsburgh, 530 Pa. 309, 310-311, 608 A.2d 1035, 1035-1036 (1992), a petition to enforce subpoenas issued by Philadelphia City Council in accordance with Section 8 of the First Class City Code, 53 P.S. § 12528, see City Council of City of Philadelphia v. Greene, 856 A.2d 217, 224-225 (Pa. Cmwlth. 2004), app. denied, 584 Pa. 710, 885 A.2d 43 (2005), and a petition to enforce, in the Commonwealth Court of Pennsylvania, by a governmental unit seeking to enforce an order issued under a statute which it administers, it may initiate the proceedings by filing a petition to enforce.").

However, no statute or rule of court endorses the filing of a "petition to enforce" the OOR's final determination as a substitute for original process in initiating a civil action in compliance with Pa.R.C.P. 1007. If a party initiates a civil proceeding by the filing of a petition and rule to show cause, but no statute or rule expressly authorizes that use of a petition and rule as original process, the civil action is "improperly commenced" and "the common pleas court ha[s] no power to act and no jurisdiction over" the parties. Flaherty v. Burke, 101 Pa. Cmwlth. 19, 23, 515 A.2d 365, 367 (1986). Accord In re Casale, 512 Pa. 548, 554, 517 A.2d 1260, 1263 (1986) ("Even on the civil side of our courts, an action brought by petition and rule, neither authorized by statute nor auxiliary to jurisdiction already obtained and not designed to correct the court's own records, is a nullity and confers no jurisdiction on the court."); In re Correction of Official Records with Civil Action, 44 Pa. Cmwlth. 511, 513-514, 404 A.2d 741, 742-743 (1979) (reversing trial court order directing recorder of deeds to remove oil and gas leases from public records, and holding that lower court lacked jurisdiction and power to act since suit was instituted by petition and rule as original process, even though there was no statutory authorization for such use of a petition and rule).

The more appropriate procedural device for commencing an action to enforce the OOR's decision and to secure the requested public records would appear to be the filing of a complaint in mandamus pursuant to Pa.R.C.P. 1093(1) and 1095 seeking to compel the local agency's Open Records Officer to produce the relevant records. The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty, as opposed to a discretionary one, and may issue if the petitioner has "a clear legal right; the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists." Fagan v. Smith. 41 A.3d 816, 818 (Pa. 2012). If the OOR has issued a final determination which has not been timely appealed by the local agency under 65 P.S. § 69.1302, the requester would have a clear legal right to the records at issue and the local agency's Open Records Officer would have a concomitant statutory obligation to produce those materials. The performance of that statutory duty would be mandatory, rather than discretionary. Furthermore, since the RTKL does not expressly provide a successful requestor with a designated means to enforce compliance with an OOR final determination, an available remedy at law does not exist. ⁶

In connection with a duly instituted civil action, a requester may possibly seek to obtain records pursuant to an unappealed OOR final determination by requesting a civil contempt order against the non-compliant Open Records Officer who has been designated by the local agency under 65 P.S. § 67.502 to respond to RTKL requests on behalf of the local agency. See 65 P.S. § 67.502. The OOR is an administrative agency, see Scott v. Delaware Valley Regional Planning Commission, 56 A.3d 40, 43-44 (Pa. Cmwlth, 2012), and some precedent recognizes that a local agency may be held in civil contempt of an order issued by an administrative agency. See, e.g., Com., Department of Environmental Resources v. Derry Township, 466 Pa. 31, 39, 351 A.2d 606, 610 (1976) (Department of Environmental Resources' petition seeking to have municipality held in contempt of administrative order under 45 P.S. § 691.210 found to be "proper procedure."). But see Petition for Enforcement of Subpoenas to John Doe Corporations, 507 Pa. 137, 160, 489 A.2d 182, 194 (1985) (Zappala, J., dissenting) (opining that 42 Pa.C.S.A. § 4132, "Attachment and summary punishment for contempts" does not grant "the courts of this Commonwealth... the power to impose the punishment of civil contempt for disobedience or neglect of the process of administrative agencies," absent some

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statutory authority by the legislature). To secure a finding of civil contempt in order to coerce compliance and, if appropriate, to compensate the complainant for losses sustained, the complainant must establish by a preponderance of the evidence that the contemnor had notice of the order, that its non-compliance was volitional, and that the contemnor acted with wrongful intent. *MacDougall v. MacDougall*, 49 A.3d 890, 892 (Pa. Super. 2012); *In re Contempt of* Christopher P. Cullen, 849 A.2d 1207, 1210-1211 (Pa. Super. 2004), *app. denled*, 582 Pa. 676, 868 A.2d 1208 (2005). It is conceivable that a requester, who is denied access to public documents that the OOR has determined to be discoverable, may also seek to obtain those records by way of a civil contempt petition.

The County has not raised an objection to the propriety of the "petition to enforce" that has been filed by Ledeke, Therefore, it is not necessary to decide whether such a petition is an appropriate form of original process under Pa.R.C.P. 1007 or the RTKL. Of course, the Legislature may resolve this procedural dilemma by amending the RTKL to provide a successful requester with a statutorily authorized means of seeking relief from the Commonwealth Court and the common pleas courts to enforce a final determination of the OOR which has not been timely appealed by the Commonwealth, legislative, judicial or local agency.

Ledcke's petition seeks to enforce compliance with the OOR's final determination by compelling the County to produce the materials that the OOR Appeals Officer found to be accessible. It is undisputed that the County has now produced those records on three separate occasions, and the record does not contain any submission or communication suggesting that Ledcke is dissatisfied with the County's response, Consequently, Ledcke's petition to enforce is now moot and will be dismissed on that havis

Request for Fees and Costs

In his "petition to enforce," Ledoke also seeks an award of "all costs and fees" in accordance with Section 1304 of the RTKL. (Docket Entry No. 1, at pp. 6-8). Section 1304 governs the recovery of "[c]ourt costs and attorneys fees" in judicial appeals of OOR determinations, and provides:

- (a) Reversal of agency determination. - If a court reverses the final determination of the appeals officer or grants access to a record after a request for access was deemed denied, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester if the court finds either of the following:
- (1) the agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or
- (2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.
- (b) Sanctions for frivolous requests or appeals. The court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to an agency or the requester if the court finds that the legal challenge under this chapter was frivolous.
- (c) Other sanctions. -- Nothing in this act shall prohibit a court from imposing penalties and costs in accordance with applicable rules of court.

65 P.S. § 67.1304.

Section 1304(a) provides two bases for a requester to recover counsel fees and costs. First, the successful requester may recover such fees and costs if the agency denied access to a public record willfully or with wanton disregard, or otherwise acted in bad faith in responding to a RTKL request. See 65 P.S. § 67.1304(a)(1). Alternatively, a requester may be awarded counsel fees and costs if the exemption, exclusion or defense asserted by the agency was not based upon a reasonable interpretation of the

law. See 65 P.S. § 67.1304(a)(2). By contrast, a prevailing agency may only recover counsel fees and costs under the singular ground set forth in Section 1304(b). Under subsection (b), the prevailing agency, as well as a successful requester, may recover counsel fees and costs if the legal challenge advanced by the unsuccessful litigant was "frivolous." 65 P.S. § 67.1304(b). Thus, Section 1304 provides three grounds for the recovery of counsel fees and costs by a prevailing requester, but only one basis for such an award to an agency which succeeds on appeal. Cf. Scott, 56 A.3d at 47-48.

To receive an award of counsel fees and costs under Section 1304(a), the requester must either establish willful, wanton or bad faith conduct by the agency, or, at a minimum, a legal argument on appeal that was the product of an unreasonable interpretation of the governing law. See Barkeyville Borough v. Sterns, 35 A.3d 91, 98 (Pa. Cmwlth. 2012) (holding that trial court committed reversible error in awarding attorney fees, and finding "[t]here is no evidence in the record that the Borough acted in bad faith or that it unreasonably interpreted the law."). Counsel fees and costs are recoverable under either of those grounds only if (1) the court reverses the OOR final determination, or (2) the court grants access to records following a deemed denial by the agency. See 65 P.S. § 67.1304(a). The criterion for a counsel fee award set forth in Section 1304(a)(2), i.e., lack of "a reasonable interpretation of law," appears to be less demanding than the willful, wanton and bad faith standard contained in Section 1304(a) (1), See, e.g., Weiley v. Albert Einstein Medical Center, 51 A.3d 202, 211 (Pa. Super, 2012) ("Wanton misconduct means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow."); In re Estate of Warden, 2 A.3d 565, 574 (Pa. Super, 2010) ("The Pennsylvania Supreme Court has defined bad faith conduct as being motivated by 'fraud, dishonesty or corruption.'"), app. denied, 610 Pa. 580, 17 A.3d 1255 (2011).

The recovery of counsel fees and costs under Section 1304(b) applies more broadly to any frivolous "legal challenge" by a party, and unlike Section 1304(a), is not confined to agency conduct in connection with an unsuccessful deemed denial or a reversal of the OOR final determination. Moreover, "an RTKL challenge is frivolous under Section 1304(b) if it is arbitrary, vexatious or the result of bad faith." *Pennsylvania State Troopers Association* v. Scolforo, 18 A.3d 435, 442 (Pa. Cmwlth. 2011). Reported decisions involving an award of counsel fees and costs under Section 1304 are apparently non-existent, and two commentators have observed;

As of this writing, the authors are unaware of any unappealed judicial award of attorney fees or civil penalties based on the finding that either an agency acted in bad faith or based its reasons for denying access to records on an unreasonable "interpretation of the law," although the Commonwealth Court has reversed a Court of Common Pleas of Venango County decision awarding attorney fees based on a lack of evidence "that the Borough acted in bad faith or that it unreasonably interpreted the law." Similarly, while the RTKL provides that both requesters and agencies may be subject to attorney fees and costs of litigation for pursing frivolous appeals, no court has yet made such a finding.

Byerly & Schnee, supra, at 129 (footnotes omitted),

In Andrew Staub and the Citizens Voice v. City of Wilkes-Barre and LAG Towing, Inc., No. 8294 of 2012 (Luz. Co. Oct. 16, 2012), Judge Lesa S. Gelb awarded counsel fees to a prevailing requester after finding that the City of Wilkes-Barre and its contracted towing company, LAG Towing, Inc., ("LAG"), had engaged in frivolous conduct. On July 22, 2011, a Luzerne County newspaper, The Citizens Voice, and its reporter, Andrew Staub, had requested LAG's towing records and receipts from the City of Wilkes-Barre, and on August 29, 2011, the City and LAG denied the request on the ground that the records were not "accessible under the Right-to-Know Law." Id. at p. 2. At the time that LAG had affirmatively represented that the towing records were not discoverable under the RTKL, it knew that the requested records had been destroyed and no longer existed. Id. at p. 3. The City solicitor likewise "knew that there was a possibility that there were no records based on his conversations with [LAG] in July 2011," and was aware that pursuant to Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Cmwlth, 2010), the City could have responded to the RTKL request by submitting an affidavit attesting to the non-existence of the records sought. Id. at pp. 3-4.

Neither the City nor LAG informed the requesters that the records did not exist, and as a consequence, the requesters filed an appeal to the OOR. Id. at p. 2. On January 27, 2012, the OOR determined that "providing towing services relating to the City's enforcement of its ordinances, laws or other lawful directives is the performance of a governmental function," under 65 P.S. § 67.506(d)(1), see SWB Yankees, LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012), such that LAG's towing records were subject to disclosure under the RTKL. Id. at p. 2. After the requesters had secured the favorable determination by the OOR, the City and LAG informed the requesters that the records sought did not exist, Id. at pp. 2-3.

In granting the requesters' motion for counsel fees under Section 1304(b) of the RTKL, Judge Gelb reasoned:

This Court finds that LAG Towing engaged in willful and wanton misconduct when it litigated a matter frivolously. Specifically, the Defendant, LAG Towing, Inc., argued that the information contained in its records was confidential, proprietary information when, according to LAG itself, those records did not exist at the time the statement was made. It is beyond comprehension that it was purported that the towing records had confidential, proprietary information contained within them when counsel for LAG never reviewed such documents because [LAG] admitted that no such documents existed. Therefore, no such documents could have ever been reviewed and these non-existent records could not contain confidential or proprietary information. The appeal by LAG Towing to the RTKL request was frivolous when all that was necessary was an affidavit indicating that there were no responsive records.

Additionally, the City of Wilkes-Barre responded to the RTKL request that it did not possess any responsive records. But what the City did not do is indicate that LAG did not have any responsive records when it knew early on that LAG did not have the records, or as [the City Solicitor] indicated "he knew it was a possibility that LAG Towing, Inc. had no responsive records to the request fairly early on in this matter." [citation omitted]. To know for sure, all [the City Solicitor] had to do was ask [LAG] at that time whether [LAG] in fact had the responsive records. Wilkes-Barre let LAG take the lead in the RTKL litigation, having a good idea that LAG had no records and failed to ensure that either LAG provided an affidavit of no records or notified the Citizens Voice or OOR mediator that LAG did not have any records which the Citizens Voice was requesting.

Id. at pp. 4-5. Based upon the foregoing findings, the Luzerne County court directed LAG to pay 90% of the requester's counsel fees, with the remaining 10% to be paid by the City. Id. at p. 6. The City and LAG have appealed that counsel fee ruling to the Commonwealth Court of Pennsylvania. See Staub v. City of Wilkes-Barre, No. 2140 CD 2012 (Pa. Cmwith. 2012).

During the hearing on January 31, 2013, counsel for the County represented that the failure to timely furnish the pertinent items to Ledcke was the result of inadvertent oversight rather than deliberate obstruction. In the early summer of 2012, the County was undergoing a transition in its Open Records Officer position, and the new Open Records Officer mistakenly believed that the responsive records were being produced and delivered by the County Prison instead of the County Administration. Once the County was served with Ledcke's petition to enforce, it promptly provided the responsive materials to Ledcke by forwarding them to the federal penitentiaries in Alabama and Colorado and to his relative in Ohio. The record does not contain any evidence indicating bad faith, willful or wanton conduct, or frivolous legal argument on the part of the County. More importantly, Ledcke has not incurred any counsel fees or litigation costs since he has proceeded *pro se* and payment of the filing fee was waived by the Clerk of Judicial Records due to his *informa pauperis* status. (Docket Entry No. 1). Accordingly, based upon the foregoing, his request for an award of "all costs and fees" will be denied.

AND NOW, this 7th day of February, 2013, upon consideration of the "Petition to Enforce Final Determination of Office of Open Records Pursuant to Section 1302 of the Pennsylvania Right-To-Know Law" filed by Petitioner, Shawn Michael Ledcke, the response of the County of Lackawanna, and the evidence introduced during the hearing on January 31, 2013, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

1. The "Petition to Enforce" the final determination issued by the Office of Open Records on June 6, 2012, is DISMISSED as moot; and

The petitioner's request for an award of "all costs and fees" pursuant to 65 P.S. § 67.1304 is DENIED.

BY THE COURT:

<<signature>>

Terrence R. Nealon

cc: Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. Civ. P. 236(a)(2) by mailing time-stamped copies to:

Shawn Michael Ledcke

ID # 18807-424

USP Florence - High

United States Penitentiary

P. O. Box 7000

Florence, CO 81226-7000

Pro se-

Donald J. Frederickson, Jr., Esq.

County Solicitor

Lackawanna County Administration Building

6th Floor, 200 Adams Avenue

Scranton, PA 18503

Counsel for County of Lackawanna

Footnotes

Ledcke was indicted for various firearms offenses in the United States District Court for the Northern District of Illinois after "Ledcke purchased approximately 43 firearms in Ohio and sold them in Chicago to reputed members of street gangs and the Mexican mafia," U. S. v. Ledcke, 231 Fed. Appx. 507, 508, (7th Cir. 2007), cert. denied. 553 U.S. 1006 (2008). Ledcke pled guilty to the firearms charges, and the federal district court sentenced him to ten years imprisonment after imposing calancements to Ledcke's base offense level score under the sentencing guidelines due to his 2000 conviction for reckless homicide and 1996 conviction for aggravated battery. Id. at 508-509. Ledcke appealed his sentence, but the United States Court of Appeals for the Seventh Circuit affirmed Ledcke's sentence on July 23, 2007. Id. at 512. There is no indication in either the administrative record of the OOR or the court file maintained by the Clerk of Judicial Records regarding the circumstances that led to Ledcke's incarceration at the Lackawanna County Prison in the summer of 2010 while he was still serving his federal sentence.

- On December 12, 2011, Ledeke filed a pro se lawsuit against the Pennsylvania Department of Corrections, the Lackawanna County Sheriff, the Lackawanna County Prison, and the Prison Warden, Robert McMillian, in the United States District Court for the Middle District of Pennsylvania seeking "wide ranging materials, including audio and videotapes, as well as production of documents," pursuant to the RTKL and the federal Freedom of Information and Privacy Acts, 5 U.S.C. §§ 551-552a, Ledeke v. Pennsylvania Dept. of Corrections, 2012 WL 716052, at *1 (M.D. Pa. 2012). On February 3, 2012, U. S. Magistrate Judge Martin C. Carlson issued a Report and Recommendation concluding that Ledeke's action should be dismissed, without further leave to amend his complaint, since; (1) the Freedom of Information and Privacy Acts "only applied to federal agencies and offices;" (2) the appropriate remedy for denial of a RTKL "request is to appeal that denial in state court;" (3) the Eleventh Amendment to the U. S. Constitution "precludes persons from pursing claims against state agencies and officials under Pennsylvania's Right-To-Know Law;" and (4) diversity of citizenship jurisdiction did not exist under 28 U.S.C. § 1332(a)(1) in that the amount in controversy did not exceed \$75,000,00. Id. at *4-5. On March 5, 2012, U. S. District Judge John B. Jones III adopted the Report and Recommendation dated Pebruary 3, 2012, and dismissed Ledeke's suit. See Ledeke v. Pennsylvania Dept. of Corrections, 2012 WL 718591, at *2 (M.D. Pa. 2012). Thirty five days later, Ledeke submitted his RTKL request to the County.
- Section 102 of the RTKL defines a "[p]ublic record" as "[a] record, including a financial record, of a ...local agency that: (1) is not exempt under [65 P.S. § 67.708]; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege." 65 P.S. § 67.102. HIPAA regulates the conduct of third parties who have access to protected medical information, Pik v. University of Pennsylvania, 2010 WL 3933275, at * 4 (E.D. Pa. 2010), and "defines certain patient rights such as the patient's right to access his/her medical record information." Jones v. Shelby County Government Civil Service Merit Bd., 2012 WL 5503859, at *1 n.1 (Tonn, Ct. App. 2012). HIPAA empowers the Secretary of the U.S. Department of Health and Human Services to promulgate regulations to implement uniform national standards for the protection and disclosure of health information. See Citizens for Health v. Leavitt, 428 F.3d 167, 172 (3d Clr. 2005). Those regulations recognize an individual's right of access to his or her own medical records. See 42 C.F.R. § 482.13(d)(2) ("The patient has the right to access information contained in his or her clinical records within a reasonable time frame."); 45 C.F.R. § 164.524(a)(1) (stating that, as a general rule, "an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set...."). "The obvious thrust of the regulations is to deny inappropriate access to a patient's records by third parties, not to deny a patient access to his or her own records." Merryfield v. Kansas Social and Rehabilitation Services, 44 Kan. App. 2d 324, 332, 236 P.3d 528, 534 (2010) (citing 42 C.F.R. § 482.13(d)(2)).

The OOR quoted 45 C.F.R. § 164.502(a) in support of its conclusion that Ledcke's medical records were exempt from disclosure. Although that regulation generally states that "[a] covered entity may not use or disclose protected health information, except as permitted or required by this subpart," it also identifies "[p]ermitted uses and disclosures" and provides that "[a] covered entity is permitted to use or disclose protected health information... [t]o the individual." 45 C.F.R. § 164.502(a)(1)(i). A possible basis for denying Ledcke access to his own medical records can be found in a separate regulation which states that "[a] covered entity that is a correctional institution or a covered health care provider acting under the direction of the correctional institution may deny, in whole or in part, an immate's request to obtain a copy of protected health information if obtaining such copy would jeopardize the health, safety, security, custody or rehabilitation of the individual or of other immates, or the safety of any officer, employee, or other person at the correctional institution or responsible for the transporting of the immate." 45 C.F.R. § 164.524(a)(2)(ii).

The state MHPA and the accompanying regulations adopted by the Department of Public Welfare also provide that "the patient controls the release of information contained in his or her [mental health] records and is entitled to access those records." Christy v. Wordsworth-at-Shawnee, 749 A.2d 557, 558 (Pa. Cmwlth. 2000) (citing 55 Pa. Code § 5100.31(f)). See also 55 Pa. Code § 5100.32(d). Therefore, although the MHPA and the foregoing regulations operate to deny third parties access to Ledcke's mental health treatment records, they do not serve as grounds for denying Ledcke access to his own mental health records.

- A petition to enforce may also be filed in a pending suit that has been commenced by the filing of a complaint or writ of summons as original process. See, e.g., Salsman v. Brown, 51 A.3d 892, 893 (Pa. Super. 2012) (petition to enforce settlement agreement in breach of contract action); Annechino v. Joire, 946 A.2d 121, 124-125 (Pa. Super. 2008) (petition to enforce marriage settlement agreement under 23 Pa.C.S.A. § 3105).
- Other immates have sought to enforce an OOR final determination by filing a "petition to enforce" as initial process, See Byerly & Schnee, What Every Lawyers Needs to Know About the Right-To-Know Law, 83 Pa. B.A.Q. 116, 127 n. 120 (July 2012) (citing Thomas v. Wolgemuth and Lebanon County Right To Know Office, No. 2012 00063 (Leb. Co. April 10, 2012) (granting pro se prisoner's petition to enforce OOR's final determination)). The filings in Thomas reflect that the inmate petitioner submitted a proposed "Order to Enforce Final Determination of PA Office of Open Records," which the trial judge signed on April 10, 2012, after Lebanon County and its Open Records Officer failed to answer the rule to show cause by the rule returnable date of January 25, 2012, (See "Motion to Move the Court to Enter Order to Enforce Final Determination of PA Office of Open Records," at §5 in Thomas, supra.). Additionally, an enforcement action was instituted in the Court of Common Pleas of Lackawanna County by the filing of a "Petition to Enforce

Final Determination of Office of Open Records" and the issuance of a Rule to Show Cause in Rogan v. County of Lackawanna and Correctional Care, Inc., No. 09 CV 6858 (Lacka. Co. Oct. 13, 2009). However, prior to the scheduled rule to show cause hearing, the parties agreed to stay that enforcement action pending the outcome of a prior suit, Lackawanna County v. Correctional Care, Inc., No. 09 CV 6194 (Lacka. Co.). See Rogan v. County of Lackawanna and Correctional Care, Inc., No. 09 CV 6858, Minora, I. (Lacka. Co. Nov. 2, 2009) (approving joint motion to stay proceedings). Thus, the propriety of initiating a civil action by the filing of a "Petition to Enforce Final Determination of Office of Open Records" was never addressed in Rogan, nor do the limited filings in that case suggest that an issue was over raised regarding the filing of a civil action via a "petition to enforce,"

There is decisional authority under the former Right to Know Act staling that mandature is not a proper remedy for a requestor who has been denied access to local agency records, but who has not sought recourse under the appeal procedure set forth in that Act. Under Section 4 of the old Right-to-Know Act, Act of June 21, 1957, P.L. 390, § 4, 65 P.S. § 66.4 (repealed), any citizen who was denied access to public records of a local agency could appeal that denial to the common pleas court, and "[i]f such court determine[d] that such denial was not for just and proper cause under the terms of [the former] act, it may enter such order for disclosure as it may deem proper." See Weaver v. Department of Corrections, 702 A.2d 370, 371 n. 1 (Pa. Cmwith. 1997), app. denied, 553 Pa. 685, 717 A.2d 536 (1998), In 2002, Section 4 of the prior Act was amended to eliminate the "just and proper cause" standard, See Van Osdol v. Com., Department of Transportation, 909 A.2d 428,430 n. 3 (Pa. Cmwith. 2006). The former Right to Know Act, 65 P.S. §§ 66.1-66.4, was repealed and replaced by the current RTKL, Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104. See Johnson v. Pennsylvania Convention Center Authority, 49 A.3d 920, 921 n.1 (Pa. Cmwith. 2012). The present RTKL affords an aggrieved requester an initial administrative appeal to the OOR, see 65 P.S. §§ 67.1101-67.1102, as well as a right of judicial review by appealing the OOR determination to the Commonwealth Court or the common pleas court, see 65 P.S. §§ 67.1301-67.1305. See also Bowling v. Office of Open Records, 990 A.2d 813, 821-823 (Pa. Cmwith. 2010), app. granted in part, 609 Pa. 265, 15 A.3d 427 (2011).

In Wiley v. Woods, 393 Pa. 341, 141 A.2d 844 (1958), a citizen who was denied the opportunity to examine field investigation notes of the city planning commission instituted a mandamus action against the director of the planning commission, rather than appealing the local agency's denial under Section 4 of the old Right-to-Know Act, 65 P.S. § 66.4 (repealed). The lower court granted the mandamus request and directed the planning commission to permit the requester to examine the planning commission's field investigation notes. Id. at 345, 141 A.2d at 846-847. The Supreme Court of Pennsylvania reversed and held that the citizen did not have "the right of examination and inspection of appellant's 'field investigation notes' which are clearly not public records." Id. at 353, 141 A.2d at 850-851. In a footnote, the Supreme Court noted that the citizen's "resort to mandamus as a remedy was improper" since "Section 4 of the statute provides the exclusive remedy to a person denied the right of examination and inspection of public records." Id. at 350 n. 9, 141 A.2d at 849 n. 9. Accord, Storobiu v. Department of Revenue, 53 Pa. Cmwlth. 543, 545-546, 418 A.2d 800, 802 (1980) (stating that the requesters "...are confronted with a formidable procedural problem resting in the fact that the Supreme Court has declared that resort to mandamus as a means of obtaining access to public records is improper based on Section 4 of the Right-to-Know Act, Act of June 21, 1957, P.L. 390, as amended, 65 P.S. § 66.4, providing for appeals to courts from the denial of a request for access to public records."), app. quashed, 494 Pa. 103, 429 A.2d 1112 (1981). In contrast to the requesters in Wiley and Starobin, Ledcke did avail himself of the appeal remedy set forth in the RTKL, but at the time that he commenced this civil action, had not received the records that the OOR had determined were subject to disclosure. Hence, the prospective use of a mandamus action by a prevailing requester seeking production of public records found to be accessible by the OOR, would appear to be distinguishable from Wiley and Starobin where the requesters did not exhaust their available statutory remedies.

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